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15
16 **IN THE UNITED STATES DISTRICT COURT**
17 **FOR THE DISTRICT OF ARIZONA**

18 Roy and Josie Fisher, et al.,
19 Plaintiffs

CV 74-90 TUC DCB
(Lead Case)

20 v.
21 United States of America,
22 Plaintiff-Intervenor,

**OBJECTION TO SPECIAL
MASTER'S REPORT TO THE
COURT ABOUT THE
RESTRUCTURING OF
FRUCHTHENDLER
ELEMENTARY SCHOOL
AND THE CREATION OF
SABINO MIDDLE SCHOOL
(ECF 1790)**

23 v.
24 Anita Lohr, et al.,
25 Defendants,

26 and
27 Sidney L. Sutton, et al.,
28 Defendants-Intervenors,

CV 74-204 TUC DCB
(Consolidated Case)

1 Maria Mendoza, et al.
2
3 Plaintiffs,
4 United States of America,
5
6 Plaintiff-Intervenor,
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8 v.
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10 Tucson Unified School District No. One, et al.
11
12 Defendants.

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17 **I. INTRODUCTION**

18 Defendant Tucson Unified School District #1 (“TUSD” or “District”) objects to the
19 Special Master’s Report (“Report”) rejecting TUSD’s Notice and Requests for Approval of
20 grade expansions at 1) Fruchthendler Elementary School (“Fruchthendler”), and 2) Sabino
21 High School (“Sabino”). The requests included the required Desegregation Impact Analysis
22 (“DIA”), comply with the student assignment goals of the Unitary Status Plan (“USP”), and
23 are congruent with the Constitution. Accordingly, the requests should be approved.

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27 **II. STANDARD OF REVIEW**

28 This Court has established a procedure requiring TUSD to “provide the Special
Master with notice and seek approval of certain actions regarding changes to the District’s
assignment of students and its physical plant.” USP §X(C)(2) (ECF 1713) at 59. To assist
the Special Master in assessing a Notice and Request for Approval (“NARA”), TUSD must
submit a DIA assessing “the impact of the requested action on the District’s obligation to
desegregate” and specifically addressing “how the proposed change will impact the
District’s obligations” under the USP. *Id.* After considering the NARA, the DIA, and party
objections and responses, the Special Master submits a report “setting forth proposed
findings of fact and conclusions of law with respect to said notice.” January 6, 2012 Order
Appointing Special Master (ECF 1350) at 4.

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1 A court must “decide de novo all objections to conclusions of law made or
2 recommended” by a special master. *Fed. R. Civ. P. R. 53(f)(4)*. Here, the Court must
3 consider de novo the express provisions of the USP and whether the Sabino expansion
4 satisfies the USP program mandates to the extent practicable. *See* August 20, 2014 Order
5 (ECF 1651) at 4 of 16 (citing *Fisher v. TUSD*, 652 F.3d 1131, 1135-1136 (9th Cir. 2011)).

6 In an email dated February 2, 2015, the Special Master observed that his opinions
7 regarding the Sabino and Fruchthendler requests only “count with respect to impact on
8 integration.” Sabino NARA, Taylor Decl. (ECF 1789-1) at 39. He is correct. As a judicial
9 designee overseeing the implementation of the USP, his authority to block the District’s
10 programmatic choices is limited to those circumstances in which a plan violates a specific
11 provision of the USP or conflicts with the Constitution. In the context of reviewing a report
12 and recommendation from the Special Master, this Court has recognized that “[s]chool
13 authorities have the primary responsibility for elucidating, assessing, and solving these
14 problems; courts [] have to consider whether the action of school authorities constitutes
15 good faith implementation of the governing constitutional principles.”). ECF 1651 at 4-5
16 (quoting *Brown v. Board of Education*, 349 U.S. 294, 299 (1955)).

