UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

LITTLE ROCK SCHOOL DISTRICT,
ET AL. PLAINTIFFS

v. NO.4:82CV0866 BSM

PULASKI COUNTY SPECIAL SCHOOL DISTRICT,
NO. 1, ET AL. DEFENDANTS

MRS. LORENE JOSHUA, ET AL. INTERVENORS

KATHERINE W. KNIGHT, ET AL. INTERVENORS

Joshua Intervenors' Memorandum
In Support of LRSD's Motion for a Stay

The Joshua Intervenors support the "Amended Motion [Of The LRSD] For [A] Stay Pending Appeal" [5-24-11] of a portion of this court's order of May 19, 2011. That language "released [the State of Arkansas] from its obligation to pay for any and all desegregation efforts of the NLRSD, the PCSSD, and the LRSD, except for those associated with M-to-M transfers." [5-21 at 110] The court did not identify the particular categories of funds, prior court orders, or court-approved agreements affected by its ruling.[1]

[1] In an opposition of May 26, 2011 to the LRSD's motion for a stay in the Eighth Circuit, the State informed that court that as a result of this court's order, it plans to withhold $2,620,575 that would have been paid to the LRSD on or about June 20, 2011, "includ[ing] $1,341,597 in magnet funding and $1,278,978 in teacher health insurance and retirement funding. . . ." [Affidavit of William J. Goff, Asst. Commissioner for Fiscal

Intervenors rely on the standards governing such stay motions, factual findings made and remedies approved in this case, as well as standards establishing the fundamentally important right to be heard following appropriate notice of the issues to be decided.[2]

A. The Decisions of the District Court [Henry Woods, DJ]

In November 1982, the LRSD filed an action against the PCSSD, the NLRSD, the Arkansas State Board of Education, [and the State of Arkansas which the district court dismissed as a defendant]. After hearings, Judge Woods found that actions and inactions of State, PCSSD, and NLRSD employees, as well as other public agents, had caused interdistrict segregation in Pulaski County, necessitating a consolidation remedy. See LRSD v. PCSSD, 584 F.Supp. 328, 351-53 (E.D.Ark.1984), 597 F.Supp. 1220, 1227-28 (E.D.Ark.1984); see also LRSD, supra, 778 F.2d at 408-09 (describing proceedings before Judge Woods).[3]

Regarding interdistrict segregation, Judge Woods identified 9

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and Administrative Services, Ark. Dept. of Education, Exhibit A at 1] The affidavit does not discuss the PCSSD or the NLRSD.

[2] On May 23, 1984, the Court of Appeals ordered this court [H. Woods, J.] to allow the intervention of Joshua Intervenors; the district court had earlier denied such intervention. LRSD v. PCSSD, 778 F.2d 404, 409 (8thCir. 1985), cert. den., 476 U.S. 1186 (1986). In its significant 1990 opinion in this case, reported at 921 F.2d 1371, the Court of Appeals characterized the Joshua Intervenors as "the plaintiffs" in this case. Id. at 1383.

[3] As noted in the "Settlement Agreement," actions initiated earlier against LRSD, NLRSD, and PCSSD were consolidated with (and within) the civil action initiated by LRSD in 1982.

acts committed by the PCSSD "with continuing racially segregative effects" and 4 such acts by the NLRSD. See 584 F.Supp. at 353. This court quoted Judge Woods' findings regarding the PCSSD and the NLRSD. [5-19 at 10-11] This court also wrote that Judge Woods "found that . . . Arkansas [was] in violation of the Constitution by creating `racial isolation between and among the districts" -- but did not describe his findings in this realm. [Id.]

B. The Court of Appeals Review of Judge Woods' Rulings

In 1985, the Court of Appeals for the Eighth Circuit (en banc) reviewed Judge Woods' factual findings and the requirement of a consolidation remedy. LRSD v. PCSSD, 778 F.2d 404. The court: [i] described fully and upheld the factual findings made by the district judge concerning the State, the NLRSD, the PCSSD, and other public actors; [ii] ruled that while interdistrict relief was appropriate, consolidation was not required, in part because "that remedy exceeds the scope of the violations" [at 433-34]; and [iii] set forth priciples for interdistrict relief [at 435-36].

