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12

13 **UNITED STATES DISTRICT COURT**
14 **DISTRICT OF ARIZONA**

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

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

**MENDOZA PLAINTIFFS' OPPOSITION
TO TUSD'S NOTICES AND REQUESTS
FOR APPROVAL OF GRADE
EXPANSIONS AT (1) COLLIER
ELEMENTARY SCHOOL; (2)
FRUCHTHENDLER ELEMENTARY
SCHOOL; AND (3) SABINO HIGH
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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10 **Introduction**

11 On November 16, 2015, TUSD filed its Notices and Requests for Approval of
12 Grade Expansions at: (1) Borman Elementary School; (2) Collier Elementary School; (3)
13 Drachman K-6 School; (4) Fruchthendler Elementary School; and (5) Sabino High School
14 (Doc. 1869, hereinafter referred to as “TUSD’s NARA”).¹ Because TUSD’s NARA lacks
15 clarity on commitments to be undertaken if its proposals are approved by this Court (at
16 8:22-27), Mendoza Plaintiffs received confirmation that the District would indeed
17 undertake such commitments upon approval of its proposal. (See November 25, 2015
18 email from Sam Brown, attached hereto as Exhibit A.) Mendoza Plaintiffs do not object to
19 the District’s proposals relating to grade reconfigurations at Drachman K-6 and Borman
20 Elementary School so long as the District’s accompanying commitments are implemented.
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25 ¹ Mendoza Plaintiffs note that they strongly disagree with the District’s reading of USP
26 Section II, D, 2 in section II, B of TUSD’s NARA, which takes a very narrow view of
27 what constitutes a “boundary change.” They do not however now burden the court with
28 this issue as the District, subsequent to the development of its initial proposals, conducted
an analysis of integrative scenarios and now indicates that it will further analyze two
scenarios and present them in the second semester of the 2015-16 school year. (TUSD’s
NARA at 7:7-15.)

