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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

ROY and JOSIE FISHER, et al.,)
)
Plaintiffs,)
)
UNITED STATES OF AMERICA)
)
Plaintiff-Intervenor,)

vs.)

ANITA LOHR, et al.,)
)
Defendants,)
)
SIDNEY L. SUTTON, et al.,)

Defendants-Intervenors,)

MARIA MENDOZA, et al.,)
)
Plaintiffs,)

UNITED STATES OF AMERICA)
)
Plaintiff-Intervenor,)

vs.)

TUCSON UNIFIED SCHOOL)
DISTRICT NO. ONE, et al.,)
)
Defendants.)

No. CV 74-90 TUC DCB

**FISHER PLAINTIFFS’ OBJECTION
TO SPECIAL MASTER’S 05/11/16
REPORT & RECOMMENDATION
REGARDING ROBERTS-NAYLOR**

Submitted to United States District Judge
David C. Bury on Wednesday 05/25/16

No. CV 74-204 TUC DCB

1 **1. THE FISHER PLAINTIFFS OBJECT TO SM ROBERTS-NAYLOR R&R**

2
3 COME NOW, Plaintiffs Roy and Josie Fisher (hereinafter the Fisher Plaintiffs), by and
4 through counsel undersigned, Ruben Salter, Jr. to object to Special Master (SM) Willis
5 Hawley's 05/11/16 supplementary report and recommendation (R&R) regarding
6 Roberts-Naylor K-8 School (filed 05/11/16 as document number 1933).

7
8 **1.1. PROCEDURAL HISTORY**

9
10 This Court's 04/28/16 amended grade reconfiguration order (document number 1929)
11 establishes a reporting and briefing schedule for: (1) Defendant Tucson Unified School
12 District's (TUSD) report regarding Roberts-Naylor K-8 School (submitted to the SM and
13 plaintiffs on 04/15/16); (2) the SM's 05/11/16 supplementary R&R regarding Roberts-Naylor
14 (document number 1933) and any party objections thereto. Specifically, this Court's 04/28/16
15 order provides in relevant part that "[t]he Special Master shall a supplement to the R&R within
16 14 days of receiving TUSD's report. All parties may have 14 days to file objections to the
17 Special Master's Borman supplement" (at page 17 lines 23-25 of document number 1929 filed
18 04/28/16 emphasis added). Because the SM filed his supplementary R&R regarding
19 Roberts-Naylor on Wednesday 05/11/16, party objections are due fourteen (14) days from that
20 date, Wednesday 05/25/16.

21
22 **1.2. THIS COURT HAS PROPERLY REJECTED REQUESTS TO CREATE SPECIAL**
23 **EXEMPTIONS TO THE DEFENDANT'S OBLIGATION TO INCREASE**
24 **INTEGRATION AND ACADEMIC ACHIEVEMENT UNDER FEDERAL LAW**

25
26 In its 04/28/16 amended grade reconfiguration order, this Court explained that "[o]n
27 November 16, 2015, TUSD filed the NARA proposing to add 6th-8th grades at Borman K-5"
28 (at page 2 of document number 1929 filed 04/28/16). In that same order, this Court explained

1 that “[c]hanges which open new middle schools and move students from one school to another
2 are not easily undone. Missed opportunities to improve diversity may be missed forever. And
3 of course, changes exacerbating segregation must be avoided” (idem). In its order, this Court
4 explained that “Borman elementary school is located on the Davis-Monthan Air Force Base
5 (DMAFB) [and] serves children of military personnel and civil servants living and working on
6 the base. Accordingly, many of the Borman students are not TUSD students and TUSD
7 students cannot attend Borman unless their parents or grandparents are in the military. TUSD
8 argues that adding the middle school at Borman would have virtually no impact on the
9 surrounding middle schools because approximately 70% of the children attending Borman do
10 not attend TUSD middle schools. After Borman, these students move to a charter K-8 on-base
11 school or go to middle schools outside of TUSD. TUSD seeks to add grades six through eight
12 to compete with the on-base charter school and to discourage students at Borman from going
13 to middle schools outside TUSD” (idem at 3).

