IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Roy and Josie Fisher, et al., Plaintiffs and United States of America, Plaintiff-Intervenor, v. Tucson Unified School District, et al., Defendants, and Sidney L. Sutton, et al., Defendants-Intervenors,	No. CV-74-00090-TUC-DCB (Lead Case)
Maria Mendoza, et al., Plaintiffs, and United States of America, Plaintiff-Intervenor, v. Tucson Unified School District, et al. Defendants.	No. CV-74-0204-TUC-DCB (Consolidated Case) **ORDER**

Reconsideration: GRANTED IN PART DENED IN PART

Simultaneously with the issuance of this Order, the Court amends its Order issued on June 4, 2020, (Doc. 2471), in part to allow the District to present arguments of mitigation to show cause why magnet status should not be terminated for Booth-Fickett K-8 school. The Court's decision to order magnet status removed was "[b]ased solely on the school letter grades for SY 2016-17, 2017-18, and 2018-19," (Motion (Doc. 2481) at 1), because the District failed to present any evidence what so ever regarding the student achievement profile for the school. This was not the first time the Court was forced to piece together data from various studies and reports, (Order (Doc. 2123) at 20 (citing Order (Doc. 1753) at 16), including obtaining the State's accountability scores. *See* www.azreportcards.azed.gov. The Court has previously addressed this omission. In its September 6, 2018, Order, it wrote: "To be clear, there are two magnet school criteria, Integration and Student Achievement." (Order (Doc. 2123) at 23.) "Of special concern to the Court is the District's omission of the State's accountability scores for the schools." *Id.* at 24. The Court continued: "The District cannot move forward by ignoring the elephant in the room: an academically 'failing' manet school or program." *Id.* 2123. The District omits student achievement data reflecting a magnet school's student achievement profile at its own risk of having the Court turn to the public source for this data, which the Court has clearly identified as necessary and relevant to discussions involving magnet status.

In its Motion for Reconsideration, the District presents evidence that Booth-Fickett might have an AZDMerit grade C in 2019-20. This is a big turn-around for the school which has a C school in 2016-17 and has gone downhill since and was an F school in 2018-19.[1] Accordingly, the Court will allow the District to treat Booth-Fickett the same as the other six magnet schools which have AZMerit grades of C: Bonillas ES, Borton ES, Tully ES, Drachmant K-8, Roskruge K-8, and Palo Verde HS. The District may file a TAIP and

[1] Booth-Fickett has been a magnet school since the inception of the USP and, arguably, a beneficiary of the full attention of the District to bring it into compliance with magnet standards, fully funded, with a magnet improvement plan and annual Magnet School Plans (MSPs). (Order (Doc. 2471) at 12.) The Court had every reason to believe that if improvement had been impracticable over the past seven years, it would remain so in SY 2019-20.

Transition Plan for Booth-Fickett.

The Court is not surprised by the District's argument that this Court does not have jurisdiction to enter any of the directives issued in the Order because disparities addressed by such directives "cannot be linked to the *specific, original Constitutional violation*," which was the subject of this lawsuit as filed in 1974. (Motion for Reconsideration (Motion) (Doc. 2481) at 7.) This argument is not properly presented because a motion for reconsideration should not be used to ask a court "to rethink what the court ha[s] already thought through, rightly or wrongly." *Above the Belt, Inc. v. Mel Bohannon Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D.Va.1983). As this Court has repeatedly explained, if this were true as a matter of law, the case would not have been remanded in 2011. (Order (Doc. 2123) at 6 (citing *Fisher v. TUSD*, 652 F.3d 1131 (9th Cir. 2011)). As this Court understands the law, it shall grant unitary status when the District demonstrates "good faith implementation, monitoring, revision, and operation of the District under the USP for at least three years and the elimination of the vestiges of past discrimination to the extent practicable." *Id.* at 7. Even if the District is correct regarding the vestige's argument, it remains to be determined whether it has acted in good faith to implement the USP. The Court has made it clear that it does not intend to look back again at the desegregation directives issued in Judge Frey's 1978 Order; this approach was soundly rejected by the Ninth Circuit when it remanded the case in 2011.