1 They do however object to the District's Collier and Fruchthendler Elementary
2 School and Sabino High School grade reconfiguration proposals. Those schools are not
3 integrated and represent the schools with the highest percentages of white student
4 populations for their school grade levels. The District's DIAs demonstrate that its
5 proposals would, if approved, take each of those schools further away from integration,
6 thereby frustrating the USP's integration requirements. Moreover, the new telephonic
7 parent surveys regarding express incentive busing on which the District relies to now
8 assert that its proposals would increase integration at each of these schools are flawed,
9 unrealistic and unreliable. Specifically, the District asserts that its surveys demonstrate
10 that there exists significant interest in these schools were its proposals to be implemented.
11 However, this Court need only compare those numbers to the District's reports on students
12 eligible to receive incentive transportation and non-white students who actually received
13 incentive transportation in the 2014-15 school year to know that the surveys grossly over-
14 estimate interest and are therefore unreliable. The integrative impact the District claims its
15 proposals would have is further undermined by the facts that these schools already have
16 incentive transportation available (but that availability has not produced results reflecting
17 anything near the enormous interest the District claims exists were its proposals to be
18 implemented) and that the District expects almost all of the Fruchthendler and Collier 6th
19 graders would transition to Sabino.
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24 In addition, because these grade reconfiguration proposals could, when taken
25 together, very rapidly reduce the white student population at Magee by over 21%, Magee
26 may well be propelled to become a racially concentrated school as it reaches a "tipping
27 point." That risk is exacerbated by Magee's rating as a "C" school, and the fact that the
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1 District has recently decided to locate its new alternative to long-term suspension program
2 at Magee. Moreover, the phone survey on which the District relies to suggest that Magee
3 is attractive to parents whose students would contribute to that school's integration efforts
4 is misleading in that it identifies this "C" school as one with strong academics and makes
5 references to a competition at that school, without any additional information having been
6 provided. For these reasons, this Court should deny the District's Collier, Fruchthendler,
7 and Sabino Grade Reconfiguration proposals, but should order that the District put in place
8 all the programmatic proposals it made for Magee regardless of whether it approves the
9 proposed grade configurations.
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13 **TUSD's Grade Reconfiguration Proposals for Collier and Fruchthendler Elementary**
14 **Schools and Sabino High School Would Take Those Schools Further Away From**
15 **Reaching Integration**
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17 Collier and Fruchthendler Elementary Schools and Sabino High School are not
18 integrated schools. Under the USP, an integrated school is one in which no racial or ethnic
19 group varies from the District average for that grade level by more than +/- 15 percentage
20 points (and in which no single racial or ethnic group exceeds 70% of the school's
21 enrollment). (USP Section II, B, 2.) The District's recent Annual Report (filed on
22 September 30, 2015) demonstrates that in 2014-15, the white populations of Fruchthendler
23 and Collier Elementary Schools *exceeded* the percentage of white students at the TUSD
24 elementary school grade level by 42% and 39% respectively, the white student population
25 at the elementary school level standing at 23% for that year. (2014-15 Annual Report,
26 Doc. 1848-5, Appendix II-41.) Notably, those two schools are, by far, the elementary
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1 schools with the largest percentages of white students in the District. (*Id.* (Borman, the
2 elementary school with the third highest percentage of white students, has 11% fewer
3 white students than Fruchthendler, and 8% fewer white students than Collier. Further,
4 Borman is in many respects a “special case” since it is located on the Davis-Monthan Air
5 Force Base with a school population that is effectively limited to those living on the base
6 by virtue of the security restrictions on entry to the base.)) The white population at Sabino
7 High School *exceeds* the District average for that grade level by 33%, with Sabino reported
8 to be the school with the highest percentage of white students in TUSD for its school grade
9 level. (*Id.*)
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12 Without including the District’s new analysis on express busing, the proposed grade
13 reconfigurations at Fruchthendler, Collier and Sabino are projected to further exacerbate
14 the high white student populations at each of those schools by one percent (*see*
15 Fruchthendler DIA, Doc. 1869-5 at 5; Collier DIA, Doc. 1869-3 at 5; Sabino Draft DIA,
16 Doc. 1869-9 at 37²), thereby taking them even further away from achieving integration in
17 frustration of the integration requirements of the USP.
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19 The parent surveys regarding express incentive transportation that the District
20 indicates caused it to change its initial determination that the Fruchthendler, Collier, and
21 Sabino proposals (TUSD’s NARA at 8:5-6) would take each of those schools further away
22 from achieving integration (*see* TUSD’s NARA at 8:5-6; Fruchthendler DIA, Doc. 1869-5
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25 ² While the most recent versions of the DIAs for Fruchthendler and Collier include
26 projected demographic changes at those schools were the proposals to be implemented
27 (separate from the District’s additional analysis of the claimed impact of express busing),
28 which are identical to projections included in the draft DIAs for those schools (see
Fruchthendler and Collier draft DIAs, Doc. 1869-9 at 32, 23), identical analysis for Sabino
included in its draft DIA (Doc. 1869-9 at 37) was dropped from the District’s final Sabino
DIA (Doc. Doc. 1869-6).