17 “The ultimate inquiry is whether [TUSD] has complied in good faith with the
18 desegregation decree, here the USP, to eliminate the vestiges of past discrimination to the
19 extent practicable.” *Id.* at 5. Beyond the first sentence of the Report, the Report is devoid of
20 any reference to the USP whatsoever. Of the Special Master’s proffered reasons for
21 rejecting the Sabino NARA (financial costs, the possibility of limited educational
22 opportunities for all students in Sabino’s 7th and 8th grade, and impact on integration), only
23 the latter implicates TUSD’s good faith implementation of the constitutional principles
24 governing USP implementation. Recommendations based on financial costs involving non-
25 910(G) funds, and the chance of limited educational opportunities for students whose
26 parents voluntarily choose to enroll their students into a program (absent a suggestion that
27 plaintiff-class students will be burdened disproportionately), are well beyond the scope of
28 the Special Master’s authority. Such decisions belong with the duly-elected school board.

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1 **III. FRUCHTHENDLER ELEMENTARY SCHOOL GRADE EXPANSION**

2 As delineated in the Fruchthendler NARA, the District seeks to add a sixth grade
3 component to Fruchthendler Elementary School to stem a documented student exodus from
4 TUSD which occurs in that community between the fifth and sixth grades. While TUSD
5 retains its objections regarding the Special Master’s analysis to the extent that it exceeds the
6 legal standard of review above, TUSD agrees with the Special Master’s recommendation to
7 approve the Fruchthendler grade expansion.

8 **IV. SABINO HIGH SCHOOL GRADE EXPANSION**

9 The Special Master presents three reasons for rejecting the Sabino grade expansion,
10 including the “financial costs” (which do not include desegregation funding), his conclusion
11 that students at “...Sabino middle school would have such low enrollment as to limit the
12 educational opportunities of students who attend the school,” and his opinion about the
13 “likely negative impact on Magee Middle School” with regard to integration. The first two
14 arguments go beyond the scope of the Special Master’s authority – and are based on
15 speculative assumptions that ignore the facts TUSD has presented. The third argument is
16 not supported by the DIA or any other supporting documentation. In fact, to the extent the
17 Sabino expansion may impact integration, such impact would be positive per the USP. As
18 such, the third argument cannot form the basis for a rejection of the Sabino NARA. For the
19 reasons set forth below, the Court should reject the Special Master’s analyses supporting his
20 recommendation against the Sabino grade expansion.

21 **A. The Financial Investment is Self-Sustaining and Revenue-Generating**

22 As a threshold matter, it is not the Special Master’s role to second-guess the
23 Governing Board’s decisions regarding the expenditure of non-910(G) funds. The Special
24 Master argues that “funds invested in the Sabino option will come from scarce resources
25 that could be invested in pursuing the goals of improving the quality of education and the
26 levels of integration throughout the District.” Report at 5. Whether non-910(G) funds
27 “could be invested” in other activities that the Special Master deems worthy is an untenable
28 standard. Despite categorizing resources as “scarce,” the Special Master acknowledges

1 “there would be increased revenue if the District captures students who are not likely to
2 enroll in Magee or another District school.” *Id.* The Sabino grade expansion will lead to
3 increased enrollment and, in turn, increased revenue. Increased revenue will result in a
4 greater pool of funding from which to pursue quality of education and integration goals. If
5 resources are scarce, a short-term investment that will return long-term funding increases is
6 precisely the type of prudent, reasonable action one would expect from a school district that
7 is acting in good faith to best serve its students and families.

8 The Special Master opines that “*whatever the cost*, it is clear that this investment
9 would not enhance integration and, as suggested, could well have a negative effect on
10 student achievement of the students remaining at Magee...” Report at 5, emphasis added.
11 This statement implies the Special Master is not considering cost as a valid consideration
12 for disapproving the NARA – the Special Master would have the same qualms whether the
13 cost were one dollar or one million dollars. The alleged “financial cost” argument simply
14 rehashes his initial concerns about integration and student achievement at Magee. That
15 these funds “could be used to strengthen programs at Magee” is not a relevant consideration
16 in the context of a NARA assessment. One can always argue that an expenditure “could be
17 used” for something else. There is no evidence that rather than investing these funds in
18 Sabino, investing these funds in Magee will more positively impact TUSD’s ability to
19 fulfill its USP obligations.

