

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

LITTLE ROCK SCHOOL DISTRICT

PLAINTIFF

VS.

NO. 4:82CV 00866 BSM

**PULASKI COUNTY SPECIAL SCHOOL
DISTRICT NO. 1, et al.**

DEFENDANTS

LORENE JOSHUA, et al.

INTERVENORS

KATHERINE KNIGHT, et al.

INTERVENORS

**NORTH LITTLE ROCK SCHOOL DISTRICT'S
BRIEF IN RESPONSE TO SHOW CAUSE ORDER**

Comes now Separate Defendant North Little Rock School District (“NLRSD” or the “District”) by and through its counsel, Jack Nelson Jones and Bryant, P.A., and for its Brief in Response to Show Cause Order, states as follows:

BACKGROUND

Voluntary majority-to-minority transfers (“M-to-M”), with the State of Arkansas funding the cost of education and transportation, was a remedy for interdistrict segregation among the three school districts in Pulaski County ordered by the Eighth Circuit Court of Appeals in 1985. *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.*, 778 F.2d 404, 436 (8th Cir. 1985) (en banc). Following the principles set out by the Eighth Circuit, North Little Rock School District (“NLRSD”), Pulaski County Special School District (“PCSSD”), Little Rock School District (“LRSD”) (collectively, the “Districts”), and the State entered into an M-to-M Stipulation to “permit and encourage” voluntary M-to-M transfers, which was submitted to the district court on August 26, 1986. The M-to-M Stipulation requires that the

State of Arkansas (“State”) pay the cost of educating and transporting M-to-M transfer students, and to also pay a financial incentive to the sending district. The 1989 Settlement Agreement incorporated the M-to-M Stipulation as a desegregation remedy.

In the May 19, 2011 decision, this Court found NLRSD unitary in all but one area of its desegregation plan and ordered NLRSD to “show cause why the State of Arkansas should not be ordered to stop funding for M-to-M transfers.” Doc. 4507 (“May 19, 2011 Decision”). However, the May 19, 2011 Decision does not resolve whether the Districts would still be obligated to continue the M-to-M program; if so, whether NLRSD would still be obligated to participate in the M-to-M program; and, if it were, who would have the responsibility for paying the education and transportation costs of the participating students which are presently paid by the State. Because immediate termination of M-to-M funding would cause student disruption, increase segregation, place NLRSD in fiscal distress and leave obligations of the Districts unresolved, M-to-M funding should not be immediately terminated.

If this Court were to order the State to immediately cease M-to-M funding without a finding that circumstances had changed such that the Settlement Agreement between the Districts no longer compelled the District’s participation, NLRSD would be compelled to predict the future resolution of that issue. In addition, NLRSD would be faced with the difficult decision of either a) upholding its promise to students and parents, by continuing to transport them to their current school, and thus, being forced to operate outside its budget, or b) breaking that commitment to students and parents because the funding is no longer available. *See* Exhibit 1 (“Kirsipel Affidavit”).

If M-to-M funding is to be terminated, the Supreme Court has stated that a court has a duty to “provide an orderly means for withdrawing from control when it is shown that the

school district has attained the requisite degree of compliance. A transition phase is an appropriate means to this end.” *Freeman v. Pitts*, 503 U.S. 467, 490, 112 S. Ct. 1430, 1445 (1992). In *United States v. Bd. of School Comm’rs of the City of Indianapolis*, 128 F.3d 507, 510-11 (7th Cir. 1997), the court noted that the injunction in that case should not be “dissolved so suddenly as to disrupt the education of the children currently being bused.” Also, in *Berry v. Sch. Dist. of the City of Benton Harbor*, 195 F.Supp.2d 971, 996-1000 (W.D. Mich. 2002), the court addressed its concern regarding the potential “impact of an immediate termination of the remedy” and determined that a five year transition phase was best.

I. Immediate termination of M-to-M funding would result in increased racial segregation within the Districts.

M-to-M funding should not be discontinued because it has been successful in achieving better racial balance among the Districts. According to the March 2011 ODM Report, in the 2010-11 school year, 181 black students were M-to-M transfers to PCSSD from NLRSD, and 603 white students were M-to-M transfers from PCSSD to NLRSD. As of October 1, 2010, the current racial composition of NLRSD is 58.81% black (5,528 students) and 41.19% nonblack (3,872 students). Kirspel Affidavit. If all the students returned to their district of residence, the impact on the racial composition of NLRSD would be to change these proportions to 63.59% black (5,710 students) and 36.41% nonblack (3,269 students). *Id.* Also, according to the March 14, 2011 ODM Report, LRSD would be 68.50% black and 31.50% nonblack, instead of 66.62% black and 33.38% nonblack. *Id.* PCSSD would be 37.70% black and 62.30% nonblack, instead of 43.19% black and 56.81% nonblack, which makes it a more identifiably white school as it had been. *Id.* Moreover, the discontinuation of State funding for M-to-M transportation will likely have a harsher impact on low income

students whose parents cannot provide transportation, and the great majority of such students are African American. *Id.*

