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13 UNITED STATES DISTRICT COURT
14 FOR THE DISTRICT OF ARIZONA
15

16 Roy and Josie Fisher, et al.,
17 Plaintiffs,
18 v.
19 United States of America,
20 Plaintiff-Intervenors,
21 v.
22 Anita Lohr, et al.,
23 Defendants,
24 Sidney L. Sutton, et al.,
25 Defendant-Intervenors,
26
27
28

Case No. 4:74-CV-00090-DCB

**MENDOZA PLAINTIFFS’
OBJECTIONS TO TUSD’S NOTICE
AND REQUEST FOR APPROVAL OF
PORTABLE CLASSROOMS AT DIETZ
K-8 SCHOOL**

Hon. David C. Bury

1 Maria Mendoza, et al.,

Case No. CV 74-204 TUC DCB

2 Plaintiffs,

3 United States of America,

4 Plaintiff-Intervenor,

5 v.

6 Tucson United School District No. One, et al.,

7 Defendants.

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11 **Introduction**

12 On April 14, 2015, the Tucson Unified School District, No. One (“TUSD” or the
13 “District”) Governing Board began implementing its proposal to add two portables at Dietz
14 K-8 school by granting approval of a specific contract to relocate those portables to Dietz.
15 Notwithstanding the requirement that the District request approval for actions like those in
16 issue here through the express notice and request for approval (“NARA”) process set forth
17 in the Order Appointing Special Master, USP, and other subsequent orders of this Court, it
18 was not until more than two weeks after it approved the portables contract that the
19 District provided the Special Master and Plaintiffs with its Dietz NARA.

20 In TUSD’s NARA filing, the District asserts that it has complied with USP Section
21 X,C,2, requiring TUSD to “assess the impact of the requested action on the District’s
22 obligation to desegregate and [to] specifically address how the proposed change will
23 impact the District’s obligations under this Order.” (TUSD’s Notice and Request for
24 Approval of Portable Classrooms at Dietz K-8 (“District’s NARA filing”), Doc. 1798, at 6
25 (citing USP Section X,C,2)). However, on the contrary, when TUSD began implementing
26 its proposal by approving the portables contract, it failed to (1) conduct the USP-required
27 desegregation impact analysis (“DIA”) or to consider the effect its proposal would have on
28 its desegregation efforts, (2) assess whether the CORE enrichment program that would be

1 provided at the portables would comply with the requirement that the District provide
2 Latino and African American students equal access to its programs, or (3) assess whether
3 the apparent large anticipated increase in exceptional education students at Dietz involves
4 disproportionate or inappropriate referrals of Latino or African American students to the
5 program, or whether the use of portables for exceptional education purposes would
6 exacerbate the effect of any such referrals by further stigmatizing these students. The
7 District concedes that it only began preparing the DIA after its Governing Board granted
8 approval of the Dietz portables contract. (District's NARA filing at 3.) As far as Mendoza
9 Plaintiffs are aware, no assessment has been conducted related to the CORE enrichment
10 and exceptional education issues described above.

11 Mendoza Plaintiffs stress that what is at issue here is not simply a procedural issue
12 – important as that is and given how frequently this Court has referred to the need for
13 meaningful input by the Plaintiffs and the Special Master before the District moves
14 forward with actions governed by the NARA process and the USP. What it also reveals is
15 that the District, having failed to prepare a desegregation impact analysis before acting to
16 approve the addition of new portable classrooms at Dietz, failed to assess the impact of
17 its actions on its obligations to desegrate, as mandated by the USP.

18 Because the District has failed to follow proper NARA procedures, and in doing so,
19 failed to conduct USP-required assessments, Mendoza Plaintiffs respectfully request that
20 this Court deny the District's NARA request. They further request that the Court order the
21 District to not implement any future NARA proposal before obtaining the required
22 approval, and direct the District to clearly indicate in publicly available documents that any
23 item approved by its Governing Board in preparation of implementation of pending NARA
24 proposals are subject to this Court's approval.

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1 **Argument**

2 The District Began Implementing the Addition of Portables at Dietz by Approving a
3 Specific Contract for Their Relocation Before It Initiated USP-Required NARA
4 Procedures

5 The Order Appointing the Special Master, and the USP (by reference), require that
6 the District provide the Special Master and Plaintiffs a NARA for, among other things,
7 “projects that will result in a change in student capacity of a school[.]” (Order dated
8 January 6, 2012 at 3:16-21; USP Section X,C,2.) On May 1, 2015, the District provided
9 the Plaintiffs and Special Master with its notice regarding the addition of two portables
10 (that is, four classrooms) at Dietz K-8. (*See* May 1, 2015 Notice of the Addition of Two
11 Portables at Dietz K-8 (dated April 30, 2015) (“District’s NARA memo”), attached to the
12 District’s NARA filing as Exhibit 3.) In its cover email, the District indicated that it
13 “recognizes the need to involve [the Plaintiffs and Special Master] as early in the process
14 as possible, [that] this is that time[.]” and that the “matter just began bubbling up from the
15 school site.” (District’s May 1, 2015 cover email transmitting District’s NARA memo,
16 attached as Exhibit A.) Mendoza Plaintiffs provided the District with a response in which
17 they raised several concerns regarding the District’s proposal. (*See* Mendoza Plaintiffs’
18 May 6, 2015 Response, attached as Exhibit B.)