1 at 5; Collier DIA, Doc. 1869-3 at 5; Sabino Draft DIA, Doc. 1869-9 at 37) and to then
2 assert that they “would [instead] increase integration at all four schools³” (emphasis in
3 original; TUSD’s NARA at 8:8) are deeply flawed and unrealistic, as is demonstrated by
4 the District’s own surveys and data. (Specifically, as a result of the surveys, the District
5 now asserts that “in two racial-ethnic categories” Collier, Fruchthendler and Sabino may
6 all move closer to integration by 7-8%, 4-5%, and 4-5%, respectively. (See TUSD’s
7 NARA at 8:10-15.)) It makes little sense that the District would so significantly alter its
8 DIAs, which were based on (limited) data available on “current patterns of choice” (see
9 e.g., Fruchthendler DIA at 8; Collier DIA at 8; Sabino DIA, Doc. 1869-6 at 11) as a result
10 of a flawed survey that measured “interest,” presented incomplete information, gave
11 parents only “yes” or “no” options, and, given past experience, appears to have grossly
12 over-estimated the number of parents who would take advantage of that transportation.
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15 The Sabino survey provides a good example of the District’s deeply flawed surveys
16 and the accompanying grossly over-optimistic analysis. According to the Sabino survey, a
17 total of 874 parents whose children are eligible for incentive transportation expressed an
18 interest in their child attending Sabino High School if express transportation from Pueblo,
19 Cholla, and Tucson Magnet High Schools were offered. (See Sabino DIA at 13.) Notably,
20 that total is *almost double* the number of students the District reports were “eligible
21 rider[s]” under the USP to Sabino in the 2014-15 school year (471 students).⁴ (See TUSD
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25 ³ The fourth school referenced by the District is Magee Middle School which is addressed
26 below.

27 ⁴ Although Appendix III-4 was filed to address reporting requirements under USP Section
28 III, C, 1 regarding actual ridership (see TUSD 2014-15 Annual Report, Doc. 1848 at 55),
Appendix III-4 regards “Eligible Rider[ship]” (TUSD 2014-15 Annual Report, Doc. 1848-
8, Appendix III-4). Mendoza Plaintiffs additionally note that they understand that under
the Sabino proposal the number of incentive transportation “eligible riders” would increase,

1 2014-15 Annual Report, Doc. 1848-8, Appendix III-4.) In addition, that survey total
2 relating to one school, Sabino, *exceeds* the total number of non-white students across all
3 TUSD schools who were actually provided incentive transportation for the entire 2014-15
4 school year by 175 students. (*See* TUSD 2014-15 Annual Report, Doc. 1848-8, Appendix
5 III-3 (699 non-white students provided incentive transportation in 2014-15).)
6
7 (Significantly, the District goes so far as to say that “[i]f this were applied to all 6 grades
8 that might be able to attend Sabino, there would be over 2600 parents interested” in Sabino
9 (Sabino DIA at 6) (or 372% of all non-white students across all TUSD schools who were
10 provided incentive transportation in 2014-15 (*see id.*)).

11
12 While the District reports to have changed its analysis to include “only a fraction”
13 of the survey respondents expressing an interest in attending Sabino with express busing
14 (TUSD’s NARA at 8:7), the addition of 100 non-white students in the Sabino DIA (Sabino
15 DIA at 6) that it claims would be added through express busing is based on the unreliable
16 surveys and represents over one seventh of all non-white students across all TUSD schools
17 who were provided incentive transportation in 2014-15 (*see* TUSD 2014-15 Annual
18 Report, Doc. 1848-8, Appendix III-3). Significantly, because incentive transportation
19 already is available for African American and Latino students to attend Sabino (and
20 Fruchthendler and Collier as well) (TUSD 2014-15 Annual Report, Doc. 1848, Appendix
21 III-2), one must ask why, if there is such significant interest in Sabino, parents have not
22 already taken advantage of existing incentive transportation to attend Sabino, and why the
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27 but present these figures to demonstrate that the District should have questioned the
28 reliability of its surveys and bases for changing its proposals’ DIAs based on those surveys.

