

IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF ARKANSAS  
WESTERN DIVISION

LITTLE ROCK SCHOOL

PLAINTIFF

v.

NO.4:82CVO866 BSM

PULASKI COUNTY SPECIAL  
SCHOOL DISTRICT, ET AL

DEFENDANT

MRS. LORENE JOSHUA, ET AL.

INTERVENORS

KATHERINE WRIGHT KNIGHT, ET AL.

INTERVENORS

**Joshua Intervenors' Hearing Brief Regarding the NLRSD**

**I. Proposed Findings of Fact**

In these proposed findings, the many designations "B# --" cite the "Bates number" on a page provided by NLRSD in response to Joshua Intervenors' discovery. Intervenors also cite the NLRSD Desegregation Plan of April 29, 1992 [a 48 page version], Office of Desegregation Monitoring [ODM] reports concerning the NLRSD [by date and page number], documents which the NLRSD provided to ODM [in connection with ODM's work on its 2008 report], and some of Intervenors' discovery requests to the NLRSD and the district's responses. Intervenors interpret the Court's scheduling order to require NLRSD to identify particular proposed findings which NLRSD challenges. The district's pre-hearing responses to the proposed findings and Intervenors' proposed exhibits, as well as its opening showing in the hearing will play important

roles in shaping Intervenor's initial cross-examinations and responsive trial presentation.

A. Introduction

1. The court-ordered Desegregation Plan of the North Little Rock School District [NLRSD] is dated April 29, 1992. The Plan includes an "Introduction" identifying 10 "segregative acts," which NLRSD representatives were "found . . . to have committed . . . ." [Plan at 5] The "Table of Contents" lists 10 categories of remedial provisions addressed in the Plan.

2. On September 18, 1995, this court granted the NLRSD release from supervision and monitoring of student assignment. [ODM Report, 6-9-04 at 2]

3. On March 27, 1996, this court also released the district from supervision of its gifted and talented program in the elementary schools. [ODM Report, 6-9-04 at 2]

B. Staff Recruitment Plan [Plan Section 2 and 2A at 12-15]

4. Regarding personnel, this court found "as segregative acts" that: [a] black persons "were underrepresented on the administrative staff and teaching faculties of the NLRSD schools" [NLRSD Plan Introduction at 5, para. 2]; and [b] "the NLRSD has failed to have [black persons] coaching at the senior high school level." [Id. at para. 4]

5. In the years indicated, black persons constituted the following proportions of the teachers in the NLRSD:

school year black teacher representation

1984-85 104 of 519 [20.0 percent]

1985-86 102 of 542 [18.8 percent]

1986-87 95 of 550 [17.3 percent]

1987-88 87 of 526 [16.5 percent]

2006-07 95 of 755 [12.6 percent; 13.9 % minority]

2007-08 98 of 772 [12.7 percent; 13.9 % minority]

2009-10 101 of 766.42 [13.2 percent; 14.5 % minority]

[Sources: B# 12,691 (1984-85 to 1987-88; calculations made by Intervenors); charts provided to ODM by NLRSD (data for 2006-07 and 2007-08); B# 82 (2009-10)]

6. ODM's Report of June 6, 2008 concerning the NLRSD states: "In 2007-08, thirteen percent (13%) of NLRSD's teachers were black, which is 3% fewer than what we reported in ODM's June 2004 report." [ODM Report, 6-6-08 at 5]

7. Data supplied by NLRSD shows that in the period from 1984-85 through 2009-10, the district teaching force increased by 247.42 persons; in the same period, the number of African American teachers decreased by 3 persons. See FOF# 5.

8. The NLRSD "Staff Recruitment Plan" includes a requirement that the district "[develop] reasonable goals and timetables for each classification." [Plan at 15]

9. In 1995 and 1999, ODM found that NLRSD "had failed to establish any type of goals, numerical standards, general guidelines, or timetable against which to measure the level

of black certified staffing and its rate of change." [ODM Report, 6-9-04 at 10]

10. As of 2004, the NLRSD had adopted "a goal to employ a staff that ensures students at each school will have access to, and contact with, a diverse staff of licensed personnel." [ODM Report, 6-9-04 at 10]

11. More recently, "the NLRSD . . . set a goal of each school having a minority staff that is equal to at least twenty percent (20%) of total employed staff." [ODM Report, 6-6-08 at 5; B# 675]

12. In the school year 2005-06, the Crestwood and Lakewood Elementary Schools were two of the three elementary schools in the district with an enrollment under 30 percent African American. [ODM Report, 12-9-08 at 41] In that school year, 1 of the 22 teachers at Crestwood was African American; at Lakewood Elementary, all 23 teachers were white persons. [B#s 42, 48]

13. ODM's Report of June 6, 2008 states (at 6): "It is still possible for students to attend some elementary schools in the NLRSD and not have contact with a minority teacher. In 2007-08 those schools were: Amboy, Boone Park, Seventh Street, North Heights, Crestwood, Park Hill, Pike View, Belwood, and Glenview." 14. In 2007-08, there were 14 elementary schools in the NLRSD. [ODM Report, 12-9-08 at 49] ODM's finding refers to 9 of those schools.

15. This paucity of African American teachers in many elementary schools was not inevitable. [a] In 2005-06, 4 of

the 13 teachers employed at the Meadow Park Elementary School were African American persons. [B# 46] [b] In 2006-07, 5 of the 14 teachers assigned to the Meadow Park Elementary School were African American persons. [B# 69] [c] In 2007-08, 6 of the 16 teachers assigned to the Meadow Park Elementary School were African American persons. [B# 78]

16. NLRSD asserts that as of October 14, 2009, each of the 9 elementary schools cited by ODM had "at least one certified minority teacher on staff." [B# 675]

17. Unlike for earlier years, in responding to Joshua Intervenors' discovery, the NLRSD did not provide for 2008-09 and 2009-10 data allowing determination of the number of teachers, by race, assigned to each school. [Compare B#s 42, 65 and 78 with B#s 79 and 82]

18. The NLRSD has allowed the presence of African American teachers in its elementary schools to depend on the willingness of school principals' to have African American teachers.

19. The "Staff Recruitment Plan" section of the NLRSD Desegregation Plan promised development of a budget providing necessary funding for the activities identified in the recruitment plan. [NLRSD Plan at 12] The recruitment plan included actions designed to increase the number of black teachers. [Plan at 12-14]

20. ODM's Report of 6-9-04 shows [at 9] that the recruitment budget was as follows in the school years indicated:

1996-97	\$ 9,990
1997-98	\$ 9,140
1998-99	\$ 10,400
1999-00	\$ 11,400
2000-01	\$ 12,040
2001-02	\$ 10,540
2002-03	\$ 7,925

21. ODM concluded: "The 2002-03 budget, which was the most current year for which NLRSD supplied data, was the lowest in the seven years we reviewed. The 2002-03 budget was 25% lower than that of the previous year and 34% lower than the highest budgeted amount, which was in 2000-01." [Report of 6-9-04 at 9]

22. The recruitment budget was as follows in the period from 2005-05 through 2009-10 [NLRSD response to Intervenor's Interrogatory number 10]:

2005-06	\$ 10,000
2006-07	\$ 10,000
2007-08	\$ 10,000
2008-09	\$ 13,500
2009-10	\$ 15,475

23. The NLRSD continued to fund staff recruitment at a level below the period 1998-99 through 2001-02 until the pendency of the district's motion seeking a court determination of unitary status.

