

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF ARKANSAS  
WESTERN DIVISION

LITTLE ROCK SCHOOL DISTRICT,  
ET AL.

PLAINTIFFS

v. NO.4:82CVO866 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 Their  
Motion Pursuant to Rules 52(b) and 59(e), Fed.R.Civ.Pro.  
Concerning the Pulaski County Special District

A. Introduction

This memorandum identifies in detail the bases for Joshua Intervenors' Motion pursuant to Rules 52(b) and 59(e), Fed.R.Civ.Pro., concerning the Pulaski County Special School District [PCSSD] portion of the "Findings of Fact and Conclusions of Law" dated May 19, 2011. The Motion first addresses the student achievement section of the court's rulings. See 5-19-11 at 92-103. Intervenors seek modified and additional findings of fact and conclusions of law, as well as related orders directed to the PCSSD defendants. Intervenors also discuss the timeliness of their motion.

B. Errors in Construing PCSSD's Obligations Regarding the Student Achievement Section of Plan 2000

In accord with controlling law, the court ruled that the PCSSD

had "the burden of proving unitariness." [5-19-11 at 17] The PCSSD must satisfy its burden of proof by establishing compliance with "the terms" of Plan 2000. [Ruling 5-19 at 14, 60, 61, 62; Freeman v. Pitts, 118 L.Ed.2d 108, 134-35 (1992) ("whether there has been full and satisfactory compliance with the decree . . .")]

1. The Scope of the Obligation Regarding the Achievement Gap

Section M of PCSSD "Plan 2000" [JX 0-1] reads, in part, as follows [at 6]:

Student Achievement

(1) The PCSSD shall implement the plans designed to improve student achievement recommended by Dr. Stephen Ross, and shall work with Dr. Ross in their implementation. See attachment (plans).

The court erred in construing a central element of the attached plan.

The court's opinion provides [5-19 at 93-94, emphasis added]:

Considering all of these influences on student achievement, it is not surprising that the education plan devised by Ross to meet the student achievement requirement includes a number of general educational goals dealing mainly with factors over which the district has direct control. The goals most specifically related to student achievement and racial inequity are:

To improve the educational achievement by all students, with special attention to African-American students and others who are at-risk of academic failure due to socioeconomic disadvantages, or other factors.

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To decrease the performance gap between white students and African-American students through the systematic design/selection and implementation of intervention programs that provide effective remediation and/or adaption to individual or group needs.

According to these goals, Pulaski County must in good faith implement and comply with a plan to improve general educational achievement while making good-faith efforts to close the achievement gap between white and black students. As such, the plan requires Pulaski County to do more than simply increase student achievement across the board; instead it requires Pulaski County to pay specific attention to its black students and the achievement disparities that attain between them and white students.

A comparison of the highlighted excerpts from Plan 2000 and the court's ruling renders the court's error apparent. A pledge "[t]o decrease the performance gap between white students and African-American students" is converted to "making good-faith efforts to close the achievement gap . . . ." This diluting of PCSSD's obligation is without justification.

First. PCSSD agreed voluntarily to implement the Ross plan. In approving Plan 2000, this court (S.W. Wright, J.) noted that PCSSD filed a motion, requesting approval of a revised desegregation plan entitled Plan 2000" [PC 2 at 2] and "that the proposed plan [arose] from the joint efforts of Joshua and PCSSD . . . ." [*Id.* at 4]

Second. The court departed from the plain, objective meaning of the words of the Ross Plan, a component of Plan 2000. First National Bank of Crossett v. Griffin, 310 Ark. 164 (1992) (reliance on "the plain language of the agreement"); Lion Oil Co., Inc. v. Tosco Corporation, 90 F.3d 268, 270 (8thCir. 1996) (same).

Third. In the NLRSD portion of the May 19 rulings the court justified a similar construction of the NLRSD Plan by reference to a decision by Judge Wilson in the LRSD case. However, the relevant part of the LRSD plan contained limiting language not found in Plan 2000. See LRSD v. PCSSD, 237 F.Supp. 2d 988, 1023, 1025, 1040

(E.D.Ark.2002).

Fourth. The Plan requires PCSSD to "decrease" -- not "eliminate" the achievement gap. PCSSD relies on testimony concerning the achievement gap given by Dr. David Armor at an earlier point in the case. See PCSSD's Proposed Findings of Fact and Conclusions of Law (Document 4469), filed 6-24-10, at 103-05. NLR Ex. 5, cited by PCSSD, includes the following testimony by Dr. Armor, identifying the ability to "decrease" the achievement gap. [at 153-54].

Q. You also indicated that you think the compensatory programs and magnet schools have a positive impact on the achievement gap or trying to limit the achievement gap. What I'm trying to determine is, how much of the achievement gap, given the socioeconomic conditions we face today, can reasonably be addressed by what the school district can do.

A. Well, the research that has been done, I hesitate to give a single number, because it differs in each study I have done, but I think we're probably looking at something less than a quarter, I would say.