1. Interdistrict Violations

a. The State's Role

The Court approved the district court's finding that "the state's acts had an interdistrict segregative effect with respect to the three school districts in Pulaski County." LRSD, 778 F.2d at 412. The State long required segregated public schools; and "black public schools in Arkansas were inferior to white schools,"

including in NLRSD and PCSSD. [At 412] The court elaborated:

> The black elementary schools [in NLRSD and PCSSD] were inferior to the black elementary schools in LRSD. . . . [] The disparities at the high school level were even more pronounced. . . . The district court credited several studies and the testimony of several witnesses to the effect that LRSD was identified as the school district in the state which provided educational opportunities for black students. Id. This identification tended to draw black students to LRSD from all over the state, and particularly from Pulaski County. The state was fully aware of these disparities. Indeed, it had commissioned studies documenting that the disparities existed, and that the disparities were prominent among the factors that drew black families to Little Rock from the county and the rest of the state. [At 412]

The court cited the district court's findings of longstanding failure by the state to act to help dismantle the segregated, discriminatory system [at 412, 413, 417], a failure affecting the foregoing Pulaski County disparities (and affecting residential patterns).

In 1953, the state enacted legislation authorizing the transfer of the Granite Mountain housing project site from PCSSD to the LRSD. [At 412-13] "This action insured that a major black housing project would be built in LRSD, and that LRSD would continue to be recognized as the school district in Pulaski County which educated black children." [At 413]

The court noted that rather than acting affirmatively after Brown I and Brown II consistent with those decisions, "[the state] took a series of actions which delayed the elimination of the dual school system in the state for years. These actions were primarily directed against LRSD and heightened the identity of that district

as the `black' district in Pulaski County." [At 413] The court of appeals described the many forms of delaying tactics. [At 413-17] The court also cited demographic data "tend[ing] to support plaintiffs' theory that the state-created racial turmoil in LRSD in the 1950's fostered substantial white flight from LRSD to PCSSD and NLRSD." [At 417, n. 8]

b. The NLRSD

The Court identified NLRSD actions which "contributed to the concentration of blacks in LRSD . . . ." [778 F.2d at 422; see also at 423 (acts which "discouraged black students from attending that district"); at 427 (participant in "concurrent actions" which "exerted an unmistakable interdistrict effect on the schools of the metropolitan area by singling out LRSD as the school district which provided some educational opportunities for black students and by identifying . . . NLRSD as [a] white [district]"). The court noted: NLRSD's pre-Brown failure "to maintain equal or adequate schools for black students, particularly at the high school level"; this caused "significant transfers of black high school students from NLRSD to LRSD" at 422]; and the system's "grossly overclassifying its black pupils in EMR programs and . . . failing to desegregate the faculty and staff of its schools." [At 428]

c. The PCSSD

The Court identified actions of PCSSD which in combination with those of other public actors "set aside LRSD as the best place

for black students to obtain an education" and contributed to the disproportionate movement of black families to the LRSD and white families to the PCSSD. LRSD, 778 F.2d at 428. The court noted: PCSSD provided inadequate elementary schools for black pupils and no accredited high school for black students until 1955, causing black students from the county to attend schools in the LRSD. [At 418] PCCSD cooperated with LRSD in the transfer of land for segregated public housing to the LRSD, to be served by LRSD schools, "enhancing LRSD's position as the school district with the responsibility of educating black children." [At 418] After court requirements for desegregation intensified, PCSSD changed its policies regarding the boundaries between PCSSD and LRSD "to keep LRSD predominantly black and PCSSD predominantly white." [At 418-20]

The Court of Appeals identified multiple, other ways in which PCSSD caused "substantial and continuing inter[district] . . . effects . . ." [at 421]; ". . . discouraged the growth of a black community in PCSSD" [id.]; and "exacerbated the historical trend of black in-migration to LRSD and white out-migration to PCSSD." [At 422][4]

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[4] These included: delaying the commencement of desegregation [at 420]; engaging in school construction and closure practices to facilitate racial segregation of pupils, including by cooperation with the City of Little Rock [at 421-22]; segregative choices in assigning students to schools [at 421]; failing to apportion the burden of transportation fairly among white and black students [at 421]; "fail[ing] to meet the goals for the

d. The Role of Housing Policies and Practices

The court of appeals summarized the findings and evidence demonstrating how state legislation, the housing authorities of Little Rock and North Little Rock (created pursuant to statutory authorization), the Pulaski County government, and the state real estate commission engaged in actions in the housing sphere further directing African American population to Little Rock, rather than the territory of the PCSSD. LRSD, 778 F.2d at 423-25. The court then cited legal authority showing that consideration of this evidence was proper. [At 425-27] The actions discussed occurred during a period when public housing in Pulaski County was racially segregated. [At 423]