24. Taking account of the violation concerning the make-up of "teaching faculties," the long delay in adopting the

hiring goal required by the NLRSD Plan, the total racial make-up of the teaching corps through the years, the amounts provided to respond to the Plan requirement for a recruitment budget, faculty racial make-up at the elementary level, and the incomplete data provided, the NLRSD has failed to demonstrate that it has in this sphere substantially complied with its Plan or eliminated the vestiges of its discrimination to the extent feasible.

25. Data provided by the NLRSD shows the following regarding the employment of coaches at the senior high school level (grades 9-12). [B#s 89, 91, 93, 95]

<u>Year</u>	<u>White</u>	<u>AfricanAmerican</u>
2006-2007		
Head coach	12	2
Asst. coach	15	3
Cheerleading		
dance, drill	5 [32]	1 [6]
<u>2007-08</u>		
head coach	13	2
asst. coach	16	3
cheerleading,		
dance, drill	5 [34]	1 [6]
<u>2008-09</u>		
head coach	13	2
asst. coach	17	3
cheerleading		
dance, drill	5 [35]	1 [6]

2009-10

head coach	13	2
asst. coach	17	3
cheerleading		
dance, drill	5 [35]	1 [6]

26. In the four year period addressed in FOF# 25, the NLRSD employed 6 African American persons each year, while the total of white persons employed grew from 32 to 35. The data evidences an upward limit on the employment of African American coaches at the high school level. Absent explanation, the NLRSD can not be found, in this area, to have satisfied its burden of establishing substantial compliance with its Plan [at 15 ("coaching positions"), or to have eliminated the vestiges of its discrimination to the extent practicable.

C. Special Education Plan [Plan Sections 3, 3A at 16-23]

27. This court in 1984 found the "segregative acts" of the NLRSD to include assigning black students to special education classes so that they were significantly overrepresented, without a valid basis for this pattern. In addition, the district tended to classify white students as "learning disabled" and black pupils as "mentally retarded." [NLRSD Plan at 5]

28. The NLRSD remedial plan includes a requirement to utilize "alternative instructional practices" which "would enable some students at risk of EMR placement to improve



their performance to the extent that referral for special services would not be necessary." [NLRSD Plan at 19]

29. The "NLRSD's plan for remediating violations related to the overrepresentation of blacks in special education programs" [Plan at 23] includes the following requirements.

. . . [T]he NLRSD did provide that the District would maintain records sufficient to identify and tabulate separately the total number of students by race in each school and grade level and by type of placement who are (a) referred for consideration for placement in a special education program; (b) evaluated for such placement; and (c) actually placed in a special education program. This data will be maintained in the central administrative offices although separately from each student's individual file. This data is to be reviewed by the central administrative staff and reported to the Court annually.

30. ODM wrote as follows in its Report of June 9, 2004 concerning plan implementation in the NLRSD. "The district maintains an extensive database on all special-needs students and updates the information as needed. However, contrary to the district's plan, officials have not filed special education data with the Court every year, although the NLRSD has sent its annual reports on special education to ODM every year." [Report at 20]

31. ODM wrote as follows in its Report of June 6, 2008 concerning the special education reporting requirement [at 8-9].

### **Noncompliance**

\* The NLRSD does not submit annual special education reports to the Court. Until 2005, the district did submit annual

special education data to ODM, which the NLRSD's Office of desegregation considers an arm of the Court; however, the district discontinued this practice.

- \* The Assistant Superintendent for Desegregation indicated that the failure to provide special education reports for the past two years was an oversight. The district had two changes in special education administrators during that time. Apparently the requirement to submit the special education report was lost in the transitions.
- \* On May 14, 2008, the ODM received copies of NLRSD's special education reports dating from 2005, through 2008.

32. When filed, the NLRSD's version of these reports did not comply with the requirements of the remedial plan. Each of the reports for the period 2005-2008, referenced by ODM, was a single page and included only: total average daily enrollment in the system (with no breakdown by racial group); the total number and the percentage of students with a special education classification; the total number of students in each racial group with a special education classification; the total number of students by disability category (but not by race); the total number of male and female students with a special education classification (but not by race). [B#s 680-683).

33. These four recent reports do not contain any information on the "total number of students by race in each school and grade level and by type of placement . . . ." [NLRSD Plan at 23]. They do not show, by school, the numbers of students: [i] "referred for consideration for placement in a special education program" [id.]; [ii] "evaluated for such

placement" [id.]; or [iii] "actually placed in a special education program" [id.]. One can not determine from the court report, by race and sex, the proportion of each racial group with a special education placement, or any particular category of placement.

34. In sum, the reports do not contain the required information, which has been needed to determine whether the problem of racial disparity which gave rise to the remedial provisions persists in the NLRSD as a whole, or in any school.

35. The NLRSD had available the data necessary to provide a complete report to the court. [ODM Report 6-9-04 at 18; ODM Report 6-6-08 at 8; B# 7498 at para. 3 (referral and eligibility data)]

36. The reports filed with the court do allow a determination that in the four years covered by the reports the number of male students with a special education classification exceeded the female number by 1.9, 2.2, 2.1 and 3.1 times. [B# 680-83]

37. The NLRSD provided to ODM monitors a table allowing calculation, by race and sex, of placement rates in the NLRSD special education program as of February 13, 2006 (the 2005-06 school year).

38. As shown by this table, the placement rates for each 100 students of a racial/national origin group were as follows in 2005-06:

In SPED Enrollment Rate

Black Male -	565	of	2690	-	21.0
Black Female -	285	of	2626	-	10.85
Total Black -	850	of	5316	-	15.99
White Male -	177	of	1624	-	10.90
White Female -	80	of	1646	-	4.86
Total White	257	of	3270	-	7.86
Hispanic Male -	12	of	224	-	5.36
Hispanic Female	12	of	199	-	6.03
Total Hispanic	24	of	423	-	5.67
Other Male	3	of	29	-	10.34
Other Female	0	of	25	-	0
<u>System Total</u>	1134	of	9063	-	12.51

39. As shown by the table in FOF# 38, in 2005-06, black male students were 1.93 times as likely as white males to have a special education placement and black female students were 2.23 times as likely as white females. Overall, the placement rates for black pupils were 2.03 times that for white pupils.