20 **B. The Expansion Will Create Positive Impacts on Educational Opportunities**

21 The Special Master next asserts a variety of educational policy reasons for not
22 endorsing the Governing Board’s proposal. Again, it is not the role of the Special Master to
23 second-guess the educational policy decisions of the Governing Board. He suspects the 7th
24 and 8th grade component of Sabino would be small; suggests the curriculum has not been
25 analyzed; course options, professional development opportunities, and access to libraries
26 might be limited; and fears that middle school students might want to attend high school
27 sporting events. Parents choosing to enroll their student into Sabino’s expanded 7th and 8th
28 grade will do so knowingly and voluntarily. It is not the Special Master’s role to seek to

1 protect the families of all of TUSD’s 49,000-plus students from themselves. *See Swann v.*
2 *Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 22 (1971) (“[E]limination of racial
3 discrimination in public schools is a large task and one that should not be retarded by efforts
4 to achieve broader purposes...”)

5 TUSD has many successful small-sized middle schools and K-8 schools. The 7th and
6 8th grade components of most of TUSD’s K-8 schools are similar in size to the projected
7 size of Sabino’s 7th and 8th grade. In those schools, course options, access to professional
8 development opportunities (for teachers), and access to libraries (for students) may be
9 limited. Every approach has costs and benefits. However, TUSD has had many years of
10 experience addressing small-school issues in the K-8 school context and there is no
11 evidence or reason to believe these obstacles cannot be surmounted in this instance. For
12 instance, the Special Master asserts “professional development for teachers would be
13 affected in a negative way and the opportunities to build teacher teams that are involved in
14 professional learning communities would be negatively affected,” but states no basis to
15 support the assertion. Middle and high school teacher teams working together in
16 professional learning communities (PLCs) through vertically-aligned curriculum designed
17 to provide consistency for students as they matriculate through middle school into high
18 school is a strong and viable model. The Sabino expansion will utilize the model described
19 above, resulting strong teacher teams and positive effects for PLCs.

20 Last, a middle school student’s interest in attending a high school sporting event is
21 not a bad thing. But, good or bad, the appropriate question for this Court’s inquiry is
22 whether a middle school student’s interest in attending a high school sporting event
23 implicates TUSD’s USP obligations. It does not.

24 **C. The Evidence Shows Potential for Positive Integrative Impact on Magee**
25 **Middle School Pursuant to the USP**

26 The Special Master argues, generally, that the Sabino expansion will negatively
27 impact Magee Middle School without reference to TUSD’s obligations under the USP.
28 Specifically, the Special Master argues many Anglo families will leave Magee middle

1 school (which, he asserts, will negatively impact integration at Magee), and that because
 2 Anglo parents are more likely to have higher incomes, the loss of Anglo students would
 3 change Magee’s socioeconomic demographics – causing a decline in overall student
 4 achievement at Magee. Neither argument is supported by the facts or evidence, nor do they
 5 implicate TUSD’s obligations under the USP or the Constitution.

6 First, as described throughout the NARA and DIA:

- 7 • The Sabino expansion is “expected to have a minimal impact on the racial ethnic
 8 composition of Magee...” Sabino NARA, Taylor Decl. (ECF 1789-1) at 43.
- 9 • “7. The impacts on racial-ethnic composition will be minimal because all of the
 10 affected populations have similar compositions.” *Id.* at 54.
- 11 • “As shown in the DIA Tables..., the changes are expected to have a minimal impact
 12 on the racial ethnic composition of Magee because, although the population that
 13 would attend the Fruchthendler-Sabino option, does have a slightly different racial-
 14 ethnic composition than the remainder of the Magee population, the number
 15 choosing that option is expected to be relatively small. *Id.* at 89.
- 16 • See also “Desegregation Impact Analysis (DIA) Tables” describing the
 17 negligible/slight impacts of various incoming student groups. *Id.* at 97-98.