14
15 1.2.1. THIS COURT PROPERLY DENIED TUSD’S REQUEST TO CREATE A SPECIAL
16 EXEMPTION FOR DMAFB STUDENTS IN 2007 AS INCONSISTENT WITH THE
17 DISTRICT’S INTEGRATION OBLIGATIONS UNDER FEDERAL LAW

18
19 As this Court acknowledged, this is not the first time the Defendant has made this request:

20 In 2007, TUSD sought and was denied leave to open then recently closed Lowell Smith
21 Elementary School as an on-base middle school. Then as now, TUSD hoped to
22 compete with the on-base charter school and to prevent students from going to schools
23 outside of TUSD. Then as now, the TUSD school serving DMAFB was
24 Roberts-Naylor K-8, which is only 3.5 miles from the front gate of DMAFB” (idem at 3
25 citations omitted and emphasis added).

1 In its 2007 ruling, this Court denied the Defendant’s request and explained that it found the
2 reopening of Smith Elementary School as a middle school would have an adverse affect on
3 ongoing desegregation obligations because it is inconsistent with ongoing efforts to reduce
4 segregation in TUSD's schools [...]. Reopening Smith School as a middle school removes a
5 segment of the existing community assigned to Naylor Middle School, thereby, decreasing its
6 base of concerned parents. Attendance by DM students at other TUSD schools and charter
7 schools has had precisely this result. To the extent that TUSD is attempting to bring charter
8 students back into its fold, this may benefit the Naylor Middle School. Conversely, it is not in
9 the best interest of the community for TUSD to authorize non-minority DM students to attend
10 other TUSD schools instead of Naylor Middle School [...]. In light of the evidence that Naylor
11 Middle School, with a [predominantly] minority student body, is seriously failing to educate
12 its student body, it is highly suspect for TUSD to carve out a separate non-minority
13 educational system for a group of these students that are [predominantly] non-minority. Fisher
14 Mendoza [is] a desegregation case, which at its core is based on the principle that separate
15 schools will not provide equal education” (at pages 45 of document number 1209 filed
16 05/10/07 emphases added).

17
18 1.2.1. THIS COURT PROPERLY DENIED TUSD’S REQUEST TO CREATE A SPECIAL
19 EXEMPTION FOR DMAFB STUDENTS IN 2016 AS INCONSISTENT WITH THE
20 DISTRICT’S INTEGRATION OBLIGATIONS UNDER FEDERAL LAW

21
22 In its amended 04/28/16 reconfiguration order, this Court found that the Defendant’s proposal
23 to add grades 6 and 7 to Borman would directly compete with any marketing advantage
24 Roberts-Naylor might have as a K-8 school, all else being equal. This Court then posed two
25 questions relevant to the Defendant’s integrative obligations at Borman and Roberts-Naylor:
26 first, whether the White students completing 5th grade at Borman would “make a difference to
27 the integration efforts at Roberts-Naylor” (at page 5 of document number 1929 filed 04/28/16)
28 and second, whether The second, whether there are strategies that might attract Borman

1 students to Roberts-Naylor instead of the K-8 on-base charter school or to middle schools
2 outside of TUSD” (idem). This Court also noted that, beyond increasing the racial integration
3 of Roberts-Naylor, “adding even minority students from Borman would indirectly improve
4 future integration by improving the overall academic environment at Roberts-Naylor because
5 Borman is an A school” (idem). Revisiting the Defendant’s obligations under the Unitary
6 Status Plan (USP), this Court explicitly rejected the Defendant’s reliance on “current patterns
7 of choice” in its desegregation impact analyses, explaining that:

8 One educational opportunity not currently available at Borman but offered at
9 Roberts-Naylor is K-8 grades. The USP requires more than just doing no harm, it
10 requires TUSD to take affirmative actions to do good in the context of improving
11 integration and the quality of education for minority students, if it can. In other words,
12 it is not ok for TUSD to base its Borman proposal on “current patterns of choice” if it
13 has the means to change those choices. Roberts-Naylor is a racially concentrated
14 school uniquely situated adjacent to DMAFB, an unusual source of Anglo students,
15 which could affirmatively impact integration at Roberts-Naylor if they could be
16 directed there. Until the Court is certain that Roberts-Naylor cannot be a viable K-8
17 program for Borman students, it will not approve a plan which will ensure
18 Roberts-Naylor can never be such an alternative (idem at 3-4).