40. As shown by the table in FOF# 38, there was also a disparity in the placement rates for male and female students. Here, 757 of 4567 males [placement rate of 16.58] and 377 of 4496 females [placement rate of 8.39] had special education placements. This is a disparity in placement rates of 1.98 to 1.

41. There was no valid basis for the disparity in placement rates between male and female students shown in FOF#s 30 and 34.

42. As shown by the table in FOF# 38, in 2005-06, approximately 1 of each 5 black male pupils in the NLRSD had a special education placement.

43. Pursuant to a "suggest[ion]" in the NLRSD remedial plan [at 23], the Arkansas Department of Education has monitored annually the compliance of the NLRSD special education program with the requirements of state and federal law. [E.g., B#s 707, 712]

44. The Arkansas Department of Education has repeatedly cited the NLRSD for having an overrepresentation of black students in the district's special education program. [B#s 707 (ADE letter to NLRSD on 1-8-07); 712 (ADE letter to NLRSD on 4-23-08); see also 4920 (noting citations for 2002-03 to 2004-05) and 8831 (noting citations for 2004-05 to 2007-08)]

45. Each year, in accord with the requirements of Arkansas law, the NLRSD submits to the State a system "school improvement plan." This plan has identified a "disproportionality of minority black) students in special education" as a problem requiring a remedy. [B#s 4894 (2005-06), 5472 (2006-07), 7459 (2007-08), 8194 (2008-09), 8807 (2009-10)]

46. The NLRSD system school improvement plan for 2005-06 contains the following paragraph [B# 4921].

Data collected in 2003-04 with the Special Education School Self-Assessment (SESSA) indicated most schools had screening committees for pre-referral purposes. However, upon closer scrutiny, many of those schools did not have a formal procedure for problem-solving pre-referral interventions as part of the screening process. A review by schools of the number of new referrals compared to the number of students determined eligible indicates that of all the referrals/evaluations, only 56% of those students were actually found to have a disability. This would indicate a need for a more systematic and consistent pre-referral/screening process.

47. The NLRSD 2007-08 system school improvement plan contains the following paragraph [B# 7498]

The District has collected data on the number of new referrals each year and of those referrals, the number of students determined eligible for special services. A review of that data indicated that in 2004-05, 54% of those students referred qualified for services. In 2005-06, the data showed 56% were determined to be eligible. During 2006-07, all schools established problem-solving (SPRINT) teams. The data for 2006-07 indicated that 58% of the students referred met the eligibility criteria for special education. Although each year the District has improved in this area, gains have been minimal and show that continued emphasis is needed for systemic change.

48. As noted in FOF#s 30 and 31, despite the requirements of the Desegregation Plan regarding the content of the report to the court on special education, the reports filed (belatedly), have not contained data allowing a comparison, by race, of referral and placement rates for the system, or its individual schools.

49. In view of the longstanding failure to provide the required statistical data, the continuing overrepresentation cited by the ADE, and the placement rate of black male

students in special education, the NLRSD has failed to establish that it has in this sphere substantially complied with its Plan or eliminated the vestiges of its discrimination to the extent feasible.

D. Compensatory Education [Plan Section 4 at 24-36]

50. This court found the "segregative acts" of the NLRSD to include that "the NLRSD does not provide adequate compensatory education programs for black students." [Plan at 5, para. 9]

51. Section 4 of the NLRSD Plan includes the following content.

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The District recognizes, however, that the regular curriculum is often insufficient in aiding disadvantaged students, particularly disadvantaged minority students suffering the effects of centuries of societal discrimination, to achieve mastery of basic skills. Therefore, within the framework of a comprehensive curriculum which meets and exceeds state standards and which is structured to meet the varying individual needs of all students, the North Little Rock School District must address identified remedial needs of disadvantaged minority students. The district also recognizes that achievement disparity does exist between the black and white student population. Addressing the disparity issue may start with the development of disparity plans at each campus unit. [Plan at 24; emphasis added]

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Stipulated Compensatory Education Programs to be Implemented by NLRSD with Settlement Monies

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In its October, 1986 Supplement to Plan for Implementing the remedial order of the Court of Appeals for the

Eighth Circuit as it applies to the NLRSD, approved by the Court in its Order of February 27, 1987 the NLRSD described in Section 4: Compensatory Education, certain educational programs needed to address achievement disparity of black students which could be implemented only with additional funding from the State. With the settlement monies from the State, the NLRSD will now be able to implement those programs as described below. [Plan at 32; emphasis added]

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## II. Pupil Services (and Program Monitoring)

Goal: To assess student achievement and monitor the reduction of achievement disparity between black and non-black students. [Plan at 33; emphasis added]

### Diagnosis and Prescription

Standardized achievement testing will be extended to grade 1 and grade 11 in order to provide more sequential and comprehensive data for curriculum assessment and individual student mastery.

Achievement data by race will be developed for each school by grade. These data will be analyzed each year to determine program efficacy and in developing achievement components of each school's annual School Improvement Plan. [Plan at 33; emphasis added]

52. Pursuant to the requirements of Arkansas law, the NLRSD has since the school year 2002-03 prepared each year a District School Improvement Plan. [B#s 3152, 3661, 4431, 4894, 5472, 7458, 8193, 8807 (first page of each plan)] These Plans have begun with an identification of priorities and goals; no priority or supporting goal has ever made explicit reference to addressing or reducing the achievement gap. [B#s 3153, 3662, 4432-33, 4894, 5472, 7458-59, 8193-94, 8807-08]



53. Since at least the school year 1999-2000, the NLRSD has implemented an extensive program of standardized testing. [B#s 748-750] It has included administering a nationally normed test each year [B# 748, 749-50] and an increasing number of Arkansas Benchmark Tests, including math and literacy tests at multiple grade levels and end of course tests in geometry, algebra, and biology. [B#s 749-50] There have been literacy and math Benchmark tests in grades 4 and 8 every year since 1999-2000 and a literacy test in grade 11 every year since 2001-02. [E.g., B#s 788-89, 814-15; 1214]

54. The results of the foregoing tests are provided to the NLRSD by student, school, grade, race and sex. [E.g., B#s 788, 825, 9, 655, 9, 661]

55. The NLRSD has not prepared, in connection with the filing of its motion for release from court supervision, a comprehensive report, using the vast body of available tests results, and addressing [i] whether or not there has been a reduction of the achievement gap between white and African American students in the NLRSD, or [ii], if so, the extent of the progress made.

56. Given the repeated failure of the NLRSD to identify reduction of achievement disparity as one of its priorities and the absence of the necessary and required analysis of test data, the NLRSD has failed to satisfy its burden of establishing substantial compliance with the parts of its "Compensatory Education" commitments which address achievement disparity between black and white students.

