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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Roy and Josie Fisher, et al., Plaintiffs, v. Tucson Unified School District No. 1, et al., Defendants.	4:74-cv-0090-DCB (Lead Case)
Maria Mendoza, et al., Plaintiffs, v. Tucson Unified School District No. 1, et al., Defendants.	4:74-cv-0204 TUC DCB (Consolidated Case)

MOTION FOR RECONSIDERATION OF ORDER REGARDING 3-YEAR PIP, CMP, TRANSPORTATION AND ORR ADDENDUMS (ECF 2471)

Introduction and Summary

Pursuant to LRCiv 7.2(g), the District respectfully moves the Court to reconsider its order entered June 4, 2020 (ECF 2471) (the "Order"). The Court did not consider evidence that Booth-Fickett's academic performance in SY19-20 would have led to a state letter grade of "C" if the COVID-19 epidemic had not prevented this year's AzMERIT testing, allowing at the very least a year for continued improvement, rather than summary removal of magnet status, as provided in the Order.

Further, removing magnet status from Booth-Fickett, requiring new school improvement plans and school integration plans, and requiring the District to adopt Court-mandated conditions for managing its magnet program for years into the future are unwarranted and unsupportable as a matter of law given that (a) they are not required by the Unitary Status Plan, and (b) in any event, the District is currently in unitary status, and the constitutional basis for any continuing interference with the operation of the District by its elected local officials has ended.[1]

Detailed Analysis

I. The Court should not summarily strip away Booth-Fickett's magnet status, because the Court did not consider current academic performance and did not give the District an opportunity to be heard on this issue.

Based solely on the school letter grades for SY2016-17, 2017-18 and 2018-19, and without any notice that it was considering such action or an affording an opportunity to District to be heard, the Court summarily took the drastic action of eliminating Booth-

[1] Moreover, the Order acts on certain recommendations of the Special Master made in his Report and Recommendation dated May 12, 2020. The Order was entered on June 4, before the time set for the parties to be heard on those recommendations, in violation of Fed. R. Civ. P. Rule 53(f)(1).

Fickett's magnet status.[2] The most recent data used by the Court was based on testing in March 2019, nearly 15 months — and a full academic year — prior to the Court's Order. Because the Court did not afford the District an opportunity to be heard, the Court had no information on what happened in the most recent school year: SY2019-20.

In fact, Booth-Fickett would likely have earned a "C" letter grade for SY2019-20, if the regular AzMERIT testing had not been prevented by the closure of schools due to the COVID-19 pandemic. The District's Director of Evaluation and Assessment, Dr. Halley Freitas, examined other available testing data for Booth-Fickett in SY2019-20, including internal District benchmarks. Based on modeling of the SY2019-20 benchmark data, which was designed to serve as a proxy for AzMERIT scores (and a reasonable projection of growth, acceleration, and ELL scores), had Booth-Fickett students taken the 2019-20 AzMERIT exam, Dr. Freitas believes that Booth-Fickett would likely have earned a "C" letter grade or better. Booth-Fickett's year-over-year benchmark assessments show a significant improvement in both Math and ELA proficiency, as shown in the chart below.

	2018-19		2019-20	
	Booth-Fickett	District	Booth-Fickett	District
ELA Q3[3]	34%	37%	**39%**	**36%**
Math Q3	27%	36%	**39%**	**37%**

[2] As the Court recognized, "[I]t is especially difficult to terminate magnet status because of its attendant benefits to a school, including extra funding which translates into program supports not afforded other schools. Parents and students attending a magnet school have much to lose from its termination." [ECF 2471, at 6.]

[3] Due to COVID-19, Q3 data is the most recent quarterly data available for a year-over-year comparison.

[Declaration of Dr. Halley Freitas, attached hereto as Exhibit A.] Indeed, Booth-Fickett's Math and ELA proficiency went from below the District's average to noticeably above the District's average.[4]

Under the Court's newly ordered magnet criteria, even if Booth-Fickett were not a "MagnetMerit B" but merely a state "C" school, it would still get at least a year to implement its Targeted Academic Improvement Plan, and, "where there is substantial progress made in year two, a school may have one more year (year three) to retain magnet status." [ECF 2471, p. 10.]