1 District has not used that purported interest in Sabino to have already integrated that
2 school.⁵

3 Data on existing use of incentive transportation to Sabino, Fruchthendler, and
4 Collier would provide much more useful insight into the impact of express busing to those
5 schools for integrative purposes. However, as far as Mendoza Plaintiffs can tell, that
6 information is not included in the District's annual report, and the District has, as of today,
7 failed to respond to the Special Master's request for that information (*see* Special Master
8 Hawley's November 23, 2015 email, attached hereto as Exhibit B (noting that the survey
9 "questions seem ill-suited for the purpose" of assessing the proposals' effects on
10 integration)).
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13 Moreover, even as the District claims that each of the Collier, Fruchthendler, and
14 Sabino proposals would "giv[e] the District greater access to [non-TUSD students who the
15 District claims it would be able to retain through its proposals] for outreach and
16 recruitment to encourage school choices that will improve integration" (TUSD's NARA at
17 11 (regarding Collier), 14 (regarding Fruchthendler), and 16 (regarding Sabino)), the
18 District's own Sabino DIA indicates that "[t]ypical 6th to 7th grade transition data support
19 the projection that almost all of the Collier and Fruchthendler 6th graders would transition
20 to Sabino" (Sabino DIA at 4). It defies logic therefore that the District simultaneously
21 states that "almost all" Fruchthendler and Collier 6th graders would transition to Sabino,
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25 ⁵ Additionally, Mendoza Plaintiffs note that the Sabino survey used by the District to assert
26 that the Sabino proposal to add a middle school component to that school may move it 4-
27 5% closer to integration (TUSD's NARA at 8) actually regarded "Sabino High School"
28 and made no reference to "Sabino Middle School" or the proposed additions of 7th and 8th
grades to that school (Sabino DIA at 13). Therefore, not only is this question irrelevant to
the proposal to add a middle school component to Sabino, but it demonstrates just how
flawed the District's projections on the effect of the express busing are.

1 even as it asserts that it can successfully market these students to leave the schools (whose
2 proposed configuration changes the District asserts would attract them to enroll in these
3 TUSD schools in the first place), to move to *other* schools at which the enrollment of these
4 students would promote integration. Notably, notwithstanding these new “opportunities”
5 to recruit students to increase integration, Mendoza Plaintiffs have not seen any change
6 whatsoever in the numbers reported in the DIAs from their first iteration to suggest that the
7 District, once it attracts non-TUSD students into the schools for which it is proposing
8 reconfiguration changes, would be able to successfully recruit them to enroll in other
9 District schools to increase integration.
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12 Because the parent surveys which the District used to support its new assertion that
13 the grade configuration proposals at Collier, Fruchthendler, and Sabino would result in
14 increased integration at each of these schools are so unreliable, this Court should not
15 accord them any weight and should deny the requested grade reconfigurations at these
16 schools.
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19 **The Collier, Fruchthendler, and Sabino Proposals’ Purported Impact on Magee is**
20 **Based on a Misleading and Flawed Survey; the Proposed Grade Reconfigurations**
21 **Could Well Propel Magee to Become a Racially Concentrated School as Magee Could**
22 **Lose Over 20% of its White Students Under the District’s Proposal**

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24 The impact the Collier, Fruchthendler, and Sabino proposals would have on Magee
25 Middle School is an additional reason this Court should deny the requested grade
26 reconfigurations relating to those three schools. Magee Middle School currently has a
27 46% white student population. (Sabino DIA at 7.) By the District’s calculations, the
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1 Collier, Fruchthendler, and Sabino reconfigurations, taken together, could reduce the
2 percentage of white students attending Magee Middle School by over 21%. (*See Id.*)
3 While Magee Middle School is not now a racially concentrated school, the significant and
4 sudden potential loss of such a large percentage of its white student population could
5 propel Magee Middle School to become a racially concentrated school in the near future.
6 Research unfortunately indicates that generally, when a school reaches a “tipping point” in
7 the enrollment of minority student populations, they experience significant loss of white
8 student populations. (*See e.g.*, CLOTFELTER, CHARLES T., ARE WHITES STILL FLEEING?
9 RACIAL PATTERNS AND ENROLLMENT SHIFTS IN URBAN PUBLIC SCHOOLS, 1987-1996
10 (2000); CAETANO, GREGORIO AT AL., SCHOOL SEGREGATION AND THE IDENTIFICATION OF
11 TIPPING POINTS (2011); CARD, DAVID ET AL., TIPPING AND THE DYNAMICS OF
12 SEGREGATION IN NEIGHBORHOODS AT SCHOOLS (2006); Kevin Brown, Reflections on
13 Justice Kennedy’s Opinion in Parents Involved: Why Fifty Years of Experience Show
14 Kennedy is Right, 59 S.C. L. Rev. 735, 750 (2008) (discussing “tipping points”
15 generally)). The loss of white students may be further exacerbated by Magee’s rating as a
16 “C” school (*see* TUSD’s Magee webpage under “School Ratings,”
17 http://tusdstats.tusd.k12.az.us/paweb/aggd/schoolinfo/SchoolDetail.aspx?loc_code=515)
18 and the District’s recent placement of its alternative to long-term suspension program,
19 DAEP (District Alternative Education Program) at Magee Middle School (*see* Doc. 1830-4
20 at 4) as white parents (and indeed all parents) may perceive that program’s placement at
21 Magee as reducing the safety and/or security of their children. Indeed, the Magee Middle
22 School principal reported to the Student Assignment Committee that “Magee is battling
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1 rumors that it will close due to the grade reconfiguration.” (SAC Meeting Minutes dated
2 October 28, 2015, attached hereto as Exhibit C.)