E. Compensatory Progs. Aimed at Dropout Prevention [Plan 37-8]

57. The "segregative acts" of the NLRSD identified by this court included that "a disproportionate number of [black students] drop out of school." [Plan at 5]

58. In its report of June 9, 2004, ODM offered praise for dropout prevention programs in the NLRSD [at 50]. However, ODM also found, with regard to the particular subject of this court's earlier finding: "The records . . . showed that the rate at which black students dropped out of school each year was significantly higher than that of white students." [Report at 50] In its summary and conclusions, ODM again referenced the statistical pattern and made a related recommendation.

While dropout rates have been relatively low for the past five years, each year black students had significantly higher dropout rates than white students. It appears that the district's efforts at dropout prevention work better for, or appeal to, white students more than they do for black students. The district managers need to evaluate the dropout prevention programs to determine why they seem to work better for white students; in the process, they may uncover some strategies that will have a greater impact on the success of black students. [Report at 51]

59. In its Report of June 6, 2008, ODM discussed the dropout prevention programs in the NLRSD under the heading "Compliance." [Report at 15]

60. The ODM Report of June 6, 2008, sets forth the overall dropout rate in the NLRSD from 1998-99 to 2006-07 (dropped from 6 percent to about 4.74 percent) and then states [at 16]:

Although not indicated on the chart, since 1998-99, black males have posted the highest dropout rates of any subgroup in each year examined. The exception being 1999-2000, when black females posted the highest dropout rate.

61. The ODM 2008 Report does not establish that the NLRSD evaluated its dropout prevention programs in the manner suggested by ODM in 2004. [Report at 15-16]

62. In response to Intervenor's Interrogatory number 1, the NLRSD provided dropout data by school, race and sex for the school years 2002-03 through 2008-09. The data shows that in these years, 72 percent of the students who dropped out did so from the North Little Rock High School-West Campus (grades 11-12 for entire system).

63. ODM reports contain enrollment data by race and sex for the NLRHS-West campus for the years 2002-03 through 2006-07. See ODM Report, 3-18-05 at 26 (20032-03, 2003-04); ODM Report, 6-6-08 at 55 (2004-05 to 2006-07).

64. The dropout rates for male students in NLRHS-West Campus were as follows in the years 2002-03 through 2006-07. [Tables use data identified in FOF#s 62-63.]

Year	Black Male Dropouts	BM Enrollment	BM Dropout Rate
02-03	48	302	15.9

03-04	35	320	10.9
04-05	34	344	9.9
05-06	64	391	16.4
06-07	57	414	13.8

Year	White Male Dropouts	WM Enrollment	WM Dropout Rate
02-03	24	316	7.6
03-04	21	314	6.7
04-05	22	322	6.8
05-06	28	347	8.1
06-07	23	309	7.4

In these five school years the rate at which black male pupils dropped out exceeded the rate for white males as follows: 2.1 times [2002-03], 1.6 times [2003-04], 1.5 times [2004-05], 2.0 times [2005-06], and 1.9 times [2006-07].

65. The dropout rates for female students at NLRHS-West Campus were as follows in the years 2002-03 through 2006-07. [Charts use data identified in FOF#s 62-63.]

Year	Black Female Dropouts	BF Enrollment	BF Dropout Rate
02-03	31	345	9.0
03-04	25	302	8.3
04-05	28	334	8.4
05-06	52	370	14.1
06-07	39	382	10.2

Year	White Female Dropouts	WF Enrollment	WF Dropout Rate
02-03	20	348	5.7
03-04	14	335	4.2
04-05	23	309	7.4
05-06	20	361	5.5
06-07	21	373	5.6

In these five school years the rate at which black female pupils dropped out exceeded the rate for white females as follows: 1.6 times [2002-03], 2.0 times [2003-04], 1.1 times [2004-05], 2.6 times [2005-06], and 1.8 times [2006-07].

66. In 2007-08, enrollment by sex is not available to Intervenors for the NLRHS-West Campus. In that year, the total black student enrollment in the school was 858 and 72 black students dropped out, a dropout rate of 8.4. There were 566 white students, of whom 35 dropped out, a rate of 6.2. The rate for black students exceeded that for white students by 1.35 times. [ODM Report on enrollment, 12-9-08 at 45; B# 7]

67. In 2008-09, enrollment by sex is not available to Intervenors for the NLRHS-West Campus. In this year, the total black enrollment of the school was 821 and 71 black students dropped out, a dropout rate of 8.6. There were 563 white students, of whom 38 dropped out, a rate of 6.7. The rate for black students exceeded that for white students by 1.28 times. [ODM Report on enrollment, 12-9-08 at 45; B# 7]

68. Taking account of the dropout rates by race and sex and the absence of evidence that the NLRSD evaluated the effectiveness of its dropout prevention programs as recommended by ODM, the NLRSD has failed to meet its burden of showing substantial compliance with its Plan or elimination of this vestige of discrimination to the extent practicable.

F. Extracurricular Activities [Plan Section 6 at 39-40]

69. Section 6 of the NLRSD Plan, titled "Extracurricular Activities," "recognizes that clubs and organization are an important part of the total educational experience for students" and identifies seven "actions [which] will be taken" "to assure greater participation by minority students." [Plan at 39-40] The Plan also provides that "membership in student organizations and clubs shall not be restricted on the basis of race, sex, national origin or other arbitrary criteria." [Plan at 39]

70. Section 6(7.) of the Plan provides, in part [at 40; emphasis added]:

Each school will prepare a summary report for all clubs, organizations and other extracurricular activities reflecting the racial composition of the officers in each activity, the total membership, and all those who tried out or sought membership. . . .

71. In 2004 ODM found that "the reports don't show the race and gender of students trying out for athletic teams nor the race and gender of students qualified for participation

in non-athletic activities that have entrance requirements, such as Beta Club and National Honor Society." [ODM Report, 6-9-04 at 57] ODM recommended that the system maintain this tryout and eligibility data. [ODM Report, 6-9-04 at 63]

72. In 2008 ODM found that the extracurricular activities report did not contain the tryout and eligibility data referred to by ODM in 2004. [ODM Report, 6-6-08 at 18]

73. The NLRSD "Extracurricular Activities Report" for 2008-09 contains the individual school reports for that school year. [B#s 8985-8994] The school reports do not contain the tryout and eligibility data which ODM found to be lacking in 2004 and 2008. [Id.]

74. The District Desegregation Team, which is to "monitor progress toward accomplishment of tasks included in the District's Desegregation Plan" [Plan at 48], has not directed that the tryout and eligibility information referenced by ODM be submitted, or, if necessary, sought action by the superintendent or the school board to insure availability of this information.