This very significant academic progress was the result of hard turnaround work at Booth-Fickett that began in SY18-19, but really took hold and began to show results in SY19-20. The District, aware that Booth-Fickett had significant issues, hired a new principal, Demetra Baxter-Oliver, at the beginning of SY2018-19. Prior to the 2018-19 school year, 12 teachers had left the school at the same time, leaving more than 20 vacancies and low student and teacher morale. [Declaration of Demetra Baxter-Oliver, attached hereto as Exhibit B.] With the diligence of the new administration and a high level of central support, student behavior and culture and climate began to improve. [*Id.* at 2.] By January 2019, Booth-Fickett developed an academic improvement plan, filled vacant teaching and administrative positions, and reduced disciplinary issues. [*Id.*] Indeed, prior to the beginning of SY2019-20, Booth-Fickett reduced teaching vacancies

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[4] According to the Arizona State Board of Education, academic growth or improvement year-over-year is by far the most important factor affecting a school's letter grade, accounting for 50% or more of that letter grade. *See Arizona State Board of Education FAQ: How Arizona's A-F Letter Grades for Schools Work*, found at https://azsbe.az.gov/sites/default/files/media/FAQ%20Final_0.pdf (last visited June 16, 2020). This calculation also shows that Booth-Fickett's prior progression from a C to a D to an F school, from SY2017-17 to SY2018-19, was affected most by its lack of growth and did not demonstrate that the school's academic performance had decreased.

to one vacancy, engaged in intense professional learning, and significantly strengthened its professional learning communities and formative assessments. [*Id.*]

Booth-Fickett also made drastic improvements in overall discipline and discipline disparities related to African American students, decreasing disciplinary incidents from 8.57% in Q1 to 6.92% in Q3, and reducing discipline for African American students from 18.06% in Q1 to 10.85% in Q3. [*See* Declaration of Student Relations Director Dan Bailey, attached hereto as Exhibit C.] And, as the Court acknowledged, Booth-Fickett is not Racially Concentrated.[5]

The Court's order removing Booth-Fickett's magnet status did not allow the District an opportunity to provide this information, which clearly shows Booth-Fickett should retain its magnet status both because it performed at the level of an improving "C" school and because its students' academic assessments improved drastically. Removing Booth-Fickett's magnet status will punish the school, its students, and their families after having made remarkable changes and improvements — improvements that would have qualified Booth-Fickett for retaining magnet status even under the Special Master's recommendations. As recognized by the Court's Order:

> [P]arents and students have made educational decisions based on the magnet status of a school. Students have commenced an academic program at a school that spans multiple years and grades. They have developed their friends and social connections at the school. When magnet status is terminated, students and parents must reassess their choices mid-program, and there are negative educational and social ramifications that

[5] In addition, Booth-Fickett's student population, though not technically "integrated" under the USP definition, is a model of student diversity and integration: approximately 18% white, 22% African American, and 51% Hispanic. This has remained approximately stable for the past two to three years. There simply is **no** evidence that this degree of diversity is any less effective at delivering the benefits of a diverse educational community than one with 3 more percentage points of Hispanic students which meets the USP definition of "integrated."

> caution against changing schools. Terminating magnet schools should not be done lightly.

[ECF 2471, p. 6, n.3.]

At a minimum, the Court should reconsider its order, allow the District to prepare a Targeted Academic Improvement Plan, and continue the turn-around well underway at Booth-Fickett. More broadly, however, as discussed below, the District should manage its magnet program on its own, without Court supervision and orders.

II. The continued attempt to direct the operation of the District despite its unitary status is manifest error.

Pending is the District's Supplemental Petition for Unitary Status, which asks the Court "to acknowledge that it is in unitary status, dissolve the current desegregation decree, and return control of the District to its duly elected local officials." [ECF 2461, p. 85:14-16; *see also generally id.*] In his Report and Recommendation on the District's Supplemental Petition for Unitary Status (ECF 2468) (the "Unitary Status R&R"), the Special Master recommended that the District be granted unitary status in all areas of operations. [*See generally* ECF 2468.] The Order ignores the Special Master's recommendation and continues to direct the operation of the District, in derogation of the authority of its locally elected officials.

