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7 UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

9 ROY and JOSIE FISHER, et al.,)

No. CV 74-90 TUC DCB

10 Plaintiffs,)

11 UNITED STATES OF AMERICA)

**FISHER PLAINTIFFS' OBJECTION
TO AND REQUEST FOR A REPORT
AND RECOMMENDATION
REGARDING DEFENDANT TUSD'S
11/16/15 NOTICES AND REQUESTS
FOR APPROVAL OF GRADE
EXPANSIONS (DOCUMENT 1869)**

12 Plaintiff-Intervenor,)

13 vs.)

14 ANITA LOHR, et al.,)

15 Defendants,)

Submitted to Special Master
Willis Hawley on 12/07/15

16 SIDNEY L. SUTTON, et al.,)

17 Defendants-Intervenors,)

No. CV 74-204 TUC DCB

18 MARIA MENDOZA, et al.,)

19 Plaintiffs,)

20 UNITED STATES OF AMERICA)

21 Plaintiff-Intervenor,)

22 vs.)

23 TUCSON UNIFIED SCHOOL)

24 DISTRICT NO. ONE, et al.,)

25 Defendants.)

1 **1. THE FISHER PLAINTIFFS OBJECT TO AND REQUEST A REPORT AND**
2 **RECOMMENDATION REGARDING DEFENDANT TUSD'S 11/16/15 NOTICES AND**
3 **REQUESTS FOR APPROVAL OF GRADE EXPANSIONS**
4

5 COME NOW, Plaintiffs Roy and Josie Fisher (hereinafter the Fisher Plaintiffs), by and
6 through counsel undersigned, Rubin Salter, Jr. to submit the instant, timely¹ objection to and
7 request for a report and recommendation regarding the notices and requests for approval filed
8 with this Court on 11/16/15 by Defendant Tucson Unified School District (hereinafter TUSD)
9 seeking: “(1) to add 6th-8th grades to Borman K-5 Elementary School; (2) to add 6th grade to
10 Collier K-5 Elementary School; (3) to add 7th-8th grades to Drachman K-6 Elementary
11 School; (4) to add 6th grade to Fruchthendler K-5 Elementary School; and (5) to add 7th-8th
12 grades to Sabino High School” (at page 2 of document number 1869 filed 11/16/15 emphases
13 added). The Fisher Plaintiffs have previously objected to the District’s grade reconfiguration
14 proposals for Sabino HS and Fruchthendler ES (see Fisher Plaintiffs’ 04/23/15 objection to
15 Defendant TUSD’s 04/14/15 grade reconfiguration NARA). This Court reviewed the Fisher
16 Plaintiffs’ concerns when it denied the District’s 04/14/15 NARA (see order filed 05/12/15 as
17 document number 1799). Because those concerns apply equally the District’s most recent
18 11/16/15 NARA and revised desegregation impact analyses for these schools, they are
19 presented again here. Because the likely impact is segregative, the Fisher Plaintiffs object to
20 the District’s request for approval of grade expansions at Borman ES, Collier ES,
21 Fruchthendler ES and Sabino HS. Because the likely impact is integrative, the Fisher
22 Plaintiffs support the request for approval of grade expansions at Drachman K-6 school.

¹ The instant response is filed timely insofar as the parties, on 11/16/15 jointly moved this Court to allow the plaintiffs in this proceeding “20 days from the filing by TUSD of the NARA to file any Objection made to the Special Master with the Court” (at page 2 of document number 1868 filed 11/16/15). On 12/04/15, this Court issued an order approving the proposed briefing schedule (at page 2 of document number 1874). The Fisher Plaintiffs filed the instant response on Monday 12/07/15, because 20 days from the Defendant’s 11/16/15 filing of its NARA fell on Sunday 12/06/15.

