2015 WL 3657594
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United States District Court, D. 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.

Nos. CV 74–90 TUC DCB, CV 74–204 TUC DCB.
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Filed June 12, 2015.

Attorneys and Law Firms

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ORDER

DAVID C. BURY, District Judge.

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

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

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

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

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

The Fisher Plaintiffs are concerned that the estimate for

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

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

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

This is true. In both this proposal and the Fruchthendler–Sabino Honors program proposal, "the Board [did] not have the benefit of any perspective that the plaintiffs and the Special Master might offer." *Id.* There is, however, nothing wrong with the Board leading in the implementation of the USP. In fact the Board is responsible for leadership in respect to all the District's efforts, including those undertaken to implement the USP. But, when the Board acts without considering input from the Plaintiffs and the Special Master, especially if it acts even before the preparation of the DIA, the Board has not acted consistently with the USP requirement that it consider the impact of its proposals in respect to its obligations under the USP.

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

***3** The Court turns to the expedited nature of most of the NARA proposals. This NARA is a good example. On **April 14, 2015,** without the benefit of the DIA, the Board moved to add two portable buildings at Dietz K–8 School by approving a procurement contract for $225,000 to Kitttle Design & Construction to move the portables. (NARA (Doc. 1798–1), Ex. 2: Board agenda action item)). **May 1, 2015,** the District submitted the proposal, including the DIA, to the Plaintiffs and Special Master and requested their approval to avoid a contested NARA. Here, within 17 days of the Board's action, the DIA had been prepared and the NARA was submitted to the parties and Special Master for review and comment. Preparing the DIA was not overly burdensome nor time consuming. The Special Master recommends: "When a significant proposal for new or revised District-wide policies and practices that would fall under provisions for comment

and review provided for in the USP is being seriously considered by the District, the District should share these ideas with the Plaintiffs and ask for a one week turnaround for comments." (R & R (Doc. 1805) at 7.)

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

Accordingly,

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

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

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

IT IS FURTHER ORDERED that within 30 days of the filing date of this Order the Special Master and the parties shall work together to develop viable procedure(s) for the comment and review provisions which are required under the USP when a significant proposal for new or revised District-wide policies and practices are seriously being considered by the District, with the goal being to improve communications and expedited decision-making, including judicial determinations. Within 45 days of the filing date of this Order, the Special Master shall file a status report, including any recommendations.

NOTICE OF FILING BY SPECIAL MASTER OF REPORT AND RECOMMENDATIONS RELATING TO DIETZ NARA

WILLIS D. HAWLEY, Special Master.

***4** The Special Master hereby respectfully submits the attached Report and Recommendations relating to the Dietz NARA and recommends Court approval of the District's proposal.

On May 9, 2015 TUSD submitted a proposal to the Court to approve the location of two portable classroom buildings on the Dietz K–8 campus to be used beginning in August 2015 (*see* Exhibit A). Both the Fisher and the Mendoza Plaintiffs oppose the District's Dietz proposal. The Department of Justice has no objection. For the reasons set forth herein, including the undisputed fact that the introduction of portables at Dietz will have no effect on the racial composition of the school or of any other school, the Special Master recommends that the Court approve the District's proposal.

Procedural History

On April 14, 2015, the District administration submitted to the Governing Board a proposal for locating portable buildings on the Dietz campus, and the Board then approved the proposal. On May 1, the District submitted this proposal to the Plaintiffs and the Special Master along with the required Desegregation Impact Analysis and requested approval in order to avoid burdening the Court with a contested Notice and Request for Approval (NARA) (Exhibit B). On May 15, the Mendoza Plaintiffs expressed their objections (Exhibit C) as did the Fisher Plaintiffs expressed their objections (Exhibit D). Also on May 15, the Department of Justice indicated that it had no objection to the District's proposal (Exhibit E).