75. Based upon information provided by NLRSD, ODM reported in June 2008 that the following sports have been racially identifiable since 2002 to the present: baseball, soccer, tennis, and golf (mostly white males/females); football, basketball, and track (mostly black males/females). [ODM Report, 6-6-08 at 17]

76. Section 6(5.) of the NLRSD Plan provides [at 39]:

Principals and sponsors will monitor participation in all extracurricular activities and, where such participation is racially identifiable, special efforts will be made to promote minority participation in any such racially identifiable clubs and/or organizations.

77. The District Desegregation Team has not conducted, provided for, or sought a focused study of several one-race, or virtually one race athletic teams to determine the cause[s] and possible remedies.

78. Plan Section 6(7.) provides [at 40] that the school extracurricular activity reports "will be compiled in a District summary for all extracurricular activities which will be completed and presented to the Board of Education at its May meeting each year."

79. In its Report of June 6, 2008 at 18, ODM found, with regard to the "Extracurricular Activities Report": "The report lacked any commentary or analysis of the data."

80. In response to Intervenor's discovery, the NLRSD furnished the district reports for 2006-07 [47 pages], 2007-08 [44 pages], and 2008-09 [31 pages]. [B#s 8892-9013] Each report consists of copies of the individual school's reports, the results of cheerleading tryouts, and a copy of the Spirit Group Handbook. [Id.] The 2006-07 report also includes a helpful chart showing participation by race and sex on athletic teams and spirit groups. [B# 8896] There is in these



reports no analysis, identification of problems, or recommendations. [B# 8892-9013]

81. Section 6(7.) of the NLRSD Plan [at 40] requires that the annual "District summary" be "presented to the Board of Education at its May meeting each year."

82. Review of the minutes of NLRSD school board meetings for the period July 11, 2006 to September 10, 2009 [B#s 12,497 - 12,687] reveals:

[a] no mention of the submission of any one of these annual district extracurricular activities reports to the school board;

[b] no discussion of the content of any one of these reports.

83. The NLRSD has failed to meet its burden of showing that it has substantially complied with Section 6 of its Plan concerning extracurricular activities.

G. Discipline, Expulsions and Suspensions [Plan Sec.7 at 41-2]

84. Section 7 begins with the statement that "disciplinary policies are periodically reviewed to ensure fundamental fairness and the absence of bias." [Id; emphasis added]

85. Section 7 includes the following content [id; emphasis added]:

The NLRSD student population is 40% black and 60% white [footnote omitted]. In the 1985-86 school year 48% of those students suspended were black. While the District

does not believe this is significantly disproportionate, it has taken additional steps to ensure fairness and the absence of bias.

86. In the quoted language, in considering whether or not suspensions were marked by bias, the NLRSD compared the proportion of students suspended who were black persons to the proportion of black student enrollment in the system.

87. For the school years 1998-99 through 2006-07, ODM reported on suspensions in the NLRSD. ODM reports show, by school year, by level (elementary and secondary), by race and sex, enrollment, and for each form of in-school and out-of-school suspension, the numbers and percentages of black and white students subjected to one or more suspensions. [ODM Report, 3-18-05 at 21, 31; ODM Report, 6-6-08 at 45, 52]

88. Using the ODM data for the years 1998-99 through 2006-07, the same comparison/calculation made by NLRSD in the Plan for 1985-86 [see FOF# 85] can be made, at each grade level, in 45 instances, for the multiple forms of suspension. In 44 of those instances, the disproportion disfavoring black pupils was greater than the one reported by NLRSD for 1985-86. [ODM Report, 3-18-05 at 21, 31; ODM Report, 6-6-08 at 45, 52] [For example, in 2006-07, at the secondary level, black students received 86% of the suspensions, while constituting 57% of enrollment at that level. See ODM Report, 6-6-08 at 52]

89. Section 7 of the NLRSD Plan includes the following provision. Third, a summary of suspensions showing the number

and race of students suspended in each school will be compiled by the Assistant Superintendent for Student Affairs and will be provided to the Board of Education at its July meeting each year. [Plan at 41]

90. In its Report of June 9, 2004 ODM described [at 67] the statistics in this annual report and continued as follows [emphasis added]: The reports have not contained even the barest expository comment to identify the discipline categories or explain the relevant data, nor have they highlighted changes or offered insight into the causes of negative or positive shifts. The reports haven't pinpointed schools where data indicate problems, nor outlined any school-based or district wide initiatives planned for improving the picture. Neither have the reports identified, explained, or discussed the effectiveness of the district's intervention programs that are already in place specifically to target students experiencing discipline problems. As a result, the reports have been much less informative and useful than if they were enriched by explanation and evaluation of what the data reveal. Instead, readers likely have been left to wonder, 'So what?'

91. ODM's 2004 criticism of the annual discipline report did not produce change. The relevant portion of ODM's June 6, 2008 Report on the NLRSD found the same deficiencies to exist in the reports. [ODM Report at 21]

92. ODM's analysis of the various forms of suspension used in the NLRSD in school years 2004-05, 2005-06, and 2006-07 did, to use ODM's words, "[pinpoint] schools where data indicate[d] problems."

[a] This data shows, by school, by race and sex, the number and percentage of each group, such as black males, subject to each form of suspension once or more. [E.g., ODM Report, 6-6-08 at 46 [Lakewood Middle School], 50 [NLRHS-East Campus], and 51 [NLRHS-West Campus]

[b] The percentage figure provided by ODM shows, in substance, the number of each group per 100 members of the group, such as black males, subjected to a form of discipline in the particular school year in the school.

[c] For suspensions in the NLRSD, this discipline rate per hundred for black males almost always exceeds the rate for white males and the rate for black females almost always exceeds the rate for white females.

[d] The magnitude of the disparity between males or females is determined by dividing the higher rate by the smaller rate.

[e] In the three schools cited in FOF# 92, for 2006-07, using ODM data on the pages cited in that finding, the disparities in rate, disfavoring African American students in all instances, were --Lakewood Middle School SAC (in school suspension) - male students, 2.4 times; female students, 4.0 times; transfer to ASAC

(Argenta Academy outside building) - male students, 5.7 times; female students, 15 times. NLRHS-East Campus (grades 9-10) SAC (in school suspension) male students, 1.7 times; female students, 3.4 times; transfer to ASAC (Argenta Academy outside building) - male students, 3.3 times; female students, 2 times.

NLRHS-West Campus (grades 11-12) SAC (in school suspension) - male students, 2.8 times; female students, 3.5 times; transfer to ASAC (Argenta Academy outside building) - male students, 3.0 times; female students, only 1 black female

93. In response to the Joshua Intervenors' discovery, the NLRSD made available the annual discipline reports for 2005-06, 2006-07, and 2007-08. [B# 9016] The district stated in its responses on November 23, 2009 that the report for 2008-09, due in July 2009, was not yet available. [Id.]