1 **1.1. DISTRICT FAILS TO GAUGE POTENTIALLY SEGREGATIVE IMPACT OF**
2 **MIGRATION OUT OF TRADITIONAL MIDDLE SCHOOLS**

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4 The Fisher Plaintiffs are concerned by the District's failure to gauge the potentially segregative
5 impact of the conversion of K-5 schools into K-6, K-7 and K-8 schools. Under the Unitary
6 Status Plan (USP), the District is required to assess the impact of its plans on its desegregation
7 obligations. Here, the District seeks to migrate enrollment away from traditional middle
8 schools to keep students enrolled at their elementary site until they graduate on to their high
9 school site. In the past, the District has regularly made (if not actually proven) a number of
10 claims that would support the conversion of K-5 schools into K-6 (and by extension K-7 and
11 K-8) schools, including improved academic performance, better discipline and the elimination
12 of the socially and academically disruptive transition between elementary and middle school
13 (see TUSD 04/14/15 Fruchthendler NARA filed as document number 1789 passim). Despite
14 these claims, it is evident that the District's primary motivation for converting elementary
15 schools into K-8 schools is to retain enrollment that might otherwise leave the District.
16 Unfortunately, as the Fisher Plaintiffs explained in their 05/15/15 objection to the conversion
17 of Dietz K-7 school into a K-8 school, "what the District promotes as a remedy for flight may
18 ultimately prove to be a major constraint on the integration of the District's 6th, 7th and 8th
19 grades" (at pages 8-9 of document number 1802 filed 05/15/15). This concern was first raised
20 by the Fisher Plaintiffs in their 01/22/13 objection filed with this Court, wherein the Fisher
21 Plaintiffs noted that "[i]t is a fact that the District's elementary schools are generally smaller
22 than its middle and high schools. It is also true that its elementary schools typically draw
23 students from smaller geographic attendance areas, thus graduation from elementary to middle
24 school in TUSD generally means graduation from a neighborhood school to a school attended
25 by students from a larger, and potentially more diverse, geographic area. For these reasons, the
26 Court should not approve [...] the conversion of elementary schools to K-8 schools until the
27 District can show that such closures will not result in more TUSD students attending relatively
28 less diverse schools for the 6th, 7th and 8th grades" (at page 12 of document number 1424

1 filed 01/22/13). For these reasons, the Fisher Plaintiffs urge the Special Master to recommend
2 that the Court deny the District's requests for approval and - further - to require the District to
3 conduct a District-wide analysis of the past and potential desegregation impact of the
4 migration of 6th, 7th and 8th grade enrollment away from traditional middle schools into K-8
5 schools.

6 7 **1.2. BIASED MEMBERSHIP OF SAC LED TO BIASED CONCLUSIONS**

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9 On 08/10/15, the Fisher Plaintiffs completed a preliminary review of material uploaded to the
10 District's Student Assignment Committee (SAC) website. Based on that review, undersigned
11 Fisher counsel sent TUSD Senior Director of Desegregation, Martha Taylor joining the
12 Mendoza Plaintiffs and the Department of Justice (DOJ) in their objection to the goals and
13 guidelines the District had initially set for the SAC (see Salter 08/10/15, Eichner 08/07/15 and
14 Thompson 08/05/15 emails). In the "Fisher Plaintiffs' 08/10/15 preliminary objection to
15 TUSD SAC" attached to that email, the Fisher Plaintiffs explained that "[t]he SAC clearly fails
16 to assign due priority to the District's desegregation obligations under the Unitary Status Plan
17 (USP) and clearly fails to involve the type and degree of input from the plaintiffs and the
18 Special Master (SM) contemplated under the USP and the Court's 05/12/15 order interpreting
19 the applicable provisions of the USP. Additionally, the composition of the SAC is clearly
20 unrepresentative of the full spectrum of stakeholders impacted by the proposed changes. The
21 overwhelming majority of SAC members appear to be Tucson Unified School District (TUSD)
22 employees and/or the parents of students attending the schools proposing the grade
23 reconfigurations. While employees and parents initiating or endorsing the proposals certainly
24 deserve a seat at the table, their participation should be balanced by a full range of stakeholder
25 participation. The Committee's membership bias raises the concern that the Committee may
26 reach foregone conclusions behind the trappings of stakeholder participation afforded by the
27 professional management of the DLR Group" (at page 1 of Fisher Plaintiffs' 08/10/15
28 preliminary objection to TUSD SAC).