19
20 Based on its findings, this Court denied the Defendants’s 11/16/15 “plan to reconfigure
21 Borman K-5 to a K-8 school” (idem at 17). Instead, this Court ordered the Defendant to:

22 prepare a detailed report regarding the academic and demographic conditions at
23 Roberts-Naylor and describe the measures, if any, which have been or could be taken
24 by TUSD to transform Roberts-Naylor into a viable K-8 program capable of competing
25 with the middle schools now attracting the Borman students. TUSD should explain
26 why or why not it is feasible to implement any such identified measures. TUSD should
27 consider a time line to accomplish a transformation at Roberts-Naylor sufficient to
28 begin attracting students that currently choose to go elsewhere (idem).

1 The Defendant submitted its report regarding Roberts-Naylor K-8 School to the SM and
2 plaintiffs on 04/15/16. In its report, the Defendant admits that “the school as a whole has had
3 proficiency rates below the district averages compared to other K-8 schools” (at page 3 of
4 04/15/16 report). Without explaining how it hopes to market an underperforming school to
5 prospective students, the District nevertheless reports that “Robert-Naylor hosted student visits
6 during the District’s Level-Up Days. Students from [...] Borman toured the campus [and]
7 were mailed a brochure to follow-up on the visit and highlight the opportunities that
8 Roberts-Naylor offers” (idem). Without stating exactly what opportunities Roberts-Naylor
9 offers prospective students graduating from Borman, the Defendant goes on to explain that its
10 efforts to “recruit students from Borman [include sending] a counselor and 6th grade students
11 [on] a visit to Borman to talk to their 5th graders about Roberts-Naylor” (idem). Additionally,
12 the Defendant explains that the principal of Roberts-Naylor “will attend a parent meeting at
13 Borman to answer questions they might have and to encourage their child’s enrollment”
14 (idem). The Defendant continues on to explain that the staff of Roberts-Naylor have “worked
15 with the [District’s] marketing department to develop a marketing video to highlight the
16 special qualities of the school” (idem). Without explicitly stating what those special qualities
17 might be, the Defendant concludes that “a parent meeting will be held at Roberts/Naylor
18 including [a] presentation to give families a sample of a typical day at a K-8 and possibly
19 include student performances and speakers” (idem).

20

21 **1.3. THE SPECIAL MASTER’S ROBERTS-NAYLOR R&R IS INCONSISTENT**

22 **WITH THIS COURT’S PRIOR RULINGS AND FEDERAL DESEGREGATION LAW**

23

24 In his report and recommendation (R&R) regarding Roberts-Naylor, the Special Master (SM)
25 states that “[t]his proposal by the District was objected to by the Fisher plaintiffs who are
26 concerned, in part, that this move will draw students from the Roberts-Naylor’s K-8 school
27 which is located outside the base and would have negative consequences for integration” (at
28 page 2 of document number 1933 filed 05/11/16). The SM’s analysis, and the assumptions it

