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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

8 ROY and JOSIE FISHER, et al.,)
 9)
 10 Plaintiffs,)
 11)
 12 Plaintiff-Intervenor,)
 13 vs.)
 14 ANITA LOHR, et al.,)
 15)
 16 Defendants,)
 17)
 18 SIDNEY L. SUTTON, et al.,)
 19)
 20 Defendants-Intervenors,)
 21)
 22)
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 24)
 25)
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 27)
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No. CV 74-90 TUC DCB

**FISHER PLAINTIFFS' OBJECTION
TO DEFENDANT TUSD'S 05/08/15
NOTICE AND REQUEST FOR
APPROVAL OF PORTABLE
CLASSROOMS AT DIETZ K-8
SCHOOL**

Submitted to United States District
Judge David C. Bury on 05/15/15

No. CV 74-204 TUC DCB

19 MARIA MENDOZA, et al.,)
 20)
 21 Plaintiffs,)
 22)
 23 UNITED STATES OF AMERICA)
 24)
 25 Plaintiff-Intervenor,)
 26 vs.)
 27)
 28)
 TUCSON UNIFIED SCHOOL)
 DISTRICT NO. ONE, et al.,)
 Defendants.)

1 **1. FISHER PLAINTIFFS OBJECT TO TUSD’S 05/08/15 DIETZ NARA**

2
3 COME NOW, Plaintiffs Roy and Josie Fisher (hereinafter Fisher Plaintiffs), by and
4 through counsel undersigned, Rubin Salter, Jr. (hereinafter Fisher counsel) to object to
5 the 05/08/15 notice and request for approval (NARA) of portable classrooms filed by
6 Defendant Tucson Unified School District (hereinafter TUSD or District).

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8 **1.1. STATEMENT OF CASE AND FACTS**

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10 Counsel undersigned states as follows:

11 1. On 04/21/15, Fisher representative Lorraine Richardson notified Fisher
12 counsel of plans by Tucson Unified School District (hereinafter TUSD or District) staff
13 to seek TUSD Governing Board (GB) approval of the addition of two new portables at
14 Dietz K-7 school to accommodate its conversion to a K-8 school in the 2015-2016 school
15 year (SY) (see attached Richardson 04/21/15 email regarding funding of portables at
16 Dietz K-8). Dr. Richardson also noted that it would be inappropriate for the District to
17 fund the addition from its desegregation budget (idem).

18 2. On Friday 05/01/15, TUSD external counsel Bill Brammer notified plaintiff
19 counsel of the District’s intention to file a notice and request for approval (NARA) the
20 following Friday (05/08/15). In that email, District counsel Brammer explained that the
21 planned NARA would seek the Court’s approval of the use of additional portables at
22 Dietz K-8. In support of the request, District counsel attached a memorandum and
23 desegregation impact analysis (DIA). District counsel also expressed his hope that the
24 plaintiffs and the SM would stipulate to the NARA to expedite the approval process (see:
25 (1) attached Brammer 05/01/15 email request regarding possible plaintiff and Special
26 Master (SM) stipulation to TUSD Dietz NARA and (2) attached 05/01/15 TUSD
27 memorandum and desegregation impact analysis (DIA) regarding the use of portables at
28 Dietz K-8).

1 3. On 05/03/15, Special Master (SM) Willis Hawley responded to TUSD
2 counsel Brammer's 05/01/15 email request with an informal, email request for
3 information (RFI) (see attached Hawley 05/03/15 email response regarding stipulation to
4 TUSD Dietz NARA). Specifically, SM Hawley asked the District to explain: (1) whether
5 and how its NARA conformed to this Court's controlling orders; (2) why overall
6 enrollment at Dietz was projected to increase in future school years; and (3) why all 6th
7 grade students at Dietz were expected to enroll in enrichment classes (*idem*).