[a] The reports set forth for the district as a whole, the elementary level, the secondary level, and each school, separately, statistics by race and sex on the number of students subjected to each form of suspension and expulsion. The reports also show the extent of use of each form of discipline from year to year. [E.g., B#s 9032-35, 9042, 9077]

[b] The reports do not address in any way whether any form of discipline at any location is racially disparate. [Id.]

[c] The reports do not set forth any student enrollment data; therefore, a reader can not calculate from the content of the report whether any of the discipline shown is racially disparate. [Id.]

[d] The reports do not, by text, raise any issues for the school board's consideration, or present any recommendations. [Id.]

94. The minutes of the school board meetings where the annual discipline reports were presented show that they were provided well after the due date and that they received no substantive consideration by the school board.

[a] The minutes of March 22, 2007 state:

Analysis of 2005-06 Disciplinary Action

Francial Jackson, Student Affairs Director, presented her annual discipline report. The board thanked her for the easy to read format and the thoroughness of her report.

The Board then approved unanimously a motion "to accept the report as presented." [B#s 9020-21]

[b] The minutes of April 17, 2008, where the discipline report for 2006-07 was presented -- about 9 months after the time specified in the NLRSD Plan -- state [B# 9027]:

Analysis of Disciplinary Actions 2006-2007 Report

Fran Jackson, Director of Student Affairs, presented the annual report. Mrs. Jackson explained the improvement of discipline actions in the schools were improving [sic]

but has some possible recommendations for the Board's consideration at another Board meeting in May or June.

The Board then approved unanimously a motion to accept the analysis "as presented by Mrs. Jackson." [B# 9027]

The same page of minutes reveals that when the District Technology Manager presented the "2009-2012 Technology Plan Recommendation" he "answered questions concerning the updating\expanding of the district's level of technology."

[Id.] See also B# 12,558 (minutes of 10-18-07 identify discussion of "several areas of concern from Board members" about Argenta Academy program).

[c] The discovery response stated that the 2007-08 report "was also made available to board members."

However, no minutes evidencing this were provided to Intervenors. [B#s 9016-27]

95. Section 7 of the NLRSD Plan states in part [at 41]:

A review of all suspensions will be conducted for any school that has a disproportionate number of suspensions of minority students to ensure that race has not been a factor in suspensions.

96. ODM's Report of June 9, 2004 states [at 67, emphasis added]:

The Director of Student Affairs prepares quarterly and annual reports that specify the types and number of discipline sanctions meted out in each school. According to the director, three top administrators, including the superintendent, review all the discipline data. If minority students are disproportionately represented in the data, the

director is to work with the principals individually to develop a plan of action to correct the problem. . . .

97. The ODM June 2004 Report does not state that the NLRSD provided ODM for review any such "plan of action." [ODM Report, 6-9-04 at 64-67]

98. The ODM Report of June 9, 2004 states [at 67], with regard to "the district's annual discipline reports": "The reports haven't pinpointed schools where data indicated problems, nor outlined any school-based or district wide initiatives planned for improving the picture." In brief, the annual reports did not identified any "plan of action" for any school.

99. The ODM Report of June 6, 2008 concerning the NLRSD contains the following finding [at 21, explanation and emphasis added].

#### **Need Improvement**

- The annual report [on discipline] does not contain any commentary or in-depth analysis of the data. For example, if minority students are disproportionately represented in a school's discipline data, the director explained that she would work with the school's principal to develop a plan of action to correct the problem. However, the discipline report does not reflect any such activity.

100. The June 2008 ODM Report does not state that the NLRSD provided ODM for review any such "plan of action." [ODM Report, 6-6-08 at 19-21]



101. In preparation for this hearing, Joshua Intervenor directed to the NLRSD Request for Production number 16, reading as follows:

Please provide a copy of each "plan of action" -- by whatever title known/used -- developed to address disproportionate representation of minority students in schools' discipline data, for the school years 2007-08 and 2008-09. [NLRSD Plan at 41; ODM 6-08 at 21]

102. In response to Request number 16, the NLRSD provided to Intervenor documents with Bates numbers 9,205 to 9,506. Not one page of this material constituted any part of a plan for a school based upon minority students' being represented disproportionately in the school's discipline data.

103. The failure of the NLRSD to provide to ODM or Intervenor any individual school "plan of action" can not be explained by the absence of instances in which black students were represented disproportionately in school discipline data. See FOF# 92.

104. Data has not been prepared for administrators, or presented to the school board in a way identifying the instances of racial disparity in discipline. The evidence shows that the "plan of action" to respond to racial disparity in a school has been a concept only. Discipline data for 2008-09 has not yet been provided. The NLRSD has failed to show substantial compliance with the discipline section of its court-ordered remedial plan.

H. Gifted and Talented Education [Secondary Level]

105. Section 8 of the NLRSD Plan is entitled "Gifted and Talented Education." [Plan at 43-45] The court's jurisdiction extends at this time to this program only at the secondary level.

106. The "segregative acts" by the NLRSD, found by this court, included that "black [students] were underrepresented in the NLRSD's gifted and talented program." [Plan at 5]

107. ODM's Report of June 9, 2004 states [at 70-71]: "Enrollment records show that, as of October 1, 2003, 55% of NLRSD's secondary students were black. Yet district wide this year, only 31% of the G/T placements were black students (14% males, 17% females). White students placement rates were double those of black students. . . ."

108. In 2004-05, in grades 6-12, there were 668 students in this program, of whom 433 were white (64.8 %) and 212 (31.7 %) were African American. [Chart provided by district to ODM]

109. In 2004-05, in grades 6-12 in the NLRSD, there were, in total, 1963 white pupils (40.2 %) and 2,729 black pupils (55.9 %). [ODM Report, 12-9-08 at 46]

110. In its Report of June 6, 2008, ODM stated [at 23]: "According to information submitted by the NLRSD, since 2004-05, the percentage of black students enrolled in the G/T program has declined to some degree."

111. In 2008-09, in grades 6-12, there were 686 students in this program, of whom 457 were white (66.6 %) and 193 (28.1 %) were African American. [B# 9,612]

112. In 2008-09, in grades 6-12 in the NLRSD, there were, in total, 1,757 white pupils (36.7 %) and 2,717 black pupils (56.7 %). [ODM Report, 12-9-08 at 46]

113. In 2009-10, in grades 6-12, there are 691 students in this program, of whom 450 are white students (65.1 %) and 211 (30.5 %) are African American students. [B# 9,614]

114. In 2009-10, in grades 6-12 in the NLRSD, there are, in total, 1,779 white pupils (36.6 %) and 2,754 black pupils (56.6 %). [ODM Report, 12-11-09 at 46]

115. Section 8 of the Plan provides in part. [Plan at 45]

Reports are submitted to the Central Administration showing the race and grade of all students referred and placed in the gifted and talented programs in each school. Where there is an unevenness of nominations, referrals and placements of the culturally disadvantaged students, the permanent folders are carefully examined by the Supervisor for gifted and talented Education.