Little Rock and North Little Rock created housing authorities; Pulaski county did not. [At 423] The two authorities could have developed public housing projects up to 10 miles beyond city limits, but neither authority built public housing within the PCSSD, nor did the evidence show Pulaski County's doing so. [At 423]

The court of appeals summarized the evidence showing that "the state, the Little Rock Housing Authority, LRSD, and PCSSD

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hiring of black principals, teachers, and administrators" [at 421]; classifying significantly more black students as educable mentally retarded than the LRSD [at 422]; unlike LRSD, failing to encourage black student participation in curricular and extracurricular activities [at 422]; and failing to adhere to requirements for black persons' participation in system governance. [At 422]

cooperated in the development of a major all-black housing project "in the Granite Mountain area, relocated as part of this endeavor to the LRSD from the PCSSD. [At 423] The court noted evidence that this project "was intended to channel black residential development toward the far southeast boundaries of the City of Little Rock, away from white residential areas." More than 500 segregated housing units were ultimately constructed over time. [At 423] The court noted other testimony, relied on by the district court, "that this all-black housing project was a significant `magnet factor' in attracting a disproportionate number of blacks to LRSD." [At 423-24 n. 13]

The court of appeals cited two other factors. The state real estate commission disciplined a black realtor who sold a home to a black person in a white neighborhood for violating a regulation forbidding introducing in a neighborhood members of any race whose presence will clearly be detrimental to property values there. [At 424] Finally, "PCSSD also contributed to the segregated nature of the private housing market through its decisions in school siting." [At 424] The system "violated the Zinnamon decree by building nearly a dozen new schools after 1973 in the furthest outlying areas of developing white population." [At 424]

2. Remedies

After holding the consolidation remedy inappropriate, the Court of Appeals set forth "principles" to be employed by the

district court, including to provide proper interdistrict remedies. LRSD, 778 F.2d at 434. A summary of the principles relevant to the current issues is as follows.

[a] NLRSD must correct each of the constitutional violations identified by the district as having an interdistrict segregative effect. [778 F.2d at 435]

[b] To account for the segregative manipulation of annexations and deannexations, the district court must after a hearing "adjust the boundaries between the PCSSD and the LRSD" in a manner described by the Court of Appeals [id.];

[c] "Voluntary intra- or interdistrict majority-to-minority transfers shall be encouraged, with the State of Arkansas being required to fund the cost of transporting students opting for interdistrict transfers and to pay benefits to the sending and receiving schools for the interdistrict transfers similar to those required to be paid in Liddell. All three defendant school districts in Pulaski County shall be included in this program." [LRSD, 778 F.2d at 436]

[d] "The district court may require a limited number of magnet or specialty schools or programs to be established at locations to be determined initially by a Magnet Review Committee and approved by the district court after a hearing. . . . The magnet schools, if ordered, shall be administered by a Magnet Review Committee with one person to be named by each school district and two persons to be named by the State of Arkansas. The State of Arkansas will be required to pay the customary state aid to [sic] any pupils attending these schools, plus an additional one-half of the cost of educating the students attending them. The local share of the cost of any magnet school established shall be paid by the three participating schools on a basis to be determined by the district court. The state shall also be required to pay one-half of the cost of the construction or rehabilitation necessary to house the magnet schools and the full cost of transporting any students who attend them. . . . [Id.]

In brief, the appellate court agreed that multiple actions had concentrated African American families and students within the LRSD, thereby promoting racially segregated education. It, in part, identified potential magnet school remedies to attract white pupils to the LRSD; it required intra-district transfer provisions so that black pupils living in the LRSD could attend schools with larger white student populations. African American adults could choose these magnet school and transfer opportunities for their children [or not do so].

