UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

LITTLE ROCK SCHOOL DISTRICT,
ET AL. PLAINTIFFS

v. NO.4:82CV0866 DPM

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 North Little Rock School 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 North Little Rock School District [NLRSD] portion of the "Findings of Fact and Conclusions of Law" dated May 19, 2011. The Motion seeks modified, additional, and, in one instance, legally sufficient findings of fact. It also seeks additional orders directed to the NLRSD defendants.

Intervenors first set forth four general standards employed in analyzing the court's findings and conclusions. Intervenors then address rulings regarding six sections of the NLRSD Plan [NLR 2].

These are -- "Special Education" [Plan at 16-23], "Compensatory Education"/"Achievement Disparity" [at 24-36], "Extracurricular Activities" [at 39-40], "Discipline, Expulsions and Suspensions" [at 41-42], "Gifted and Talented Education") [at 43-45], and "Desegregation Monitoring") [at 48].

Arguments on the first five areas focus on findings and conclusions regarding a particular obligation[s] imposed in that section of the Plan, or the court's failure to address a particular obligation. Each argument suggests modified findings and additional remedial steps. In the sixth instance, involving Plan requirements for "Desegregation Monitoring," Intervenors contend that the court did not make legally sufficient findings of fact. Intervenors also discuss the general requirement of "good faith" articulated in Freeman v. Pitts, 503 U.S. 467, 491 (1992). This is done in the light of the pattern of conduct revealed by NLRSD's actions regarding the specific obligations which have been discussed.

Lastly, Intervenors show the timeliness of their motion.

B. Standards Applied in Joshua Intervenors' Analysis

1. Evidence Adequate to Satisfy the NLRSD's Burden of Proof

In accord with controlling law, the court ruled that the NLRSD had "the burden of proving unitariness" [Ruling 5-19-11 at 17] -- that is the requisite compliance with its desegregation plan. [Id. at 14] The court held that NLRSD failed to meet this burden in one area, "Staff Recruitment." [Id. at 19] The court found that the

NLRSD relied "on personal recollections and anecdotal evidence" to establish "steps to recruit black teachers, principals and administrators," rather than adequate documentation of its efforts. [Id.] This inadequacy and data showing a decline in the percentage of black teachers over time led to the holding of non-compliance in this area. [Id. at 18-19]

This refusal to rely on personal recollection and anecdote absent documentation, by a witness the court otherwise praised [id. at 39], gave proper substance to the NLRSD's burden of proof. However, self-serving testimony, absent supporting documentation, was allowed to suffice in other significant areas.

2. Establishing Compliance with the Terms of the Plan

The NLRSD must satisfy its burden of proof with regard to "the terms" of the district's desegregation plan. [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 . . .")] Portions of the court's rulings on PCSSD illustrate proper application of this standard. See 5-19 at 48-49 (some one-race class reports were missing and the majority failed to include required information); 5-19 at 66 (PCSSD documents did not contain required focus on disparities in discipline); 5-19 at 66-67 (document submitted to satisfy discipline study requirement of Plan 2000 was a draft and did not contain the requisite content); 5-19 at 80 (no proof of compliance with Plan 2000 requirement of

additional monitoring in the event of racial disparity in a school's special education program).

3. Interpretation of the NLRSD Plan

The appeal in LRSD v. PCSSD, 112 F.3d 955 (8thCir. 1997), required the court to construe one part of the consent decree in this case, the parties' "Settlement Agreement." The court wrote [112 F.3d at 954, emphasis added]:

> Except as provided in the Settlement Agreement, or by reasonable implication therefrom, the rights and duties of the three school districts, and those with whom they do business, including employees and organizations of employees, are governed by other applicable law, primarily state law.

See also Wynn v. Sklar and Phillips Oil Company, 493 S.W.2d 439, 445 (Ark. 1973) (reliance on context in construing contract); Mears v. Nationwide Mutual Insurance Company, 91 F.3d 1118, 1122 (8thCir. 1996) ("contract terms are interpreted with strong consideration for what is reasonable").

