

*In the*  
**UNITED STATES COURT OF APPEALS**  
*for the*  
**EIGHTH CIRCUIT**

No. 11-2305

(Consolidated with 11-2130, 11-2304, and 11-2336)

North Little Rock School District  
Defendant/Appellant

v.

Little Rock School District, Alexa Armstrong, et al.  
Plaintiff/Intervenors/Appellees

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Appeal from U.S. District Court for the Eastern District of Arkansas –  
Western Division (4:82-cv-00866 BSM)

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**BRIEF OF DEFENDANT/APPELLANT**  
**NORTH LITTLE ROCK SCHOOL DISTRICT**

Jack, Nelson, Jones & Bryant, P.A.  
2800 Cantrell Road, Suite 500  
Little Rock, Arkansas 72202  
Telephone: 501-375-1122  
Facsimile: 501-375-1027

Stephen W. Jones, Ark. Bar No. 78083  
[sjones@jacknelsonjones.com](mailto:sjones@jacknelsonjones.com)  
Debby A. Linton, Ark. Bar No. 2001146  
[dlinton@jacknelsonjones.com](mailto:dlinton@jacknelsonjones.com)  
Mika Shadid Tucker, Ark. Bar No. 2006055  
[Mika.tucker@jacknelsonjones.com](mailto:Mika.tucker@jacknelsonjones.com)

Attorneys for Defendant/Appellant  
North Little Rock School District

## **Summary of Case and Request for Oral Argument**

This appeal is the most recent appeal regarding *Little Rock Sch. Dist. (“LRSD”) v. Pulaski County Special Sch. Dist. (“PCSSD”), et al.*, 921 F.2d 1371, 1376 (8<sup>th</sup> Cir. 1990). On May 19, 2011, the district court issued its order granting in part and denying in part the motions of North Little Rock School District (“NLRSD”) and Pulaski County Special School District (“PCSSD”) for unitary status and relieving the State of Arkansas from its funding obligations under the Magnet Stipulation. Add.1-110. Defendant/Appellant NLRSD is appealing the district court’s decision to deny NLRSD unitary status in the area of staff recruitment and is also appealing that portion of the district court’s order modifying the consent decree and immediately relieving the State of Arkansas from its funding obligations under the Magnet Stipulation and for past violations of the 1989 Settlement Agreement.

Because the issues are complex, Defendant/Appellant NLRSD believes this appeal would benefit from oral argument and requests the same. If the Court elects to hear oral argument, Defendant/Appellant NLRSD respectfully requests thirty (30) minutes to present its argument.

## **Corporate Disclosure Statement**

Appellant/Defendant North Little Rock School District is a public school district in the State of Arkansas. The members of its Board of Education are Dorothy Williams, Scott Miller, Darrell Montgomery, Ron Treat, Scott Teague, Kathleen McComber and John Riley.

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## Jurisdictional Statement

The district court originally exercised jurisdiction of this action under 28 U.S.C. §§ 1131(a), 1343(3) and (4), 2201, and 2202. The action was brought by the LRSD, which alleged causes of action under 42 U.S.C. §§ 1981, 1983, 1988 and 2000d and the Fourteenth Amendment of the Constitution of the United States. *LRSD v. PCSSD*, 584 F.Supp. 328, 352 (E.D. Ark. 1984), *aff'd LRSD v. PCSSD*, 778 F.2d 404 (8<sup>th</sup> Cir. 1985). In 1987, the Pulaski County school districts' intradistrict desegregation cases were consolidated into this interdistrict desegregation case for purposes of implementing a comprehensive remedy. The interdistrict case was designated as the lead case. [Docket No. 745].

In 1990, this Court approved a comprehensive settlement agreement including both an interdistrict remedy and an intradistrict desegregation plan for each district. *LRSD v. PCSSD*, 921 F.2d at 1376. A consent decree embodying the parties' settlement agreement was entered on April 29, 1992. *Knight v. PCSSD*, 112 F.3d 953, 954 (8<sup>th</sup> Cir. 1997). The district court retained ancillary jurisdiction to enforce the consent decree. *See Jenkins v. Kansas City Missouri Sch. Dist.*, 516 F.3d 1074, 1081 (8<sup>th</sup> Cir. 2008); *LRSD v. NLRSD*, 131 F.3d 1255, 1257-58 (8<sup>th</sup> Cir. 1997).

NLRSD filed its petition for unitary status on September 21, 2007. The hearing to determine whether NLRSD achieved unitary status was held in

January and February of 2010. On May 19, 2011, the district court granted NLRSD's petition for unitary status except for the area of staff recruitment; relieved the State of Arkansas of its obligations for magnet schools and past violations of the consent decree; and ordered the districts to show cause why the court should not also terminate funding for majority to minority transfers. Add.108. Defendant/Appellant NLRSD filed a timely appeal on June 15, 2011. This Court's jurisdiction is based on 28 U.S.C. § 1291, which provides jurisdiction for final decisions of district courts, and 28 U.S.C. § 1292 (a)(1), which provides for jurisdiction of interlocutory orders modifying injunctions.

## Statement of Issues

### **I. DID THE DISTRICT COURT ERR IN DENYING NLRSD UNITARY STATUS FOR SECTION 2: STAFF RECRUITMENT PLAN OF ITS DESEGREGATION PLAN.**

#### ***A. Whether The District Court Applied an Incorrect Legal Standard in Determining Whether NLRSD Achieved Unitary Status with Respect to Its Staff Recruitment Plan.***

*LRSD v. PCSSD*, 237 F.Supp.2d 988 (E.D. Ark. 2002);

*LRSD v. PCSSD*, 451 F.3d 528, 531 (8th Cir. 2006).

#### ***B. Whether the District Court's Factual Findings Regarding the Unitary Status of NLRSD with Respect to Its Staff Recruitment Plan Were Clearly Erroneous.***

*Anderson v. City of Bessemer City*, 470 U.S. 564, 105 S. Ct. 1504 (1985);

*Manning v. School Bd.*, 244 F.3d 927, 940-941 (11th Cir. 2001), *quoting Corley v. Jackson Police Dept.*, 566 F.2d 994, 1001 (5th Cir.1978)

### **II. The District Court Erred in Modifying Sua Sponte the Settlement Agreement to Terminate Immediately the Funding Obligations for Magnet School Operations and Previous Violations of the Settlement Agreement and In Ordering the Parties to Show Cause Why the Funding for Majority to Minority Transfers Should Also Be Ended.**

*Jenkins v. Missouri*, 216 F.3d 720 (8<sup>th</sup> Cir. 1991);

*Cody v. Hillard*, 139 F.3d 1197 (8<sup>th</sup> Cir. 1998);

*Berry v. Sch. Dist. of the City of Benton Harbor*, 195 F.Supp.2d 971 (W.D. Mich. 2002).