8 4. On 05/05/15, TUSD in-house counsel Sam Brown replied to the SM's
9 05/03/15 RFI (see: (1) attached Brown 05/05/15 email reply regarding stipulation to
10 TUSD Dietz NARA and (2) TUSD 05/05/15 memorandum response to SM 05/03/15 RFI
11 entered into record on 05/08/15 as pages 20-28 of document number 1798-1). In its
12 memorandum response, the District argued: (1) that this Court's orders limiting the use of
13 portables at schools at schools (like Dietz) that received students from schools closed in
14 2013 were not relevant to the current NARA; (2) that the projected increase in enrollment
15 was a consequence of the K-8's location and its recent change in leadership; and (3) that
16 the transition between 5th and 6th grade (from one room to multiple rooms and multiple
17 teachers) was especially challenging and justified universal participation in enrichment
18 class targeting planning and study skills (*idem*).

19 5. On 05/06/15, SM Hawley replied to confirm his satisfaction with and
20 conditional stipulation to the District's request (reserving the right to revise his position
21 after reviewing the plaintiffs' responses to the District's request) (see attached Hawley
22 05/06/15 email reply regarding stipulation to TUSD Dietz NARA).

23 6. On 05/06/15, United States Department of Justice (DOJ) counsel James
24 Eichner replied to confirm his satisfaction with and conditional stipulation to the
25 District's request (reserving the right to revisit the topic should other parties raise
26 concerns with the District's request) (see attached Eichner 05/06/15 email reply regarding
27 stipulation to TUSD Dietz NARA).

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1 7. On 05/06/15, Mendoza counsel Juan Rodriguez provided the District with
2 the Mendoza Plaintiffs' concerns with its plans for Dietz (see attached Rodriguez
3 05/06/15 email regarding Mendoza comments on Dietz NARA), raising inter alia their
4 concerns with the "implementation of major changes at schools originating at the school
5 site level without the District's careful consideration of the District-wide consequence of
6 those changes [and the District's seemingly] contradictory approaches for addressing the
7 transition of 5th graders into 6th grade [at Fruchthendler and Dietz]" (idem).

8 8. On 05/07/15, Fisher counsel provided the District with the Fisher Plaintiffs'
9 preliminary concerns with and comments on the placement of portables at Dietz (see
10 attached Salter 05/07/15 email regarding Fisher concerns with and comments on TUSD
11 Dietz NARA). The Fisher Plaintiffs were particularly concerned with what they
12 identified as a pattern of submitting "late proposals where there has been no [prior
13 plaintiff] input. The District continually provides the Fisher Plaintiffs with new
14 proposals [...] [affording] only a short period of time to analyze and respond to these
15 proposals" (idem).

16 9. On 05/08/15, TUSD filed its notice and request for approval (NARA) of the
17 relocation of "two double-portables (four classrooms) to Dietz K-8 School" (at page 2 of
18 document number 1798 filed 05/08/15).

19 10. On 05/08/15, SM Hawley raised concerns with the District's practice of
20 seeking GB approval to proceed with the Dietz NARA prior to soliciting SM and plaintiff
21 feedback on the plans (see attached Hawley 05/08/15 email regarding TUSD Dietz
22 NARA). Specifically, the SM expressed his concern that "[t]he fact that the Board takes
23 action signals to the community its intent to go forward and presents the plaintiffs and me
24 with a practical fait accompli - that is, we are in the position of overturning a Board
25 action. Moreover, the Board does not have the benefit of any perspective that the
26 plaintiffs and the SM might offer. The purposes of review under NARA include
27 providing the District with input with respect to its decisions, not simply to allow for a
28 veto. The District includes the Board." (idem).

1 11. On 05/08/15, TUSD external counsel Waterkotte responded to the SM's
2 concerns regarding the District's practice of seeking GB approval prior to soliciting SM
3 and plaintiff feedback on NARAs (see attached Waterkotte 05/08/15 email response
4 regarding TUSD Dietz NARA). Specifically, TUSD counsel argued that "[a]s it has done
5 in the past, the District can approve contracts, obtain licenses, seek court approval, etc.
6 simultaneously" (idem).

