

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA**

Roy and Josie Fisher, et al.,  
Plaintiffs,  
v.  
United States of America,  
Plaintiff-Intervenor,  
v.  
Anita Lohr, et al.,  
Defendants,  
and  
Sidney L. Sutton, et al.,  
Defendants-Intervenors,  

---

Maria Mendoza, et al.,  
Plaintiffs,  
United States of America,  
Plaintiff-Intervenor,  
v.  
Tucson Unified School District No. One, et al.,  
Defendants.

CV 74-90 TUC DCB  
(lead case)

**ORDER**

CV 74-204 TUC DCB  
(consolidated case)

1 On May 8, 2015, the Defendant Tucson Unified School District (the District)  
2 submitted a Notice and Request for Approval (NARA) of Portable Classrooms at Dietz K-8  
3 School. The Government does not object, but both Fisher and Mendoza Plaintiffs oppose the  
4 proposal. The District filed a Reply to the Fisher and Mendoza Objections. On May 27,  
5 2015, the Special Master filed a Report and Recommendation (R&R). (Doc. 1805.) He  
6 recommends the Court approve the District's proposal to put two double-portable buildings  
7 (four classrooms) at Dietz K-8 School. The Special Master also reports problems with the  
8 consultation process because it allows Board action to be taken on a proposal governed by  
9 the USP prior to the parties having an opportunity to review the proposal and provide input  
10 and comment. He asks the Court to once again direct the parties to develop a viable  
11 procedure for addressing the comment and review provisions in the USP, including  
12 discussions of whether specific timelines should be shortened.

13 The Dietz k-8 School was initially planned as a self-contained K-8 model, with  
14 students in grades 6-8 staying with a single teacher throughout the year. A new principal at  
15 Dietz, however, developed a middle school model, with students transitioning between  
16 teachers while maintaining a "smallschool" community and culture. TUSD explains: "Many  
17 parents are attracted to this model for the social and academic benefits it provides. Research  
18 supports the social and academic benefits of the K-8 model, generally, but particularly in  
19 urban school districts" (NARA (Doc1798), Desegregation Impact Analysis (DIA) (Doc.  
20 1798-1) at 33.)<sup>1</sup>

21  
22 <sup>1</sup>The Fisher Plaintiffs reurge their concern raised in 2013, when the District closed  
23 several schools for fiscal reasons. (Objection (Doc. 1802) at 8-9 (citing Objection (Doc.  
24 1424) at 12 (the District should not close middle schools and convert elementary schools to  
25 K-8 schools until it can show that such a shift will not result in more students attending less  
26 diverse schools for the 6<sup>th</sup> through 8<sup>th</sup> grades). Now, the District is in better position to assess  
27 school closures and consolidations than it was in 2013. As the Court understands it, there  
28 are currently no plans for future school closures so the District has a set number of schools  
making up a system of school services ranging from elementary K-6, K-8, middle and high  
schools The District now has a Boundary Plan, a school specific Magnet Plan, and an array

1 The District wants to use some of the portable building space to offer a 6<sup>th</sup> grade  
2 CORE enrichment class to increase access to 7<sup>th</sup> and 8<sup>th</sup> grade electives.

3 The remainder of portable building space will be used for support services for its  
4 Exceptional Education (ExEd) students, such as IEP meetings and other meetings between  
5 staff with families and students, for small group instruction, for testing space, and to serve  
6 as a “home base” for ExEd CCS teachers. (NARA (Doc. 1798 at 5.)

7 None of the space in the portable buildings will be used as home-room type class  
8 rooms for housing a specific group of students all day or even for a significant portion of the  
9 day. *Id.* The DIA reflects that the District considered enrollment projections, capacity  
10 changes, impacts to the racial and ethnic make-up of Dietz, and concluded that the impact  
11 from the portable buildings would cause “virtually no change to the racial-ethnic  
12 composition of Dietz.” (Reply (Doc. 1804) (citing and quoting DIA (Doc. 1798-1) at 26.)

13 The Fisher Plaintiffs are concerned that the estimate for needed future space will not  
14 materialize because Dietz is a C school. The Mendoza Plaintiffs complain the District fails  
15 to explain why the alleged benefits of a K-8 program should be offered at Dietz and not some  
16 other school. (Mendoza Objection (Doc. 1801) at 7 (noting Roberts-Naylor and Secrist have  
17 16% African American students and Drachman, Roberts-Naylor and Utterback have higher  
18 concentrations of Latino students)). The Mendoza Plaintiffs are concerned with the increase  
19 in the number of ExEd students at Dietz and question whether minority students are  
20 improvidently funneled there.

21  
22  
23 of other plans developed to move the District forward toward the most practicable unitary  
24 plan it believes it can attain under the USP. The District should in the future, in respect to  
25 proposed grade changes, include in the DIA an analysis which reflects whether  
26 improvements in the quality of education for students at one school might dis-serve  
27 desegregation of the District as a whole. *See e.g.* (Order (Doc. 1799) at 4-6 (explaining lack  
of comprehensive information as part of the reason for denying Fruchthendler-Sabino  
NARA).

1           There is no dispute that CORE enrichment classes should improve the academic  
2 standing of the school and enhance the quality of education at Dietz, which is a school with  
3 a 50% Latino student population and a 14% African American student population. (Reply  
4 (1804) at 6.) The question of whether additional portables will or will not be needed in the  
5 future at Dietz remains to be answered another day. Whether there are racial disparities in  
6 ExEd in TUSD is being monitored and tracked pursuant to the USP § V.D.1.

