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School District No. 1*

**UNITED STATES DISTRICT COURT**

**DISTRICT OF ARIZONA**

Roy and Josie Fisher, et al.,  
Plaintiffs,

v.

Tucson Unified School District No. 1,  
et al.,  
Defendants.

4:74-cv-00090-DCB  
(Lead Case)

Maria Mendoza, et al.,  
Plaintiffs,

v.

Tucson Unified School District No. 1,  
et al.,  
Defendants.

CV 74-204 TUC DCB  
(Consolidated Case)

**NOTICE OF OBJECTION**

On November 15, 2018, the Special Master filed a report and recommendation regarding five magnet schools (ECF 2147). The District had previously provided comments to the Special Master objecting to certain aspects of a preliminary draft of his report. Those comments resulted in changes in some respects to the report and

1 recommendation as filed, but not in other respects. The briefing schedule for a report  
 2 and recommendation set out in the order appointing the Special Master (ECF 1350 at  
 3 10) provides 30 days for objections; the District thus intended to file its objection to the  
 4 report and recommendation on or before December 17, 2018, the date that objections  
 5 would be due under that briefing schedule. However, the Court entered its order  
 6 approving and adopting the Special Master's report and recommendation on Thursday,  
 7 December 6, 2018 (ECF 2158), before the time period for objections had run.

8 As soon as it received the draft report from the Special Master, the District began  
 9 efforts to comply with the recommendations. Thus, the District provided both the  
 10 preliminary magnet plans for the five schools at issue, and the detailed plans, before the  
 11 Court's December 6 order actually issued. The District intends to continue to comply  
 12 with the report and recommendation and the Court's order (ECF 2158).

13 However, the District wishes to make clear for the record that its compliance is  
 14 subject to and without waiving (a) its general objections to further court supervision as  
 15 set forth in its objections to the Special Master's most recent annual report, and (b) the  
 16 specific objections set forth below, which were raised with the Special Master prior to  
 17 the filing of his report and recommendation. The District is not seeking reconsideration  
 18 of the Court's order regarding the Special Master's recommendations (ECF 2158).

19 **A. The Role of Academic Achievement in Integration Decisions.**

20 In the context of desegregation, the purpose of a magnet program is to further  
 21 integration by attracting students of the desired race/ethnicity to the school. If a magnet  
 22 school is already integrated, or is oversubscribed, then it is successfully serving its  
 23 purpose. There is no reason – in the context of determining whether a magnet school  
 24 should retain its magnet status – to consider measures of academic achievement (either  
 25 absolute or relative).<sup>1</sup> It really matters not why a school is successfully attracting

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26  
 27 <sup>1</sup> Academic achievement, and reduction of gaps in academic achievement, are obviously  
 28 hugely important educational goals generally, but should be addressed not in the context  
 of magnet status and funding, but in all schools, in the context of overall quality of  
 education, targeted support for struggling students, and creating cultures of academic

desired students, as long as it is in fact attracting desired students. As discussed with the Special Master, research shows that the academic quality of schools accounts for only a relatively small part of school choice decisions.<sup>2</sup>

Academic achievement, or success in reducing achievement gaps, should at most be considered in evaluating a magnet school which is not attracting sufficient numbers of desired students to further integration – i.e., magnet schools that are neither integrated nor oversubscribed. It is only at these schools that improved academic achievement may increase the integrative effect of the magnet program.

The following magnet schools were integrated and/or oversubscribed for the 18-19 school year. Accordingly, academic achievement should not be considered in determining continued magnet status for these schools.<sup>3</sup>

<b>Magnet School</b>	<b>Integrated</b>	<b>Oversubscribed</b>
Bonillas	Yes	No
Borton	Yes	Yes
Carrillo	Yes	Yes
Davis	Yes	Yes
Holladay	Yes	No
Tully	Yes	No
Drachman	Yes	Yes
Mansfeld	Yes	Yes
Dodge	Yes	Yes
Palo Verde	Yes	No
Tucson	Yes	Yes

excellence, to which all school districts, supervised or not, should apply themselves with vigor.