1 **1.3. DESEGREGATION IMPACT ANALYSES WERE BIASED BY THEIR**
2 **RELIANCE ON CURRENT PATTERNS OF SCHOOL CHOICE**

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4 The Fisher Plaintiffs believe the District's desegregation impact analyses (DIA) are biased by
5 their unjustifiable reliance on current patterns of school choice. Quoting its Borman DIA, the
6 District claims that the proposed grade changes "would have virtually no impact on
7 surrounding middle schools" (at page 9 lines 24-25 of document number 1869 filed 11/16/15
8 internal brackets omitted). The District explains that "[a]ll of the [enrollment] projections
9 [made in its DIAs] are estimates based on current patterns of choice" (at page 6 of document
10 number 1869-2 filed 11/16/15). As the Fisher Plaintiffs explained in their 04/23/15 objection
11 to the proposed grade reconfigurations at Fruchthendler and Sabino (see document number
12 1791 filed 04/23/15) and again in their 08/10/15 preliminary objection to the TUSD SAC, the
13 District's projected continuation of current school choice patterns (primarily patterns of White
14 Flight) is unjustified insofar as patterns of White Flight do not exist in a policy vacuum and the
15 District has the prerogative and positive duty to enact policies designed to "influence future
16 school choice patterns in ways that can make integration a reality" (idem at 1-2). The Fisher
17 Plaintiffs restate here their strong conviction that "the District has the legal duty, under the
18 USP and controlling Ninth Circuit authority," to tailor its policies to influence future school
19 choice patterns in ways that can make integration a reality. Unfortunately, this is an obligation
20 that the District appears unwilling to embrace or even acknowledge. In their 08/10/15
21 objection, the Fisher Plaintiffs explained that the "District is legally empowered and obliged to
22 consider and take affirmative steps to counteract - not cater to - the phenomenon of White
23 Flight, both without and within the District. The 'grassroots' initiatives of identifiably White
24 schools, like Fruchthendler and Borman, to recapture predominantly White enrollment (under
25 the cover of ostensibly neutral grade reconfigurations) violate both the letter and the spirit of
26 the student assignment provisions of the USP and the equal protections safeguarded by the
27 Supreme Court's landmark Civil Rights decisions in Brown and its progeny" (idem at 2
28 emphasis added).

1.4. BORMAN PROPOSAL SUFFERS SAME FAILINGS AS SMITH PROPOSAL

In their 08/10/15 objection to the SAC, the Fisher Plaintiffs explained that the District's proposed reconfiguration of Borman K-5 into a K-8 school suffers from the same shortcomings as the District's past efforts to reopen Lowell Smith ES as a MS. Like Borman ES, the Lowell Smith campus is situated on the Davis-Monthan Air Force Base (DMAFB) (idem at 2). As the Fisher Plaintiffs explained in their 08/10/15 preliminary objection, "the District first petitioned the Court to reopen the (then) recently closed Lowell Smith ES as a MS on 03/07/07 (see document number 1189 filed 03/07/07). On 03/15/07 and 04/09/07, the Fisher and the Mendoza Plaintiffs filed their respective responses in opposition to the proposed reopening as violative of the District's desegregation obligations (see document numbers 1190 filed 03/15/07 and 1195 filed 04/09/07)" (idem at 2-3). On 05/10/07, this Court agreed with the Fisher Plaintiffs' arguments and denied the District's petition, explaining that "[t]he Court finds that reopening Smith Elementary School as a middle school has an adverse affect on ongoing desegregation obligations because it is inconsistent with on-going efforts to reduce segregation in TUSD's schools [...]. Reopening Smith School as a middle school removes a segment of the existing community assigned to Naylor Middle School, thereby, decreasing its base of concerned parents. Attendance by DM students at other TUSD schools and charter schools has had precisely this result. To the extent that TUSD is attempting to bring charter students back into its fold, this may benefit the Naylor Middle School. Conversely, it is not in the best interest of the community for TUSD to authorize non-minority DM students to attend other TUSD schools instead of Naylor Middle School [...]. In light of the evidence that Naylor Middle School, with a predominately minority student body, is seriously failing to educate its student body, it is highly suspect for TUSD to carve out a separate non-minority educational system for a group of these students that are predominately non-minority. Fisher Mendoza [is] a desegregation case, which at its core is based on the principle that separate schools will not provide equal education" (at pages 4-5 of document number 1209 filed 05/10/07 emphases added). Undeterred, the District returned the following year to notify the Court that it was still