1 is based upon, are flawed in several critical respects. At page 6 of his R&R, the SM makes the
2 unsupported claim that “adding middle school grades to Borman is not likely to affect levels of
3 integration in TUSD schools one way or the other” (idem at 8). This claim perpetuates the
4 Defendant’s unjustifiable reliance upon “current patterns of school choice” in assessing the
5 impact of its student assignment proposals (a standard this Court rejected as constitutionally
6 insufficient in its 04/28/16 order). Contrary to the SM’s claim, the reconfiguration of Borman
7 from a K-5 into a K-8 would indeed affect the levels of integration in TUSD schools. In fact,
8 as the Fisher Plaintiffs explained in their 12/07/15 objection to the Defendant’s grade
9 reconfiguration NARA, “the District admits that ‘Borman’s population is approximately fifty
10 percent Anglo, reflecting the population from which it draws, and will continue to draw as a
11 K-8 as the same students in Borman now will form the 6th through 8th grades so there is no
12 change to the racial-ethnic composition’ (at page 9 of document number 1869 filed 11/16/15).
13 What the District does not explain in its NARA, is that Borman (rated as an A school in the
14 2013-14 SY) is currently an identifiably White school (54% of the student body at Borman is
15 White, whereas the district-wide average for White enrollment at grades K-5 is 20%) and
16 because it is projected to remain so as a K-8 the grade reconfiguration would result in a greater
17 number of White TUSD students attending an identifiably White school (Borman) while the
18 predominantly non-White TUSD students attending nearby Roberts-Naylor K-8 (rated as a C
19 school in the 2013-14 SY and currently designated to receive Borman-area 6th, 7th and 8th
20 grade students) would continuing attending an identifiably minority school (11% of the
21 student body at Roberts-Naylor K-8 is White, whereas the district-wide average for White
22 enrollment at grades K-8 is 20%)” (at page 7 of document number 1877 filed 12/07/15). Thus,
23 the SM, like the Defendant, fails to recognize “the unjustifiable normative assumption that
24 runs through and fatally biases” (idem) the District’s desegregation impact analysis for the
25 Borman reconfiguration. The SM, like the Defendant, cites contemporary patterns of school
26 choice as an unjustifiably low standard against which it asks this Court to gauge the potential
27 impact of the Defendant’s proposed grade reconfiguration. The Fisher Plaintiffs respectfully
28 ask this Court to adhere to its own precedent and well-established federal law and to reject the

1 SM's recommendation insofar as it relies on this constitutionally unsound standard.
2 Elsewhere in his report, the SM observes - reasonably - that, before it can comply with this
3 Court's amended order, the Defendant will first need to: (1) "[i]dentify the schools with grades
4 6-8 now serving former Borman students" (idem at 3); (2) "[i]dentify the academic programs
5 and other learning resources the competing schools offer, their demographic characteristics
6 and indicators of student outcomes" (idem); and (3) "[c]ompare what is and could be available
7 at Roberts-Naylor that would allow it to compete with the schools former Borman students
8 now attend" (idem). And, as the SM acknowledges, the Defendant does provide "a relatively
9 detailed description of academic and other activities and learning resources available at
10 Roberts-Naylor," (idem) but it unfortunately fails to "provide any information about the
11 schools it identifies as current competition for Roberts-Naylor" (idem). The SM, in his R&R,
12 also faults the Defendant for its reliance on "a survey of dubious value" to reach conclusions
13 regarding the relative weight Borman parents give to various factors when considering
14 whether or not to enroll their children on or off base. The SM, in his R&R, focuses on what is
15 likely a typo in the last paragraph of page 4 of the Defendant's report (the substitution of the
16 word the "least" for the word the "most") and thereby considerably confuses the issue and
17 likely attributes a position to the Defendant it never intended to take, as evidenced by the
18 Defendant's more systematic presentation of the same list of "[f]actors affecting school
19 choice" attached as page 8 of its report. What the Defendant states clearly under the heading
20 of factors affecting school choice is that a survey was conducted that asked "[p]arents who had
21 children enrolled in a base school (Borman Elementary or SSA-DM) or a school located off
22 the base [...] to indicate the importance of various factors in choosing the school (scale ranged
23 from not at all important to very important)" (at page 8 of TUSD Roberts-Naylor report).