7 12. On 05/11/15, TUSD counsel Brown contacted the SM and plaintiff counsel
8 to request their stipulation to an expedited submission schedule for the Dietz NARA (see
9 attached Brown 05/11/15 email proposal regarding TUSD 05/08/15 Dietz NARA).
10 Specifically, TUSD counsel noted that "TUSD filed the NARA (including DIA) with the
11 Court [on] May 8 [then the] Plaintiffs will provide comments to TUSD and the Special
12 Master by May 15 [then] TUSD will provide a response to the Plaintiffs and Special
13 Master by May 22 [then] [t]he Special Master will provide a recommendation to the
14 Court by June 1 with a request for an expedited ruling within thirty days" (idem).

15 13. On 05/11/15, Mendoza counsel Lois Thompson responded to TUSD
16 counsel Brown's 05/11/15 email proposal (see attached Thompson 05/11/15 email
17 stipulation regarding TUSD 05/08/15 Dietz NARA). Specifically, Mendoza counsel
18 Thompson explained that the Mendoza Plaintiffs had "reviewed Judge Bury's August 22,
19 2012 Order concerning the NARA process [which order] expressly contemplates
20 agreements of the parties to reduce the days for briefing a NARA and we therefore can
21 and do agree to the dates you have proposed. However, that Order also expressly
22 references the filing of objections and any response thereto with the Court and does not
23 seem to contemplate that the parties and the Special Master will on their own change that
24 process; nor do we see any reason requiring that such change be made in this instance"
25 (idem emphasis added).

26 14. On 05/11/15, TUSD counsel Brown confirmed the District's satisfaction
27 with the terms of Mendoza counsel Thompson's 05/11/15 email response (see attached
28 Brown 05/11/15 email stipulation regarding TUSD 05/08/15 Dietz NARA).

1 15. On 05/13/15, Mendoza counsel Rodriguez replied to TUSD counsel
2 Waterkotte's 05/08/15 email response to the SM (see attached Rodriguez 05/13/15 email
3 reply regarding TUSD Dietz NARA). Specifically, Mendoza counsel Rodriguez
4 explained that "[p]roviding the Plaintiffs and Special Master with the Dietz NARA
5 months after the central staff began developing the Dietz plan, and weeks after the
6 Governing Board approved a specific contract for the Dietz portables [can] not [be
7 characterized as proceeding on simultaneous] or 'parallel tracks'" (idem).

8 16. On 05/14/15, United States Department of Justice (DOJ) counsel James
9 Eichner stipulated to TUSD counsel Brown's 05/11/15 email request (as modified by
10 Mendoza counsel Thompson's email of the same date) (see attached Eichner 05/14/15
11 email stipulation regarding TUSD 05/08/15 Dietz NARA).

12 17. On 05/15/15, the Fisher Plaintiffs filed the instant objection to the District's
13 05/08/15 notice and request for approval (NARA) of portable classrooms.

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1 **1.2. DISTRICT’S NARA SHOULD BE DENIED ON PROCEDURAL GROUNDS**

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3 **1.2.1. PRO FORMA GB APPROVAL AND LACK OF PLAINTIFF INPUT**

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5 The Fisher Plaintiffs join the Mendoza Plaintiffs in their objection to the GB’s pro forma
6 approval of the District’s plans for Dietz, especially where Mendoza counsel note that:

7 the District has acted on the Dietz NARA without any regard to or interest in the
8 desegregation impact of its decision. Highlighting the lack of interest in such
9 information, even if only for informational purposes, is the fact that the Dietz
10 contract was approved as part of a consent agenda, along with 39 other items,
11 suggesting little time was spent discussing the NARA. If the District desires to
12 integrate its schools in good-faith, it is of utmost importance that, as the Court
13 recently stated specifically about NARAs, it follow “the USP requirement [to]
14 comprehensively consider the proposal, pursuant to applicable USP criteria, in an
15 effort to increase the integration of TUSD schools.” (Court’s May 12, 2015 Order
16 at 5.) (see Rodriguez 05/13/15 email renewal of Mendoza request for SM R&R
17 and objection to TUSD 05/08/15 Dietz NARA).