4. Scrutiny of the Entirety of NLRSD's Implementation Efforts

Determining whether or not the NLRSD's performance evidences the requisite good faith compliance necessitates consideration of the entirety of implementation efforts, not simply performance in each plan area in isolation. This court noted [5-19 at 14-15] that under Freeman, supra, it "should examine

> [w]hether the school district 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 the provisions of the law

> and the Constitution that were the predicate for judicial intervention in the first instance. [quoting Freeman, 503 U.S. at 491 (emphasis added)]

The Freeman Court also wrote [503 U.S. at --- (emphasis added):

> In considering these factors a court should give particular attention to the school system's record of compliance. A school system is better positioned to demonstrate its good-faith commitment to a constitutional course of conduct when its policies form a consistent pattern of lawful conduct.

See also Ruling 5-19 at 21 (reference to "the entire record").

C. The Sections of the Plan Where the Joshua Intervenors Seek Modification of the Findings, the Conclusions, and the Orders

1. Special Education [5-19-11 at 20-21]

The court found "that North Little Rock still has an overrepresentation of black students in its special education classes."[1] The court nevertheless ruled that the district had fulfilled the requirements of the special education section of the plan. However, the court did not identify or address significant elements of the commitments made by NLRSD.

The Plan reads in part [NLR 2 at 23, emphasis added]:

> In its Proposed Findings of Fact and Conclusions of law, the 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

[1] Ms. Susan Shurley, Director of Special Services, conceded that the Arkansas Department of Education has viewed the NLRSD as having an overrepresentation of black students in its special education program for the last 10 years. [Tr. 1034; 1106-07]

> for consideration for placement in a special education placement; (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.

In brief, NLRSD's specific commitments reached not only the proportion of black pupils in the system's total special education population, but also the facts by race in 18 schools on students referred for consideration of placement, students evaluated, and students placed in special education. See JX 0-6 at 40-45 (number of schools).

The court found that "North Little Rock failed to submit annual reports . . . ." [Ruling, 5-19 at 21] While the district did submit four reports belatedly, these single page documents did not contain the referral, evaluation, and placement information required by the plan. See JX 2-1 to 2-4; Tr. 1119-22 (S. Shurley) (conceding that information not provided). The court found that NLRSD maintained records, internally, on special education placements [5-19 at 20]; this did not satisfy all of "the terms" of the plan.

This is major not trivial non-compliance, paralleling that involving PCSSD's one-race class reports and discipline study. See Sec. B(2.), above. Reports are delayed and those finally submitted do not contain required, important information. The NLRSD should be ordered to provide to the court, the Office of Desegregation

Monitoring (ODM), and the Joshua Intervenors reports containing the requisite information, annually, for a three-year period.

2. Compensatory Education [5-19-11 at 21-36] Including "Achievement Disparity"

This section of the Plan includes a description of programs to be offered and strategies to be employed (many pages of the Plan), as well as language concerning achievement disparity between black and white students.

a. The Offering of Programs

The court found that NLRSD had proven the actual implementation of the programs and strategies in 18 schools, in many hundreds of classrooms, by more than 500 teachers and paraprofessionals,[2] for many years by the testimony of four witnesses -- without supporting documentation. See 5-19 at 21-32 and Document 4462, paras. 146-47 (NLRSD's proposed findings of fact; no document cited). This was the same kind of "testimony [based] on personal recollections and anecdotal evidence" which the court found inadequate to fulfill the district's burden of proof regarding staff recruitment, a narrower course of conduct. [5-19 at 19]

The system's principal witness on this point, Ms. Letitia

[2] The following exhibits show: [i] from 519 to 550 teachers in the years 1984-85 to 1987-88 [NLR 20 at B#12,691]; [ii] from 755 to 773 teachers in the years 2006-07, 2007-08 and 2009-10 [JXS 1-2, 1-3; NLR 26]; [iii] paraprofessionals also participated in providing programs [Tr. 695-96 (L. Martin)].

Martin, served as "Instructional Computer Coordinator" from 1986 through 2001; she was thereafter "Director of Federal Programs and Assessment." [Tr. 534; 538] While Ms. Martin referred to documents Tr. 702-03], she did not support her testimony as to implementation of many programs and strategies by specific references to exhibits. Indeed Ms. Martin testified at one point: "I guess I created documents. Could I hand one to you at this moment? No, sir." [Tr. 703-04][3] Ms. Martin's testimony also identified the greater number of staff needed to determine reliably whether a program that's good in concept might in some individual classroom be implemented in an excellent way, in a mediocre way, or not at all. [Tr. 678[14]-79[18]; 721[12]-726[24].[4]

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[3] Other aspects of Ms. Martin's testimony evidence limitations on the extent of her knowledge of program implementation. See Tr. 560[23]-61[7]; 695[17]-97[5]; 698[24]-99[20]; 704[8-13]; 747[2-3] ("I could only speak from what was tested. I can't speak from what was taught."); 748[8-15] ("I was not the curriculum person at the time. I was, in fact, working with technology at the time. . . . I was not at any time in possession of curriculum documents, so I cannot testify to what was the actual curriculum being taught. That was outside of my job responsibilities."); 748 ("Yes, sir. But at no point did I monitor the implementation of the curriculum.")