<sup>2</sup> There are additional reasons completely unrelated to integration why a school district might wish to have and maintain one or more magnet schools with a special emphasis or theme.

<sup>3</sup> Further, the District does not here address the much more involved and difficult question as to how important magnet funding is to the success of a school in achieving integration, and or whether the same integrative effects could be achieved with lower levels of magnet funding. However, that issue would necessarily be subjective and qualitative, susceptible of differences among reasonable educators, suggesting that this is not appropriate for inclusion as an issue in the litigation. Moreover, the consequences of a mistaken decision to reduce or eliminate magnet funding could be a substantial reduction in the existing level of integration.

1 The District recognizes that this approach is not consistent with the Court’s direction as set out  
 2 in the most recent order, but does not by silent acquiescence wish to waive its objection to the  
 3 Court’s approach.

4 **2. Uncertainty in Application of Magnet Criteria.**

5 The District is concerned that the criteria for evaluating magnet schools set out in the  
 6 Special Master’s report is not sufficiently specific to allow unambiguous application of the  
 7 criteria to reach a result. The manner in which the various criteria interact, or are weighted, is  
 8 not specified, particularly when some of the measures point in different directions. The result is  
 9 that any application of the criteria is subject to dispute in the litigation, and to differences of  
 10 opinion among reasonable educators, all of which strongly suggests again that court supervision  
 11 simply amounts to one person trying to substitute his or her judgment for someone else’s. As a  
 12 result, there is no way the District can be sure that its actions will satisfy the ultimate decider  
 13 under court supervision, and thus no predictability as to when supervision will end.

15 **3. The “proficiency” categories are blunt tools at best, and can be seriously**  
 16 **misleading as a measure of academic achievement.**

17 The criteria for evaluating magnet schools are largely based on the “proficiency level”  
 18 categories used by the state Department of Education in connection with the AzMERIT test.  
 19 There are only four categories of performance: “highly proficient,” “proficient,” “partially  
 20 proficient” and “minimally proficient.”<sup>4</sup> “Passing,” as used in the criteria, is limited to students  
 21 who achieved a “highly proficient” or “proficient.” The Special Master’s magnet criteria uses  
 22 “percent of students passing” as the measure of performance. The broad nature of the resulting  
 23 two-category system (“passing” or “not passing”) can mask significant progress within these  
 24

25 <sup>4</sup> “Highly proficient” is defined as “advanced understanding, highly likely to be ready”  
 26 for the next level course in this area; “proficient” is defined as “strong understanding,  
 27 likely to be ready” for the next course; “partially proficient” is defined as “partial  
 28 understanding, likely to need support to be ready” for the next course; and “minimally  
 proficient” is “minimal understanding, highly likely to need support to be ready” for the  
 next course.

1 categories. If a school works hard, focusing on the performance of the bottom quartile and  
2 successfully moves students up the scale, but not across the threshold, that result may never  
3 show in this two category system. Similarly, large changes in performance gaps between  
4 student groups may be masked, but small changes may be greatly exaggerated, depending on  
5 whether or not those changes are close to the single boundary between the two broad categories.

6 One better approach might be to use the scale (numeric) score assigned by AzMERIT to  
7 each student, and to look at changes or differences within the set of scale scores (e.g., average  
8 scale score, performance of certain quartiles or deciles of students year over year).

9 Another issue arises because year-to-year comparisons actually compare different  
10 groups of students, and do not measure changes within a cohort of the same students over time.  
11 Measuring changes in the same cohort (e.g., 3<sup>rd</sup> graders in 2016, 4<sup>th</sup> graders in 2017, and 5<sup>th</sup>  
12 graders in 2018) may give a better picture of the impact of a particular school on achievement.