1 "exploring ways to re-open Smith" (at page 3 of document number 1264 filed 04/10/08). In its
2 filing, the District stated that it wished to reopen Smith to recapture some 500 students lost
3 under State open-enrollment laws facilitating the flight of the predominantly White students
4 residing on the DMAFB to neighboring districts and charter schools (idem at 4). On 04/16/08,
5 the Mendoza Plaintiffs filed a response in opposition to the District's second attempt to reopen
6 Smith. In their opposition, the Mendoza Plaintiffs explained that the reopening would still
7 violate the District's desegregation obligations (see document number 1267 filed 04/16/08).
8 Yet again, the District seeks to win back enrollment currently lost from DMAFB to
9 neighboring districts and charter schools, this time by reconfiguring Borman, an identifiably
10 White K-5 school, into an identifiably White K-8 school. In its 11/16/15 NARA, the District
11 admits that "Borman's population is approximately fifty percent Anglo, reflecting the
12 population from which it draws, and will continue to draw as a K-8 as the same students in
13 Borman now will form the 6th through 8th grades so there is no change to the racial-ethnic
14 composition" (at page 9 of document number 1869 filed 11/16/15). What the District does not
15 explain in its NARA, is that Borman (rated as an A school in the 2013-14 SY) is currently an
16 identifiably White school (54% of the student body at Borman is White, whereas the
17 district-wide average for White enrollment at grades K-5 is 20%) and - because it is projected
18 to remain so as a K-8 - the grade reconfiguration would result in a greater number of White
19 TUSD students attending an identifiably White school (Borman) while the predominantly
20 non-White TUSD students attending nearby Roberts-Naylor K-8 (rated as a C school in the
21 2013-14 SY and currently designated to receive Borman-area 6th, 7th and 8th grade students)
22 would continuing attending an identifiably minority school (11% of the student body at
23 Roberts-Naylor K-8 is White, whereas the district-wide average for White enrollment at grades
24 K-8 is 20%). Instead of acknowledging and addressing these inconvenient facts (facts
25 attributable in large part to the District's past and current policies), instead of acknowledging
26 its obligation to take affirmative steps to mitigate (and not just "not exacerbate") ethnic
27 imbalances in its schools, the District argues that "[a]s the proposal draws primarily on
28 students who otherwise leave the District after 5th grade, it would have virtually no impact on

1 surrounding middle schools. The Borman proposal does not exacerbate ethnic imbalances” (at
2 pages 9-10 of document number 1869 filed 11/16/15 internal quotes, brackets and citations
3 omitted and emphasis added). This is the unjustifiable normative assumption that runs through
4 - and fatally biases - each of the District’s desegregation impact analyses. Simply stated, the
5 District has chosen current school choice patterns² as the unjustifiably low standard against
6 which it asks this Court to measure a proposal’s impact on integration. The Fisher Plaintiffs
7 respectfully believe the Court should reject this standard as ahistorical, unconstitutional and
8 directly at odds with the requirements of the USP and prior and subsequent controlling orders.
9 In its attempt to portray the impact of the proposed reconfiguration as anything other than
10 segregative, the District ignores the plain language of the USP, where it attempts to stand logic
11 on its head and substitute its own definition of diversity for the unambiguous measures of
12 racial and ethnic balance and imbalance found in the USP. Specifically, the District explains
13 that “Borman’s student population is 54% Anglo and 23% Latino. Were those numbers
14 reversed, Borman would be Integrated under the USP, meaning the level of student diversity at
15 Borman is equal to that of an Integrated school” (idem at 9-10). Stated differently, the
16 District is asking this Court (and the plaintiffs and the Special Master and the public) to
17 believe that a majority-majority (identifiably White) school in minority-majority (identifiably
18 minority) district is somehow “diverse.” A school with 50/50 White/minority enrollment in a
19 district where minorities are in an absolute majority is not “balanced,” it is an anomaly that
20 begs explanation. Section II (B) of the USP defines the measures of racial balance and
21 imbalance used in the USP and provides in relevant part that “[a] racially concentrated school
22 is any school in which any racial or ethnic group exceeds 70% of the school’s total enrollment,
23 and any other school specifically defined as such by the Special Master in consultation with
24 the Parties [...]. An integrated school is any school in which no racial or ethnic group varies
25 from the district average for that grade level (Elementary School, Middle School, K-8, High
26 School) by more than +/- 15 percentage points, and in which no single racial or ethnic group

² Shaped in no small measure by the District’s past and current policies, actions, inaction and general failure to prioritize integration in the assignment of its students and siting of its schools.

1 exceeds 70% of the school's enrollment" (at page 8 of document number 1713 filed 11/06/14
2 emphasis added). Applying these two simple standards to Borman and Roberts-Naylor, we
3 find that Borman is an identifiably White and racially concentrated school because its
4 percentage of White enrollment is 54%, which exceeds the district-wide average percentage of
5 White enrollment for elementary schools by 34%. We also find that Roberts-Naylor is not an
6 integrated school, because its percentage of AA enrollment exceeds the district-wide average
7 at the K-8 grade levels by more than 15%. Thus, the District's proposal to increase the
8 number of White students attending an identifiably White racially concentrated school should
9 be denied as segregative in design and effect. The District should instead propose ways to
10 attract those same, predominantly White, students currently lost to the Charter Sector into
11 Roberts-Naylor, where their enrollment would have an integrative, instead of a segregative,
12 impact.