19 On May 7, 2015, Mendoza Plaintiffs learned that the District began implementing
20 its Dietz proposal before providing the Plaintiffs and Special Master with its Dietz NARA.
21 (*See* Mendoza Plaintiffs’ May 7, 2015 email to TUSD, attached as Exhibit C.) The District
22 first began considering the proposed portables at Dietz in mid-January, 2015. (District’s
23 NARA memo at 1, n.1.) In February and March, central and site staff came together to
24 develop and complete a plan for the proposed changes at Dietz and sought a proposal from
25 contractors. (District’s NARA filing at 2.) The Plaintiffs and Special Master could
26 presumably have been provided with notice of the District’s proposal at this time. Weeks
27 later, at TUSD’s April 14, 2015 Governing Board meeting, the Board granted approval for
28

1 the District to “proceed with contracts... to relocate... portable classrooms to Dietz.”¹
 2 (April 14, 2015 Governing Board Agenda, action item #33, attached to the District’s
 3 NARA filing as Exhibit 2.)²

4 It was only on May 1, 2015, months after the District began developing its Dietz
 5 plan, and weeks after its Governing Board approved the specific contract for the relocation
 6 of portables at Dietz, that the District provided the Plaintiffs and Special Master with its
 7 Dietz NARA. Because the District failed to obtain the required approval of its NARA
 8 before it began implementing its proposal and failed to consider the proposal in the context
 9 of its obligations to desegregate the District’s schools, Mendoza Plaintiffs request that the
 10 Court deny TUSD’s NARA request. They further request that this Court order the District
 11 to not implement any future NARA proposal before seeking and obtaining the required
 12 approval under the USP and Order Appointing the Special Master.³

13 The District Approved a Specific Contract for the Relocation of Portables to Dietz Without
 14 Any Consideration of the Desegregation Impact of its Proposal

15 The USP requires that for any proposed change affecting a school’s capacity, TUSD
 16 must prepare a “Desegregation Impact Analysis, [] that will assess the impact of the
 17 requested action on the District’s obligation to desegregate...” (USP Section X,C,2.)

18
 19 ¹ Notably, on April 7, 2015, a week before TUSD’s Governing Board approved the
 20 contract for the relocation of portables to Dietz and over three weeks before it provided the
 21 Plaintiffs and Special Master with its Dietz NARA memo, Mendoza Plaintiffs raised with
 22 the District the issue of implementation before obtaining Court approval in a detailed
 memo regarding the Sabino/Fruchthendler NARA. (See Doc. 1791-3.) Notwithstanding
 that memo, the District apparently felt no need to provide the Plaintiffs or Special Master
 any notice before it approved the Dietz portables contract.

23 ² As far as Mendoza Plaintiffs can tell, there was no indication at the meeting, or in the
 24 Governing Board meeting agenda and related documents, that the Board’s approval of the
 25 portables contract was subject to Court approval, raising the issue of whether the District
 provides sufficient information for the public to understand that actions by its Governing
 Board that are subject to the NARA process cannot proceed until this Court has ruled.

26 ³ Mendoza Plaintiffs note that in their May 7, 2015 email to the Special Master and parties
 27 (Exhibit C), they requested that the Special Master bring this instance of the District’s
 28 noncompliance with required procedures to the attention of this Court. Mendoza Plaintiffs
 reiterated their request on May 13, 2015. (See May 13, 2015 email to the Special Master
 and parties, attached as Exhibit D.)

1 Notwithstanding the USP’s clear language, TUSD concedes that it did not prepare the DIA
2 until after the Governing Board approved the contract for the relocation of portables to
3 Dietz. (District’s NARA filing at 3 (“After the Governing Board approved the contract,
4 staff immediately began developing the [DIA] and other information to present to the
5 Special Master and Plaintiffs.”).)⁴

6 The District therefore began implementation of its proposal without any regard to
7 the affect its decision might have on its obligation to desegregate its schools and on its
8 other obligations under the USP, even if only for informational purposes. The District’s
9 lack of attention to the impact of the Dietz proposal is highlighted by the fact that the Dietz
10 contract was part of a consent agenda, along with 39 other items, (*see* April 14, 2015
11 Governing Board Agenda, attached to the District’s NARA filing as Exhibit 2), therefore
12 making it likely that its Governing Board spent very little time considering the impact of
13 the proposal on its desegregation obligations and its other obligations under the USP. In
14 approving of the Dietz contract without consideration of the effect on its desegregation
15 and USP obligations, and in effect preparing the DIA for the sole purpose of providing it to
16 the Special Master and Plaintiffs as part of its NARA, the District has failed to conduct the
17 desegregation impact analysis required by USP Section X,C,2.