C. The Court of Appeals Treatment of the Parties Settlement Plans and Settlement Agreement

The court of appeals' opinion of December 12, 1990, identifies provisions developed to implement that court's November 7, 1985 decision, discussed above. See LRSD v. PCSSD, supra, 921 F.2d at 1377-81. These are [i] a NLRSD plan to comply with the 1985 decision, approved by the district court [at 1377]; [ii] a plan for the PCSSD agreed to by the district and Joshua Intervenors [at 1378]; [iii] agreed modifications of the NLRSD plan [at 1379]; [iv] a "long-range [LRSD] desegregation plan" agreed to by the Joshua intervenors [at 1379]; [v] a stipulation governing "six interdistrict magnet schools" approved by the district court on February 27, 1987 [at 1379 & n.6];[5] [vi] an "Interdistrict

[5] See LRSD v. PCSSD, 659 F.Supp. 363 (E.D. Ark. 1987) (Judge Woods' discussion of proposals for magnet schools [at 365-67]; "Stipulation for Recommendations Regarding Magnet Schools" [at

Desegregation Plan" addressing in part, desegregative, inter-district student transfers "at the expense of the state" and six additional interdistrict schools [at 1379];[6] and [vii] the "Settlement Agreement" dated Sept. 28, 1989, in part "relating to the financial responsibility of the State" [at 1380].

The court's discussion of the Settlement Agreement reads, in part [at 1380; footnote omitted].

> The agreement contains a number of other significant funding provisions. First, interdistrict magnet pupils are to be counted in the formulas used to distribute state minimum-foundation program aid. The agreement also confirms that the State will continue to make payments for (a) one-half the operational costs of the existing six interdistrict magnet schools, (b) sums agreed to be due to 'sending' and 'receiving' districts for interdistrict majority-to-minority transferring pupils, (c) the State's share of Magnet Review Committee expenses, (d) transportation costs for interdistrict magnet-school students, and (e) transportation costs for interdistrict majority-to-minority transfer students. 14 App. 3449-53. Thus, the agreement includes state financing of majority-to-minority transfer costs, including transportation, not only for the magnet schools properly so-called -- the six 'stipulation magnets' -- but also for the 'generic magnets' described above -- interdistrict specialty-theme schools designed to attract students for purposes of desegregation. . . .

In sum, the Settlement Agreement, approved by the three school districts, the State, and Joshua Intervenors, included funding to

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370-72]). There is a Magnet School Stipulation dated Feb. 27, 1987. [JX 0-12 at 50.

[6] See LRSD v. PCSSD, 659 F.Supp. 363 (E.D. Ark. 1987) (Judge Woods' reference to parties' agreement to "a system for handling majority-to-minority transfers" [at 367]; "Stipulation for a Proposed Order on Voluntary Majority to Minority Transfers [at 383-86]).

support remedies drawn from the Court of Appeals' 1985 decision and designed to overcome conduct of State, NLRSD, PCSSD, and other public actors, which had concentrated African American pupils in the LRSD.

The Court of Appeals decision also addressed approval and implementation of the "settlement plans and the settlement agreement." On remand, the district court must approve "the settlement plans" and "the parties' settlement agreement as written by them." LRSD, 921 F.2d at 1394, paras. 3, 6. The district court must ensure compliance with "the plans and the agreement." Id. at par. 8.

D. Court Enforcement of the Settlement Agreement

Two court of appeals decisions evidence the enforceability of the terms of the Settlement Agreement against the State. In LRSD v. PCSSD, 83 F.3d 1013 (8thCir. 1996), the Court affirmed orders of the district court concerning the manner in which the State should make certain payments to the LRSD and the PCSSD for workers' compensation costs and "loss funding." The Court of Appeals explained why the payments which the State had planned to make violated certain terms of the Settlement Agreement. LRSD, 83 F.3d at 1017-19. Similarly, in the 1998 decision reported as LRSD v. NLRSD, 148 F.3d 956 (8thCir.), the court affirmed a district court ruling that changes made by the State in the funding of retirement and health insurance violated the terms of the Settlement

Agreement.

E. Notice of the Issues to be Tried

This court scheduled hearings on "[The NLRSD's] Petition for Declaration of Unitary Status and Release From Court Supervision" (Doc. No. 4143) and "PCSSD's Motion for A Declaration of Unitary Status" (Doc. No. 4159). In an Order dated January 11, 2010, dealing with the order of presentation of evidence, this court identified the issues to be tried by reference to 9 topic headings in the intradistrict portion of the NLRSD "desegregation plan" [see NLR Exh. 2 at 6, 12-48] and 13 topic headings in PCSSD "Plan 2000," which had, by order of Judge S. W. Wright, replaced the PCSSD Plan referenced by the Eighth Circuit in 1990.