## Statement of the Case

This “case” is the product of four consolidated cases: the interdistrict desegregation case, *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. et al*, LR-CV-82-866, which is designated as the lead case; *Clark v. Bd. of Educ. of the LRSD*, LR-CV-64-155 (“Clark”), an intradistrict case; *Davis v. Bd. Of Educ. of the NLRSD*, LR-CV-68-151 (“Davis”), an intradistrict case; and *Zinnamon v. Bd. of Educ. of the PCSSD*, LR-CV-68-154 (“Zinnamon”). [Docket No. 745]. All four cases were resolved by the 1989 Settlement Agreement approved by this Court in 1990. *LRSD v. PCSSD*, 921 F.2d 1371 (8<sup>th</sup> Cir. 1990).

On September 21, 2007, NLRSD moved for unitary status based on its good faith and substantial compliance with its desegregation plan. [Docket No. 4141].

In the spring of 2010, the district court conducted a hearing on NLRSD’s petition for unitary status. Before the hearing, the district court issued a detailed scheduling order outlining the order of proof. It provided:

The hearing on the North Little Rock School District’s (“NLRSD”) petition for declaration of unitary status and release from court supervision (Doc. No. 4141) is set for January 25, 2010. To ensure an orderly hearing, the NLRSD is ordered to present evidence regarding the requirements of its desegregation plan in the following order: (1) staff recruitment; (2) special education; (3) compensatory education; (4) compensatory programs aimed at dropout prevention; (5) extracurricular activities; (6) discipline, suspensions and expulsions; (7) secondary gifted and talented education; (8) school construction and facilities; and (9) desegregation monitoring.

Docket No. 4312. With minor exceptions, NLRSD presented proof as ordered by the district court. No evidence was presented regarding the efficacy of the interdistrict remedy (magnet schools and the M-to-M transfer program) or the State of Arkansas's compliance with the consent decree.

On May 19, 2011, the district court issued its order granting in part and denying in part NLRSD's Petition for Unitary Status. Add.1-110. In particular, the district court denied NLRSD unitary status only in the area of staff recruitment. In addition, the district court modified sua sponte the consent decree immediately relieving the State of Arkansas of its funding obligations under the Magnet Stipulation and for past violations of the 1989 Settlement Agreement. The district court further ordered the districts to show cause why the State of Arkansas should not also be relieved of its funding obligations under the M-to-M Stipulation. On June 21, 2011, this Court granted LRSD's motion to stay the district court's order pending appeal. The district court has not yet ruled on state funding for the M-to-M program.

NLRSD is appealing the district court's decision to deny NLRSD unitary status in the area of staff recruitment and that portion of the order modifying the consent decree and immediately relieving the State of Arkansas from its funding obligations under the Magnet Stipulation and for past violations of the 1989 Settlement Agreement.

## **Statement of the Facts**

### ***History***

NLRSD's Desegregation Plan was originally submitted to and approved by the district court in February 1987. App.68; *LRSD v. PCSSD*, 659 F. Supp. 363, 368 (E.D. Ark. 1986). Subsequently, some modifications to the Plan were made by petition to and approval by the court and later by operation of the settlement among the parties as the "Desegregation Plan: North Little Rock School District (April 29, 1992)" (the "Plan"). App.68. A smaller version of the Plan without the attachments was prepared by the District (the "1992 Plan Handbook") and distributed to NLRSD officials and employees for their ease of reference in implementing the provisions of the Plan. App.363-390; Transcript ("Tr.") 12-13 (NLRSD Superintendent Ken Kirspel (W, M)).

On August 31, 1995, NLRSD reached an agreement with the other parties regarding its unitary status in the areas of Student Assignment and Elementary Gifted and Talented. The Court approved the release of NLRSD from court supervision regarding student assignment on September 18, 1995, and from the Elementary Gifted and Talented portion of the Plan on March 27, 1996. Doc. 2525 and 2648.

On April 10, 1998, the Court entered an order approving LRSD's Revised Plan, which stated that it "shall supersede and extinguish all prior agreements

and orders” in this case “and all consolidated cases related to the desegregation of LRSD.” *See LRSD*, 237 F. Supp.2d at 993 n.6. As a result, the sole measure of NLRSD’s unitary status became its compliance with the Plan.

In compliance with an order of this Court, the Office of Desegregation Monitoring (“ODM”) was created. *See LRSD*, 921 F.2d at 1388, 1394. The role of the ODM was to monitor the compliance of the parties with the settlement plans and the 1989 Settlement Agreement. *Id.*; *LRSD v. PCSSD*, 769 F. Supp. 1483, 1495 (E.D. Ark. 1991).

As part of 1989 Settlement Agreement, NLRSD was “release[ed] of all liability” except for liability relating to the enforcement “of the terms of this settlement or the terms of the Plan.” App.23; *LRSD*, 131 F.3d at 1255, 1257.

### ***Section 2: Staff Recruitment Plan***

The primary objective of Section 2: Staff Recruitment Plan (“SRP”) of NLRSD’s Plan is to increase representation of black individuals as principals and administrators in the district. App.79. NLRSD has been committed to this objective since the inception of the Plan. Tr.223(NLRSD Assistant Superintendent of Desegregation Bobby Acklin (B, M)).

As required by the Plan, NLRSD developed annual budgets that anticipated the activities related to all components of the Plan and provided the necessary funding for the SRP. Tr.224, 254(Acklin); App.391-400;

Tr.321(NLRSD Director of Personnel Gregg Thompson (W, M)); App.372. This budget did not include the salary of any employee involved in recruiting efforts. Tr.224(Acklin); Tr.321(Thompson). NLRSD also enhanced its recruitment budget with Title I funds. Tr.322-323(Thompson).

In compliance with the Plan, NLRSD personnel are notified of vacancies in administrative positions and have been notified of such vacancies since the implementation of the Plan. Tr.224, 254-255(Acklin); App.409; App.372. This is a formal policy of NLRSD's Board of Education. App.409; Tr.224(Acklin). As required by the Plan, NLRSD personnel are encouraged to apply for these positions and have been so encouraged over the years since the implementation of the Plan. Tr.224, 254-255(Acklin); App.409; App.372. This is also a policy of NLRSD's Board of Education. App.409; Tr.254-255(Acklin). Current employees of the district are automatically granted an interview for any position for which they apply. Tr.224(Acklin); Tr.2627(Thompson)<sup>1</sup>.