18 The District Failed to Assess the Impact that Implementation of the CORE Enrichment
19 Program Under its Dietz Proposal Would Have On Its Obligation to Provide Equal Access
20 to its Programs to its Latino and African American Students.

21 As the District cites in its NARA filing, USP Section X,C,2 requires that the
22 District “specifically address how the proposed change will impact the District’s
23 obligations under this Order.” (USP Section X,C,2.) However, notwithstanding the
24 District’s assertion that its proposal “furthers the goals of USP section V(A)(1), Quality of
25 Education” and “help[s] address [] inequality” in equal access to the CORE enrichment

26 _____
27 ⁴ Mendoza Plaintiffs again stress that the purpose of the DIA requirement is not to create a
28 box that the District must check before filing its NARA. It is the vehicle to facilitate and
inform an assessment of the impact of the proposed action on the District’s obligations to
desegregate and under the USP.

1 program, (District's NARA filing at 5-6), the District has failed to provide any rationale
2 for expanding the program at Dietz or any assessment of what impact implementation of
3 that program at Dietz would have on Latino and African American students' access to it, or
4 to such programs more generally in the District.

5 The District's NARA memo and filing describe the CORE enrichment program that
6 would be provided in portables under the Dietz proposal as a program that helps students
7 transition into the sixth grade. (*See* District's NARA memo and District's NARA filing.)
8 In its May 5, 2015 response to requests for information, the District identified the seven
9 schools at which the CORE enrichment program already exists. (*See* TUSD's Responses
10 to Questions re Addition of Two Portables at Dietz K-8, attached to the District's NARA
11 filing as Exhibit 5.) Upon seeing no rationale for its proposal to implement the program at
12 Dietz, or any assessment of the impact the Dietz proposal would have on Latino and
13 African American students' access to the program, Mendoza Plaintiffs expressed their
14 concern that the program would "not be[] provided in a way equitable to its Latino
15 students." (Exhibit B.) At no point before the District filed its Dietz NARA were the
16 Mendoza Plaintiffs provided with a rationale for why, if the program is to be expanded to
17 now reach eight (instead of seven) of the District's 24 K-8 and Middle schools, that
18 expansion should be at Dietz K-8.

19 Presumably in anticipation of Mendoza Plaintiffs' objection, in its NARA filing
20 with this Court, the District attempted to address for the very first time⁵ the issue of Latino

21 ⁵ Mendoza Plaintiffs understood the District's indication in its NARA filing that the CORE
22 enrichment program is available at "seven TUSD schools: five on the westside, one
23 centrally, and one on the eastside," (District's NARA filing at 5), as an attempt to address
24 the "apparent unequal access" to the program Mendoza Plaintiffs referred to in their May 6
25 response (Exhibit B), which was based on the District's initial identification that of the
26 schools that had the program, "three are west, two are central, and two are east," (District's
27 NARA filing, Exhibit 5 at 3). The District has not identified which schools it now has
28 moved from "central" and "east" to "west." The issue of what is "central", "east" or
"west" in TUSD apparently is a matter of some debate. For example, Doolen is west of
Alvernon Way and Country Club Road but well east of the Interstate 10 and could be
considered "central," and, for that matter, so, too, can Safford and Hollinger be considered
"central." In any event, the focus on the geographical location of the schools offering the
CORE enrichment program is misplaced. The real issue is that the District has not
provided any rationale for placing a new CORE program at Dietz as opposed to the 16
other K-8 and middle schools in the District.

