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7 **UNITED STATES DISTRICT COURT**
 8 **DISTRICT OF ARIZONA**

9 ROY and JOSIE FISHER, et al.,)
 Plaintiffs,)
 10 UNITED STATES OF AMERICA,)
 11 Plaintiff-Intervenor,)
 12 vs.)
 13 ANITA LOHR, et al.,)
 14 Defendants,)
 15 and)
 16 SIDNEY L. SUTTON, et al.,)
 Defendants-Intervenors.)
 17 _____)
 18 MARIA MENDOZA, et al.,)
 Plaintiffs,)
 19 UNITED STATES OF AMERICA,)
 20 Plaintiff-Intervenor,)
 21 vs.)
 22 TUCSON UNIFIED SCHOOL)
 23 DISTRICT NO. ONE, et al.,)
 Defendants.)
 24 _____)

CIVIL ACTION
 NO.: 74-90 TUC DCB
 (consolidated case)

THE UNITED STATES'
OBJECTIONS TO THE SPECIAL
MASTER'S REPORT AND
RECOMMENDATION ABOUT THE
RESTRUCTURING OF
FRUCHTHENDLER ELEMENTARY
SCHOOL AND THE CREATION OF
SABINO MIDDLE SCHOOL

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2 **I. Introduction and Summary of the Argument**

3 The United States submits the following objections to the Special Master's Report
4 and Recommendation about the Restructuring of Fruchthendler Elementary School and the
5 Creation of Sabino Middle School ("Fruchthendler -Sabino R&R"), as filed with this Court
6 on April 10, 2015 [ECF No. 1790]. Specifically, this filing sets forth the United States'
7 objections to the standard used in the Special Master's Fruchthendler-Sabino R&R to
8 evaluate the proposal by the Tucson Unified School District No. One ("TUSD" or
9 "District") because it does not comport with the January 6, 2012 Order Appointing Special
10 Master [ECF No. 1350] ("Appointment Order"), the February 20, 2013 Unitary Status Plan
11 ("USP") [ECF No. 1450], and this Court's subsequent orders.

12 TUSD's proposal, as the Special Master recognizes, is not being undertaken to
13 satisfy a requirement of the USP. Therefore there is no barrier to the District moving
14 forward with its proposal unless it negatively impacts its desegregation obligations. TUSD
15 has submitted evidence that its proposal not only will not negatively impact desegregation,
16 but will further that goal. As the Special Master has not cited compelling evidence to the
17 contrary, there is no basis for the Special Master to object to the creation of Sabino Middle
18 School. In addition, although he did not ultimately object to that part of the proposal, the
19 Special Master also failed to apply the proper standard to the Fruchthendler proposal.

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21 **II. Background**

22 On January 26, 2015, the Special Master notified the Fisher Plaintiffs, the Mendoza
23 Plaintiffs, and the United States (collectively, the "Plaintiffs"), that the District was
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1 considering grade restructuring at Fruchthendler Elementary School and Sabino High
2 School (“grade restructuring”). On February 9, 2015, the District provided the Plaintiffs
3 and the Special Master with its Desegregation Impact Analysis (“DIA”), analyzing the
4 potential effects of the proposed grade restructuring on student assignment and
5 transportation. On February 12, 2015, the Fisher Plaintiffs objected to the proposed grade
6 restructuring; on February 17, 2015, the Mendoza Plaintiffs also objected to the proposal.
7 On March 4, 2015, the District submitted a response to those objections, as well as a
8 formal Request for Approval to the Special Master and the parties. On April 2, 2015, the
9 Special Master informed the Parties that he would submit a report to the court – the
10 Fruchthendler-Sabino R&R to which this filing responds. That report was submitted on
11 April 10. The District filed its grade restructuring plan with the Court on April 14, 2015.

13 In support of its restructuring plan, the District avers that adding a sixth grade to
14 Fruchthendler Elementary School and a seventh-eighth grade component to Sabino High
15 School will not negatively impact the District’s desegregation obligations. March 4, 2015
16 Letter to the Special Master and Plaintiffs (“March 4 Letter”) at 2. Indeed, the District
17 asserts that the grade restructuring will in fact *help* the District meet those obligations by
18 retaining district resident students who have historically chosen non-TUSD options, and
19 that, based on existing evidence, any impact on the racial integration of surrounding
20 schools will be negligible. *Id.*

22 The Special Master’s Fruchthendler-Sabino R&R assesses the District’s proposals
23 based on the educational and developmental benefit to students, economic costs and
24 benefits, and the racial composition of nearby schools. Fruchthendler-Sabino R&R at 3-6.