Q. Of the gap?

A. Yes. In other words, I would say the majority of the gap lies outside of school policies or whatever they might do. Also, timing-wise, because the gap has been created in early childhood before children even get to school. Unless we change our definition of schooling, which is happening to some extent, to include the very early ages, preschool and even pre-preschool, it would be hard to be able to close much more than maybe a fourth to a third of it, because I believe that much comes from family background differences.

## 2. Assessing Progress in Decreasing the Achievement Gap

The court's findings address PC Ex. 63 concerning purported progress in lowering the achievement gap. [5-19 at 96] The court's findings also discuss and, in substance, demonstrate the validity

of the Joshua intervenors' position on the PCSSD approach. Namely, PCSSD's approach, utilizing Arkansas categories for evaluating student scores on the State's Benchmark examinations, does not accurately identify the achievement gap. [5-19 at 96-98] The court does not address Intervenor's discussion, in proposed findings, of a valid achievement gap analysis. [Id.] The court concludes:

Consistent with the holding on North Little Rock, it would be unreasonable to hold Pulaski County to the standard put forward by Joshua. [5-19 at 98]

Joshua intervenors note the following:

First. The court does not identify any part of its NLRSD discussion to which it refers, or, more importantly, why "it would be unreasonable to hold Pulaski County to the standard put forward by Joshua." As shown in the accompanying memorandum regarding NLRSD [Sec. C(2.) (b.)], that system's Director of Assessment, Ms. Martin, conceded that the achievement gap analysis suggested by Intervenor's, using student's scaled scores, could be undertaken.

Second. The testimony in the PCSSD hearing of Dr. Robert Clowers, Director of Educational Accountability, for the district, does the same. [Tr. 1203, 1216-22]

Third. Intervenor's proposed findings and the evidence there cited [paras. 232-37] together with Dr. Clowers' testimony establish that achievement gap analysis using the student's scaled scores in the available electronic data system is valid and feasible.

Joshua Intervenor's respectfully request that the court adopt amended and additional findings and conclusions. They should

provide that PCSSD's method for assessing the achievement gap is inappropriate and that the approach suggested by Joshua Intervenors is valid and feasible.

Based upon such findings and conclusions, the PCSSD should be ordered to file within 30 days following the court's order, a proposal for achievement gap analyses using the electronic data base containing student's scaled scores. The PCSSD should consider, inter alia, analyses, by racial group, of Benchmark Test results of students attending the same school for multiple years since the data became available. After Joshua Intervenors have had a reasonable opportunity to reply to the PCSSD proposal, the court should require the district to file specified achievement gap analyses for a three-year period.

D. Intervenors Motion Pursuant to Rules 52(b) and  
59(e) Is Timely

Intervenor's motion must be filed "no later than 28 days after entry of the judgment. . . ." Rule 52(b) and Rule 59(e), F.R.Civ.Pro. The motion is timely because, with respect to the May 19, 2011 rulings, judgment has yet to be entered in accord with the requirements of Rules 52(a) and 58(a)-(c), Fed.R.Civ.Pro.

Rule 52(a) required the court, in deciding the issues presented by the PCSSD Petition, to "find the facts specially and state its conclusions of law separately." The court did so. Rule 52(a) also provides: "Judgment must be entered under Rule 58." Judgment has not been entered in accord with Rule 58.

Regarding PCSSD, the court amended earlier judgments requiring the system to implement its desegregation Plan. The court released

the district from court supervision regarding three sections of the Plan. [5-19-11 at 1, 109] The court did not release PCSSD regarding nine sections of the Plan. [5-19-11 at 1-2, 109-10] The court set forth a new remedial requirement in that area of "one-race class reports." [5-19-11 at 49] The court also subjected PCSSD to a show cause requirement regarding "funding for M-to-M transfers." [5-19-11 at 108]

Because this case as to PCSSD involves a "judgment and amended judgment" -- by operation of Rule 58(a) [(1)-(5) not applicable], (b) (1) (A)-(C) [not applicable], (b) (2) (A)-(B) [(A) not applicable], and (c) (2) (A) -- entry of judgment required here:

- [i] the setting out of the "judgment and amended judgment" "in a separate document" [58(a), (c) (2) (A)],
- [ii] the court's approval of the form of the content of the separate document [58(b) (2), and
- [iii] the clerk's entry of the separate document (the judgment and amended judgment) "in the civil docket under Rule 79(a); . . ." [58(b) (2), (c) (2)].

The requisite "separate document" has not been prepared, approved, and docketed. See also Comments to the 2002 Amendments to Rule 58, second paragraph ("Rule 58(a) preserves the core of the present separate document requirement both for the initial judgment and any amended judgment.")

#### Conclusion

Entry of modified and additional findings of fact and conclusions of law, as well as additional orders, is necessary.

Respectfully submitted,

/s/ John W. Walker  
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**CERTIFICATE OF SERVICE**

I do hereby state that a copy of the foregoing pleading has been served on all counsel of record upon filing by utilizing the CM/ECF system on this 22<sup>nd</sup> day of July, 2011.

/s/ John W. Walker