[4] The testimony of the other three witnesses cited was of limited scope. [i] Ms. Rosie Coleman's cited testimony was almost entirely about current programs [Tr. 797, 801, 810, 825-26], including the planned offering "this year" of an elementary summer school program at locations not yet identified. [Tr. 825-26] [ii] Ms. Rhonda Dickey began working in the district in the 2006-07 school year [Tr. 976], long after Plan implementation began. [iii] The cited testimony of Ms. Veit-Edrington [453-55] deals only with the "Home Instruction Program for Preschool Youngsters" ("HIPPY"), with the witness testifying in part: ". . . I knew the coordinator at that time. So I'm quite certain if

b. Achievement Disparity Between Black and White Students

The court's discussion of "achievement disparity" -- "an issue of particular importance during the hearing" [5-191 at 32] -- includes the following content [at 32-33; numerals and emphasis added].

> Although not a separate topic under the compensatory education section of the desegregation plan, the achievement disparity between black and white students is mentioned throughout this section and was an issue of particular importance during the hearing. [1] The introduction to the compensatory education section states, '[t]he 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.' [2] Under learning resources, the plan states that the goal is to '[p]rovide technology based remedial skill instruction to reduce the achievement disparity between black and non-black students.' [3] Under pupil services, the plan states that the goal is '[t]o assess student achievement and monitor the reduction of achievement disparity between black and non-black students.' [4] This part requires that '[a]chievement 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.' [5] Under basic skills instruction, the plan states that the goal is to '[p]rovide remedial instruction for basic skills mastery to reduce achievement disparity between black and non-black students.'
>
> North Little Rock's desegregation plan does not require that the achievement disparity be reduced. It recognizes that there is disparity, that the disparity needs to be addressed, and prescribes various programs and actions in an effort to reduce the disparity. Certainly, reducing the achievement disparity is an important goal. Indeed, one could argue that it is what this case is all about. An absolute reduction in

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that's what it said, she was doing that." [Tr. 454(10-12)]

> the achievement disparity, however, is not required by the plan and, as demonstrated above, North little Rock has met its obligation to implement the processes and actions prescribed by the plan.
>
> . . . . Although it is the hope of all involved that the disparity be reduced, and reduced quickly, this is not a requirement of the plan. In his September 13, 2002, order finding Little Rock partially unitary, Judge Wilson found that what was required of Little Rock when it came to the achievement disparity was effort. The same is required of North Little Rock, and it has met this obligation. . . .

The court, in the quoted language, offers three points in support of the conclusion that the "plan does not require that the achievement disparity be reduced."

First. The court simply asserts that this is the case, without accounting for the words in the five parts of the Plan which it has quoted. These words do promise a reduction in achievement disparity. They provide: Achievement disparity between black and white students exists and will be addressed, with a possible first step being disparity plans at each campus. Technology based remedial skills instruction and remedial instruction for basics skills mastery will be provided "to reduce the achievement disparity" ("to reduce achievement disparity"). NLRSD will develop achievement data by race for each school by grade. It will use this data to evaluate program effectiveness and to develop program components for school improvement plans. The district will also use the achievement data to "monitor the reduction of achievement

disparity between black and non-black students."

Second. The court refers to "effort to reduce the disparity." The court introduces the concept of effort as sufficient. It is not part of the cited content of the NLRSD Plan.