The NLRSD presented its case for compliance with reference to the above cited portions of NLR Exh. 2 and PCSSD its case with reference to the content of Plan 2000. This court's Finding of Fact of May 19, 2011 address segments of these NLRSD and PCSSD plans. [5-19-11 at 1-2] This court wrote at page two of the May 19 ruling that "parties were reminded a number of times that the only determination to be made is whether the districts acted in good faith and substantially complied with their desegregation plans . . ." -- with "plans" in context obviously referring to NLR Exh. 2 at 6 and 12-48 and Plan 2000.

There was no notice of any issue to be tried regarding: the parties "Settlement Agreement" or any district court or court of

appeals decision enforcing it; the Magnet School Stipulation dated February 27, 1987; the Order dated September 3, 1986, regarding the Magnet Review Committee; the M-M Stipulation dated February 27, 1987; the duration of settlement payments; or the status of the interdistrict violations which led to various forms of interdistrict relief.

F. <u>A Stay Pending Appeal Is Warranted</u>

The remainder of Joshua Intervenors' argument relies to some considerable extent on the papers filed by the LRSD, the Amended Motion on May 24, 2011 and the Memorandum Brief on May 23, 2011.

LRSD sets forth the four-part standard applicable to a motion for stay pending appeal. [Mem. at 1-2] The first factor is "whether the stay applicant has made a strong showing that he [she or it] is likely to succeed on the merits; . . ." [LRSD Mem. at 2] LRSD cites Eighth Circuit precedent that "the most important factor is the appellant's likelihood of success on the merits," that the court "must consider the relative strength of the four factors, `balancing them all'," and that "greater certainty of victory should result in a less stringent requirement of proof of irreparable injury." [LRSD Mem. at 2]

No basis for upholding on appeal this court's releasing the State from its desegregation funding obligations is discernible.

First. There was an absence of notice and the opportunity to be heard on this major issue. On the merits, the court of appeals

could and should rely on this defect alone. Jenkins v. Missouri, 216 F.3d 720, 727 (8thCir. 1991) (sua sponte declaration of unitary status and release from court supervision "without giving notice either to the constitutional violator or the victims or permitting the parties to present evidence and argue these issues was error" [emphasis added]). This court has made major changes to interdistrict relief after a hearing on two districts' intradistrict plan obligations.

This court has set aside agreed upon, court-approved (by the Eighth Circuit) interdistrict funding relief described in the Order of September 3, 1986 on the Magnet Review Committee, the Magnet School Stipulation dated February 27, 1987, and the Settlement Agreement (Sept. 28, 1989 revision), not only without notice and hearing, but without any consideration of the current status of the totality of conditions which necessitated this relief.

This court has, without notice and hearing, set aside the mandate of the court of appeals regarding payment of retirement and medical insurance costs, set forth in LRSD v. NLRSD, 148 F.3d 956 (8thCir. 1998); see also footnote 1 above (planned withholding of these funds).

This court has modified orders and obligations approved at the appellate level, not only without notice and hearing, but also without reference to any standards for modifying such requirements.

This court's terse funding release discussion does not explain

how the rationale applies to either the LRSD or the NLRSD (as viewed by the court); it does not explain how the actions authorized (already seized upon by the Ark. Department of Education) will help the PCSSD improve implementation of remedies for "the victims" (Jenkins v. Missouri, supra) of discrimination.

If and when, following appropriate notice, discovery, and hearing[s], a modification of interdistrict funding relief is determined to be proper, it must include carefully considered transitional steps. See authorities cited by LRSD. [Mem. Brief, 5-23-11 at 13-14]

This court's terse discussion did not address the LRSD's pending "Motion to Enforce 1989 Settlement Agreement," filed on May 19, 2010.

Joshua Intervenors note the following regarding irreparable harm. Joshua Intervenors' Exh. 0-12, ODM's enrollment report for 2009-10, indicates that in that year 2,035 black students enjoyed the benefit of the six stipulation magnet schools located in the LRSD [at 51-52]. The court's terse discussion does not address the impact of its May 19 funding obligation release, encompassing funding to the three systems, on black students, "the victims" in Jenkins terms, or the other students attending these schools. See Exh. 0-12 [1,756 other students in 2009-10]; see also footnote 1 above.

Joshua Intervenors otherwise rely on the Presentation by LRSD

in support of stay.

Respectfully submitted,

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