1 and African American students' access to the CORE enrichment program. The District
2 asserts that implementation of the program at Dietz under its proposal would address the
3 inequality in the program's current availability "at only one school where [African
4 American students] have a sizable percentage of population[.]" (District's NARA filing at
5 5.) However, if that truly is its rationale, the District has failed to explain why the program
6 is better added to Dietz K-8 than to other schools with relatively concentrated numbers of
7 African American students. For example, TUSD could implement the program at
8 Drachman (14% African American student enrollment in 2013-14), Booth-Fickett (14%),
9 Roberts-Naylor (16%), Secrist (16%), or Utterback (12%). (*See* Appendix II-23, page 2 of
10 TUSD's 2013-14 Annual Report, Doc 1686-6 at 97.) Notably, Drachman, Roberts-Naylor,
11 and Utterback each have much higher concentrations of Latino students than does Dietz
12 (73%, 60%, 75%, 47%, respectively), (*id.*), and thus implementation of the program at any
13 of these schools would provide improved access to both TUSD's Latino and African
14 American students rather than to only its African American students. Moreover, given the
15 District's effort to improve academic achievement at its magnet schools, particularly in
16 light of this Court's January 16, 2015 Order regarding the comprehensive magnet plan, the
17 CORE enrichment program is better placed at a school like Utterback, which received a
18 letter grade of "D" by the Arizona Department of Education in 2013-14. (*See*
19 <https://www.azreportcards.org/ReportCard?school=5749&district=-1>.)

20 Plainly, the proposed expansion of the CORE enrichment program at Dietz under
21 the District's proposal was not the result of an effort to "address th[e] inequality" in access
22 to the program, as the District now contends. Nor did the District engage in the kind of
23 analysis or assessment of how its Dietz proposal would impact its obligation to provide
24 equal access to African American and Latino students to its programs under the USP, as
25 required by USP Section X,C,2. Mendoza Plaintiffs therefore respectfully request that this
26 Court deny the District's NARA request to add two portables to Dietz K-8.

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1 The District Failed to Assess Whether the Unanticipated Increase in Exceptional Education
2 Students at Dietz Involves the Inappropriate Referral of Latino or African American
3 Students, or Whether Its Dietz Proposal Would Further Stigmatize These Students.

4 As with the CORE enrichment classes, in proposing to use two portable classrooms
5 for exceptional education purposes, the District has not “assess[ed] the impact of the
6 requested action... [by] specifically addressing how the proposed change will impact the
7 District’s obligations under this [USP] Order.” (USP Section X,C,2.) Specifically, as far
8 as Mendoza Plaintiffs can tell, the District has not assessed “whether African American
9 and Latino students, including ELL students, are not being inappropriately referred,
10 evaluated or placed in exceptional (special) education classes or programs” at Dietz, (USP
11 Section V,D,1), or whether, if this is the case, the addition of the portable classrooms
12 would further stigmatize Latino and African American children in exceptional education
13 by locating these programs in portable classrooms rather than the main school facility.

14 The District indicates that in the 2015-16 school year, Dietz will add an eighth
15 grade component to its school. (District’s NARA memo at 3.) Notwithstanding that Dietz
16 added a sixth and seventh grade component in the last two school years without needing to
17 add portables, the District now asserts that Dietz needs two of the four portable classrooms
18 under the Dietz proposal for exceptional education “IEP meetings,... instruction, for
19 testing space, and to serve as a ‘home base’ for [Exceptional Education Cross-categorical]
20 teachers[.]” (*Id.* at 4.) Notably, the District indicates that the additional space needed for
21 exceptional education purposes exceeded its initial projection. (*Id.*)

22 The District’s NARA memo and filing contained no indication that any assessment
23 was conducted to determine the cause of the apparent large number of exceptional
24 education students expected at Dietz, or whether there are disproportionate or
25 inappropriately referred Latino or African American students within that cohort. (*See*
26 District’s NARA memo and District’s NARA filing.) Mendoza Plaintiffs therefore
27 requested that the District address these issues, and further asked “whether there are any
28 questions of stigma or diminished status in the decision to place Exceptional Education

1 staff in portables and to conduct testing in that location.” (See Exhibit B.) This Court too
2 has recognized the significance of these issues, noting that minority students incorrectly
3 placed in exceptional education results in “racial stereotyping [that] affects student
4 achievement[,]” and that the “goal of [USP Section V,D,1] is to limit involvement by
5 minority students in stigmatizing special needs programs...” (October 22, 2014 Order,
6 Doc. 1705, at 1-15.) Mendoza Plaintiffs still have not received responses to their
7 questions, or any indication that the District has assessed or even considered these issues.

8 **Conclusion**

9 For the reasons set forth above, this Court should sustain the objections of the
10 Mendoza Plaintiffs to TUSD’s Notice and Request for Approval of Portable Classrooms at
11 Dietz K-8. Additionally, it should direct TUSD to not implement any future NARA
12 proposal until it has sought and obtained Court approval, and direct the District to clearly
13 indicate in publicly available documents that any item that is subject to the NARA process
14 that is approved by the Governing Board is subject to further Court approval.

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Dated: May 15, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2015, I electronically submitted the foregoing Mendoza Plaintiffs' Objections to TUSD's Notice and Request for Approval of Portable Classrooms at Dietz K-8 School to the Office of the Clerk of the United States District Court for the District of Arizona for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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s/ Marco Gomez