116. Joshua Intervenors' Requests for Production numbers 20 and 21 to the NLRSD sought documentation bearing upon whether in 2007-08 and 2008-09 system personnel actually engaged in the reporting and monitoring promised by the quoted portion of the Plan.

117. The documents provided in response to requests for production 20 and 21 do not establish that the required reporting and monitoring occurred. See B#s 9,616 - 9,695, 9,698 - 9,707. Indeed, the response to Request 21 states in part: "Please note that such documents for 07-08 are missing, and every attempt is being made to locate them."

118. The NLRSD has failed to meet its burden of showing substantial compliance with Section 8 of its court-ordered remedial plan.

I. School Construction and Inadequate Facilities

119. Section 9 of the NLRSD Plan addresses "School Construction and Inadequate Facilities." [Plan at 46-47]

120. The Plan states that "if new facilities or additions to existing facilities become necessary in the future, the District shall rely on the standards contained in Swann v. Charlotte-Mecklenburg Bd. of Educ., (1977)." [At 47]

121. The Plan describes "the overall condition of school facilities in the NLRSD [as] excellent." [At 47] It states: "No building is in need of major renovation." [Id.] The Plan states: "The overall condition of buildings shows only minor variations throughout the District" and adds, "certainly, no building condition bears a relationship to its geographical location within the District." [Id.]

122. Jerry Massey, Director of Plant Services, informed the NLRSD District Desegregation Team as follows on January 11, 2005.

Mr. Massey reported receiving the preliminary state facilities report, but needed to meet with the group who composed the report to get questions answered. Eventually, between the facilities report and what the legislature does this spring, we hope to begin a facility plan, but at this point, there are too many unanswered questions. Mr. Massey's observation of the report was that some of our schools are not going to be what the desegregation report indicates - as being completely safe and serviceable. He stated that there

are not enough answers to move forward on anything at this point. [Minutes of the District Desegregation Team, January 11, 2005 at 1; emphasis added]

123. An "improvement plan" [2007] following a "formal study" [2004] identified a need for 340 facility projects from 2009-19. [ODM Report, 6-9-08 at 24] The areas addressed include: "general renovations, replacing or repairing roofs, improving heating and air systems, rewiring buildings, and eliminating the use of portable classrooms, to name a few." [Id.]

124. The NLRSD has failed to meet its burden of showing that it has prepared and is implementing a racially nondiscriminatory plan to provide facilities of the quality required by Section 9 of its court-ordered plan.

#### J. Desegregation Monitoring

125. Section 10 of the NLRSD Plan is entitled "Desegregation Monitoring." It contains 11 paragraphs describing the monitoring plan which the NLRSD was required to undertake. [Plan at 48]

126. Section 10 begins by identifying the "responsibility of the District's Desegregation Team to monitor progress toward accomplishment of tasks included in the District's Desegregation Plan." The Plan provides that the "District Desegregation Team will meet at least once each month to review specific tasks included in the District's Desegregation Plan." [Plan at 48, Section 10(4.)] The Plan

also requires creation of a desegregation team at each school. [Plan Section 10(7.-8.)]

127. On June 9, 2004, ODM reported as follows on the frequency of team meetings [at 76]:

Because the desegregation plan calls for the team to gather monthly, we asked the district to furnish evidence to substantiate team membership and regular meetings. Minutes of meetings held during the last five years show that the group met a total of ten times over that period: three meetings in 1998-99, four in 1999-00, and one in each of the last three years, 2000-01, 2001-02, and 2002-03. In 2001-02, the meeting was held in November; in both 2000-01 and 2002-03, the team convened for its single meeting in March.

128. As required by the Plan [at 48, Section 10(6)], the NLRSD developed a detailed form for use each year by school teams in monitoring and reporting on Plan compliance and related issues in each school. In some instances, team reports include a statement of "concerns" and the responses of the school principal.

129. NLRSD staff summarizes each school report and compiles these summaries in a booklet each year. [ODM Report, 6-9-04 at 85]

130. In response to Joshua Intervenors' Request for Production number 30, the NLRSD provided the NLRSD "Monitoring Report & Principals' Responses" for the school years 2006-07 (94 pages), 2007-08 (97 pages), and 2008-09 (95 pages). [B#s 12,210 - 12,495] Each report contains a summary for each school in the NLRSD of the report prepared by the school's monitoring team. [Id.]

131. None of the three annual reports contains any compiling and summarizing of the individual school data relating to any area of the NLRSD Plan. [B#s 12,211, 12,305, 12,402] The Desegregation Team does not in the report identify any issues for the school board to address, or make any recommendations. [Id.] The issues raised are those mentioned by a school team regarding their school. See ODM Report, 6-6-08 at 26 ("Although building principals must respond to monitoring concerns, the district does not prepare a master plan based on those responses to map out a course of action for the school year or beyond.").

132. Section 10(10.) of the NLRSD Plan states: "The District Desegregation Team will routinely review all monitoring reports and will report to the School Board the status of the District's plan." [Plan at 48]

133. The NLRSD informed ODM that the system monitoring report is submitted to the school board at the end of the school year. [ODM Report, 6-6-08 at 26]

134. Joshua Intervenors' Request for Production 31 to the NLRSD reads as follows:

If any of the content of one or more of the monitoring reports referenced in Request 30 was, after submission of the Report, discussed at a school board meeting, please provide an excerpt[s] from minutes evidencing each such discussion. [ODM 6-08 at 26]

135. The NLRSD provided 191 pages of minutes of school board meetings in response to Request 31. [B#s 12,497 - 12,687] These minutes

[a] make no mention of the submission of any one of the three monitoring reports to the NLRSD school board [id.];

[b] make no mention of the discussion by the school board of the content of any one of these reports.

136. Due to their restricted content [see FOF# 125], the monitoring reports were not reasonably calculated to aid the school board in meaningful oversight of the implementation of the NLRSD Plan -- even if the reports were actually provided to the board.

137. As previously noted, the reports on extracurricular activities and discipline were also, due to their restricted content, of limited value to school board members in fulfilling their oversight responsibilities. See FOF#s 78-80, 89-91, and 93.

## II. Legal Considerations

1. The NLRSD has the burden of establishing compliance with the terms of its court-ordered remedial plan. Freeman v. Pitts, 118 L.Ed. 2d 108, 134, 135, 137, 139 (1992); Jenkins v. Missouri, 216 F.3d 720, 725 (8thCir. 2000) ("[T]he burden of proving unitariness rests on the constitutional violator."); LRSD v. PCSSD, 470 F.Supp. 2d 963, 984 (E.D.Ark. 2004) (W.Wilson, D.J.); see also "Brief in Support of Petition for Declaration of NLRSD's Unitary Status and



Release from Court Supervision," 9-21-07 at 6-7 (district acknowledges its burden). The State also recognizes this burden. See "[State's] Response to Order Setting Status Hearing," 9-15-09 at 2 ("defendants must show").