II. Immediate termination of M-to-M funding would result in additional fiscal distress for NLRSD.

Funding is based on the previous year's average daily membership ("ADM"). The M-to-M students are *not* counted in *any* district's ADM. *Id.* M-to-M funding is entirely separate. *Id.* Since these students have not been counted in the 2010-2011 school year, they would not be counted in calculating the usual state aid associated with those students in 2011-12. *Id.* As a result, under existing State law, if M-to-M funding is terminated, NLRSD and the other Districts would receive no funding for any of the M-to-M students until 2012-2013, but would still have the duty to educate them in 2011-2012 school year, only without any State funds. *Id.* Based on the funding received last year, this results in a gap in foundation funding and any additional categorical funding of \$5,196,051 for NLRSD. *Id.* In addition, NLRSD received incentive funding of \$372,136 in 2010-11, which NLRSD would no longer receive. *Id.* Last year, the State paid \$2,056 per student as incentive funding to the sending district. *Id.* If M-to-M funding is eliminated, NLRSD will lose the \$5.5 million of current funding that it received for 2010-11. *Id.* Instead of the 603 M-to-M students educated in 2010-11, it may expect those 603 students plus return of the 181 transfers from NLRSD for a total of 784 students to educate next year but with no State funding from any source. To put this in perspective, there are 74 school districts in Arkansas with a total student population less than 784 students. *Id.* In addition, NLRSD currently expends \$1.6 million on transportation for M-to-M and magnet students. *Id.* These funds would also be lost if M-to-M funding is discontinued.

NLRSD is already limited in its ability to effectively address such losses in its 2011-12 budget. As of May 19, 2011, the District was already committed to extending teacher

contracts for the 2011-12 school year in accordance with Ark. Code Ann. § 6-17-1506 and § 6-17-1703. *Id.* These contracts cannot now be terminated except for cause. *Id.* Salary and benefits comprise over 80% of the NLRSD budget of \$98,000,000, and NLRSD cannot now absorb the cut in M-to-M funding while lacking the ability to reduce salaries and benefits dramatically. *Id.* In addition, much of the remaining funds in the budget are restricted federal funds that cannot be cut to balance out the loss because of the maintenance of effort rule contained in the No Child Left Behind Act of 2001. *Id.* Thus, the immediate discontinuation of M-to-M funding would have a significant impact on students. *Id.* Preliminary estimates are that 75-100 positions would have to be cut to absorb the loss of in M-to-M funding. *Id.* However, NLRSD cannot now eliminate those positions since it is after May 1 and those employees have already been contracted. Moreover, even if NLRSD could eliminate 75 positions, the result would almost certainly put NLRSD in violation of State standards. *Id.* Additionally, NLRSD's longstanding reduction in force policy is "last in, first out." As a result, any cuts in staff would diminish the gains NLRSD has made in the last few years in hiring new African American teachers. *Id.*

Under such circumstances, it is not possible for NLRSD to plan for the 2011-2012 school year in a manner that would ensure compliance with the State's educational standards while simultaneously satisfying the State requirement that the District not incur a deficit in its operational budget. Furthermore, the sudden change to NLRSD, LRSD and Pulaski County Special School District (collectively, the "Districts") resulting from the immediate cessation of funds will negatively impact the public's support of the Districts, especially that of the families of students who presently participate as M-to-M transfers. *Id.* As a result, the Districts may lose a significant number of students. *Id.* This loss of support is especially

critical in that the District must present a millage increase to the electorate in order to fund its recently adopted facilities plan. *Id.*

Mr. Richard Weiss, Director of the Arkansas Department of Finance and Administration, testified before the Desegregation Oversight Subcommittee of the Arkansas General Assembly meeting on June 16, 2011, that no additional funds could be disbursed without a court order requiring their disbursement. *Id.* For that reason, he said no further payment for magnet schools and teacher retirement and health insurance will be made in light of the District Court's May 19, Order. *Id.* There are outstanding reimbursements for which NLRSD has already incurred expenses, including \$213,163 in teacher retirement and health that was already paid out by NLRSD for the 2010-11 school year, which will now not be reimbursed. *Id.*

III. Immediate termination of M-to-M funding would disrupt student and NLRSD planning for the upcoming school year and may result in students leaving the District for an alternate to the public school system.