As required by the Plan, NLRSD has conducted annual interest surveys among its teachers and administrators with the purpose of identifying those individuals who would be interested in advancement to administrative or principal positions. Tr.225(Acklin); Tr.333-334(Thompson); App.430-434;

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<sup>1</sup> Please note that the Testimony of Gregg Thompson from pages 2525 to 2724 have been incorrectly labeled as "Proffered" in the District Court's transcript.



App.372. This policy of NLRSD's Board of Education is still in effect. App.401-429; Tr.255(Acklin).

In compliance with the Plan, NLRSD identified regional colleges and universities that had strong teacher education programs with significant black enrollment and contacted these institutions for the purpose of recruiting black applicants. Tr.225-226(Acklin); App.372. Likewise, NLRSD identified regional universities having post graduate education programs with significant black enrollment for the purpose of soliciting black applicants for administrative positions. Tr.225-227(Acklin); App.435-504; App.372. The colleges and universities identified and visited by NLRSD include Grambling, Southern University, University of Arkansas at Pine Bluff, Jackson State in Mississippi, Alcorn State, Louisiana State University, Louisiana Tech, Memphis State and University of Memphis. Tr.226,255(Acklin).

As required by the Plan, NLRSD visited out-of-state colleges for several years to recruit black teachers and administrators, but received virtually no black applicants from any of those institutions. Tr.226,228(Acklin); Tr.324,361(Thompson); App.372. In an effort to improve recruiting, District representatives were authorized to commit to hire black applicants "on the spot." Tr.290, 306(Acklin); Tr.2717(Thompson). This was not required by the Plan but was an additional effort to increase the employment of black teachers. NLRSD

made no such commitments to white teacher applicants during recruiting trips. Tr.306(Acklin). Instead, the District representatives simply invited white candidates to apply. *Id.*

Obstacles the District faced in recruiting at these colleges and universities included: 1) some students did not want to move to Arkansas; 2) the number of school districts recruiting greatly outnumbered the number of black candidates; 3) NLRSD could not offer salaries as high as other districts recruiting the same graduates; and 4) NLRSD could not offer additional incentives such as signing bonuses offered by other districts. Tr.234(Acklin); Tr.380(Thompson). Recognizing that out-of-state efforts had proven unfruitful, NLRSD began focusing its recruiting efforts solely on in-state colleges and universities, including Henderson State University, Arkansas State University, the University of Arkansas at Pine Bluff, Philander Smith College, the University of Central Arkansas and the University of Arkansas at Little Rock, which have significant black enrollment in teacher education programs. Tr.227, 255(Acklin); App.401-429; Tr.333, 361, 2607(Thompson); Tr.419(NLRSD Director of Elementary Education Rosie Coleman (B, F)); Tr.2119, 2132(Principal of NLRSD Argenta Academy Charles Jones (B, M)). NLRSD had more success in its recruitment efforts at these in-state institutions than at out-of-state institutions. Tr.227(Acklin); Tr.333, 361(Thompson). NLRSD's Director of Elementary

Education sits on the teacher education committees at both Philander Smith College and University of Arkansas at Little Rock, and has used this access to identify African-American candidates graduating from these schools. Tr.419(Coleman).

NLRSD faced many of the same problems recruiting at in-state colleges it faced at regional colleges because it was competing against the same recruiting districts. Tr.234(Acklin). NLRSD also has had trouble recruiting in-state over the years because it could not offer salaries as high as other local school districts such as LRSD and PCSSD. Tr.234(Acklin), Tr.328-329(Thompson); Tr.32-33(Kirspel). At one point, there was a \$4,100 difference between NLRSD's salary for beginning teachers and the beginning teacher salary of the LRSD. Tr.328, 329(Thompson).

NLRSD uses student teaching programs to identify possible African-Americans teachers and offers positions to successful African-American student teachers who perform their student teaching in the District. Tr.420(Coleman); Tr.253(Thompson). In compliance with Plan requirements, NLRSD contacted the institutions described *supra* and provided them with letters and brochures containing information about the District, its occupational opportunities and its employee benefits. Tr.228-229(Acklin); App.505-519 and App.520-530;

App.372. NLRSD continues to send out similar letters and information to colleges and universities. Tr.230(Acklin); Tr.345(Thompson); App.531-532.

In compliance with the terms of the Plan, NLRSD representatives have visited colleges and universities on career days and during visitation seminars in order to recruit black applicants and continue to do so. Tr.217, 222, 230-231, 257(Acklin); App.372. As required by the Plan, NLRSD developed materials for distribution to colleges, universities and interested students, including the introductory letter (App.132), a description of employee benefits (App.133-134), a District brochure (App.135-145), an application, specific information items on teaching, coaching and administrative positions, notices on current job vacancies, and a schedule of visitations and seminars. Tr.231, 258(Acklin); App.401-429; App.372.

As set forth in the Plan, NLRSD contacted black community leaders, including Lorene Joshua (the lead Plaintiff), members of the NAACP, members of the Urban League and local ministers, for employment referrals and in an attempt to involve them in the recruitment of African-Americans for administrative positions in the District. Tr.232-233, 316(Acklin); App.533-537; App.401-429; Tr.404(Coleman); App.372. NLRSD identified educational organizations that could serve as sources of black applicants for administrative positions as required by the Plan. Tr.236(Acklin); App.372. These organizations

included the Arkansas Department of Education (the “ADE”) and the Arkansas Leadership Academy. App.401-429; Tr.259(Acklin). In compliance with the Plan, NLRSD contacted these organizations and provided them with materials regarding employment with the District. Tr.236(Acklin); App.401-429; App.372. Likewise, NLRSD representatives attend regional or national conferences sponsored by these professional associations for the purpose of recruiting administrative personnel. Tr.236, 261(Acklin); Tr.403(Coleman); App.372.

Each semester, the ADE and the Arkansas Department of Higher Education provide NLRSD’s Personnel Director with a list of minority graduates graduating from in-state institutions. Tr.260(Acklin); Tr.350, 351(Thompson); App.538-546. This list contains the contact information for the graduates as well as their particular areas of certification. Tr.350,354(Thompson). The District determines what vacancies or potential vacancies it may have and contacts the individuals qualified for these positions. Tr.350(Thompson). The District has also used this information to contact groups of minority graduates to encourage them to apply at NLRSD. Tr.351(Thompson).

In 2007, there were only 109 black graduates from Arkansas colleges and universities with education degrees. App. 547; Tr.351(Thompson). From 2003

to 2007, there were on average of approximately 89 black graduates from Arkansas colleges and universities each year with education degrees. Tr.352(Thompson). There are approximately 287 school districts in Arkansas competing for these graduates. Tr.351(Thompson). As of November 2009, less than ten percent of licensed teachers in Arkansas were African-American. Tr.352(Thompson); App.548; App.549-553.