It has been this Court's approach to consider the good faith prong of the analysis by looking at the District's undertakings regarding the various provisions of the USP. The Court's June 4, 2020, 3-Year PIP: CMP Order was nothing more than a continuation of the analysis begun in the September 6, 2018, Order. The Court did not reach the issue of unitary status because as the District well knows their Supplemental Petition for Unitary Status was not yet fully briefed. The Court did rely on information provided by the Special Master in his responsive Report and Recommendation (R&R) because it focused on the District's "assertions about its efforts and the effectiveness of those efforts in addressing the provisions of the USP." (R&R (Doc. 2468) at 2.) Therefore, there is significant overlap

between his R&Rs filed in response to the Notices of Compliance (NC): 3-Year PIP: CMP and the R&R to the Supplemental Petition for Unitary Status, (R&R (Doc. 2468) at 3-12). *Compare* (R&R (Doc. (Doc. 2378)). The R&R in response to the Supplemental Petition for Unitary Status is the more up to date accounting. Finally, the Court does not intend, nor would it be appropriate, to reverse course as a matter of law on reconsideration, especially without "provid[ing] an opportunity for response." LRCiv. 7.2(g)(2). The Court does not afford this opportunity to the Plaintiffs or ask for a Report and Recommendation (R&R) from the Special Master to the District's Motion for Reconsideration because of the sensitive nature of magnet status for Booth-Fickett ES as the school begins in August.

The Court denies reconsideration in all other regards on the merits and importantly takes this opportunity to make the record clear because it abbreviated the record in the June 4, 2020, Order to expedite its issuance prior to the commencement of SY 2020-21. The Court takes this opportunity to add citations here to address the District's assertions on reconsideration that it has imposed "new criteria" of its own making on the District. This is wholly without merit. The 3-Year PIP Magnet Project Priorities Plan (MPPP) addendum and Action Plans requested by the Court in its recently issued June 4, 2020, Order (Doc. 2471) are simply another opportunity afforded by this Court to the District to address express provisions contained in the USP. Section II.E.3 was expressly referenced by this Court in its Order issued September 6, 2018, excerpted here as relevant to the District's request that the Court reconsider the directive for the MPPP Addendum and Action Plans, as follows:

> By April 1, 2013, the District shall develop and provide to the Plaintiffs and the Special Master a Magnet School Plan, . . . In creating the Plan, the District shall, at a minimum: (i) consider how, whether, and where to add new sites to replicate successful programs and/or add new magnet themes. . . (ii) improve existing magnet schools and programs that are not promoting integration and/or educational quality; (iii) consider changes to magnet schools or programs that are not promoting integration and/or educational quality, including withdrawal of magnet status
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> Pursuant to these considerations, the Magnet School Plan shall, at a minimum, set forth a process and schedule to: (vii) make changes to the theme(s), programs, boundaries, and . . . in conformity with the Plan's

> findings, including developing a process and criteria for significantly changing, withdrawing magnet status from, or closing magnet schools or programs, that are not promoting integration or educational quality; (viii) add additional magnet schools and/or programs for the 2013-2014 school year as feasible and for the 2014-2015 school year that will promote integration and educational quality within the District, . . .

(Order (Doc. 2123) at 19 (quoting USP (Doc. 1713) § II.E.3))

The Court asked the District to prepare the 3-Year PIP: CMP to satisfy USP § II.E., which the Court accepted in the June 4, 2020 Order except for the provisions identified in the excerpt above. The MPPP Addendum and Action Plans, which the Court directed the District to file by September 1, 2020, address the express provisions excerpted above.

The MPPP addendum provides the "how, whether, and where to add new sites to replicate successful programs." This directive was initially set for completion SY 2013-14, as feasible, and for SY 2014-15. The Court asked the District to complete this work in its September 6, 2018, Order. The request for the District to file the MPPP is not a new directive, requirement, or criteria. As the Court said, "the District should have already completed the provisions set out in the 3-Year PIP: CMP § D.3, [Review and Assess; Develop Proposal, for 'viable option(s) from the list of potential candidates and potential themes from the comprehensive study.']" (Order 2471) at 4 (citing 3-Year PIP: CMP (Doc. 2270-2) at 16)). "[T]his was in fact the goal of the Court's directive that the District prepare a 3-Year PIP." (Order (Doc. 2471) at 3.) The Court rejects the District's characterization of the MPPP addendum as something new.