2. This burden of proof extends to each provision of the NLRSD plan as to which compliance is challenged. LRSB v. PCSSD, 237 F.Supp. 2d 988, 1032-33 (E.D.Ark. 2002) (W.Wilson, J.).

3. The NLRSD has the burden of establishing "full and satisfactory compliance" with the court-ordered remedial provisions in order to establish a basis for the court to relinquish jurisdiction regarding an aspect of the system's operation. Freeman v. Pitts, supra, 118 L.Ed.2d at 134-35; Board of Education of Oklahoma City v. Dowell, 498 U.S. 237, 249-50 (1991) ("compli[ance] in good faith with the desegregation decree since it was entered").

4. This court must retain jurisdiction regarding a facet of school operation addressed in the NLRSD Plan, which is interdependent with an aspect of the system's program as to which "full and satisfactory compliance" with the Plan has yet to be achieved. Freeman, supra, 118 L.Ed.2d at 138-39. Here, the Plan requirements concerning special education and discipline are interdependent with the requirements concerning achievement disparity in Plan Section 4.

5. In deciding whether to relinquish jurisdiction, this court must consider "whether [the NLRSD] has demonstrated to the public and to the parents and students of the once

disfavored race, its good faith commitment to the whole of the court's decree and to those provisions of the law and the constitution that were the predicate for the judicial intervention in the first instance." Freeman, supra, 118 L.Ed.2d at 135.

6. It is appropriate for a party to offer, by a witness or a report, findings, conclusions, or recommendations by ODM. The opposing party may then offer evidence seeking to challenge the particular evidence which has been offered. The weight to be given the ODM evidence should be determined in the normal manner.

7. In assessing the weight to be given statements about NLRSD operation in ODM reports, a caution which ODM includes at the outset of its reports must be considered. For example, the June 2008 report notes that it relies to some extent on responses to ODM questions by district personnel and district documents, with the information secured and used "reliable to the extent the district's records and reporting are accurate and complete." [ODM Report, 6-6-08 at 1]

8. Section 5 of the NLRSD Plan contains requirements as to achievement disparity between white and African American students. These provisions are quoted and highlighted in proposed FOF# 51. The scope of these provisions is properly determined by considering them as a whole. Joshua Intervenors' contend that these provisions require: [i] consistently identifying progress in substantially reducing achievement disparity as a high priority of the NLRSD; [ii]

providing and revising as necessary based upon assessment data educational programs designed to substantially reduce achievement disparity; [iii] monitoring on a regular basis the extent of reduction of achievement disparity between black and non-black students; and [iv] making substantial progress in reducing achievement disparity. This interpretation relies on the fact that the quoted language refers: to addressing achievement disparity (twice), to "monitor[ing] the reduction of achievement disparity," and to using "achievement data by race" in identifying program efficacy and components of annual school improvement plans.

9. Joshua Intervenors' proposed findings of fact establish, with regard to many of the requirements of Sections 2-10 of the court-ordered desegregation plan, the failure by NLRSD to satisfy its burden of showing substantial compliance.

10. Joshua Intervenors respectfully request that the court: [i] enter findings of fact and conclusions of law identifying the areas in which the NLRSD has failed to establish a basis for the termination of court jurisdiction; [ii] allow the parties 21 days to suggest remedial provisions as to those areas, jointly by agreement to the extent possible; and [iii] enter remedies for the violations found after the parties' submission[s].

11. The NLRSD Plan does not contain any specific time period for the initial exercise of district court jurisdiction. It does not identify any specific period for

continued court jurisdiction in the event this court finds a lack of substantial compliance with one or more Plan requirements. If the court agrees with Intervenor's contentions, it will ultimately be necessary to identify "a reasonable period of time" for attaining and continuing compliance with the relevant plan requirement[s]. Compare Board of Educ. of Oklahoma City v. Dowell, *supra*, 498 U.S. at 247-48 (referring to initial court determination of compliance).

12. Judge Wilson's handling of this question in the LRSD segment of this case is instructive. The LRSD and Joshua Intervenor agreed to a revised desegregation and education plan. In one of its sections, the LRSD undertook to assess academic programs for effectiveness in improving academic achievement of African American students and to modify or replace a program found to be ineffective in this regard. LRSD, 237 F.Supp. 2d at 1076. The court found that LRSD had not substantially complied with this provision. At 1081-82. The court, in its opinion of September 13, 2002, set forth a specific "Compliance Remedy," including actions to be taken at specific times during the 2002-03 and 2003-04 school years. LRSD, 237 F.Supp. 2d. at 1087-88. Consideration of the Plan provision at issue and the evidence concerning it reveal that the court identified a period of further jurisdiction and supervision tailored to the specific area of non-compliance.

13. However, if multiple areas of non-compliance are hereafter identified by this court and the subject of remedies, as urged by Intervenor, it will likely be necessary to identify a single deadline for submission of a later compliance report by the school district and challenges to compliance by Joshua Intervenor, if any. This would be likely to minimize the proceedings necessary, such as filings by the parties and hearings, in the event of any such challenges. See Monteilh v. St. Landry Parish School Board, 848 F.2d 625, 629 (5thCir. 1988) (noting established procedure in Circuit of retaining jurisdiction for three years before considering possibility of unitary status and dismissal of case).

14. NLRSD's implementation of its Plan was required by court order to remedy constitutional violations. Intervenor's work in monitoring its implementation and responding to the motion for unitary status constitute reasonable post judgment monitoring for which Intervenor will have an entitlement to an award of reasonable attorneys' fees and litigation costs. McDonald v. Armontrout, 860 F.2d 1456, 1461 (8thCir. 1988) (fee award for reasonable post-judgment monitoring); ARC v. Schafer, 83 F.2d 1008, 1011-13 (8thCir. 1996) (recognizing, in principle, appropriateness of fee award for reasonable, "even largely unsuccessful defensive efforts" in response to a government motion to terminate an institutional reform decree; award reversed in circumstances of this case due to particular activities of counsel and prior awards for post-

judgment monitoring); Jenkins v. State of Missouri, 115 F.3d 554, 560-61 (8thCir. 1997) (appropriateness of fee award for reasonable defensive efforts).

Respectfully submitted,

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#### **CERTIFICATE OF SERVICE**

I do hereby certify that I have served the foregoing on all counsel of record utilizing the CM/ECF system by filing a copy of same on this 28<sup>th</sup> day of December, 2009.

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