1 Based on these assessments, the Special Master recommends granting the Fruchthendler
2 proposal and denying the Sabino proposal. As the next section will illustrate, these
3 recommendations misconstrue the standard for approving or rejecting the grade
4 restructuring plan and therefore should not be the basis of the Court’s decision on this
5 matter.

6 **III. Legal Standard**

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8 The Appointment Order requires the District to provide the Special Master and the
9 Plaintiffs with notice of, among other things, changes to student assignment patterns such
10 as the changes proposed here. Appointment Order at 3. Plaintiffs may file objections to
11 such a Notice and Request for Approval (“NARA”) within 20 days; the District may then
12 respond to those objections within 20 days. *Id.* at 4. The Special Master then makes a
13 report to the Court regarding the NARA.¹ *Id.* The USP adopted this process, adding only
14 that the District must provide a Desegregation Impact Analysis along with the NARA to
15 “assess the impact of the requested action on the District’s obligation to desegregate and . .
16 . specifically address how the proposed change will impact the District’s obligations under
17 [the USP].” USP § (X)(C)(1)-(3).

18
19 Since this Court approved and entered the final version of the USP on February 20,
20 2013,² the District has filed seven NARAs prior to this one: (1) the March 11, 2013 NARA
21 regarding bond projects connected to school closures [ECF No. 1451]; (2) the March 21,
22 2013 NARA regarding attendance boundaries [ECF No. 1453]; (3) the July 25, 2013

23 ¹ This NARA process has proceeded in an unusual manner, with the Special Master filing his R&R prior to the
24 District’s filing of its NARA; as such, the schedule for briefing has been amended so that the Parties will file their
objections by April 23, 2015.

25 ² A revised version of the USP that solely fixed typographical errors was entered by the Court on November 6, 2014.

1 NARA regarding the Pascua Yaqui land exchange [ECF No. 1486]; (4) the December 17,
2 2013 NARA regarding the sale of a closed elementary school [ECF No. 1522]; (5) the June
3 17, 2014 NARA regarding the use of portables at University High School (“UHS”) [ECF
4 No. 1626] ; (6) the October 17, 2014 NARA regarding the sale of property at a middle
5 school [ECF No. 1701]; and (7) the November 24, 2014 NARA regarding the sale of a
6 vacant lot [ECF No. 1719]. In the seven orders approving or denying these NARAs, this
7 Court did not substantively change any Party obligation under the NARA process,
8 although it affirmed that the District’s DIA must provide adequate information for the
9 Plaintiffs and the Special Master to “facilitate and expedite meaningful review” of the
10 proposal’s possible impacts on the District’s desegregation obligations. *See, e.g.*, April 26,
11 2013 Order at 7.

13 **IV. Argument**

14 The USP obligates the District to make numerous changes to how it assigns
15 students to classrooms and schools, which programs it provides and how and where it
16 provides them, how students are transported to and from schools, and much more. Those
17 processes are explicitly intended to *further* desegregation. However, the NARA process is
18 different: it is a way of allowing the District to go about the general business of running a
19 school district while ensuring that non-USP activity does not negatively affect the
20 District’s ability to meet its desegregation obligations. That is, the NARA process is not
21 for activities intended to *improve* desegregation. Rather, the NARA is designed to ensure
22 that none of the District’s other activities, such as the sale of property, opening or closing
23 schools, grade restructuring, etc., *negatively impact* its ability to fulfill its desegregation
24

1 obligations. Thus the standard for granting or denying a NARA is whether the proposed
2 activity will frustrate or impede the District's other desegregative activities, not whether it
3 will further desegregation. Moreover, the merits of the proposal as a matter of educational
4 policy or school administration are not the standard for deciding whether to grant or deny
5 the NARA.