Third. The court relies on Judge Wilson's holding in the Little Rock case. The court otherwise recognizes that the issue here is compliance with the terms of the NLRSD Plan. See B(2), above. The Little Rock Plan contained limiting language, relied upon by Judge Wilson, but not found in the NLRSD plan.[5]

A data base containing individual students' results on the Arkansas Benchmark Tests, including scaled scores, is available to the NLRSD. The data, beginning with testing in 2005, can be manipulated electronically to produce meaningful achievement gap analyses. [Tr. 704[19]-711 (L. Martin; NLRSD Director of Assessment)]

The NLRSD should be ordered to file within 30 days following the court's order, a proposal for achievement gap analyses using the foregoing data. The NLRSD 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 NLRSD proposal, the court should

[5] See LRSD v. PCSSD, 237 F.Supp. 2d 988, 1023, 1025, 1040 (E.D.Ark.2002).

require the district to file specified achievement gap analyses for a three-year period.

3. Extracurricular Activities [5-19 at 36-37

The court's findings of "[clear]" compliance in this area [at 36] do not address important elements of "the terms" of the Plan, the requisite focus. See Sec. B(2), above.

One Plan focus is "racially identifiable" extracurricular activities. [NLR 2 at 39, para. 5] In June 2008, ODM reported that seven areas of athletic participation have been racially identifiable "since 2002." [JX O-4 at 17] The Plan required that "principals and sponsors" make "special efforts . . . to promote minority participation . . ." in these instances. [NLR 2 at 39-40] The court's brief findings do not address this area. [5-19 at 36-37]

There was other evidence of racially identifiable athletic teams. See NLR 85(a) (B#12300-01) (six athletic teams racially identifiable in 2006-07 at West Campus [grades 11-12]); NLR 85(b) (B#12398) (six athletic teams racially identifiable in 2007-08 at West Campus); NLR 85(c) (B#12493) (nine athletic teams racially identifiable in 2008-09 at West Campus). In these instances, the monitoring reports did not specify, for any identified sport, any particular "special efforts" by "principals [or] sponsors." See

foregoing cites to NLR 859a), 85(b) and 85(c).[6]

The Plan contained two other significant, explicit requirements, not discussed by the court. Individual school reports and a district-level compilation of them were required to include "try out" information "for all clubs, organizations and other extracurricular activities . . . ." [NLR 2 at 40] ODM reported in 2004 and 2008 that NLRSD did not fulfill the try out information requirement [JX 0-2 at 57, 63 (recommending compliance in 2004); JX 0-4 at 18 (same problem)] Second, the Plan required that the annual district summary report be "presented to the Board of Education at its May meeting each year." [NLR 2 at 40] Minutes of Board of Education meetings contained no evidence of the "present[ation]" of these reports to the School Board during a three year period (2007-2009) [JX 5-4 B#s12,497-12,687].

Assistant Superintendent Bobby Acklin has been responsible for overseeing implementation of the extracurricular activities obligations. [Tr. 1143] Mr. Acklin agreed with ODM's finding as to try out information. [Tr. 1217(19-24)] Mr. Acklin testified that in recent years the District Desegregation Team, which he chaired, ceased implementing the Plan requirement to provide the systemwide

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[6] Mr. Bobby Acklin, Assistant Superintendent for Desegregation, testified to racially identifiable athletic teams at East Campus (grades 11-12). [Tr. 1264(4-10)] The monitoring reports did not identify this fact, or "special efforts" directed to a particular sport. E.g., NLR 85(b) at B#12392; NLR 85(c) at B#12487. See also the court's ruling regarding specificity in this area in the PCSSD portion of the memorandum. [5-19 at 101]

extracurricular report "to the Board of Education at its May Meeting each year." See NLR 2 at 40, para. 7; Tr. 1230-32.

In view of the large number of racially identifiable activities, these Plan violations can not be dismissed as trivial. For example, had the reports been provided and discussed at a Board meeting, any one of the Board of Education members could have sought evidence, for a school[s], of the "special efforts" required by the Plan in the event of racially identifiable activities.[7]

NLRSD should be ordered to comply with the explicit "special efforts," try out information, and Board presentation requirements of the Plan for a three-year period. This compliance should be documented, with the documentation available to ODM and Joshua Intervenors upon request. The requisite "special efforts" by "principals and sponsors" in instances of racially identifiable activities should be documented, at the school level, by team, by more than conclusory statements.