24 According to the Defendant:

25 [t]he most important factors in choosing the base schools (those they had in common)
26 were 1) proximity to home, 2) safety and security, and 3) keeping their child in a
27 military community. The least important factor was after-care/extended day. These
28 results make sense within the context that they have chosen to remain on base and that

1 the need for longer time at school is unnecessary. Not surprisingly, households who
2 sent their children to off-base schools identified a different set of factors. Although
3 safety and security received the highest ratings, special academic programs (e.g.
4 Honors, AP, GATE), state school rankings, and school personnel were also important.
5 This suggests that parents who are sending their children off-base place more
6 importance on the academics of a school. The least important factors were proximity to
7 work, keeping sibling together, and keeping a child in a military community” (idem).

8
9 While the SM can reasonably expect to learn more about the specifics of the survey (who
10 conducted it, when, how many parents were surveyed, what was the exact wording of the
11 survey questions etc.), the validity of the survey’s results do not fly in the face of reason and
12 offer some support to the premise that DMAFB parents afford significant weight to academic
13 achievement and programmatic offerings when deciding to enroll their children off-base. The
14 SM appears to conclude that the weight DMAFB parents afford to such factors as proximity to
15 home and remaining within the military community are insurmountable. The Fisher Plaintiffs
16 strongly disagree. In fact, the Defendant’s report offers some preliminary evidence to the
17 contrary, evidence which should certainly be the subject of further investigation and analysis,
18 but evidence nonetheless. Despite this, the SM has returned a recommendation to allow the
19 Defendant to proceed with its grade reconfiguration plans for Borman K-5 and thereby
20 effectively grant the Defendant an exemption to its affirmative obligation to effect integration
21 and ensure equitable academic achievement rates wherever practicable in its schools. The
22 SM’s recommendation clearly fails to pass constitutional muster and should not be adopted by
23 this Court. The Civil Rights of the District’s once segregated African American and Hispanic
24 students cannot be compromised in the name of political expediency. The leadership of the
25 DMAFB has expressed its support for the reconfiguration of Borman at the same time that it
26 has advertised its rigid adherence to military policies (not federal laws) that pose considerable
27 barriers to the integration of Borman. The DMAFB does indeed represent a major economic
28 and political force in our community and while it might temporarily prove politically

1 expedient to cater to the preferences of that powerful segment of our community, doing so
2 would directly or indirectly impinge upon the Civil Rights of future generations of
3 Roberts-Naylor students who will not have the option to attend a racially, ethnically and
4 academically diverse school.

5
6 **1.5. CONCLUSION**

7
8 On the basis of the facts and law set forth above, the Fisher Plaintiffs respectfully ask this
9 Court: (1) to reject the Special Master's recommendation; (2) to deny the District's request for
10 approval of grade reconfigurations at Borman K-5 School; and (3) to direct the Defendant to
11 develop a viable proposal for effecting immediate and substantial improvement in the
12 integration and improved academic achievement at Roberts-Naylor K-8. The integrative
13 imperative of the Unitary Status Plan (USP) is unambiguous, it represents a consensus reached
14 by all of the parties to this case that was approved by order of this Court and that cannot now
15 be ignored simply because the District wishes to recapture enrollment lost to the Charter
16 Sector and neighboring districts or to cater to the preferences of the predominantly White
17 parents wishing to enroll their children at schools located on Davis Monthan Air Force Base
18 (DMAFB).

19
20 Respectfully submitted this 25th day of May, 2016

21
22 s/ Rubin Salter, Jr.

23 RUBIN SALTER, JR., ASBN 01710

24 Counsel for Fisher Plaintiffs
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2. CERTIFICATE OF SERVICE

I declare and certify that a full, correct and true copy of the foregoing document was electronically transmitted to the CM/ECF system for filing and transmittal of a notice of electronic filing to the following CM/ECF registrants on this 25th day of May, 2016. I certify further that, on this date, the CM/ECF system's service-list report showed that all participants in this case were CM/ECF registrants.

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16
17 Respectfully submitted this 25th day of May, 2016
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19 s/ Rubin Salter, Jr.

20 RUBIN SALTER, JR., 01710

21 Counsel for Fisher Plaintiffs
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