

Substantial Disruption



The Tender Larceny of Fisher-Mendoza

By Mike Tully

In 1999, when I was Legal Counsel at the Tucson Unified School District, I noticed a requisition for positions in the Facilities Management Department. The requisition was for several locksmiths, and I noticed something unusual about the requisition: all the new locksmiths were paid out of the District's Desegregation budget. The "deseg" budget was a fund created to support efforts to comply with the federal court order in the *Fisher-Mendoza* case. But what did locksmiths have to do with desegregation? What, exactly, is a "deseg locksmith?"

TUSD had determined that a certain percentage of District expenditures covered maintenance, so it made sense to dedicate a portion of the deseg budget to it. But there was no pro-rating the locksmiths' hiring. Every locksmith was paid with deseg dollars. That requisition is an example of the creativity and absurdity that has characterized the *Fisher-Mendoza* lawsuit for decades.

The lawsuit began in 1974 as school desegregation actions by Hispanic and African-American plaintiffs that were consolidated into a single case. I was in court when Federal Judge Alfredo Marquez, the *Fisher-Mendoza* presiding judge, complained about the case's age. "It's been twenty-five years," he told the courtroom in 1999. Marquez was the third federal judge assigned to the case. When he retired a few years later, *Fisher-Mendoza* was still very much alive and showed no signs of wrapping up. Ironically, it was Marquez' decision that expanded the case from a limited remedy to a judicial juggernaut that left the Superintendent and Governing Board subservient to the federal court, the litigants, and a Court-appointed Special Master who became the all-powerful Man Behind the Curtain.

The *Fisher-Mendoza* lawsuit was tried before the late Judge William Frye in 1977. His ruling was so close that nobody was sure which side had won. The *Arizona Daily Star* said the plaintiffs had prevailed and the District had engaged in unlawful discrimination. The *Tucson Citizen*, the afternoon daily, reported the District had won. The confusion spawned post-judgment proceedings that culminated in a Stipulation and Order of Settlement ("the Order") in 1978. The Order was limited to 17 elementary and middle schools and anticipated the case could be dismissed by July of 1983.

How did a limited order morph into a District-wide action that endured more than four decades and cost more than a billion dollars? The answer lies in two aspects of Arizona law that provided a strong incentive to keep the case going. First of all, the Legislature decided to leave deseg matters to local school districts and allowed local governing boards to increase property taxes as often as necessary to cover deseg expenses. Then, in 1980, Arizona voters passed a Constitutional amendment that capped local primary property taxes to one percent of the property's full cash value. Since any amount exceeding the one percent limit was covered by the state's general fund, TUSD's Governing Board was empowered to raise deseg taxes as much as it wanted without blowback from local taxpayers. With taxpayers from other districts throughout Arizona basically underwriting TUSD's desegregation efforts, there was no motivation to close the case. The deseg budget grew as the *Fisher-Mendoza* case dragged on.

Then, in 1993, the Board voted to close Catalina High school. Earlier that year, the District decided it couldn't afford to build a proposed new southwest side high school while keeping Catalina open. To comply with the Order, the District petitioned Judge Marquez to approve the closing, which was vigorously opposed. Judge Marquez relied on Paragraph 20 of the Order, which reads in part:

Defendants will not undertake the construction of new schools or of permanent additions at existing schools without specific authorization of the Court. Nothing in this stipulation shall preclude the construction of new schools in the future if the construction of such schools is deemed to be in the best interest of the community and not inconsistent with on-going efforts to reduce segregation...

The District argued the Order didn't matter because high schools were never part of the *Fisher-Mendoza* lawsuit. Judge Marquez disagreed and ruled: "The Court finds that the District has failed to meet its burden" as specified by Paragraph 20. The ruling so expanded *Fisher-Mendoza* beyond the original Order that William Brammer, TUSD's lead deseg counsel at the time, observed that "the entire district" was subject to the deseg Order. The deseg budget and taxes to pay for it increased exponentially.

Not only has the *Fisher-Mendoza* case changed, so has the local educational environment. TUSD was a white majority district when the Fisher and Mendoza cases were filed in 1974. That is no longer the case. There were no charter schools siphoning off students and state funding in 1974 and TUSD was in a growth mode. More importantly, the Legislature recently voted to make TUSD taxpayers cover all deseg expenses. The one percent protection is gone, although the Legislature's action may be challenged in court. Absent a successful court challenge the gravy train has left the station.

I don't fault TUSD Board members and administrators for taking advantage of a statutory and constitutional environment that brought in additional resources when the Legislature failed to adequately fund Arizona public schools. It would have amounted to educational malpractice to decline the opportunity. But that does not change the fact that the *Fisher-Mendoza* lawsuit has metamorphized into a litigation monster that encumbers TUSD decision-making, inflames ethnic tensions, and vested far too much authority in a Court-appointed Special Master with veto power over deseg-related Board decisions. One of the ugly realities of school politics is that student welfare is frequently subjugated to adult agendas. That seems to be the situation with *Fisher-Mendoza* and its insatiable litigants.