13  
14 **4. The very small numbers of students at certain schools lead to volatile**  
15 **testing results that change radically from year to year and quite**  
16 **simply are an inadequate basis to draw conclusions on magnet status**  
17 **and funding.**

18 Many of the groups measured involve small numbers, some as low as 5 and 6  
19 students, and others substantially less than 30. This can lead to apparently volatile test  
20 results from year to year, particularly when one realizes that we are separating students  
21 into only two groups, those who are “likely to be ready” for the next course (“pass”) and  
22 those who are “likely to need support” to be ready for the next course. The difference  
23 between those two broad groups may be only a few points in the scale scores.

24 Two examples illustrate this. At Holladay, the “proficiency” level of white  
25 students appears to increase from 2016 to 2018 from 33% to 44% to 60%. This looks  
26 like a huge gain, and skews the gap figures dramatically with respect to other groups.  
27 But the number of white students tested was only 9, 9, and 5, respectively, for each of  
28 the three years used. In 2016, three white students at Holladay “passed,” in 2017, four

1 white students “passed,” and 2018, again three white students “passed.” So from year  
2 to year at Holladay, there was a difference of only one white student in the numbers  
3 passing. But this makes for a completely misleading assessment of both overall gains in  
4 achievement, and changes in the achievement gap, using the measures suggested by the  
5 Special Master.

6 At Drachman, the proficiency level of African American (AA) students appears  
7 to drop from 75% to 27% using the measure proposed by the Special Master. This looks  
8 like a tremendous and terrible change, but in fact, the number of AA students tested was  
9 12, 12, and 11 in those years. In 2016, nine AA students at Drachman “passed,” in  
10 2017, four AA students “passed,” and 2018, three AA students “passed.” So a net  
11 difference in the performance of only 6 students entirely accounts for this change.  
12 When one considers that the performance difference for each student may actually have  
13 been only a few scale score points changing the category from “likely to be ready” to  
14 “likely to need support to be ready,” it is immediately apparent that the measure  
15 proposed by the Special Master has very little value in assessing anything about the  
16 school as a whole.

17 A better approach would be twofold: first, the white student achievement scores  
18 used for comparison should be district-wide scores at that level, not the scores of  
19 individual white students at the school. Second, where the number of students in any  
20 group is less than 30, some alternate form of assessment should be used, as the numbers  
21 are simply too small, and too subject to changes in the population from year to year, to  
22 draw sufficiently strong statistical conclusions to support decisions on magnet status and  
23 funding. The District’s A&E department has found that 30 students in a category are  
24 necessary to permit statistically reliable comparison. Based on this standard, seven of  
25 the 13 magnet schools did not have a large enough student body to permit statistically  
26 reliable comparisons using a measure based on AzMERIT “pass” results:

	White Students	African-American Students
Bonillas	22	20
Carrillo	7	12
Davis	17	6
Holladay	9	19
Tully	12	26
Drachman	14	12
Roskruge	33	14

## 5. Specific Issues

a. Only two magnet schools were not integrated at the beginning of the 2018-19 school year—Roskruge and Booth-Fickett. Holladay and Mansfeld were both integrated at the beginning of the 2018-19 school year based on the 10th day data from August 15, 2018 that was emailed to the Special Master on August 29, 2018:

School	White	African American	Hispanic
Holladay	6%	23%	67%
Mansfeld	15%	9%	68%

Both schools were also integrated in 2017-18. In 2017-18, the percentage of Hispanic students entering the school was 70% of the kindergarten class. Based on 10th day data for 2018-19, Holladay is still integrated (about 67 percent Hispanic). The kindergarten class of 2017-18 (last year) was 7% white, 23% Black, and 70% Hispanic. The kindergarten class was made up of 30 students (21 were Hispanic) so an addition of only two students would have changed the Hispanic percentage from 70% (21 of 30) to 67% (21 of 32). Thirty four percent of the students at Holladay (not 20%) are magnet students who come to the school from outside its attendance boundaries.<sup>5</sup>

b. Drachman was a K-6 school prior to 2016-17; it added a seventh grade in 2016-17, and an eighth grade in 2017-18. The District submitted a DIA/NARA