The forward-reaching commands and exercises of control in the Order are substantial. In the Order, the Court instructed the District to create and file "addendums" to the 3-Year PIP Magnet Project Priority Plan and Non-Magnet Priority Improvements Plans by September 1, 2020 and provided a 14-day period after that for objections to be filed. [ECF 2471, pp. 17:27-18:5.] In doing so, the Court created substantial and burdensome new requirements, not specified in the USP. The Court also ordered the termination of Booth-Fickett's magnet status, ordered the District to prepare and

implement a transition plan for Booth-Fickett for SY2020-21, ordered that other magnet schools that do not meet certain criteria by the end of SY2021-22 shall have their magnet status terminated, and ordered that transition plans for such schools shall be implemented at the beginning of SY2022-23. [*Id.*, p. 18:13-21.] This was an effective denial of the District's Supplemental Petition for Unitary Status, and a continuation of court operation of the District beyond any semblance of a connection to the District's prior *de jure* segregation.

This was manifest error. As more fully set forth in the Supplemental Petition [ECF 2461] and Reply in support thereof [ECF 2464], unitary status has been achieved in this case because: (a) the vestiges of the prior segregative school system have been eliminated to the extent practicable, and (b) the District has shown good-faith compliance with the desegregation decree. *See Bd. of Educ. of Oklahoma City Pub. Sch., Indep. Sch. Dist. No. 89, Oklahoma County, Okla. v. Dowell*, 498 U.S. 237, 249-50 (1991).

In the first prong of the test, the only disparities that may be considered are those that are causally linked to the specific, original Constitutional violation. *See, e.g.*, *Freeman v. Pitts*, 503 U.S. 467, 496 (1992); *Missouri v. Jenkins*, 515 U.S. 70, 89-90 (1995); *Tasby v. Moses*, 265 F. Supp. 2d 757, 764 (N.D. Tex. 2003). The fact that racial disparity may currently exist does not authorize continued court supervision unless there is a causal link between the current disparity and the original violation. *See, e.g.*, *N.A.A.C.P., Jacksonville Branch v. Duval County Sch.*, 273 F.3d 960, 974 (11th Cir. 2001); *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, 413 F. Supp. 2d 1051, 1067 (N.D. Cal. 2005); *Keyes v. Congress of Hispanic Educators*, 902 F. Supp. 1274, 1281-82 (D. Colo. 1995). A school district is "under no duty" to battle reoccurrence of racial disparities that result from residential demographic patterns rather than from the

original violation. *Freeman*, 503 U.S. at 494; *see also Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 436-37 (1976).

In this case, the Court has already determined that the only vestige of the dual school system found by Judge Frey to still exist by 1978 was eliminated by 1986. [ECF1270, p. 7.] But even if this were not the case, no party has identified any remaining vestige that is causally linked to the former segregative system operated by the District before 1951. The objecting plaintiffs have not even attempted to make that showing of causality; the District has identified an absence of causally-connected vestiges. The Special Master has not pointed to any causally-connected vestiges. This prong of the test for unitary status has been met.

The reason for the second prong of the test is that "[a] finding of good faith . . . reduces the possibility that a school system's compliance with court orders is but a temporary constitution ritual." *Morgan v. Nucci*, 831 F.2d 313, 321 (1st Cir. 1987). Thus, "[t]he focus is on the school board's pattern of conduct, and not isolated events," because "[f]ocusing on isolated aberrations blurs a court's long-term vision." *Manning ex rel. Manning v. Sch. Bd. of Hillsborough County, Fla.*, 244 F.3d 927, 946 n.33 (11th Cir. 2001). "Perfect compliance with the court's remedial orders is not required for a constitutional violator to be released from judicial oversight." *Berry v. Sch. Dist. of City of Benton Harbor*, 195 F. Supp. 2d 971, 991 (W.D. Mich. 2002). Rather, the question is "whether the school district's record throughout the litigation demonstrates that the school district has accepted the principle of racial equality." *Jenkins v. Sch. Dist. of Kansas City, Missouri*, 2003 WL 27385936, at *11 (W.D. Mo. Aug. 13, 2003) (quoting *Manning*, *Freeman*, and *Morgan*).

Here, no party has raised any concern that the District's elimination of the segregative system was only temporary or that the District will return to segregation when the injunction is lifted. The Special Master's Unitary Status R&R is full of praise for the District's compliance efforts and makes clear that the District has taken steps to comply with the hundreds upon hundreds of tasks set before it by the Court. This prong of the analysis, too, has been met.