4. Discipline, Expulsions and Suspensions [5-19 at 37-39]

The court noted the "clear [racial disparity" in discipline meted out and the parties' competing contentions as to the cause. The court then observed: "the question is whether the district has acted in good faith and has substantially complied with its

[7] The court found that "[Mr. Acklin] monitors and attends extracurricular activities that require tryouts to ensure that the selection process is fair." [5-19 at 37] However, Mr. Acklin's testimony was only that he attended "cheerleading tryouts." [Tr. 1150-51; see also 1242 ("spirit group tryouts")] .

obligations under the desegregation plan." [5-19 at 37-38] The court found such compliance, but failed to discuss major Plan obligations.

a. Summary of suspensions; Its Consideration by School Board

The Plan discussed the topic of racial disparity in discipline and identified "additional steps [taken] to ensure fairness and the absence of bias." [NLR 2 at 41] Two of the "steps" were described as follows: "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." [Id.]

In view of the assertion of steps to guard against bias, a "reasonable implication" from the Plan's wording [see B(3), above] is that the summary compiled for each school would call attention to any racial disparity at that school, or include enrollment data allowing the reader to identify disparity. There was no such content, just the numbers of suspensions by race. [JXS 6-1 to 6-4; NLR 68; Tr. 1394 (Ms. Fran Jackson);[8] see also JX 0-2 at 67 (ODM's report of June 2004 stated: "The reports haven't pinpointed schools where data indicate problems . . . "); JX 0-4 at 21 (ODM report of June 2008 identified the same problem)] Finally, NLRSD did not prepare the summary of suspension data for 2008-09, the most recent

[8] Ms. Jackson, Director of Student Affairs, testified that she has been in charge of discipline for 15 years. [Tr. 1301]

school year prior to the trial. [Tr. 1329 (F. Jackson)]

Intervenors turn to the Plan requirement that the suspension data summary be submitted to the school board. "Reasonable implication" from the Plan's text is again relevant. Providing data in this context is not an end in itself. It is to provide a basis for the administration and school board to discuss whether problems are suggested and, if so, to address potential remedial steps. In addition, the court's legal analysis emphasized the importance of "good faith" compliance with the respective desegregation plans. [5-19 at 14-15]

School Board minutes reflecting provision of the suspension data to the Board are available and summarized below; they reveal a mechanical or pro forma process, not one evidencing compliance with the Plan, as properly construed, or action in "good faith."

> [i] 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." [JX 6-5 (B#s9020-21)] It is noteworthy that the Board offered praise for a report not addressing whether there was any racial disparity in discipline at any particular school. See supra.

[ii] The meeting minutes for April 17, 2008, where

the discipline report for 2006-07 was presented -- about nine months after the time specified in the NLRSD Plan -- state [JX 6-6 (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." [Id.] 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 JX 6-7 (B# 2,558) (minutes of 10-18-07 identify discussion of "several areas of concern from Board members" about Argenta Academy program).

[iii] A district discovery response stated that the 2007-08 report "was also made available to Board members." However, meeting minutes were silent on this point. [See JX 6-8 (B#s9016-27)]

ODM observed, in substance, that the content of the annual discipline report did not promote a discussion of issues and

remedies. See JX 0-2 at 67 (June 2004 ODM Report);[9] JX 0-4 at 21 (June 2008 ODM Report); Tr. 1400 (F. Jackson) (agrees with ODM characterization of annual discipline report content).

b. Review of Suspensions for School with Disparate Discipline

NLRSD Plan Section 7 reads in part [NLRSD 2 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.

This court wrote: "[J]oshua correctly points out that a grave disparity persists between the number of black children and the number of white children disciplined." [5-19 at 39] Scrutiny of implementation of the quoted portion of Section 7 was, therefore, important. Yet, the court's findings are silent on this point. [5-19 at 37-39] NLRSD failed to show compliance with this provision. Moreover, its approach to doing so changed over time.

In 2004, NLRSD informed ODM that high level administrators reviewed all discipline data. "If minority students [were] disproportionately represented in the data, the [Director of Student Affairs] [was] to work with the principals individually to develop a plan of action to correct the problem. [JX 0-2 at 67

[9] ODM wrote: "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 districtwide initiatives planned for improving the picture." [JX 0-2 at 67]

(emphasis added) (ODM report of June 2004)] The 2004 ODM report does not identify any particular "plan of action" developed, or provided to exemplify the asserted approach. [Id. at 64-67]

The ODM Report of June 2008 again noted the claimed development of "a plan of action" "if minority students [were] disproportionately represented in a school's discipline data . . . ." ODM then stated: "However, the discipline report does not reflect any such activity." [JX 0-4 at 21]

In preparation for the January 2010 hearing, Joshua Intervenors directed to the NLRSD Request for Production number 16, reading as follows [JX 6-9]:

> 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]

In response to Request number 16, the NLRSD provided to Intervenors documents with Bates numbers 9,205 to 9,506 [JX 6-10]. 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. NLRSD did not, at this time, assert that "a plan of action" was oral.