On May 17, the Special Master sent a memo to the parties indicating what his response to the proposal and the objections would be if he were to submit a Report and Recommendation to the Court on this matter (Exhibit F). The Special Master asked the Fisher and Mendoza Plaintiffs to examine his conclusions and decide whether they wished him to proceed with an R & R. Neither set of Plaintiff responded. On May 22, the District submitted the NARA to the Court (Exhibit G).

Analysis of Objections

Fisher Objections

The Fisher Plaintiffs raise four objections to placing portables at Dietz. The Special Master's response to each of these objections is as follow:

> 1. The Fisher Plaintiffs claim that the District's assertion that the student population will increase at Dietz is incorrect. In fact, the District makes no such assertion. Rather, it asserts that the population at Dietz has already increased beyond predictions and explains why this occurred. This increase in the student population, and in particular among students with special needs, is one of the justifications for the proposed portables.
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> 2. The Fisher Plaintiffs argue that the court order relating to school closures February 2013, which limited the use of portables in receiving schools, applies to the Dietz portables. However, no students from closed schools still attend Dietz, and no student will be learning in Dietz portables for any extended period of time during the school day (*see* Exhibit A, p. 5, Section 3a).
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> ***5** 3. The Fisher Plaintiffs claim that the land mass at Dietz is inadequate to support portables and link this claim to an assertion that middle school students at Dietz are receiving an inferior education. No evidence is provided to support this claim (although Dietz is a C school) or to suggest that the introduction of portables would make things worse. One of the reasons given for adding the portables is to increase student access to a broader curriculum and to provide enrichment activities intended to increase student performance.
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> 4. The Fisher Plaintiffs argue that inadequate attention was given to the District-wide impact of placing portables at Dietz. A related argument is made by the Mendoza plaintiffs and is addressed below. The educational opportunities that will be offered or facilitated by the addition of the portables at Dietz do not appear to be unique—similar programs are available at a number of other schools.

Mendoza Objections

A primary concern of the Mendoza Plaintiffs is that the introduction of CORE enrichment courses that will be offered in the portables should be offered throughout the District and, in particular, should be available in West Side schools. This concern was based, at least to some extent, on misinformation initially provided by the District. In the NARA submitted to the Court, the District corrects earlier information and indicates that the program at issue, which seeks to facilitate the transition of students from self-contained classrooms to classrooms that focus on particular subjects, exists at five West Side K–8 schools, one Central school, and one school on the East Side. This does not suggest that students in West Side schools are disadvantaged because some do not offer this program. Moreover, it is not clear that the program makes a substantial difference in student outcomes.

That there is variation in educational offerings across the District is not, in itself, evidence of discrimination or inequitable distribution of resources. Most school districts struggle with finding a balance between the need for common programs districtwide, especially with respect to core academic curricula, and the desirability of allowing for variation that is responsive to:

- differences in student needs
- the availability of community resources that support different opportunities
- unique capabilities of faculty
- traditions
- physical space and facilities
- experimenting with new ideas that might have district-wide usefulness.

Finding the right balance requires analyses that determine that the variation among schools does not result in differences in educational opportunities and outcomes by race, ethnicity and language facility. There is no reason to believe that the introduction of portables at Dietz would have invidious consequences for Latino or African–American students elsewhere in the District. And, 65% of the students at Dietz are Latino or African–American.

***6** The Mendoza Plaintiffs also expressed concern that placing services that address the needs of special education students in portables might stigmatize the students or provide them with inadequate facilities. The District's counter-argument is that student privacy will be enhanced as will space for developing Individual Educational Programs (IEPs) required by law, teacher planning and family conferences, and this contention seems reasonable. The District also points out that many students who are not special-education students will be using the portables. Moreover, most of the instruction that special education students experience will be in regular classrooms. In short, stigmatization is unlikely, and portables should allow for meeting the needs of special education students more appropriately.

Recommendation

The Special Master recommends that the Court approve the District's request to install two portables, each of which has two classroom sized spaces, at the Dietz K–8 School.