For these reasons, as more fully set forth in the Supplemental Petition [ECF 2461], the Reply [ECF 2464], the Special Master's Unitary Status R&R [ECF 2469], the District's Response to Special Master's Report and Recommendation [ECF 2477],[6] and the objection of the Department of Justice just filed (which also concludes that the District is in unitary status) [ECF 2475], the District is in unitary status. The Court's Order effectively denying unitary status, and continuing briefing and Court control months and years into the future, was manifest error and should be corrected.

III. The Court's orders requiring the District to create and file additional plans should be rescinded.

As addressed above, the Order contains several orders for the future, including a command that the District create and file additional plans, and "addendums" to the 3-Year PIP Magnet Project Priority Plan and Non-Magnet Priority Improvements Plans, by September 1, 2020. [ECF 2471, pp. 17:27-18:5.]

These specific orders should be eliminated: even absent unitary status, these additional requirements would still be improper because they are not tied to remedying

[6] Because the deadline for the District to file its response to the Unitary Status R&R had not yet passed by the time the Court entered the Order, it was through no fault by the District that that filing, and the information contained in it, were not before the Court when it entered its Order.

the District's original Constitutional violation. "[T]he nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation." *Jenkins*, 515 U.S. at 89 (quotation marks omitted). Indeed, as the District noted in its Reply in support of the Supplemental Petition for Unitary Status, the U.S. Supreme Court has admonished that "'federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate [federal law] or does not flow from such a violation. If [a federal consent decree is] not limited to reasonable and necessary implementations of federal law,' it may 'improperly deprive future officials of their designated legislative and executive powers.'" *Horne v. Flores*, 557 U.S. 433, 450 (2009) (internal citation omitted).

Here, the Constitutional violation was the former *de jure* segregated elementary school system operated with respect to African American students before 1951. Retaining jurisdiction to require the District to provide more detail in its magnet and non-magnet improvement plans and accelerate development of additional magnet schools is not tied to addressing that former system — which, as discussed above, has no remaining vestiges in this area. These orders go well beyond the requirements of the Constitution and thus were manifest error.

Additionally, obligating the District to spend substantial time and effort to revise its plans and to accelerate its development of new magnet schools is a considerable burden that should not be imposed under the current extenuating circumstances. The public health crisis caused by the COVID-19 pandemic led to unprecedented months-long school closures in SY2019-20, and the District is currently preparing for SY2020-21 under the uncertainty of whether in-person learning will be able to resume.[7] The District is conducting contingency planning to ensure it is in the best position possible to provide a

[7] The District faces unique challenges with distance learning, given the number of its students who are economically disadvantaged and less technologically equipped at home.

quality education to its students in the coming school year regardless of the platform, but this preparation is consuming substantial District time and resources and will continue to do so at least through the end of the summer.

Adding substantial additional tasks to the load the District must juggle by September would be an undue burden. And the new tasks are, indeed, substantial. The Order directs the District to create in-depth new plans over the next 2.5 months and actually directs the District to accelerate its development of new magnet schools, accomplishing over those 2.5 months what the District would have had a year to complete under the existing plans. Specifically, the District prepared and submitted a 3-year PIP for magnet schools in which the first year (beginning in September 2020) would be dedicated to planning and the third year would potentially involve the launch of a new magnet program; the Court directs the District to now complete that whole first year of planning by September and to accelerate the entire plan. [ECF 2471, pp. 3:12-4:22 ("In effect, the District should have already completed the provisions set out in § D.3 of the 3-Year PIP for year one, Spring-Summer.").] Under the extenuated circumstances, this would be an undue burden. For these reasons, the Court should eliminate its orders that the District create and file new plans.

IV. The Court's Order imposing its own new criteria for magnet schools should be rescinded.

Finally, the Court's Order imposing new criteria for magnet schools, both for academic and integration measures, should be rescinded. First, as noted above, the District is in unitary status. Second, the orders cannot be causally tied to remedying specific conduct which ended 70 years ago. Third, the use of a state-assigned letter grade is a poor and arbitrary indicator of a school's current overall academic performance. The Court's Order set the following criteria for a magnet school to retain its status:

> [A] magnet school must be an A or B school as graded by the state, AZMerit scores. The Court relies on the state AZMerit scores for two reasons 1) they reflect the academic performance of a school and 2) the scores are readily apparent and easily understood by students and parents.