1 **W, AA and H enrollment by school and grade range at instructional day 40 of 2015-16.**

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	W	AA	H
ES	20.3	4.9	64.5
COLLIER ES	62.3	4.5	23.2
	42	-0.4	-41.3
BORMAN ES	53.9	5.7	22.1
	33.6	0.8	-42.4
FRUCHTHENDLER ES	61.7	2.5	26.5
	41.4	-2.4	-38
MS	20	6.6	63.6
DRACHMAN K-6	8.4	7.1	77.1
	-11.6	0.5	13.5
ROBERTS-NAYLOR K-8	11	23.1	55.6
	-9	16.5	-8
HS	23.7	6.2	60.6
SABINO HS	57.4	2.7	31.1
	33.7	-3.5	-29.5

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1 **1.5. SABINO, FRUCHTHENDLER AND COLLIER PROPOSALS ARE**
2 **SEGREGATIVE IN DESIGN AND EFFECT**

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4 The table above shows that Sabino, Fruchthendler and Collier are extremely racially
5 concentrated schools with percentage White enrollments over 30% above the district-wide
6 average for their grade ranges. These are the very schools that the District should be
7 attempting to attract non-White enrollment into and White enrollment out of. Instead, the
8 District asks this Court to approve grade reconfiguration proposals explicitly designed to
9 attract predominantly White students into these already extremely racially imbalanced,
10 identifiably White schools. This Court should deny the District's requests in toto as
11 segregative in intent and impact and instead direct the District to develop proposals to attract
12 the predominantly White students currently lost to the Charter Sector and neighboring districts
13 into TUSD schools where their enrollment will have an integrative impact. The plaintiffs and
14 the Court have previously considered, and rejected, the District's constitutionally unsound
15 approach to recapturing enrollment lost to White Flight. On 04/14/15, the District filed a
16 notice and request for the Court's approval (NARA) of the reconfiguration of grade levels at
17 Fruchthendler ES and Sabino HS (see document number 1789 filed 04/14/15). In that NARA,
18 the District explained that "[a] high percentage of middle-school aged students living in the
19 area surrounding Fruchthendler Elementary School ('Fruchthendler') and Sabino High School
20 ('Sabino') do not attend TUSD schools for grades 6 through 8. Some area students attend the
21 nearest TUSD middle school, Magee, but many students who leave TUSD after fifth grade for
22 middle school outside the district do not return at all. As a result, TUSD loses funding, and the
23 decline of its Anglo student population is exacerbated (thereby frustrating efforts to recruit
24 Anglo students to other TUSD schools for integration purposes)" (idem at 2). The Fisher
25 Plaintiffs remain extremely concerned by the District's continued efforts to reconfigure grade
26 levels at Fruchthendler ES and Sabino HS. Their concerns are motivated in equal parts by the
27 District's initial efforts to insulate the work of the SAC from the input of the plaintiffs and the
28 SM and the District's erroneous assumption that it has no obligation to recognize and

1 counteract the pernicious effects of White flight in its student assignment plans. The Supreme
2 Court has long held that “a student assignment plan is not acceptable merely because it appears
3 to be neutral, for such a plan may fail to counteract the continuing effects of past school
4 segregation” (Swann v Board of Education, 402 U.S. 1 1971). In Swann, the Supreme Court
5 found that “racially neutral assignment plans proposed by school authorities to a district court
6 may be inadequate; such plans may fail to counteract the continuing effects of past school
7 segregation resulting from discriminatory location of school sites” (idem). Under federal law,
8 a school district operating under a federal desegregation order carries an affirmative obligation
9 to account for the legacy of discriminatory practices when fashioning its student assignment
10 policies and plans. The seeming “neutrality” of the District’s proposed student assignment
11 “honors pipeline” from Fruchthendler to Sabino is absurd when the pipeline is designed to
12 provide privileged programming to the historically privileged class of predominantly high SES
13 White students residing in the Sabino attendance area (an area of the District where deed
14 restrictions and the actions of neighborhood associations, realtors, and individuals kept African
15 Americans and Mexican Americans from owning or renting property well into the 1960s).³
16 This Court recognized the need for the District to show how an honors pipeline fits into the
17 District’s overall remedial desegregation plans when, on 05/12/15, it issued an order denying
18 the District’s initial Fruchthendler and Sabino grade reconfiguration NARA, explaining that
19 “[t]he record reflects that the student assignments proposed by TUSD were not considered in
20 the context of the four integration strategies required by the USP: attendance boundaries,
21 pairing and clustering of schools; magnet schools and programs; and open enrollment. (USP §
22 II.1.) Because the proposed student assignments involve the creation of an honors program, the
23 USP, section V, requires the District to also consider Plaintiffs’ concerns regarding equal
24 access. There is nothing about a NARA proposal to change student assignments to exempt it

³ Although the District has officially backed off of its once openly advertised “honors pipeline,” asserting that “there is no separate, honors pathway at Sabino-Fruchthendler different from what exists elsewhere” (at page 51 of document number 1869-8 filed 11/16/15), Fisher representatives were informed by TUSD site staff at a SAC meeting that this change is a change in name only and that the promised pipeline will still be available to Fruchthendler and Sabino students.

