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' Response to
the Court's Order to Show cause

A. Introduction

This court's orders of May 19, 2011 provide in part [at 108]: "Further, Little Rock, North Little Rock and Pulaski County are hereby ordered to show cause why the State of Arkansas should not be ordered to stop funding for M-to-M transfers. Each district has thirty days from the entry of this order to file a ten page brief on this issue." This court did not include the Joshua Intervenors in the show cause requirement (or otherwise identify Intervenors' right to participate on this issue).

The court's omission is unexplained and in error. In 1984, The Court of Appeals for the Eighth Circuit directed the district court to allow the intervention of the Joshua intervenors (after that

court had earlier denied intervention). LRSD v. PCSSD, 778 F.2d 404, 409 (8thCir.1985), cert. den., 476 U.S. 1186 (1986). The Joshua Intervenors began active participation in the case shortly after the Court of Appeals' directive (778 F.2d at 409) and have continued active participation thereafter, as shown by the docket in this court and published Court of Appeals decisions. Lastly, and most important, the Joshua Intervenors are the identified representatives of the many hundreds of black pupils who, by decisions of their parents, take advantage of interdistrict M-to-M transfers.[1]

The interdistrict M-to-M transfer program, including State funding, is an element of the relief ordered to redress the interdistrict student segregation violation, in which many State agents participated.[2] This court's show cause discussion does not indicate explicitly whether the court is addressing the

[1] There were 878 such transfers from the LRSD to the PCSSD in 2009-10. [JX 0-12 at 55] In 2009-10, a total of 206 black pupils residing within the LRSD attended Maumelle Middle School and Chenal Elementary School in the PCSSD, two of that system's newer and high-end facilities. See JX 6-7 (PCSSD hearing) and 5-19-11 at 75-76.

[2] See LRSD v. PCSSD, 659 F.Supp. 363, 367, 383-85 (E.D.Ark.1987) (approval of "Stipulation for Proposed Order on Voluntary Majority to Minority Transfers") (E.D.Ark. 1987); "Settlement Agreement" (9-28-89) at IIE.(2),(5) (funding); LRSD v. PCSSD, 921 F.2d 1371, 1380, 1394, para. 6 (8thCir.1990) (alluding to funding provisions in Settlement Agreement and directing district court on remand to approve Settlement Agreement as written by the parties).

continuation of the interdistrict M-to-M transfer requirement, or solely the State funding for such transfers. Joshua Intervenors, therefore, address each situation.

B. No Proper Predicate for Termination of the Requirement for M-to-M Transfers Has been Established

This court (Judge Henry Woods) found that intentionally discriminatory actions and inactions of various public agents had concentrated black families and students within the LRSD and promoted the movement of white families and students to the PCSSD and the NLRSD. These varied public agents were representatives of or employed by the State, PCSSD, NLRSD and other public bodies, such as housing authorities. After affirming Judge Woods' findings concerning interdistrict violations and effects and putting aside the consolidation remedy, the Court of Appeals specified principles for interdistrict remedies, including interdistrict majority to minority transfers. Approval of the M-to-M transfer provisions, cited above, followed. See detailed discussion of these facts, with record citations, in "Joshua Intervenors' Memorandum In Support of LRSD's Motion for a Stay," June 6, 2011, at 2-12.

Court orders and agreements also approved three separate plans for assignment of students attending a school in the Pulaski County district of their residence. E.g., LRSD v. PCSSD, 921 F.2d at 1378-79 (discussing such plans); 5-19-2011 ruling at 11 (same). However, full implementation of these plans alone -- even implementation sufficient to earn unitary status -- would not yield a wholly

lawful system of student assignment. The intentionally discriminatory actions cited above had, the courts found, rigged the racial make-up of the districts. Full implementation of the inter-district remedies, including inter-district transfers, was necessary to remedy the full sweep of the violations.

There is no present basis for terminating the requirement of inter-district M-to-M transfers.