7           The Court approves the NARA for the two portable buildings to be added at Dietz  
8 K-8 School. The Court turns to the harder question of whether this Court should “order the  
9 District to not implement any future NARA proposal before obtaining the required approval,  
10 and direct the District to clearly indicate in publicly available documents that any item  
11 approved by its Governing Board in preparation of implementation of pending NARA  
12 proposals are subject to Court approval.” (Mendoza Objection (Doc. 1801) at 2.)  
13 Alternatively, the Court considers whether it should, as recommended by the Special Master,  
14 direct the parties “to, once again, develop a viable procedure for addressing the comment and  
15 review provisions of the USP and to make a report to the Court about the results of this  
16 effort.” (R&R (Doc. m1805) at 7.) The concern is that the USP calls for the parties to work  
17 together to implement the USP, with the District having the benefit of input from the  
18 Plaintiffs before it acts. The Special Master put it best: “The fact that the Board takes action  
19 signals to the community its intent to go forward . . . The purposes of review under NARA  
20 include providing the District with input with respect to its decisions, not simply to allow for  
21 a veto. The District includes the Board.” (Fisher Objection (Doc. 1802) at 4 (quoting  
22 Special Master 5/8/15 email)).

23           This is true. In both this proposal and the Fruchthendler-Sabino Honors program  
24 proposal, “the Board [did] not have the benefit of any perspective that the plaintiffs and the  
25 Special Master might offer.” *Id.* There is, however, nothing wrong with the Board leading  
26 in the implementation of the USP. In fact the Board is responsible for leadership in respect  
27

1 to all the District's efforts, including those undertaken to implement the USP. But, when  
2 the Board acts without considering input from the Plaintiffs and the Special Master,  
3 especially if it acts even before the preparation of the DIA, the Board has not acted  
4 consistently with the USP requirement that it consider the impact of its proposals in respect  
5 to its obligations under the USP.

6 The Court refers to the USP NARA provision which requires "the District to provide  
7 the Special Master with notice and seek approval of certain actions regarding changes to the  
8 District's assignment of students and its physical plant, . . . [and to] also provide notice and  
9 a request for approval regarding the closing or opening of magnet schools or programs and  
10 attendance boundary changes . . . [And,] *[i]n order to assess the District's plans in these*  
11 *regards*, the District shall submit with each request for approval, a Desegregation Impact  
12 Analysis, ("DIA"), that will assess the impact of the requested action on the District's  
13 obligation to desegregate and shall specifically address how the proposed change will impact  
14 the District's obligations under [the USP.]" (USP (Doc. 1713) , § X.2.C) (emphasis added).  
15 Without the DIA, the Board cannot assess the impact of an action on its obligation to  
16 desegregate nor address how its proposed change will impact its obligations under the USP.  
17 The Court agrees with the Special Master that the Board should have the advantage of the  
18 information contained in the DIA when considering an action that will require a NARA.

19 The Court turns to the expedited nature of most of the NARA proposals. This  
20 NARA is a good example. On **April 14, 2015**, without the benefit of the DIA, the Board  
21 moved to add two portable buildings at Dietz K-8 School by approving a procurement  
22 contract for \$225,000 to Kittle Design & Construction to move the portables. (NARA (Doc.  
23 1798-1), Ex. 2: Board agenda action item)). **May 1, 2015**, the District submitted the proposal,  
24 including the DIA, to the Plaintiffs and Special Master and requested their approval to avoid  
25 a contested NARA. Here, within 17 days of the Board's action, the DIA had been prepared  
26 and the NARA was submitted to the parties and Special Master for review and comment.

1 Preparing the DIA was not overly burdensome nor time consuming. The Special Master  
2 recommends: “When a significant proposal for new or revised District-wide policies and  
3 practices that would fall under provisions for comment and review provided for in the USP  
4 is being seriously considered by the District, the District should share these ideas with the  
5 Plaintiffs and ask for a one week turnaround for comments.” (R&R (Doc. 1805) at 7.)

6 In this case, it would have taken approximate 24 days for staff to prepare the DIA,  
7 submit the proposal and DIA to Plaintiffs and the Special Master for a one-week turn-around  
8 review and comment period, before the Board considered the matter. In this way, the Board  
9 has the proposal with the DIA and a general idea of the parties and Special Master’s positions  
10 and/or concerns. The Court finds this is in keeping with the USP’s mandate that the DIA  
11 be used to assess the District’s plans in regard to it’s obligations under the USP. It creates  
12 an informational imbalance if only the parties and the Special Master have the benefit of the  
13 DIA to assess a proposed plan. The Court has found the DIAs to be extremely helpful. The  
14 Board is at a disadvantage if it must assess and commit to a project prior to preparation of  
15 the DIA. After-the-fact preparation of the DIA delays meaningful discussions and is contrary  
16 to the usual expedited nature of NARAs.

17 **Accordingly,**

18 **IT IS ORDERED** that the NARA (Doc. 1798) to add two portable buildings at  
19 Dietz K-8 School is APPROVED.

20 **IT IS FURTHER ORDERED** that the Special Master’s R&R (Doc. 1805) is  
21 ADOPTED as described below.


22 **IT IS FURTHER ORDERED** that the District shall prepare a DIA and allow a one-  
23 week turnaround review and comment period and for both the DIA and comments to be  
24 presented to the Board when it is assessing whether or not to approve a proposal governed  
25 by NARA provisions.

26 **IT IS FURTHER ORDERED** that within 30 days of the filing date of this Order  
27 the Special Master and the parties shall work together to develop viable procedure(s) for the  
28

1 comment and review provisions which are required under the USP when a significant  
2 proposal for new or revised District-wide policies and practices are seriously being  
3 considered by the District, with the goal being to improve communications and expedited  
4 decision-making, including judicial determinations. Within 45 days of the filing date of this  
5 Order, the Special Master shall file a status report, including any recommendations.

6 DATED this 11<sup>th</sup> day of June, 2015.

7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28



David C. Bury  
United States District Judge