1 from the USP requirement that the District, the parties, and the Special Master
2 comprehensively consider the proposal, pursuant to applicable USP criteria, in an effort to
3 increase the integration of TUSD schools. USP § II.D.2. Plans and strategies are now in place,
4 pursuant to the USP, for addressing student assignments, but this NARA fails to reflect how
5 the Fruchthendler-Sabino Honors Pipeline plan fits into these plans and strategies, and if not,
6 why” (at page 5 of document number 1799 filed 05/12/15 emphasis added). Rather than
7 attempt the impossible (ie., explaining how offering special programming to attract
8 predominantly White students into predominantly White schools supports its desegregation
9 efforts), the District instead disingenuously claims the honors pipeline is not actually a unique
10 offering after all. It is extremely unsettling that the District again proposes to alleviate White
11 flight from the District by endorsing White flight within the District. The Fisher Plaintiffs are
12 extremely disappointed that the District, rather than exploring ways to increase the diversity at
13 schools like Magee MS and Roberts-Naylor K-8, again propose intradistrict White flight as
14 way to recapture enrollment currently lost to interdistrict White flight. The Fisher Plaintiffs
15 remained concerned that the District’s desegregation impact analysis (DIA) and its claim that
16 the proposed changes will have “minimal impact on the racial ethnic composition of Magee”
17 (at page 43 of document number 1869-8 filed 11/16/15) MS are flawed by the District’s
18 unjustifiable reliance on “current patterns of choice” (idem at 46) (since those patterns, far
19 from neutral, are largely patterns of White flight). A comparison of percentage White
20 enrollment at the three schools discussed in the District’s proposal at instructional day 40 of
21 the 2014-15 school year shows that 58.1% of Sabino HS students were White, 46.2% of
22 Magee MS students were White and 65.3% of Fruchthendler ES students were White. By way
23 of comparison, the average percentage White enrollment was 25% for TUSD high schools,
24 19.8% for TUSD middle schools and 20.3% for TUSD elementary schools. The Fisher
25 Plaintiffs believe that an impact analysis based on potential (as opposed to current) school
26 choice patterns would show a significant and segregative impact on racial and ethnic
27 enrollment at Magee MS. The District’s projected increase in (disproportionately White)
28 enrollment otherwise lost to neighboring districts and charter schools (primarily during the

1 middle school years) promises to aggravate (or at a minimum reinforce) the high degree of
2 racial and ethnic isolation already present in Fruchthendler and Sabino. The Fisher Plaintiffs
3 remain concerned that that outcome cannot be reconciled with the District's obligations under
4 the USP. The Fisher Plaintiffs are extremely disappointed that the District, rather than simply
5 exploring ways to realize the potential racial and ethnic diversity at Magee (potential currently
6 unrealized as a consequence of White flight within and without the District), instead approved
7 a plan that promises to reinforce the current lack of racial and ethnic diversity at Sabino and
8 Fruchthendler (effectively promoting intradistrict White flight as way to recapture enrollment
9 currently lost to interdistrict White Flight).

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11 **1.6. THE PARENT-LINK PHONE SURVEYS DO NOT SUPPORT DISTRICT'S**
12 **ENROLLMENT ESTIMATES**

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14 In a 11/23/15 email, Special Master Willis Hawley explained that the Parent-Link phone
15 survey (conducted by the District to gauge potential enrollment at Sabino, Collier,
16 Fruchthendler and Magee) "was obviously intended to investigate concerns that implementing
17 a middle school at Sabino or a sixth grade at Collier and Fruchthendler would have adverse
18 effects on integration. Conducting a survey for these reason makes sense—but the questions
19 seem ill-suited for the purpose. The questions about transportation to Sabino are irrelevant. I
20 assume that the inference to be drawn from the response is that if respondents would choose
21 Sabino HS, they would choose Sabino MS. This does not follow. As a parent, I saw middle
22 school and high school as very different places and felt differently about my children's social
23 development as they progressed through adolescence. Why didn't the survey focus on Sabino
24 MS? The Magee question asserts that Magee has a strong academic program. Maybe, but why
25 is it a C school? If parents looked into it and they learned that Magee's student performance
26 warranted a C rating, would their answers to the survey be the same?" (see attached Hawley
27 11/23/15 email). The Fisher Plaintiffs agree with the SM in his belief that the design of the
28 parent survey has meant that its results offer little insight into the interest the District sought to