NLRSD and its students will be irreparably harmed if M-to-M funding is immediately discontinued because the District and its students will suffer significant disruptive consequences from the uncertainty resulting from the decision. In order to encourage racial balance, in accordance with the findings and orders of the Court and in compliance with the M-to-M Stipulation, the M-to-M students are given the right to attend the district to which they transfer until they graduate or otherwise choose to leave. *Id.* Because students and parents bond with administrators, teachers and peers in the district where they attend school, the certainty that a student will be allowed to continue in that district is very important to parents and students, and this certainty has facilitated the success of M-to-M transfers in achieving better racial balance among the Districts. *Id.* In the NLRSD, students are first

assigned to M-to-M in the last week of January every year in order to M-to-M for the following fall, which means the assignments for 2011-12 were largely completed in January 2011. *Id.* This allows the Districts to plan for necessary space and teachers needed each Fall.

In light of the Arkansas Public School Choice of 2004 Act, A.C.A. § 16-18-227, NLRSD cannot determine how many students would return to NLRSD if this Court ordered the immediate cessation of the State's funding for M-to-M transportation. If M-to-M transfers were terminated immediately, there is a possibility that as many as 181 black students could return to NLRSD if busing is not available and 603 nonblack students could leave NLRSD, although it is anticipated that many, even most, nonblack students would remain in NLRSD under School Choice. *Id.* Such an outcome would inevitably create questions regarding available space for these students. Based on past experience with parents and students, this sort of uncertainty is generally a reason that parents enroll their students in private schools, which would result in further racial imbalance in the Districts. *Id.*

IV. A hearing and findings regarding the settlement agreement and funding should occur prior to any termination of funding.

We request that the Court not order the immediate cessation of M-to-M funding without a hearing regarding to the settlement agreement and funding. It is respectfully submitted that, absent such hearing, NLRSD is likely to succeed on the merits this issue because the Court would have *sua sponte* modified the consent decree without notice, a hearing, or sufficient factual findings related to funding. Such an action resulted in reversal in *Jenkins v. Missouri*, 216 F.3d 720, 727 (8th Cir. 1991) and *Mayberry v. Maroney*, 529 F.2d 332, 335 (3rd Cir. 1976). The Supreme Court noted in *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 112 S.Ct. 748 (1992) that a consent decree “embodies an agreement of the parties and thus in some respects is contractual in nature” and should be governed by the standards that govern

modifications of judgments as set forth in Federal Rule of Civil Procedure 60(b). *Id.* at 379-81, 112 S.Ct. at 758.

Here, there has been no opportunity to determine whether the Settlement Agreement should continue, and, if so, the M-to-M funding along with it. Moreover, M-to-M funding and the cessation of such funding was not addressed in the District's hearings to determine the unitary status of NLRSD and PCSSD.

Even if it is ultimately determined that M-to-M funding should be discontinued, NLRSD submits it is likely to succeed on the merits of its position that the discontinuation of M-to-M funding should not be immediate but be phased out over a reasonable period. To do otherwise would result in the likely disruption and destabilization of District finances and community support. NLRSD submits that a phase out of State funding would be consistent with the Supreme Court's recognition that a party's withdrawal from court supervision in a desegregation case must be done in an "orderly" manner and that a gradual "transition phase... is an appropriate means to this end." *Freeman v. Pitts*, 503 U.S. 467, 490, 112 S. Ct. 1430, 1445 (1992). *See also United States v. Bd. of School Comm'rs of the City of Indianapolis*, 128 F.3d 507, 510-11 (7th Cir. 1997); *Berry v. Sch. Dist. of the City of Benton Harbor*, 195 F.Supp.2d 971, 996-1000 (W.D. Mich. 2002).

Finally, it is not clear what is meant by "desegregation efforts." Currently, the State is making that decision without guidance. For example, the State's position is that payment for health insurance and teacher retirement may be discontinued even when there has not been a discontinuation of M-to-M funding. It is submitted that teacher retirement and health insurance payments are not related to "desegregation efforts" but to separate obligations of the State under the 1989 Settlement Agreement. Moreover, even if they were deemed somehow

related, those payments would still be related to M-to-M transfers and should not be discontinued until M-to-M transfer funding is terminated. Certainly, payments should not be terminated for expenses incurred by the Districts prior to the Court's Order of May 19.

CONCLUSION

For these reasons, NLRSD urges the Court to determine that the M-to-M funding should be continued until appropriate findings are made after a hearing and during the appeal of LRSD. NLRSD also requests a hearing on the manner in which the State's funding is terminated and on the specific continuing obligations of the parties under the consent decree.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Stephen W. Jones, attorney for Separate Defendant North Little Rock School District, certify I electronically filed the foregoing with the Clerk of the court using the ECF system which sent notification of such filing to the following:

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