In compliance with the Plan, each year the NLRSD submits a plan for recruiting black teachers to the ADE. Tr.260(Acklin); Tr.343, 365-363(Thompson); App.554-563; App.372. The minority recruitment plan is the product of the District's analysis of the success or failure of previous recruiting efforts. Tr.2643(Thompson). The minority teacher and administrator recruitment plan also reflects advice from ODM and the ADE related to minority recruitment efforts. Tr.2644(Thompson). Most of the items that must be covered in these plans are also required by the staffing section of the Plan. Tr.366(Thompson). Therefore, in the last decade, NLRSD has used the minority teacher and administrative recruitment plan to detail its recruitment efforts related to compliance with the staffing section of the Plan. Tr.2643(Thompson).

As provided in the Plan, NLRSD's recruitment activities have been administered by persons fully aware of the District's non-discrimination and equal employment opportunity policies as well as the Plan and the District's

obligations thereunder. Tr.236(Acklin); App.372. Since implementing the Plan, NLRSD has notified its recruitment sources in writing and all of NLRSD's recruitment materials, including newspaper advertisements, state that the District is an Equal Opportunity Employer as required by the Plan. Tr.237(Acklin); App.401-429; Tr.335(Thompson); App.373. In compliance with the Plan, NLRSD has produced short presentations describing the District and its occupational opportunities for use at recruitment sites. Tr.237(Acklin); App.373. The slide show presentations previously used by the District have been replaced by the Power Point presentations in current use. *Id.* Again, as provided in the Plan, NLRSD has advertised and continues to advertise teaching and administrative vacancies in newspapers and other media in communities that have colleges and universities targeted for recruitment efforts. Tr.237, 263(Acklin); Tr.336, 2625(Thompson); App.564-566; App.373.

When he was first hired, NLRSD's Assistant Superintendent, Bobby Acklin, was given complete authority to hire as many African-American teachers as he could find. Tr.315(Acklin). Soon thereafter, Acklin realized how difficult it was to recruit African-American candidates to NLRSD. *Id.* Mr. Acklin is very involved in the recruiting and hiring process. Tr.355(Thompson).

When Gregg Thompson was hired as Director of Personnel in 2006, Superintendent Ken Kirspel asked him to examine why the District had not been

more successful in recruiting African-American teachers and directed him to make the recruitment of African-Americans a priority. Tr.323(Thompson); Tr.33(Kirspel). Recruitment techniques have evolved over recent years. When Thompson became Director of Personnel in 2006, he, Bobby Acklin, Ken Kirspel and others assessed the success and cost-effectiveness of the recruiting methods being utilized by the District. Tr.324, 375(Thompson). As a result, the District redirected its funds in more efficient ways to increase the number of black applicants. Tr.324-325(Thompson). This was not required by the Plan.

For example, the District employed technology and the internet to identify, recruit and hire minority applicants. *Id.*; Tr.372-373(Thompson). NLRSD principals now use a real-time on-line tracking system to find applicants interested in the vacancies at their schools. *Id.* The District held professional development sessions with the administrators about how to use the tracking system. Tr.376(Thompson). The District uses a company called Search Soft for applicant tracking and advertising job vacancies. Tr.332, 346(Thompson). The District also uses [www.teacher-teacher.com](http://www.teacher-teacher.com) and [www.EducationAmerica.net](http://www.EducationAmerica.net), which are nation-wide networks, in order to increase its minority applicant pool. Tr.332, 346(Thompson); Tr.87(Kirspel); App.567. Furthermore, in addition to delivering hard copy flyers for posting vacancies in locations throughout the District, NLRSD also posts its vacancies



on its web site, the Arkansas Educational Administrators Association web site and the ADE web site so that the postings are seen by as many people as possible. Tr.87(Kirspel); Tr.333, 335, 346, 2625(Thompson). Even as the District implemented new technology and recruiting techniques, it still continued its obligations under the SRP and its commitment to hiring African-American applicants. Tr.332, 399(Thompson).

After Thompson became Director of Personnel, NLRSD's hiring and selection process was modified and the Directors of Elementary Education and Secondary Education became more involved in the hiring process to help encourage the hiring of minority job applicants. Tr.330-331, 354(Thompson). NLRSD also significantly increased its starting salaries after Thompson became Director of Personnel, which has resulted in its becoming competitive with the competing districts. Tr.329(Thompson).

Since implementing these new policies and recruiting techniques, the number of African-American new hires has increased significantly. Tr.326, 2615-2616(Thompson); App.568-581. In the two years prior to the changes, the percentage of minority new hires was 9.9% and 6.03%. Tr. 2615(Thompson). In 2006-2007, the percentage of minority new hires was 21.3%; in 2007-2008, it was 12.6%; in 2008-2009, 17.7%; and in 2009-2010, the percentage of minority new hires was 23.3%. App.568-581. These improvements are especially notable

since newly hired black teachers ranged from 5.3% to 9.3% statewide during the same period (App.550), and African-Americans with new teacher certifications had declined from 8.1% to 6.1% statewide from 2006-07 to 2008-09. App.551.

In 1986, NLRSD proposed to the court that it would develop goals and timetables to address any underutilization of African-Americans in its certified workforce. App.373. Accordingly, the District commissioned labor economists Welch Associates in 1988 to conduct an analysis of the pool of qualified applicants in the relevant labor market for teaching and administrative positions within the District (“Welch Study”). Tr.239, 309(Acklin); App.582-744.

The Welch Study found that few new teachers were recruited from the other two school districts in Pulaski County. App.594-595, 598. This remains true today. Tr.239(Acklin); Tr.399-400(Thompson). Based upon a review of the District’s hiring, Welch Associates found the relevant labor market for the District to be the entire state, not just Pulaski and Saline counties. App.582-744. This still remains true. Tr.239(Acklin); Tr.399-400, 2617(Thompson). The Welch Study found that the pool of qualified blacks in NLRSD’s relevant labor market was 11.9%. App.5597. Today, that has declined to 9.0%. App.549. In 1988, when the Welch Study was completed, African-Americans comprised 15.2% of the certified educators in the NLRSD. App.587. Today, they represent 16.7%. App.745.

The Welch Study also found that the proportion of black administrators in NLRSD exceeded the relevant labor market in every year studied. App.587-589. In addition, the Welch Study found that the proportion of black teachers in NLRSD exceeded the labor market in every year studied by at least 2.9 percentage points. App.588. The Welch Study further indicated that representation of African-Americans in NLRSD's administration had grown steadily during the years studied. App.587.