18 TUSD estimates that although a greater proportion of Anglo families would choose the
 19 Sabino option over Magee, the number of Anglo students lost from Magee is approximately
 20 18 students (from a total of 30 students). *See id.* “Table 1: No Longer at Magee” at 97.
 21 However, these parental choices would not significantly impact the racial/ethnic
 22 composition of Magee. Even in a “worst-case,” “extreme” situation, the impact on Magee
 23 would be the “loss of 118 students” which would alter the ethnic-racial composition of
 24 Magee “by only 2% to 3%.” *Id.* at 92. The Report’s assumption that the availability of the
 25 Sabino option will create massive “white flight” from Magee is as speculative as it is
 26 cynical. Report at 4 (theorizing “a substantial likelihood that the number of white families
 27 now choosing Magee would decrease exponentially”). TUSD has articulated several factors
 28 that will likely cause parents of all races to prefer Magee over Sabino, and such factors

1 weigh against the Special Master’s theory of exponential decline. *See e.g.* proximity to
 2 home, or a preference for traditional middle school (ECF 1789-1) at 89. Most critically,
 3 perhaps, is the uncontested data confirming that those families who do not want to send
 4 their children to Magee Middle School already are staying away.

5 Even if the Special Master’s theory proves true and a significant proportion of Anglo
 6 students chose the Sabino option over Magee, such choices would operate to increase the
 7 “opportunities over time for students in Magee to experience an integrated education” –
 8 rather than to decrease such opportunities as suggested by the Special Master. Report at 4.

9 Magee has not yet reached “Integrated” status as that term is defined by the USP.¹
 10 The statistical obstacle (ironically, perhaps) is Magee’s excess Anglo students. *USP*
 11 *§II(B)(2)* (ECF 1713) at 8. As recognized throughout the course of USP implementation, a
 12 primary goal of TUSD’s desegregation efforts is for non-integrated schools to move
 13 towards the USP definition of an “Integrated School.” Magee’s current Anglo student
 14 population is approximately 46%. *See* “Table 2” (ECF 1789-1) at 98. At the middle school
 15 grade level, the district average enrollment for Anglo students is 23%. To reach the USP
 16 definition of an “Integrated School,” Magee’s Anglo population must be reduced by 8% to
 17 at least 38% (within 15 percentage points of the 23% average for the middle school grade
 18 level), with a corresponding 11% increase of Latino students (within 15 percentage points
 19 of the 60% average for the middle school grade level). As described above, the greatest
 20 projected impact to Magee’s racial/ethnic composition (in a worst-case scenario) would be
 21 2-3%. Over time, a 2-3% decrease in Magee’s Anglo student population would move
 22 Magee closer towards to being an “Integrated School.” A 15-30% decrease (an
 23 “exponential decline”) would likely result in Magee reaching “Integrated” status. Magee
 24 could lose 100-200 Anglo students and/or gain 100-200 Latino students, and still be
 25 “Integrated” under the USP.

26 ¹ The USP defines an “Integrated School” as “any school in which no racial or
 27 ethnic group varies from the district average for that grade level (Elementary School,
 28 Middle School, K-8, High School) by more than +/- 15 percentage points, and in which no
 single racial or ethnic group exceeds 70% of the school’s enrollment.

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1 Second, the Special Master applies a sweeping generalization (“...white families are
2 more likely to have higher incomes than Latino and African American families”) to the
3 families at Magee despite citing not a shred of supportive evidence. Report at 4.
4 Approximately half of the Anglo students at Magee receive Free and Reduced Lunch (an
5 indicator of low-socioeconomic status). There is no evidence that high-income Anglo
6 families are more likely than low-income Anglo families to choose Sabino over Magee, or
7 that high-income families of any race are more likely to select Sabino over Magee.
8 Moreover, this argument is founded on an unsustainable premise that both retards and
9 compromises TUSD’s efforts to integrate schools: any action that leads to a decline in a
10 school’s Anglo student population is inherently bad for the students remaining at the school.
11 If this premise is utilized consistently, TUSD’s efforts to attract Anglo students from
12 Eastside schools to attend Westside magnet schools should likewise be deemed inherently
13 bad.

14 **V. CONCLUSION**

15 For the reasons outlined above, this Court should approve TUSD’s request for grade
16 expansions at Fruchthendler Elementary School and Sabino High School as the DIA and
17 supporting documentation indicate little to no impact on TUSD’s ability to implement the
18 USP, and in no way indicate a departure from the constitutional principles governing
19 TUSD’s actions.

20
21 DATED this 23rd day of April, 2015

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1 Electronic Notification System and transmittal of a
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