During the hearing, NLRSD changed its position. The Director of Student Affairs testified that she received computer printouts showing discipline in the district and copies of suspension and referral forms. If "areas of concern" were identified for a school,

she conferred with the principal to develop "a plan of action." [Tr. 1301-02 (F. Jackson)] Ms. Jackson continued: "Usually this is not put in writing because I found out that when it is put in writing, I get less cooperation from the administrator." [Tr. 1302; emphasis added] Asked to describe "the kind of situations [that] have come up that you're looking to address through the plan of action . . .", Ms. Jackson discussed a situation involving a disruptive child. [Tr. 1303-04] While the word "usually," indicated that a plan of action is at times in writing, NLRSD offered no such exhibit.

When asked on direct examination about compliance with the individual school review requirement of the Plan quoted above, Ms. Jackson spoke four words in response to two questions: "I do," "I do." [Tr. 1330] She identified neither any school, nor the results of her review for any school. She identified no supporting documentation.

On cross-examination, Ms. Jackson agreed that the Plan called for an "analysis" of the reasons for disproportionate discipline, that an analysis "calls for a writing," and that she never made one. [Tr. 1343-44] Later, Ms. Jackson again claimed to have fulfilled the individual school review requirement, while admitting: "I don't have a document." [Tr. 1371]

NLRSD's inconsistent position and reliance on conclusory, self-serving testimony, unsupported by any documentation, negative

any contention that the district satisfied its burden to show compliance with this important provision.

c. Other Aspects of the Court's Discipline Findings

Two facets of the court's discipline findings do not, in fact, support its conclusion of good faith compliance.

The court found as a "[process] to ensure fairness [in discipline]" that "the district has an exhaustive progressive discipline plan requiring the district to give a number of warnings to a student before discipline is handed out." [5-19 at 38] The district did not offer in evidence any such "exhaustive . . . plan." Rather, some witnesses, including Ms. Jackson, asserted such an approach. [Tr. 1332-33] However, she later testified that there is no writing. [Tr. 1376 (1-5)] This is another example of undocumented, self-serving testimony, where documentation would be expected in a system of 18 schools. See Sec. B(1), above. A district would not rely on many hundreds of staff members, some new to the system, to memorize the content of an "exhaustive plan."

Finally, the court found "[Assistant Superintendent Bobby] Acklin was very believable when he explained that black children are not being treated unfairly but that they receive discipline in proportion to the number of offenses they commit." [5-19 at 39] Misbehavior prompting discipline could occur in the classroom, in other parts of the school facility, on the grounds of the districts 18 schools, at school sponsored events on and off campus, on the

way to school, at school bus stops and on school buses. [NLR 69 at B#s 9245, 9246, 9248, 9251] Mr. Acklin, the system's only Assistant Superintendent, had no basis to compare the conduct of thousands of black and white pupils, interacting with hundreds of district employees, in countless locations.

d. Additional Orders

The court should enter orders requiring: [i] preparation of the annual summary of school discipline in a manner which reveals within the content for each school whether and if so the extent to which there is racial disparity in discipline; [ii] submission of this report each year to the Board of Education for discussion of any racial disparities shown, explanation of remedial steps undertaken by the administration, and other remedial actions identified by the Board; [iii] reviews of the discipline in schools with significant racial disparities in discipline, with documentation of the reviews and remedial steps undertaken; and [iv] access to documentation to ODM and Joshua Intervenors upon request. These actions should be undertaken for a three-year period.

5. Secondary Gifted and Talented Education [5-19 at 39-42]

The commitments made by the NLRSD in the gifted and talented section of its Plan include making progress in reducing the "underrepresent[ation]" (unevenness) of black student participation

in the program. [Tr. 1530-33 (Ann Kincl testimony);[10] NLR 2 at 5, para. 6; at 43, para. 3; at 45, paras. 2-3] Giftedness is found as much in the African American student population as it is in the white student population. [Tr. at 1534 (Ann Kincl)]

The court wrote that resolution of "[the] issue [of compliance in this area] is very difficult because the numbers indicate that there is grave disparity in the number of black and white students enrolled in gifted and talented classes." [5-19 at 42][11] The court ruled that NLRSD had satisfied its obligations in this sphere. However, it did so without addressing, properly, the specific terms of NLRSD's commitments, next discussed.