1 demonstrate. For this reason, the Fisher Plaintiffs share the Mendoza Plaintiffs' conviction
2 that "the new telephonic parent surveys regarding express incentive busing on which the
3 District relies to now assert that its proposals would increase integration at each of these
4 schools are flawed, unrealistic and unreliable. Specifically, the District asserts that its surveys
5 demonstrate that there exists significant interest in these schools were its proposals to be
6 implemented. However, this Court need only compare those numbers to the District's reports
7 on students eligible to receive incentive transportation and non-white students who actually
8 received incentive transportation in the 2014-15 school year to know that the surveys grossly
9 overestimate interest and are therefore unreliable. The integrative impact the District claims its
10 proposals would have is further undermined by the facts that these schools already have
11 incentive transportation available (but that availability has not produced results reflecting
12 anything near the enormous interest the District claims exists were its proposals to be
13 implemented) and that the District expects almost all of the Fruchthendler and Collier 6th
14 graders would transition to Sabino. In addition, because these grade reconfiguration proposals
15 could, when taken together, very rapidly reduce the white student population at Magee by over
16 21%, Magee may well be propelled to become a racially concentrated school as it reaches a
17 'tipping point.' That risk is exacerbated by Magee's rating as a 'C' school, and the fact that the
18 District has recently decided to locate its new alternative to long-term suspension program at
19 Magee. Moreover, the phone survey on which the District relies to suggest that Magee is
20 attractive to parents whose students would contribute to that school's integration efforts is
21 misleading in that it identifies this 'C' school as one with strong academics and makes
22 references to a competition at that school, without any additional information having been
23 provided. For these reasons, this Court should deny the District's Collier, Fruchthendler, and
24 Sabino Grade Reconfiguration proposals, but should order that the District put in place all the
25 programmatic proposals it made for Magee regardless of whether it approves the proposed
26 grade configurations" (at pages 3-4 of document number 1876 filed 12/07/15).

1.7. PLANS IMPEDING IMPLEMENTATION OF USP MUST BE DENIED

As the Fisher Plaintiffs explained in their 04/23/15 objection the SM's R&R regarding the District's initial Sabino and Fruchthendler NARA, "[a]bove and beyond any procedural defects in the District's proposal, a 'grassroots' initiative that creates an honors pipeline catering to predominately White students from high socioeconomic status (SES) families stands to frustrate the student assignment goals of the USP. Indeed, this Court has explicitly recognized that '[s]chool policies must yield to the Constitution where they stand to impede or otherwise limit the implementation of the USP. See North Carolina State Bd. of Ed. v. Swann, 402 U.S. 43, 46 (1971) (where policy limits a school from operating a unitary school system or impedes disestablishing a dual school system, it must fall)' (at lines 18-21 of page 5 of document number 1468 filed 04/26/13 emphasis added). The District's NARA seeks to establish a favored feeder pattern for a favored class. In his report to this Court, the SM argues that the District's failure to develop 'sixth grade additions to schools that serve greater numbers of African American and Latino students [...] does not undermine the benefits of adding the sixth grade to Fruchthendler' (at lines 17-21 of page 3 of document number 1790 filed 04/15/15). Unfortunately, the District's proposal to privilege one class of students over another impedes the implementation of the student assignment and achievement provisions of the USP and does, therefore, undermine any benefits arising from the addition of a sixth grade at Fruchthendler" (at pages 14-15 of document number 1791 filed 04/23/15).

1.8. PLANS RELY ON DESEGREGATION IMPACT ANALYSES THAT FAIL TO CONSIDER WHITE FLIGHT

Nowhere in its desegregation impact analyses does the District consider White (and high SES) Flight among the likely reasons parents pull their children out of TUSD upon completion of 6th grade at Fruchthendler. In its earlier 03/04/15 DIA, the District speculated that some mystical combination of geography and travel time have conspired to rob TUSD of otherwise