[a] Neither the NLRSD petition, nor the PCSSD motion raised the question of terminating inter-district M-to-M transfers.

[b] This court's scheduling order of September 30, 2009 [Doc. 4271], distributed after the status conference on September 30, 2009, identified the NLRSD petition and the PCSSD motion as the subjects of the respective hearings scheduled for early 2010.

[c] This court's May 19, 2011 ruling identifies the various sections of the two district's intradistrict plans as the focal points of the hearings. See 5-19-11 at 2, 17.

[d] In Board of Education of Oklahoma City v. Dowell, 111 S.Ct. 630, 638 (1991), the Court wrote: "The District Court should address itself to whether the Board had complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination had been eliminated to the extent practicable." See also Freeman v.

Pitts, 118 L.Ed.2d 108, 135, 139 (1992) (twice quoting this language from Oklahoma City decision).

[e] "[T]he burden of proving unitariness rests on the constitutional violator." Jenkins v. Missouri, 216 F.3d 720, 725 (8thCir. 2000); Freeman v. Pitts, 118 L.Ed 2d at 137 ("The school district bears the burden of showing that any current imbalance is not traceable, in a proximate way, to the prior violation"); 5-19-2011 ruling at 17 (recognizing burden of "constitutional violator").

[f] No defendant or other "constitutional violator" identified as culpable by Judge Woods and the Court of Appeals has sought, by offering evidence at a hearing, to satisfy the requisite standard for termination of the interdistrict M-to-M transfer remedy.[3]

[g] The unitary status of NLRSD on student assignment and the almost complete unitary status of PCSSD in that sphere do not, alone, establish a lack of need for interdistrict transfers to address the racially rigged make-up of the three districts.

C. State M-to-M Funding Should Not Be Terminated

[3] PCSSD has been found to have met Plan 2000 requirements regarding interdistrict schools, some of the enrollment of which has consisted of interdistrict transferees. Ruling, 5-19-11 at 53-59. However, these findings did not address the status of the conditions leading to the requirement of an interdistrict transfer program.

Joshua Intervenors next proceed on the premise that this court addressed only the State funding aspect of the M-to-M transfer program. In 2009-10, 2,131 students attended schools by virtue of the interdistrict transfer remedy and the decisions of persons in loco parentis to them. [JX 0-12 at 55] Moreover, the guidelines for this transfer program provide that "students who have elected to transfer shall remain students of the host district until they choose to return to the district where they reside." LRSD v. PCSSD, 659 F.Supp. 363, 367, 384 para. 7 (E.D.Ark.1987). Joshua Intervenors offer three perspectives regarding the court's approach.

First, in Joshua Intervenors' view, there are other ways to improve implementation which do not jeopardize the remaining remedies funded wholly or partially by the State by court directive. ODM could be given by the court, after input from the parties, additional monitoring tasks geared to specific areas of non-compliance identified by the court. The court, after input from the parties, could add to the two areas in which it specified steps to be taken by the districts. See 5-19-11 ruling at 19 (NLRSD to maintain and to present to ODM records documenting its recruitment efforts); at 49 (remedy for deficiencies re PCSSD "one-race class reports"). Schedule permitting, the court might periodically have a time-limited hearing for questioning relevant PCSSD agents on steps underway in an important area of non-compliance identified in

the court's ruling. Notice of the area(s) would be provided the district and the other parties in advance to allow targeted questioning and substantive responses. Lastly, the State might be asked to elaborate on the content of its "Response to Order Setting Status Hearing" (9-15-09) where it broached not immediate termination of State settlement payments, but instead some modification of the mode of payment to promote compliance with requirements.

Second, Joshua Intervenors have comments on this court's rationale for the release of the State's funding obligation and the order to show cause. This is not a situation of "the State of Arkansas . . . using a carrot and stick approach . . . ." [5-21-11 at 108] This is a situation where the courts found violations of the Constitution by various State actors, necessitating interdistrict remedies, including interdistrict transfers and magnet schools, with State funding warranted due to the State role in the underlying violations, and necessary agreements and orders approving them.