3 The District’s survey as it relates to Magee is directed at demonstrating that it can
4 attract additional non-white children to Magee; however, there are a number of flaws in
5 that survey. Immediately before being asked whether they would be “interested in free
6 transportation to Magee,” parents who participated in the “Parent-Link Phone Survey”
7 were told that “Magee Middle School is an eastside school with strong academics and an
8 outstanding Odyssey of the Mind competition.” What is not explained in the phone survey
9 is that Magee Middle School was last rated to be a “C” school, which is something a
10 reasonable parent would not understand from the statement that Magee is a “school with
11 strong academics.” Nor would a parent necessarily know what it means to have “an
12 outstanding Odyssey of the Mind competition.” Notably, these telephonic surveys were
13 not preceded with additional explanation of Magee Middle School, its academics, or the
14 grade configuration proposals; rather, parents were immediately asked about their interest
15 following the statement regarding Magee being a “school with strong academics.”
16 (Declaration of Juan Rodriguez at paragraph 2.) The District then, in an overly-simplistic
17 fashion, reasons that Magee Middle School could attract as many as 400 students by
18 multiplying the number of parents of 5th graders indicating interest in Magee so as to
19 “appl[y its survey results] to all 3 grades which [students] may attend at Magee”, before it
20 undertakes to include only “10% of the potential indicated by the survey.” (Sabino DIA at
21 7.)

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27 Mendoza Plaintiffs additionally do not understand why, given that Magee Middle
28 School is a non-integrated “C” school, the District developed proposals to improve

1 academics at Magee Middle school “to increase their attractiveness” only *after* receiving
2 Plaintiffs’ objections relating to the potential negative impact of the proposed grade
3 reconfigurations on Magee, or why implementation of these programmatic proposals is
4 conditioned on the approval of the Sabino grade reconfiguration proposal. (See Exhibit
5 A).

6
7 **Conclusion**

8 Based on the foregoing and the documents referenced herein, the Mendoza
9 Plaintiffs ask that this Court deny approval of the District’s Collier, Fruchthendler, and
10 Sabino grade reconfiguration proposals and that it order the District to put in place all the
11 programmatic proposals it made for Magee regardless of whether the proposed grade
12 reconfigurations go forward.
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14
15 Dated: December 7, 2015

16 PROSKAUER ROSE LLP
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19 /s/ Lois D. Thompson
20 *Attorney for Mendoza Plaintiffs*

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24 /s/ Juan Rodriguez
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26
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28

CERTIFICATE OF SERVICE

I hereby certify that on December 7, 2015, I electronically submitted the foregoing MENDOZA PLAINTIFFS' OPPOSITION TO TUSD'S NOTICES AND REQUESTS FOR APPROVAL OF GRADE EXPANSIONS AT (1) COLLIER ELEMENTARY SCHOOL; (2) FRUCHTHENDLER ELEMENTARY SCHOOL; AND (3) SABINO HIGH SCHOOL; DECLARATION OF JUAN RODRIGUEZ 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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