1 satisfied parents, explaining that “anecdotal evidence gleaned by Fruchthendler principal Mary
2 Anderson, as well as a review of an area map, suggest that geography/travel time play a role in
3 the accelerated loss of students at 6th grade. That evidence suggests that many Fruchthendler
4 families choose to go outside of TUSD for middle school because there are two competitive
5 middle school options within a few miles of Fruchthendler (Esperero to the north and Basis to
6 the west [...]). In contrast, the TUSD middle school (Magee) into which Fruchthendler feeds is
7 four miles away and in the opposite direction that many parents travel to get to work. Ms.
8 Anderson reports that once a TUSD family transfers a middle- school-age student into
9 adjacent Catalina Foothills, the parents are more likely to then take their younger children out
10 of Fruchthendler and enroll them into the adjoining elementary school in an effort to have all
11 family members on the same district calendar. Every student for whom a transfer is avoided
12 results in increased ADM to the District and, potentially, greater diversity” (at page 3 of TUSD
13 03/04/15 response to plaintiff objections to grade changes at Sabino and Fruchthendler). As
14 the Fisher Plaintiffs explained in their sss, “[i]f the District were to consider the possibility that
15 White (and high SES) Flight is a factor leading parents to withdraw their students from the
16 District after completion of 6th grade at Fruchthendler, then it would also have to consider the
17 possibility that the current plan tacitly encourages intradistrict White (and high SES) Flight as
18 a means of countering interdistrict White (and high SES) Flight, which would run directly
19 counter to its obligations under the USP. If the District afforded due consideration to both
20 those possibilities it would necessarily conclude that its plan is at odds with its obligations
21 under the USP and would be forced to amend its current plan to ensure that the predominantly
22 White (and high SES) students retained in the 7th and 8th grades at Sabino are
23 counterbalanced by attracting or incentivizing or facilitating the transfer of a commensurate
24 number of predominantly non-White (and low SES) students from other TUSD schools. As
25 explained above, the District’s counterbalancing proposals show little likelihood of attracting
26 sufficient non-White enrollment to counterbalance the severely segregative impact of its
27 primary plan to attract back White enrollment.
28

1.9. SUPPLEMENTARY SCENARIOS DO NOT COUNTERBALANCE**SEGREGATIVE IMPACT OF PLANS**

In its 11/16/15 NARA, the District explains that “[n]otwithstanding that none of the five proposals involve the redrawing of attendance boundaries, the District proposed and evaluated various scenarios, and considered them comprehensively, with the SMP in an effort to increase integration at the subject, surrounding, and racially concentrated schools” (at page 7 of document number 1869 filed 11/16/15). It then cites five scenarios it considered: (1) “other potential grade configurations to increase integration” (idem at 7); (2) “open enrollment using incentive transportation/express buses” (idem at 7); (3) “magnet transportation with express buses to Drachman” (idem at 8); (4) “enhance educational quality at surrounding schools” (idem at 8); (5) “commitment to propose additional integration initiatives” (idem at 8-9). Following its 11/16/15 filing, District counsel Samuel Brown also make explicit assurances regarding these supplementary proposals (see attached Thompson 11/23/15 and 11/24/15, Salter 11/23/15 and Brown 11/12/15, 11/24/15 and 11/25/15 emails). As a threshold matter, the Fisher Plaintiffs join the Mendoza Plaintiffs where they “strongly disagree with the District’s reading of USP Section II, D, 2 in section II, B of TUSD’s NARA, which takes a very narrow view of what constitutes a boundary change” (at page 2 of document number 1876 filed 12/07/15). Regarding the substance and integrative intent of the supplemental proposals and assurances, however, the Fisher Plaintiffs have no objection. They are all very worth pursuing in their own right, even if they cannot be claimed to offset or counterbalance the clearly segregative intent and impact of the District’s grade reconfiguration proposals for Borman, Fruchthendler, Collier and Sabino.

1 **CONCLUSION**

2
3 On the basis of the facts and law set forth above, the Fisher Plaintiffs respectfully ask this
4 Court to sustain the substantive and procedural objections raised herein and deny the District's
5 request for approval of grade reconfigurations at Sabino, Fruchthendler, Collier and Borman
6 and instead direct the District to do what it should have already done, to wit: implement the
7 Drachman grade reconfiguration and the supplemental proposals and assurances designed to
8 integrate TUSD schools. The integrative goal of student assignment is unambiguous, it was
9 reached by agreement between all of the parties to this case and by order of this Court and it
10 should not be ignored because the District also wishes to recapture enrollment lost to the
11 Charter Sector and neighboring districts.

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13 Respectfully submitted this 7th day of December, 2015

14
15 s/ Rubin Salter, Jr.

16 RUBIN SALTER, JR., ASBN 01710

17 Counsel for Fisher Plaintiffs
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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 7th day of December, 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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