The Welch Study concluded that the NLRSD actually *exceeded* the representation of African-Americans in its relevant labor market. Accordingly, there was no underutilization to be addressed by the creation of numerical goals and timetables. Tr.242(Acklin). However, the District remained committed to recruiting African-American teachers. *Id.*

Since 1988, the availability of African-American educators has actually declined, and the pool of qualified black applicants in NLRSD's relevant labor market today is less than 10%. Tr.2617(Thompson); App.549-553. However, the proportion of certified staff in NLRSD who are black has never fallen below 11.9% since 1986. Tr.302(Acklin); App.582-744.

At the urging of ODM, NLRSD established in 2008 an informal goal of achieving a 20% black workforce even though the Plan did not require it. Tr. 84-86, 2781-2782(Kirspel); Tr.265(Acklin); Tr.2598(Thompson); Tr. 1891(ODM

Monitor Margie Powell (B, F)). Because 20% of students in Arkansas are African-American but less than 10% of the certified teachers in Arkansas are African-American, it is mathematically impossible for all of the school districts in Arkansas to have a teacher workforce that reflects the racial makeup of its students. Tr.2617, 2619, 2706(Thompson); App.746-747; App.549-553.

In 2008-2009, NLRSD had 14.89% African-American certified staff. App.748. In the 2009-2010 school year, NLRSD had 16.7% African-American certified staff. App.745.

Despite the obstacles to increasing the number of black teachers, NLRSD has been able to increase dramatically the number of African-American administrators and coaches in the District, which was the primary focus of the Plan. In 2009-2010, almost 29% of NLRSD's coaches were African-American. App.749-750. In that same year, 55% of NLRSD's building administrators were African-American and 40% of its District level administrators were African-American. App.751-756; Tr.380-381(Thompson); Tr.994, 1019(NLRSD Director of Secondary Education Rhonda Dickey (W, F)).

The pool of African-American administrators at NLRSD has primarily come from employees already working in the District. Tr.363(Thompson). Promoting current African-American employees into administrative positions helps the District comply with the goal of its Plan, but it also decreases the

number of the District's African-American teachers. *Id.* Moreover, the number of African-American graduates with education degrees is declining. Tr.311(Acklin); App.552. The District continually monitors staffing activities and seeks to hire African-Americans. Tr.269, 274, 275-277, 316(Acklin); Tr.1844(NLRSD Board of Education Board Member Dorothy Williams (B, F)). The Assistant Superintendent of Desegregation annually reviews the racial composition of the staff of each school. Tr.247(Acklin).

Since the inception of the Plan, NLRSD has continually reported on the racial composition of its staff and other staffing issues to the district court, either through status reports filed with the court or by providing information to ODM. Tr.304(Acklin); *see* App.1776-1799; App.1800-1809; App.1810-1820; App.1821-1832; App.1833-1840; App.1841-1845; App.1846-1867; App.1868-1874; App.1875-1888; App.1889-1910; App.1911-1926; App.1927-1949; App.1950-1960; App.1961-1973; App.1974-1980; App.1981-1986; and App.1987-1999. The District is attentive to any concerns expressed by ODM, including concerns about staffing, and works with the ODM to address these concerns. Tr.356, 357(Thompson); App. 790.

For example, in 2008, ODM criticized the District because, it said, there were nine elementary schools in the district where it was possible for a student to attend the school through each of its grade levels without having an African-

American teacher. App.766. Upon receiving ODM's criticism, the Director of Personnel met with the Assistant Superintendent for Desegregation, the Director of Elementary Education and principals of each of the nine schools and discussed the concerns. Tr.357-358(Thompson). Of the nine schools listed by ODM, at least four had minority principals. Tr.357(Thompson). Furthermore, each of them had at least one black teacher in the 2007-2008 school year. App.813-815. Additionally, today there is at least one black teacher in each of these schools. Tr.358(Thompson).

NLRSD recognizes the value of "growing its own" administrators. Tr.346(Thompson). Therefore, in 2007, NLRSD presented a program for current district employees who had showed interest in becoming administrators. Tr.346-347(Thompson); App.912-914. During this program, representatives from universities discussed financial assistance for tuition needed for obtaining further education. Tr.347(Thompson). NLRSD uses a tuition reimbursement program to assist teachers who are obtaining advanced degrees, including degrees in administration, or certification in areas outside their current certification areas. Tr.347-348(Thompson). The tuition reimbursement program also helps fund tuition for current uncertified staff members who are working to become certified. Tr. 348(Thompson); see also Tr.496(NLRSD Coordinator of Pre-K Program Jody Veit-Edrington (W, F)). Several African-Americans have

taken advantage of the District's tuition reimbursement program. Tr.349(Thompson); Tr.496-497(Edrington). For example, at the time of the hearing, there were three black teacher's aides at the Early Childhood Program at Redwood seeking to become certified teachers through this program. Tr.497(Edrington); Tr.348(Thompson). The tuition reimbursement program is not required by the Plan. App.363-390.

It is NLRSD's objective to make sure its hiring process is fair and consistent. Tr.376(Thompson). The District has created a hiring process that has the goal of ensuring the best candidate is hired while eliminating any improper bias. First, a job description is created or updated. Tr.2625(Thompson). Next, the job is posted on the District's web site and the Arkansas Educational Administrators Association's website and flyers are posted in locations around the District. *Id.* The job is also advertised in the newspaper. *Id.*

For administrative positions, the Superintendent, the Assistant Superintendent and the Director of Personnel select an interview team, which is always bi-racial. Tr.2545, 2626, 2644(Thompson); Tr.299(Acklin). The interview team then reviews every application and every transfer request and selects the applicants to be interviewed. Tr.2545(Thompson). The District maintains a transfer request list which identifies current district employees that are interested in a particular position. Tr.2627(Thompson). Any current district

employee interested in a position is always granted an interview. Tr.2627(Thompson).

The Director of Personnel and the interview team develop a set of questions to be used in every interview so that each applicant is asked the same questions during the interview process. Tr.2550, 2629(Thompson). The Director of Personnel and the interview team also identify the rationale for asking each question. Tr.2630(Thompson). Each question relates in some way to the essential functions found in the job description. Tr.2631(Thompson). Each member of the interview team has an interview reaction sheet to score each applicant's response to each question. *Id.* There is no discussion among the interview team about the applicants during the interview process and team members keep their scores to themselves until they submit the interview reaction sheets and their ratings for each applicant. Tr.2631(Thompson). The scores are reviewed by Director of Personnel to ensure there is consistency among the interviewers and that there are no differences along racial lines. Tr.2630(Thompson). This process has been used to fill principal and administrative positions in the District for over three years. Tr.2633-2634(Thompson). On limited occasions, Superintendent Kirspel has authorized Thompson and Acklin to hire a black applicant for a particular position without going through this lengthy process. Tr.2717-271(Kirspel).