The Action Plans address the extent to which it is reasonably practicable to improve integration at non-magnet schools and/or take measures to ensure that students attending Racially Concentrated schools are not abandoned in floundering academic institutions. The District shall "consider changes to magnet schools or programs that are not promoting integration and/or educational quality, including withdrawal of magnet status," *supra above,* and surely this does not mean the District can simply abandon a failing school once magnet status is withdrawn. In fact, the Court held that "the USP does not call for integrated magnet schools; it requires district-wide integration." (Order Doc. 2123) at 31.) "The

natural consequence of identifying TUSD schools that are potential future magnet schools is the identification of schools that are not. "For these schools, the 3-Year PIP: CMP shall identify viable non-magnet strategies . . . On a school-by school basis, the District shall identify the non-magnet strategies, if any, that would improve integration at that school and adopt school specific integration plans. Priority shall be given to creating Integrated schools and integrating Racially Concentrated schools." *Id.* And, where the District identifies schools that may always be Racially Concentrated or never Integrated, it shall include improvement plans focused on academic student achievement. *Id.* at 32.

The Court agreed with the Special Master that the 69 integration plans for the non-magnet schools were generic. The Court's directive on June 4, 2020, for the District to prepare school-specific, rather than cookie-cutter, Action Plans for integration of approximately nine non-magnet schools, which the District rated as having High potential for integration, is not new. As the record above reflects, this requirement was expressly included in the USP § II.E.3, reiterated in the Court's Order of September 6, 2018. The Court rejects the District's characterization of the Action Plans: Integration as something new.[2]

The Court also called for the District to prepare Action Plans for improving student achievement for approximately 19 schools with AZMerit grades below C, with priority on Racially Concentrated schools. Admittedly, this is not an express provision of the USP § II.E.3, but it is required by USP § V. "The purpose of this section shall be to improve the academic achievement of African American and Latino students in the District . . ., (USP § V.A.1), and to improve the academic achievement and educational outcomes of the District using strategies to seek to close the achievement gap and eliminate the racial and ethnic disparities for these students in academic achievement, ..., USP § V.E.1.a. The

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[2] *Cf.*, (Order (Doc. 1983) at 4) (citing (Order (Doc. 1870) at 7 (referencing (Order (Doc. 1870) at 7 (in context of existing magnet schools, requiring transitional plans so these schools continue to move forward under the USP regardless of whether they retain magnet status or not.)

Court rejects the District's characterization of the Court's directive that the District prepare Action Plans: Student Achievement as something new for addressing 19 non-magnet schools with AZMerit grades D and F, starting with plans for Racially Concentrated schools.

Next, the Court turns to the District's request that the Court reconsider and rescind the imposition of "its own criteria for magnet schools . . ., both for academic and integration measures." (Motion (Doc. 2481) at 11.) The Court issued no such directive; there is nothing to rescind. The Court directed the District to develop alternative criteria to measure integration and student achievement relevant to magnet status, especially to determine when magnet status should be terminated. Furthermore, the Court understands that magnet program integrity needs to be balanced by magnet program stability. The District is free to develop graduated definitions, a point system, or any other criteria reflecting acceptable variables for measuring integration and student achievement, as long as the criteria expressly, specifically, and clearly identifies the tipping point when the balance weighs decidedly to end magnet status. The Court has left the criteria up to the District, with input from the Special Master. The Court has not rejected any criteria. *See* (Order (Doc. 2123) at 24-26 (describing need to measure student achievement to ensure a school is academically attractive, i.e., a measure that reflects a school's academic student achievement profile), at 31-32 (conceptually approving idea of measuring degrees of improved integration).