[ECF 2471, p. 9.]

Basing magnet status on the state-assigned grade alone is inappropriate in large part because Arizona bases more than half of its school letter grades on growth or improvement from the prior year. Specifically, for K-8 schools, Arizona bases 50% of the school letter grade on "Growth," 30% on "Proficiency," 10% on "Proficiency" and "Growth" on English Learner Assessment, and 10% on "Acceleration/Readiness," an indicator that takes into account increases in students scoring proficient or higher, decreases in those scoring minimally proficient, decreases in chronic absenteeism in comparison to the prior year, and improvement in the school's subgroup scores compared to the prior year. *See Arizona State Board of Education FAQ: How Arizona's A-F Letter Grades for Schools Work*, found at https://azsbe.az.gov/sites/default/files/media/FAQ%20Final_0.pdf (last visited June 16, 2020).

In sum, the majority of a K-8 school's letter grade is based on comparison to the prior year, rather than on current-year proficiency. And, under the Court's Order, if a magnet school that is performing better than many "B" and "C" schools does not improve that performance year-over-year, it will lose its magnet status.[8] Such a standard would punish a school and its community even though its scores were the same as or similar to the prior year's, and even though it outperformed other schools that received better letter grades, simply because there was little or no growth compared to the prior year.

[8] This is exactly what happened with Booth-Fickett, whose SY2019-20 benchmark assessments showed that its students performed much better than the District average.

The standard set forth in the District's Response to the Special Master's R&R regarding the 3-year Plus PIP and Magnet Plans (ECF 2422) is a better standard. In summary, the District proposed a series of measures using a system of points for meeting each measure. [ECF 2422, pp. 5-7.] Such a standard more accurately tracks the academic achievement of a magnet school without prematurely or arbitrarily removing magnet status, and it allows a school making progress in multiple areas to continue that academic improvement even if its state-assigned letter grade does not reflect that progress.

The District also notes that use of letter grades, which in turn are based only on the two categories of performance recognized under that letter grade system, is a blunt tool that can mask substantial progress in improving academic outcomes. If a school works hard, focusing on the performance of the bottom quartile and successfully moves students up the scale, but not across the threshold, that result may never show in this two category system. Similarly, large changes in performance gaps between student groups may be masked, but small changes may be greatly exaggerated, depending on whether or not those changes are close to the single boundary between the two broad categories.

Moreover, year-to-year comparisons actually compare different groups of students and do not measure changes within a cohort of the same students over time. Measuring changes in the same cohort (e.g., 3rd graders in 2016, 4th graders in 2017, and 5th graders in 2018) may give a better picture of the impact of a particular school on achievement.

Finally, the very small numbers of various groupings of students at certain schools lead to volatile testing results that change radically from year to year and quite simply are an inadequate basis to draw conclusions on magnet status and funding. Many of the groups measured involve small numbers, some as low as 5 and 6 students, and others substantially less than 30. This can lead to volatile test results from year to year,

particularly when one realizes that we are separating students into only two groups, those who are "likely to be ready" for the next course ("pass") and those who are "likely to need support" to be ready for the next course. The difference between those two broad groups may be only a few points in the scale scores.

The District also objects to the Order to the extent it imposes a short-term integration criterion on magnet status. Though magnet schools are certainly intended as tools of integration, overall progress in integration is largely dependent on factors beyond the District's control, and a magnet may be deemed successful even if the school is not "integrated" by any arbitrary definition, if progress is being made, or if District believes that the school remains more integrated than it would be without magnet status.

In short, the District, with its talented staff of actual educators, and not the Court, is best equipped to determine the academic and integrative merit of a magnet school within the overall context of the District in a nuanced, case-by-case analysis taking into account a range of academic, demographic and community factors.

Conclusion

For the foregoing reasons, the Court should reconsider and revise its Order [ECF 2471] as addressed herein.

Dated this 18th day of June, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of June, 2020, I electronically transmitted the attached foregoing document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic filing to all CM/ECF registrants.

/s/ P. Bruce Converse