A similar hiring process is used to hire teachers. Tr.2634(Thompson). The District requires the use of bi-racial interview teams for the hiring of teachers. Tr.2644, 2654(Thompson). During the hiring process for teachers, the Director of Elementary or Secondary Education, the Director of Personnel, the Assistant Superintendent for Desegregation and the respective school's principal rank the teacher applicants using a uniform applicant ranking form. Tr.359, 377(Thompson). The District has certain ranking criteria for each position, and the criteria cannot be changed during the hiring process. Tr.2539-2540(Thompson). Based on the rankings and the opinions of the Director of Elementary or Secondary Education, the Director of Personnel and the Assistant Superintendent for Desegregation, the principal then makes a recommendation to the Superintendent to hire a particular applicant for a teaching position. Tr.359-360(Thompson). Once a decision has been made for a particular candidate, the Superintendent makes the recommendation to hire that candidate to the Board of Education. Tr.359(Thompson).

NLRSD has conducted in-service training with the District's administrative staff to teach them about this hiring process. Tr.2654(Thompson). The hiring processes described above, which are not required by the Plan, illustrate the District's continuing obligation to the spirit, as well as the letter, of the Plan. App.363-390.

The District ignores no source in seeking minority applicants. For example, it has hired African-American applicants recommended by its Board. Tr.362(Thompson). Rosie Coleman was very successful in recruiting black teachers to Meadow Park Elementary when she was principal. Tr.403(Coleman). When she was promoted to Director of Elementary Education, she and Director of Personnel Thompson worked together to try to increase the number of the District's African-American teachers. Tr.446(Coleman). Thompson, Coleman and Assistant Superintendent Acklin discussed strategies for hiring more African-American teachers. *Id.* NLRSD's Superintendent, Director of Personnel and Assistant Superintendant have communicated to Coleman the high priority of hiring more African-American teachers. Tr. 447(Coleman).

In order to increase the presence of African-American teachers in the District, NLRSD hires African-American teachers without regard to which school might need them. Tr.421-422(Coleman). This is not done for white teachers. *Id.*

Complaints about pay or compensation issues are common among both white and black employees. Tr.367(Thompson). The pay for each teacher and administrator position in the District is based on an objective salary schedule approved by the Board of Education. Tr.2634(Thompson); App.915; App.933.

ODM has worked closely with NLRSD and has been monitoring NLRSD's compliance with its Plan since 1990. Tr.1889(Powell). On June 6, 2008, ODM published its "Update on the Status of the North Little Rock School District's Implementation of Its Desegregation Plan" ("2008 Update"). App.757-812. In this 2008 Update, the ODM concluded:

In sum, it is clear that NLRSD has not only *substantially complied* with its 1992 desegregation plan, but it has also demonstrated *good faith* in its performance of its obligations in concrete ways throughout the course of this case. The district has always welcomed the assistance of the ODM and has followed up on recommendations made by the office. The NLRSD has indeed gone above and beyond mere compliance with the plan in a number of instances.

The NLRSD has demonstrated *good faith* efforts to address the *more intractable areas of staff recruitment*, discipline and dropout prevention...

App. 790 (emphasis added).

## **Summary of the Argument**

NLRSD contends that the district court did not apply the correct legal standard in determining whether NLRSD achieved unitary status with respect to the SRP of its Desegregation Plan. The correct standard to be applied is whether the District acted in good faith and substantially complied with its desegregation plan. In applying this standard, the court must measure the District's actions against the express terms of its desegregation plan. Instead of applying this standard, the district court improperly imposed new obligations on NLRSD that were not part of its desegregation plan. Specifically, although the desegregation plan did not require the District to maintain any particular records regarding its staff recruitment efforts and did not include a commitment to achieve a specific statistical outcome resulting from these efforts, the court found that the NLRSD did not comply with its plan because it did not satisfy these requirements. Accordingly, this Court should reverse the district court's order denying NLRSD unitary status with respect to the SRP.

NLRSD also contends the court's factual finding that NLRSD did not adequately document its staff recruitment efforts and, therefore, was not unitary in the area of staff recruitment was clearly erroneous. First, where a court applies an incorrect legal standard, its findings of fact lose the insulation of Rule 52(a) of the Federal Rules of Civil Procedure. Second, it is clear that the court

erred by making this finding as a considerable amount of documentary evidence illustrating the District's compliance with and good faith commitment to the SRP was introduced during the hearing. This documentary evidence, which detailed over twenty years of the District's compliance with its plan, included numerous status reports completed by the District and filed with the court; comprehensive internal audits; status reports of the Office of Desegregation Monitoring; and a detailed minority recruitment plan. Thus, this Court should reverse the district court's finding that NLRSD failed to substantially comply with the Staff Recruitment Plan.

Finally, NLRSD contends that the district court erred in modifying *sua sponte* the 1989 Settlement Agreement to terminate immediately the funding obligations for magnet school operations and the State's previous violations of the 1989 Settlement Agreement and in ordering the parties to show cause why the funding for majority to minority transfers should not also be ended. The court made this finding having heard no evidence which supports, or even relates to, modification of the consent decree. The court's order also does not mention the standard for modification of a consent decree and fails to make findings of fact required by that standard. Because the district court failed to conduct an evidentiary hearing before modifying the consent decree, the order of the district court should be vacated. Additionally, the district court should be

instructed on remand that, if it determines that State funding should be terminated, the funding should be phased-out over time to minimize the educational disruption to the three Pulaski County districts' students.

## **Argument**

### **I. THE DISTRICT COURT ERRED IN DENYING NLRSD UNITARY STATUS FOR ITS STAFF RECRUITMENT PLAN.**

#### ***Introduction***

As the lower court held (Add.13-16), the proper standard to be applied in determining if a district is unitary is whether the District has acted in good faith to implement the terms of its plan and achieved substantial compliance with the requirements of that plan. *See LRSD*, 237 F.Supp.2d at 1026-1027, 1035-1036, citing *Board of Education of Oklahoma City v. Dowell*, 498 U.S. 237, 249-50, 111 S. Ct. 630 (1991); *see also LRSD. v. PCSSD*, 470 F. Supp. 2d 963, 984 (E.D. Ark. 2004); *Missouri v. Jenkins*, 515 U.S. 70, 88-89, 115 S. Ct. 2038 (1995); *Freeman v. Pitts*, 503 U.S. 467, 491-492, 112 S. Ct. 1430 (1992). The opposing party agrees. App.2000-2002. Good faith is measured against the implementation of the Plan as a whole. *Id.* at 491 (“Whether the school district has demonstrated . . . its good faith commitment to the *whole* of the court’s decree . . .”) (emphasis supplied).