In the September 6, 2018, Order, the Court referenced the District's proposed data markers for both Integration and Student Achievement, which included five criteria: 1) A or B school; 2) Proficiency rates for magnet schools meeting or exceeding overall state proficiency rates; 3) academic growth of all students higher than state median in reading and math; 4) academic growth of bottom 25% of students, and 5) reduced achievement gaps. The Court's objection was that the District then proceeded to measure only goals 2 and 5, ignoring the AZMerit grade data entirely. The Court held that AZMerit grades below A and B, especially D and F grades, could not be ignored because of their visibility in the

community as academic accountability scores. (Order (Doc. 2123) (citing CMP (Doc. 1898) at 10-15); Order (Doc. 1753) at 9-10)).

In the June 4, 2020, Order, the Court referenced, without comment, the various measures for student achievement used by the Special Master and those proposed by the District's point system in its Notice of Compliance with Special Master's R&R. (Order (doc. 2471) at 9 (citing TUSD NC (Doc. 2422)). The point system criteria, being proposed in response to the R&R, had not been reviewed by the parties and the Mendoza Plaintiffs sought to strike it. The Court did not reject the proposal, but simply ordered that the Mendoza Plaintiffs' objections be taken into consideration. *Id.*

In respect to student achievement, the Court's Order issued June 4, 2020, did three things: 1) it held that magnet schools with AZMert grades of A or B meet magnet standards; 2) it held that there shall be no magnet schools with AZMerit grades D and E because the negative connotations of these publicized accountability scores cannot be overcome by any alternative measures, and 3) directed the District to work with the Special Master to create alternative measures for the District to use going forward for magnet schools with C AZMerit grades, which the Court described as a TUSD MagnetMerit grade. The Court's only directive regarding the MagnetMerit grade was that it be a credible reflection of a solid academic program and that the alternative measures be applied in a graduated fashion so as to identify a clear tipping point for terminating magnet status, preferably before, but at least as soon as possible after, a school receives an AZMerit score of D or E.

There is no merit to the District's complaint that the Court imposed "its own criteria for magnet schools . . ., both for academic and integration measures." The Court ordered the District to do this work. It did not set a deadline, but the work must necessarily be completed before the District can complete its review of the existing magnet schools with AZMerit grades of C and that are Racially Concentrated or not Integrated. The Court extends the 21 days in allowed in the June 4, 2020, Order.[3] The Court allows the District

[3] The Court does not address COVID 19 complications because the District did not request a related extension of time.

two weeks to synthesize the various alternative measures for Integration and Student Achievement into a graduated rating system that meets the goals described by the Court in the June 4, 2020, Order and clarified here. The 21 days for filing notices for any of the existing magnet schools that do not receive a MagnetMerit grade B or that are not Integrated shall follow and be the simultaneous deadline for the District to file the MagnetMerit B and Integration alternative measures, which shall clearly identify the tipping point where termination of magnet status is triggered.

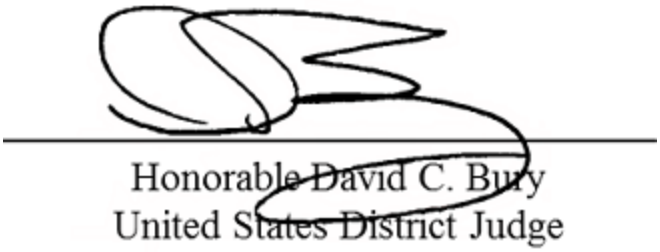
Accordingly,

IT IS ORDERED that the Motion for Reconsideration (Doc. 2481) is GRANTED IN PART for Booth-Fickett and DENIED IN ALL OTHER PARTS.

IT IS FURTHER ORDERED that the deadline for filing the MagnetMerit B and Integration Notices with the Court for existing magnet schools with AZMerit grades of C, including Booth-Fickett ES, is extended to July 29, 2020.

IT IS FURTHER ORDERED that the District shall file the alternative measures for Integration and the MagnetMerit B for student achievement by July 29, 2020.

Dated this 22nd day of June, 2020.



Honorable David C. Bury
United States District Judge