Comment on the Need to improve the Consultation Process

That this relatively minor matter—the installation of two portable classroom facilities that will have no effect on integration—made its way to the Court and consumed many hours of time by all the parties and the Special Master with the attendant costs is bleak testimony to the continuing absence of trust and goodwill among the parties and the failure to develop a viable process for approving actions by the District that are subject to the provisions of the USP. On this matter and others, the Plaintiffs object to the District taking action without adequate prior consultation. The District appears to believe that it must fully develop proposals (*see* Exhibit G, p. 4, lines 7–10) before consultation and that it is often desirable to get approval of the Governing Board for such consultation, as is the case in the Dietz issue. And in some cases, the District engages in what can only be seen as preliminary implementation, as in the matter of the Fructhendler/Sabino restructuring that was recently before the Court.

It seems likely that the District considers consultation with the Plaintiffs and the Special Master a burden, one that impedes its responsibility to get on with the complex task of meeting the needs of its students. The District identifies what it believes to be good ideas and wants, understandably, to implement them expeditiously.

Even though the USP does not require consultation prior to the District's submission of a proposal to the Governing Board, such submissions suggests that the District does not see consultation as productive in shaping its proposals and further does not believe that the Board should be considering the positions of the Plaintiffs or the Special Master when it makes its decisions. When the District moves forward in developing a proposal without consultation, not only does it deny itself the benefit of input from the Plaintiffs and the Special Master, but it engages staff in the development of proposals in which they become invested, thus making acceptance of "external" input more difficult. When such matters go to the Board for action and approval is given, this signals to the community that something is about to be done and puts the Plaintiffs and the Special Master in a position of undermining public confidence in the District and/or in the USP.

***7** The Court is not unaware of this problem and has consistently urged the parties and the Special Master to work collaboratively. From time to time, the parties pledge to work together more constructively and do so. But, this commitment is not consistently applied, and each time it is not, the situation can be perceived by the Plaintiffs as a lack of goodwill on the part of the District.

On the face of it, the solution seems relatively simple. When a significant proposal for new or revised District-wide policies and practices that would fall under provisions for comment and review provided for in the USP is being seriously considered by the District, the District should share these ideas with the Plaintiffs and ask for a one week turnaround for comments. If this feedback suggests that conflict might occur, a telephone conference should be scheduled and the matter discussed. A proposal could then be formalized and the procedures outlined in the USP followed. Arguably, the USP provides for relatively extensive periods of comment and the parties should discuss whether specific timelines should be shortened. The District should not take an action item to the Board about which there is continuing consultation although it surely should inform the Board of issues about which it would need to make a decision

during study sessions. At the study sessions, the District should provide the Board with information about the dispositions of the Plaintiffs and the Special Master. Policies would not be enacted by the Board before Court approval in those instances in which the Plaintiffs have requested that a Report and Recommendation be made to the Court by the Special Master.

The Special Master urges the Court to require the parties to, once again, develop a viable procedure for addressing the comment and review provisions of the USP and to make a report to the Court about the results of this effort.

Filed May 27, 2014.

All Citations

Not Reported in F.Supp.3d, 2015 WL 3657594

Footnotes

[1] The Fisher Plaintiffs reurge their concern raised in 2013, when the District closed several schools for fiscal reasons. (Objection (Doc. 1802) at 8–9 (citing Objection (Doc. 1424) at12 (the District should not close middle schools and convert elementary schools to K–8 schools until it can show that such a shift will not result in more students attending less diverse schools for the 6th through 8th grades). Now, the District is in better position to assess school closures and consolidations than it was in 2013. As the Court understands it, there 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 of other plans developed to move the District forward toward the most practicable unitary plan it believes it can attain under the USP. The District should in the future, in respect to proposed grade changes, include in the DIA an analysis which reflects whether improvements in the quality of education for students at one school might dis-serve 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).