It cannot be credibly argued the NLRSD has not demonstrated its good faith in the implementation of its Plan since it has now been found unitary in nine of its ten sections. Further, the trial court made no contrary finding.

Thus, what remains to be determined is whether the NLRSD substantially complied with the elements of the Staff Recruitment Plan. It is now settled law in this case that substantial compliance does not mean perfect compliance:

The Court in *Cody* made it clear that, in order to determine if a party is in “substantial compliance” with a consent decree, the trial court must examine whether any of the alleged violations of the consent decree “were serious enough to constitute substantial noncompliance” and “to cast doubt on defendants’ future compliance with the constitution.”

*LRSD*, 237 F. Supp.2d at 1035 *quoting Cody*, 139 F.3d at 1197 (emphasis supplied).

Moreover, a “party can be in ‘substantial compliance’ with a consent decree even if it has committed violations that are ‘inconsequential’ in light of the party’s overall performance.” *Id.*

In applying this standard, a district’s actions must be measured against the express terms of its plan. *See LRSD*, 451 F.3d at 531 (A district’s obligations under its plan “arise as a matter of contract, not constitutional law, and thus we examine [the District’s] compliance under ordinary rules of contract interpretation.”); *LRSD*, 131 F.3d at 1258 (“[T]he terms of the settlement agreement [and the plans incorporated therein] became the law of the case.”); *see also LRSD v. PCSSD*, 83 F.3d 1013, 1017 (8<sup>th</sup> Cir. 1996) (The court applies “the terms of the contract between the parties to the facts that have arisen since its creation.”).



***A. The District Court Did Not Apply the Correct Legal Standard in Determining Whether NLRSD Achieved Unitary Status with Respect to Its Staff Recruitment Plan.***

***Standard of Review***

The issue of whether the district court applied the correct legal standard is reviewed *de novo* on appeal. See, e.g., *Sherman v. Winco Fireworks, Inc.*, 532 F.3d 709, 714 (8th Cir. 2008) citing *Indus. Lumbermens Mut. Ins. Co. v. Timberland Pallet & Lumber Co.*, 195 F.3d 368, 374 (8th Cir. 1999).

***Argument***

***1. The Court Erroneously Used a Statistical Test to Determine Compliance.***

Unfortunately, the district court never discussed the express terms of the SRP. Instead, the court immediately focused only on statistics relating to teachers:

The primary objective of the staff recruitments section of the plan is to increase the number of black teachers, principals and administrators in the North Little Rock School District. Although this is the case, the evidence indicates that the percentage of black teachers has actually gone down in the district. For example, in the 1984-85 school year, twenty percent (104 of 519) of the district's teachers were black, while in 2009-2010 school year, approximately 14.5 percent (111 of 766) of the district's teachers were black. And this was not an aberration for there were at least two school years (2006-2007 and 2007-2008) in which the percentage

of black teachers dropped to as little as thirteen percent.

Add.18 (internal citations omitted).

There are several problems with the court's use of these calculations. First, it begins with statistics from 1984-85 when the Plan was not approved until February 1987. Since the issue is the implementation of the Plan, the comparison should begin with the 1987-88 school year. Second, the court chose to ignore one category of teachers in making its analysis; those characterized as "Other." The table relates to administrators and teachers only. Thus, anyone who is not an administrator is by definition a teacher. When this category is added it reveals that 18.3% of NLRSD's teachers were black in 1984-85. More important, when the same analysis is applied to 1987-88, one learns that African-Americans comprised 15.1% of the teachers at the point the implementation of the Plan began.

Equally important, the analysis carefully ignores the primary target group of the Plan, *i.e.*, administrators and coaches. As the district court observed, the primary violation found by Judge Woods in 1984 was that the District "failed to assign blacks to its central administration or to high school principalships and coaching positions." Add.10.

A review of the same data discloses that 10 of 62 administrators (16.1%) were black in 1984-85 compared to 13 of 65 (20.0%) in 1987-88. It also ignores

that in 2009-10, 27 of 60 (45.0%) of NLRSD's administrators were black. Needless to say, this is a dramatic increase. At the same time, 19.2% of high school coaches were black. App.750.

Of greatest concern, however, is that the court's statistical analysis was ever done at all, especially since the court never compared the results of its analysis to what was available in the District's relevant labor market.

The appropriate analysis begins with the actual terms of the SRP, which reveals the following commitments:

1. Developing a recruitment budget.
2. Establishing a process to notify District personnel of vacancies.
3. Periodically conducting an interest survey among teachers and administrators to identify persons interested in advancement to administrative and principal positions.
4. Identifying and recruiting at colleges and universities with significant black enrollment.
5. Being involved in community activities with close ties to African-Americans.
6. Joining professional associations which could be a significant source of black applicants.
7. Attending association meetings and university job fairs to identify potential black applicants.
8. Noting in all advertisements and recruitment materials that the NLRSD is an "Equal Opportunity Employer."

9. Advertising positions when it would be beneficial in finding black candidates.
10. Engaging a labor economist to determine the relevant labor market for the NLRSD and to analyze the availability of African-Americans in that market with the necessary training to be teachers.
11. Developing numerical goals and timetables if there are any areas identified where blacks are underrepresented in comparison to the availability in the relevant labor market.

App.79-82.

Nowhere in the SRP is there any suggestion that NLRSD would ensure any particular level of employment of black teachers, administrators or coaches. The district court recognized the considerable and uncontroverted testimony demonstrating that NLRSD had “gone to great lengths” to recruit black teachers, principals and administrators. Add.18-19. As with all of the sections of its Plan, NLRSD’s SRP speaks to implementing processes and programs, as implementation is within the District’s control, and is silent with respect to predicting or guaranteeing the outcome of these processes and programs since that may involve variables beyond the District’s control. *See, e.g.,* Tr.31-32(Kirspel).

Yet, this is what the lower court has done: measured the District’s employment of black teachers against some unspecified statistical expectation and found the District wanting, while ignoring its accomplishments in hiring

administrators and coaches. We respectfully submit that this exceeded the court's authority.