If arguendo, a punitive approach is warranted [Ruling 5-19-11 at 109], plainly no punishment of transferring students or adult decisionmakers, who choose to invoke transfer rights, is appropriate. If the court continues along the current path, there is a need to insure that implementation of the funding change posed by the court would not end or damage a required remedy (in which

approximately 2,000 students participate according to ODM's report).

Third, during the course of this litigation, the Court of Appeals in Appeal of LRSD, 949 F.2d 253 (8thCir.1991) discussed the standards governing modification of approved agreements in this case. The Eighth Circuit quoted with approval from a discussion of standards for considering modifications of decrees in Heath v. DeCourcy, 888 F.2d 1105, 1110 (6thCir.1989). The first portion of the quoted language identified several circumstances possibly supporting such modification. See 949 F.2d at 258. The quoted language from Heath continued [id., emphasis added]: "A modification will be upheld if it furthers the original purpose of the decree in a more efficient way, without upsetting the basic agreement between the parties."

This court discussed Appeal of LRSD. This court wrote, as follows [5-19-11 at 11]: "In the years following [the 1990] approval [of the plans], the plans were modified. The modifications were allowed as long as they did not affect the `major substantive commitments to desegregation' embodied in the plans. Appeal of LRSD, 949 F.2d 253, 256 (8thCir.1991)."

In this instance, this court, in the absence of a motion, authorized a major change in the approved remedy, which ADE agents promptly implemented. This court, without a motion, also presented the possibility of a second major change in the remedy by the show

cause order. The court viewed the mode of State funding as a defect in the approved orders impeding the implementation of substantive relief. See Appeal of LRSD. The court, however, acted without taking evidence or hearing from the parties on [i] its orders or other approaches for improving plan implementation, and [ii] the impact of such funding changes on magnet school and interdistrict transfer remedies, important parts of "the basic agreement between the parties," or stated otherwise "major substantive commitments to desegregation embodied in the plans." See Appeal of LRSD.

Indeed, the initial exploration of the impact of the authorized funding change came in the parties dueling presentations, not subject to cross-examination, regarding a stay pending appeal. Given timing, budget, student assignment, personnel, and transportation issues, Joshua viewed the districts' presentations as more persuasive. The court, in the ruling on the stay motions, sided with the State, but without explanation. Order, 6-9-11 at 1. The Eighth Circuit will have to decide if this court modified approved remedies in a lawful manner.

The same complex, dueling facts can be expected in this realm. A decision should be made after a hearing, following discovery. This will permit a careful resolution of "factual disputes crucial to resolution of the [matter]." Cody v. Hillard, 139 F.3d 1197, 1200 (8thCir.1998). Factual disputes bear on whether such a funding termination would "[upset] the basic agreement between the

parties," or stated otherwise, "affect [a] major substantive [commitment] to desegregation."[4]

Conclusion

Joshua opposes such an order on M-to-M funding [no predicate for ending M-to-M transfers established in a hearing; court's rationale lacks merit; other sound ways to improve implementation; hearing required prior to decision on the matter].

Respectfully submitted,

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[4] Due to the stated framework for the hearing, Joshua did not offer evidence on M-to-M funding. Joshua proffers: due to such funding, some inner city schools closed to facilitate desegregation, including Mitchell, Rightsell, Badgett, Ish and Garland; they had served more than 1,500 students, almost all Af.-American; absent M-to-M funding, LRSD would face either paying for their educations elsewhere, including transportation costs, or very large construction costs ($40 million spent on the new Roberts School in West Little Rock); building 2 to 4 schools (to educate students in segregated environments) would take time; these students would face burdens, not faced by other pupils.

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing has been served on all counsel of record including the Office of Desegregation Monitoring upon filing utilizing the CM/ECF system on this 20th day of June, 2011.

/s/ John W. Walker