6 In its March 4 Letter, the District uses a variety of tools – historically based
7 transition rates from fifth to sixth grade, feeder patterns, past and projected enrollments,
8 Census data, geographic assessments, historical and projected area building permits – to
9 determine that the addition of sixth grade to Fruchthendler will not have a segregative
10 impact on enrollment in surrounding middle schools, and that the addition of seventh and
11 eighth grade to Sabino will similarly not have a segregative impact. March 4 Letter at 2-
12 16. The school geographically closest and therefore most likely to be affected, Magee,
13 would, in the District's "worst case" evidence-based scenario, only change in racial
14 composition by 2-3 percent. *Id.* Magee is not yet close to racially integrated under the
15 USP's definition, *see* USP § (II)(B)(1)-(2), and so a change in demographics of 2-3 percent
16 would not impact the school's status as racially concentrated. March 4 Letter at 10-11.
17 Indeed, if 2-3 percent of Magee's Anglo students transferred to another school site as a
18 result of these proposed changes, Magee would be closer to, not further from, from being
19 racially integrated.³ *Id.* Indeed, no school, in these evidence-based projections, would
20 become racially concentrated due to the proposed changes in grade structures. *Id.*

23 _____
24 ³ As of March 4, 2015, Magee's demographic breakdown was as follows: 46 percent Anglo, 13 percent African
25 American, 34 percent Latino, 2 percent Native American, 2 percent Asian/Pacific Islander, and 3 percent Multi-
26 Racial. March 4 Letter at 10-11.

1 A. *Sabino*

2 As discussed above, in his Fruchthendler-Sabino R&R, the Special Master assesses
3 the impact of the proposed changes based on a variety of factors. He suggests that the
4 Sabino proposal would: (1) negatively impact Magee Middle School's status as racially
5 integrated; (2) cost the District money; and (3) negatively impact educational opportunities
6 for the seventh and eighth graders at the new Sabino Middle School. Fruchthendler-
7 Sabino R&R at 4-6. But his consideration and assessment of these factors does not justify
8 his recommendation to reject the proposal to add a seventh and eighth grade to Sabino.
9

10 The Special Master's first inquiry, whether the proposed change will negatively
11 impact the racial composition of a nearby school, is appropriate. But the Special Master
12 does not base his assessment of this inquiry on any evidence or data. *Id.* at 4-5. Instead,
13 he suggests that "there is really no way to accurately assess the effect on racial
14 composition based on past choices." *Id.* at 4. In order for this Court to ever assess a
15 NARA, which requires projecting potential future harm, the Court must use the evidence
16 available, even if that evidence is imperfect. In this case, evidence of past enrollment
17 patterns and choices, as well as the other kinds of evidence cited by the District, are likely
18 the best options available, and are therefore the appropriate metrics to use to measure any
19 negative future impact on the District's desegregation obligations.
20

21 The Special Master's objection based on cost is also misplaced. The District does
22 not propose using A.R.S. § 910(G) funds ("910(G) funds") funds for renovations to
23 Sabino. Nevertheless, the Special Master suggests that these expenditures *may* lead to
24 changes in the District's 910(G) funds commitments. *Id.* at 5. But at this time, there is no
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1 evidence that the District *will* reduce its financial commitments to USP-directed projects.
2 If the District can assure the Court that this will remain the case, then cost should not be a
3 relevant factor for the NARA assessment of this proposal.

4 Finally, the Special Master suggests that Sabino Middle School would be too small,
5 and therefore negatively affect the educational opportunities of the students enrolled there.

6 *Id.* at 6. If there were evidence that new Sabino Middle School would in fact negatively
7 impact the educational opportunities of African American or Latino students, then that
8 would be a relevant issue for approving or denying the NARA. But the kind of general
9 speculation about staffing, course options, and professional development provided in the
10 Fruchthendler-Sabino R&R is an inadequate basis for approving or denying the request.
11 Instead, if the Court is concerned about this factor, the Court could order additional
12 briefing on how the District intends to prevent potential negative impacts on the
13 educational opportunities for African American or Latino students enrolled at new Sabino
14 Middle School. The District took a similar approach when approving school closures in
15 2013. *See* February 15, 2013 Order Approving School Closures [ECF No. 1447] at 12-13.
16 Once the evidence is presented, the Court can properly evaluate the impact of this proposal
17 on the District's desegregation obligations.
18

19 **B. *Fruchthendler***

20 The Special Master ultimately does not object to the Fruchthendler proposal.
21 However, in reaching this result, the Special Master once again does not properly limit the
22 inquiry to whether the proposal would negatively impact desegregation. In analyzing the
23 District's proposal, the Special Master opines that the Fruchthendler proposal would: (1)
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Dated: April 23, 2015

/s/ Zoe M. Savitsky
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CERTIFICATE OF SERVICE

I hereby certify that on April 23, 2015, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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