18
19 Although TUSD staff sought GB approval of the relocation of portables to Dietz on
20 04/14/15, it only solicited plaintiff and SM feedback on its plans the following month, on
21 05/01/15. This two-week delay meant that the Fisher Plaintiffs were afforded no
22 opportunity to inform the GB’s vote and were only able to provide the District with their
23 feedback the day before the District filed its NARA with this Court (see attached Salter
24 05/07/15 email regarding Fisher concerns with and comments on TUSD Dietz NARA).
25 The Fisher Plaintiffs are dismayed by the District’s unabated and untenable practice of
26 submitting “late proposals where there has been no [prior plaintiff] input. The District
27 [often] provides the Fisher Plaintiffs with new proposals [...] [affording the plaintiffs]
28 only a short period of time to analyze and respond to these proposals” (idem).

1 1.2.2. TUSD DIA FAILS TO GAUGE IMPACT OF CONVERSION TO K-8 SCHOOLS

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3 The Fisher Plaintiffs object to the District's failure to analyze the potentially negative
4 impact of the establishment of K-8 schools. Under the Unitary Status Plan (USP), the
5 District is required to analyze the impact of its plans on its desegregation obligations.
6 Here, the District seek to utilize two new portable classrooms to further facilitate the
7 conversion of Dietz from a K-5 to a K-8 school.¹ The District has made (if not actually
8 proven) a number of claims that would support the conversion of K-5 schools into K-6
9 (and by extension K-7 and K-8) schools, including improved academic performance,
10 better discipline and the elimination of the socially and academically disruptive transition
11 between elementary and middle school (see TUSD 04/14/15 Fruchthendler NARA).
12 Notwithstanding these claims, the District's primary rationale for converting Dietz and
13 other elementary schools into a K-8 schools is to retain students who might otherwise exit
14 the District. Unfortunately, what the District promotes as a remedy for flight may
15 ultimately prove to be a major constraint on the integration of the District's 6th, 7th and
16 8th grades. This concern was raised by the Fisher Plaintiffs in their 01/22/13 objection
17 filed with this Court:

18 It is a fact that the District's elementary schools are generally smaller than its
19 middle and high schools. It is also true that its elementary schools typically draw
20 students from smaller geographic attendance areas, thus graduation from
21 elementary to middle school in TUSD generally means graduation from a
22 neighborhood school to a school attended by students from a larger, and
23 potentially more diverse, geographic area. For these reasons, the Court should not
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25 ¹ Although the Court did subsequently approve the District's 03/11/13 NARA regarding
26 the approval of construction to aid the conversion of Dietz into a K-8, its approval was
27 preceded by its order approving the closure of a number of other TUSD schools, which
28 order explicitly stated that "[r]eceiving schools should not turn to portable classrooms to
accommodate the influx of students from closed schools" (at page 10 of order filed
02/15/13 as document number 1447).

1 approve the closure of middle schools and the conversion of elementary schools to
2 K-8 schools until the District can show that such closures will not result in more
3 TUSD students attending relatively less diverse schools for the 6th, 7th and 8th
4 grades (at page 12 of Fisher objection filed 01/22/13 as document number 1424).

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6 1.2.3. THE DISTRICT MISCONSTRUES PLAIN LANGUAGE OF 02/15/13 ORDER

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8 The Fisher Plaintiffs believe the District is using an overbroad lens and stretch of the
9 imagination to interpret the plain language of this Court's 02/15/13 order as now
10 somehow allowing the use portables at Dietz K-8. In its 02/15/13 order, this Court
11 explicitly stated that "[r]eceiving schools should not turn to portable classrooms to
12 accommodate the influx of students from closed schools" (at page 10 of order filed
13 02/15/13 as document number 1447). It was clearly the intent of this Court to ensure that
14 students who were then attending, or would soon have attended, the schools targeted for
15 closure would not be placed in portables at receiving schools. In its 05/05/15
16 memorandum response to the SM's RFI, the District argues that:

17 [t]he February [15th] 2013 Order applied [only] to students from "schools being
18 closed" or from "sending schools" (in this case, Carson Middle School) who were
19 transitioning into Dietz K-8 [and does] not apply in perpetuity to any use of
20 portables at Dietz K-8 [...]. [N]one of the students in Dietz were in Carson before
21 it closed (aka "students from closed schools"). The February [15th] Order applied
22 to former Carson students. No former Carson students [now] attend Dietz. The
23 February Order does not apply (at page 1 of TUSD 05/05/15 memorandum
24 response to SM's Dietz RFI).