The NLRSD Plan provides in part [NLR 2 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.

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[10] Ms. Ann Kincl served as coordinator of the NLRSD program for 27 years. [Tr. 1458]

[11] In 2009-10, in grades 6-12, 691 students were identified as gifted and talented, of whom 450 were white students (65.1 %) and 211 (30.5 %) were African American students. [JX 7-3 (B#9,614)] In 2009-10, in grades 6-12 in the NLRSD, there were, in total, 1,779 white pupils (36.6 %) and 2,754 black pupils (56.6 %). [JX 0-6 at 46 (ODM Report, 12-11-09)] These statistics show that in 2009-10, the NLRSD identified 25.3 percent of white secondary students and only 7.7 percent of black secondary pupils as gifted and talented. Thus, the identification rate for white students exceeded that for black pupils by more than three times.

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. [JXS 7-4, 7-5]

The documents provided in response to requests for production 20 and 21 do not establish that the required reporting and monitoring occurred. [JX 7-6 (B#s9,616 - 9,695); JX 7-7 (B#s9,698 - 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." [JX 7-5] The NLRSD, which had the burden of proof, did not introduce any exhibit showing that any such reporting and monitoring occurred.

The NLRSD Plan also stated [NLR 2 at 45]:

> As a result of such additional reviews, minority students who might be gifted are identified and follow-up procedures are initiated to observe and document the student's actions which would justify referral, evaluation and possible placement. . . .

The NLRSD, which has the burden of proof, did not provide any exhibit showing that these activities actually took place.

The court found: "Finally, the district monitors the records of its gifted and talented students, and if it determines that there is a racially uneven number of referrals, it carefully searches the files of its black students to see if there is anyone who would be appropriate for the program. This is done in an effort

to even out the number of black and white students in gifted and talented classes." [5-19 at 41] As shown above, discovery responses do not support this finding. NLRSD offered in support of such a finding its proposed finding of fact 224 [document 4462]. It cites one NLRSD exhibit, number 71, which does not appear to support the court's finding. It otherwise cites self-serving recollections and anecdotes, held not to satisfy the district's burden of proof in the staffing realm; the same result is appropriate here.

The NLRSD should be ordered: [i] to document carefully the full implementation of the two full paragraphs of its gifted and talented plan quoted above and appearing at page 45 of NLR 2, for a period of three years; [ii] to include in this documentation data showing, in a manner not personally identifiable, by school, by grade, by race: [a] students referred for possible identification as gifted and talented and the outcome, and [b] students whose permanent folders were examined by the program supervisor as part of "additional reviews" and the outcome for each such student (identified as gifted and talented, or not identified); [iii] to make such documentation available to ODM and the Joshua Intervenors, upon request; and [iv] to file for a three year period by December 15 a report showing by school, grade, and race the total number of secondary students identified as gifted and talented.

6. Desegregation Monitoring [5-19 at 43]

In the foregoing discussion, Intervenors have identified specific tasks in the NLRSD Plan carried out inadequately, if at all. The 11 paragraphs of this part of the Plan [NLR 2 at 48] include the following text:

> 1. It will be the responsibility of the District's Desegregation Team to monitor progress toward accomplishment of tasks included in the District's Desegregation Plan.
>
> 2. The District Desegregation Team will consist of the Superintendent, Assistant Superintendents, and one member of the local Board of Education appointed by the President and approved by the Board. . . .
>
> 4. The District Desegregation Team will meet at least once each month to review specific tasks included in the District's Desegregation Plan.
>
> 5. All administrators assigned responsibilities for implementing the desegregation plan will regularly report to the District Desegregation Team. . . .
>
> 10. The District Desegregation Team will routinely review all monitoring reports and will report to the school Board the status of the District's Plan.

In sum, the monitoring effort was to focus on the implementation of tasks now discussed by Joshua intervenors, with the Team, by reasonable implication from the text of the plan, providing for remedial steps if tasks were carried out inadequately, or not at all.