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<sup>5</sup> There were 69 magnet students out of 203 total students, or 34%.

in 2015 to add 7th and 8th grades to Drachman to increase the numbers of students attending an integrated school. [1869 and 1869-4.] The SM recommended approval in January 2016. [1884 at 3:11-14.] No party objected. [Id. at 2: 10-13.] The Court approved of the change for integration purposes. [1929 at 3:7-10 (“All parties agree that the likely impact of adding grades seven through eight at Drachman will improve integration and afford more students an opportunity to experience an integrated school environment.”) By 2018-19, the school has become integrated and has added more than 50 students. Because of the change there are more students at an integrated school, precisely the outcome the Court sought when approving the request.

Drachman became an Integrated School in 2017-18 – the first full year of the K-8. While the current 6-8 grade cohorts have higher Hispanic populations, the more-diverse 3-5 grade cohorts will replace them over time:

<b>Drachman Enrollment</b>	White	Hispanic
2015-16	8%	75%
2016-17	12%	71%
2017-18	18%	67%
2018-19	19%	63%

Drachman competes for students in Tucson who have K-8 Montessori options. There are two K-8 Montessori schools in Tucson: Khalsa and Hermosa. These schools have existed for a number of years and are successful. Clearly, parents in Tucson are interested in K-8 Montessori schools.

Finally, if Drachman were to close its 6-8 grades, the majority of the those students would move from an integrated Drachman to a racially concentrated K-8 or middle school, as Drachman is the only integrated K-8 school and the only integrated 6-8 magnet option with space (both Mansfeld and Dodge are oversubscribed).

c. Student performance at Roskrue is above the District average for K-8 schools in most respects: the percent passing at Roskrue exceeds the District ELA average by 3.2% for white students, by 9.5% for AA students, and by 4.4% for Hispanic



1 students. The percent passing at Roskrige exceeds the District math average by 6.8%  
 2 for white students, and by 1.2% for Hispanic students. The percent passing math for AA  
 3 students is only 2.7% less than the District average.

4 d. The achievement gap at Borton is large because white students at  
 5 Borton far outperform other students in the district: for math, the passing rate for white  
 6 students at Borton is 73.8%, while the District average at that level is 53.4%; for ELA,  
 7 the passing rate for white students at Borton is 69.8%, while the District average is 52%.

8 Absolute levels of performance for AA and Hispanic students are high at Borton  
 9 too, and in fact far higher than at schools with smaller achievement gaps. Both African  
 10 American and Hispanic students at Borton have percent passing ELA significantly  
 11 above district average. African American students had 46.7% of students pass versus  
 12 the district's 30.2%. Hispanic students had 34.3% passing, versus 32.7% district  
 13 average. Borton's AA Math percent passing was 40%, compared to the district average  
 14 percent passing of 29.6%. Hispanic percent passing rates were 3.7% below district  
 15 average for math. Moreover, both African American and Hispanic students made gains  
 16 in percent passing compared to 2016-17 scores.

17 Nonetheless, subject to and without waiving its objections, the District does not  
 18 seek reconsideration of the Court's order (ECF 2158).

19  
 20 RESPECTFULLY SUBMITTED this 12<sup>th</sup> day of December, 2018.

21 **STEPTOE & JOHNSON LLP**

22  
 23 By /s/ P. Bruce Converse  
 P. Bruce Converse  
 Timothy W. Overton

24  
 25 **TUCSON UNIFIED SCHOOL DISTRICT**  
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27 Attorneys for Tucson Unified School District  
 28 No. 1

**CERTIFICATE OF SERVICE**

The foregoing document was filed with the Court electronically through the CM/ECF system this 12<sup>th</sup> day of December, 2018, causing all parties or counsel to be served by electronic means, as more fully reflected in the Notice of Electronic Filing.

/s/ Diane Linn

Employee of Steptoe & Johnson LLP