1 The District’s argument is unavailing insofar as it unjustifiably limits the effect of
2 closures to individual students rather than to the resulting patterns that clearly shape and
3 bias current and future enrollment at the impacted schools. The far-reaching
4 consequences of the 2013 school closures, and this Court’s clear directive to mitigate the
5 most obviously detrimental of those consequences, are not reasonably limitable to the
6 individual students enrolled in the impacted schools in 2013. For these reasons, the Fisher
7 Plaintiffs suggest that the District’s arguments strain credibility where they construe the
8 plain language of this Court’s 02/15/13 order as countenancing the relocation of new
9 portables at receiving school like Dietz.

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11 1.2.4. DEMAND FOR PORTABLES ASSUMES INCREASED ENROLLMENT

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13 While the District argues that the student population at Dietz will increase in the future as
14 it finishes its expansion from a K-6 to a K-8 school, the Fisher Plaintiffs are concerned
15 that the projected increase in enrollment is unlikely in light of the schools current “C”
16 status. The Fisher Plaintiffs fear parents of prospective students will have little incentive
17 to enroll their children in a “C” school when they have the option to enroll their children
18 in an “A” school. Without improving the school’s rating, the Fisher Plaintiffs believe the
19 student population at Dietz is more likely to decrease than increase in coming school
20 years. The Fisher Plaintiffs believe that any increase in students at Dietz is more likely
21 driven by the closure of Carson MS and Keen ES, rather than population growth or the
22 increased attractiveness of the K-8. The Fisher Plaintiffs are concerned that the reported
23 need for additional portables is predicated on flawed enrollment projections.

1 1.2.5. INVESTMENT IN UNDERSIZED DIETZ CAMPUS IS SHORTSIGHTED

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3 The landmass required for the efficient functioning of a K-8 school is greater than that
4 required for a K-6 or a K-7 school. Approving the relocation of new portables to a school
5 sited on insufficient acreage would be a short-sighted and inefficient allocation of the
6 District's limited resources. Dietz simply does not have the acreage necessary to meet
7 the needs of a K-8 school functioning on a "middle school" model. Notwithstanding the
8 addition of two new portables at Dietz, the school's students would still not be provided
9 the range of options other TUSD middle school students typically receive. Specifically,
10 Dietz - with the exception of one computer lab - does not have standard PE facilities,
11 science labs or technology classrooms. The middle school students currently enrolled in
12 7th grade at Dietz are receiving an inferior educational experience that will not provide
13 them with the academic and social skills necessary to enter high school. The addition of
14 new portables would do little to rectify that deficiency. In the alternative, the Fisher
15 Plaintiffs believe the District should look for a better solution than the relocation of
16 portables to an undersized campus. One possible solution would be to reopen the
17 currently closed Carson campus as a K-8 school. The Carson site has the facilities and
18 acreage necessary to provide a quality and diverse educational experience to the students
19 currently enrolled at Dietz.

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1.3. CONCLUSION

On the basis of the foregoing facts and law, the Fisher Plaintiffs respectfully ask this Court to deny the District's 05/08/15 NARA.

Respectfully submitted this 15th day of May, 2015

s/ Rubin Salter, Jr. _____

RUBIN SALTER, JR., ASBN 01710

Counsel for Fisher Plaintiffs

1 **2. CERTIFICATE OF SERVICE**

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3 I declare and certify that a full, correct and true copy of the foregoing document was
4 electronically transmitted to the CM/ECF system for filing and transmittal of a notice of
5 electronic filing to the following CM/ECF registrants on this 15th day of May, 2015. I
6 certify further that, on this date, the CM/ECF system's service-list report showed that all
7 participants in this case were CM/ECF registrants.
8

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15 Respectfully submitted this 15th day of May, 2015

17 s/ Rubin Salter, Jr.

18 RUBIN SALTER, JR., ASBN 01710
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