The court was required in considering the NLRSD Petition to make factual findings. Rule 52(a)(1)-(2), Fed,R.Civ.Pro. The findings must be adequate to allow review by the Court of Appeals, should an appeal ensue. LRSD v. PCSSD, 60 F.3d 435, 436-37 (8thCir.

1995); Cody v. Hillard, 139 F.3d 1197 (8thCir. 1998).

The entirety of the court's findings on this part of the plan are [5-19 at 43]:

> 9. Desegregation Monitoring
>
> It was definitely clear that North Little Rock acted in good faith and substantially complied with its obligation to monitor its desegregation efforts. Although there was much cross examination on this point, nothing came close to controverting this finding.

These "findings" are too cryptic to allow review. If there were an appeal, the Court of Appeals would be faced with receiving a summary of the relevant evidence and making findings as to 11 paragraphs. This is not its role. Cody, supra. Monitoring, as the Court of Appeals emphasized in 1990 in the course of directing approval of the parties' agreements, including the NLRSD plan, can not be dismissed as unimportant. LRSD v. PCSSD, 921 F.2d 1371, 1386 ("monitoring by the District Court and its agents is essential"; "important for the settlement plans to be scrupulously adhered to . . .").

Respectfully, it is necessary for proper findings to be made, following consideration of the parties' proposed findings of fact on this topic.

7. Absence of An Overall Showing of Good faith Compliance

Intervenors have shown that proper findings would establish a lack of "demonstrat[ion] to the public and to the parents of the once disfavored race, [NLRSD's] good-faith commitment to the whole

of the court's decree and to the provisions of the law and the Constitution that were the predicate for judicial intervention . . . ." Freeman, supra, 503 U.S. at 491.

Proper findings would establish: [i] required annual reports on special education data by school were not submitted; [ii] NLRSD did not undertake a meaningful and feasible analysis of reduction of achievement disparity; [iii] the system-level summary of extracurricular activities did not contain the requisite try out information and the Desegregation Team did not submit the report to the School Board in recent years (precluding a discussion with the Board of compliance problems); [iv] the annual discipline data report has not identified particular schools with racial disparities in discipline and the most recent report was not completed; [v] School Board minutes reflect perfunctory treatment of the annual discipline report, when submitted; [vi] reviews of discipline at schools with racially disparate patterns, if undertaken, were not documented; and [vii] required steps to ensure identification of students as gifted and talented in accordance with NLRSD standards were not documented.

There was other significant evidence on this point. It revealed an absence of reports or other documents addressing particular issues, of the kind one would expect, had there been an energetic rather than a pro forma approach to Plan obligations, including monitoring. See Tr. 1171-72 (no narrative report prepared

by Ms. Jackson on extracurricular activities); 1173-74 (in period 1992 to 2010, Mr. Acklin wrote one narrative document; it addressed extracurricular activities); Tr. 1179 (no writing district will pay field trip fee, if parent can't afford to do so); Tr. 1191 (no document that district will pay for cheerleading and other spirit group expenses, if parent unable to do so); Tr. 1223 (no focused study by District Desegregation Team on several one-race athletic teams or programs to determine causes and possible remedies); Tr. 1231 (Mr. Acklin concedes as to District desegregation team: We didn't have written reports."); Tr. 1269[13-25]; Tr. 1339 (during 16 year period in which Ms. Jackson has had responsibility for discipline, she never prepared a narrative written report regarding discipline in the NLRSD); Tr. 1342[2-6] (superintendents did not express to Ms. Jackson dissatisfaction with the disproportionate suspension of African-American students); Tr. 1343-44 (superintendents and Mr. Acklin did not request Ms. Jackson to prepare a written analysis of the reasons for disproportionate discipline).

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 NLRSD Petition, to "find the facts specially and 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 NLRSD, the court amended earlier judgments requiring the system to implement its desegregation Plan. The court released the district from court supervision regarding eight sections of the Plan. [5-19-11 at 1, 19-20, 109] The court did not release NLRSD regarding the area of "staff recruitment" and set forth a new remedial requirement in that area. [5-19-11 at 19-20] The court also subjected NLRSD to a show cause requirement regarding "funding for M-to-M transfers." [5-19-11 at 108]

Because this case as to NLRSD 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,

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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 22nd day of July, 2011.

/s/ John W. Walker