This Court has held that each of the desegregation plans of the school districts in this matter “constitutes a contract between the parties, and the district court [i]s not free to expand its terms beyond that which was contemplated by the parties.” *LRSD*, 451 F.3d at 536-537 *citing, inter alia, EEOC v. New York Times Co.*, 196 F.3d 72, 78 (2d Cir. 1999) (“A court may not replace the terms of a consent decree with its own, no matter how much of an improvement it would make in effectuating the decree’s goals.”). However, this is what the district court has done—added elements that were not in the Plan. Moreover, it ignored established law in doing so.

The district court's improper application of a statistical standard for compliance is consistent with ODM's continued miscomprehension with respect to NLRSD's obligations related to goals and timetables. The Plan requires goals and timetables only to address “*underrepresentation* of blacks in administrative, teaching, principal or coaching positions.” App.82 (emphasis added). Indeed, numerical goals and timetables are a device used in developing affirmative action plans to remediate an *underutilization* of a minority group. *National Bank of Commerce of San Antonio v Marshall*, 628 F.2d 474, 476 (5th Cir. 1980), *cited with approval, Sharkey v Dixie Elec. Membership Corp.*, 262 Fed.

Appx. 598, 600 n. 3, 2008 U. S. App. LEXIS 1296, (5th Cir. 2008). However, a necessary predicate to the use of goals and timetables is the existence of an underrepresented group. Where there is no underutilization, the use of numerical goals and timetables is inappropriate.

The appropriate analysis in determining whether there is underrepresentation of a certain class of persons is now virtually “black letter law.” One compares the race of those in the subject jobs to the racial composition of the qualified population in the relevant labor market. *Johnson v. Transportation Agency*, 480 U.S. 616, 632, 107 S. Ct. 1442 (1987); *Hazelwood School Dist. v. U.S.*, 433 U.S. 299, 304-310, 97 S. Ct. 2736, 2740-2743 (1977).

Therefore, in 1988, as the SRP required, the District commissioned labor economists Welch Associates to conduct an analysis of the pool of qualified applicants for teaching and administrative positions in its relevant labor market. Tr.239, 309(Acklin); App.582-744. The Welch Study found the relevant labor market for the NLRSD, based upon where its teachers actually lived before being hired, was the State of Arkansas as a whole. It then determined that the availability of blacks in the state was 11.9% for certified personnel. App.597. This finding has not been disputed. Moreover, if one limits the analysis to teachers in the same manner as the lower court, the availability of black teachers was 12.0% and of black administrators 10.2%. *Id.* Since the implementation of

the Plan in 1987-88, the proportion of NLRSD's certified black staff has never fallen below any of these percentages. Tr.302(Acklin); App.582-744; App.745

Moreover, it was undisputed at trial that the availability of black educators in the relevant labor market has actually declined since the Welch Study. Tr.2617 (Thompson); App.549-553. Today, the pool of qualified black applicants in NLRSD's relevant labor market is less than 10%. App.549-553. Thus, NLRSD recognized that goals and timetables were never appropriate after the Welch Study was conducted because, as the uncontroverted evidence at the hearing indicated, the availability of African-American educators declined after 1988, (*see, e.g.*, App.549-553), and the NLRSD never employed black educators in numbers less than would be expected from the pool of qualified applicants in its relevant labor market. Tr.242(Acklin).

Even though the Plan does not promise specific outcomes, this does not mean that the District is not deeply concerned about disparities or that progress has not been made. For example, by the 2009-2010 school year, 55% of NLRSD's building level administrators were African-American (App.751), as were 40% of its district level (central) administrators (App.755), even though 16.7% of its certified staff was African-American. App.745; Tr.380-381 (Thompson); Tr.994, 1019(Dickey). Moreover, the same year, almost 20% of NLRSD's high school coaches were African-American. App.749-750.

With respect to the repeated suggestion that the proportion of African-American educators in the District should reflect the proportion of African-American students in the District, it is important to note that this suggestion has been repeatedly and emphatically rejected. As the law of this case has recognized, the “proper [statistical] comparison . . . [is] was between the racial composition of [the school’s] teaching staff and the racial composition of the qualified public school teacher population in the relevant labor market.” *LRSD v. PCSSD*, 663 F. Supp. 1557, 1559 (E.D. Ark. 1987), *discussing* *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 106 S. Ct. 1842, 1848 (1986), *quoting* *Hazelwood School Dist*, *supra* at 308, 2742.

The Supreme Court has also noted that tying the percentage of minority teachers in a district to the number of minority students would allow a district to “engage in discriminatory hiring and layoff practices long past the point required by a legitimate remedial purpose.” *Wygant*, *supra* at 275. Moreover, as NLRSD’s student population in 2009-10 was 59% black while approximately 10% of licensed teachers in its relevant labor market, *i.e.*, the State of Arkansas, were minorities, attempting to match the percentage of black teachers to the percentage of black students in the NLRSD is mathematically suspect. App.548; App.2109; App.746-747; Tr.2617, 2619, 2706(Thompson). On a statewide level, it is actually mathematically impossible for teacher race proportions to mirror



student racial proportions because 20% of students in the State of Arkansas are African American when only 10% of the teachers in the State of Arkansas are minority licensed teachers.” Tr.2617, 2619, 2706(Thompson).

While there was no obligation in the Plan requiring that the NLRSD modify its procedures in an effort to improve the recruitment of black educators, the District has nonetheless done so. Tr.326, 2615-2616(Thompson); App.568-581. As a result, in 2006-2007, the percentage of minority new hires was 21.3%; in 2007-2008, it was 12.6%; in 2008-2009, 17.7%; and in 2009-2010, 23.3%. App.568-581. These improvements are especially notable since newly hired black teachers ranged from 5.3% to 9.3% of all newly hired teachers statewide during the same period (App.550), and African-Americans with new teacher certifications had declined from 8.1% to 6.1% statewide from 2006-07 to 2008-09. App.551.

This evidence regarding the number of black certified staff in NLRSD was uncontroverted at trial, as was the testimony by numerous witnesses that the District’s lower salary scale made it difficult for NLRSD to compete for minority applicants with the other school districts. Nonetheless, NLRSD has remained committed to increasing its pool of qualified applicants. In fact, the District has offered qualified African-American teachers positions before the candidates actually applied for a position while not doing the same for

candidates of other races. Tr.290, 306(Acklin); Tr.2717(Thompson); App.1749-1751; App.560. Moreover, realizing NLRSD's lower salary scale was an impediment to hiring black teachers, the District raised its salary scale as a strategy to increase black teachers accepting positions with the District. Tr.328-330(Thompson); App.1749-1751; App.560. Again, neither of these actions was required by the Plan.

It is also important to note that this is not a class action employment discrimination case. The only issue presented at the hearing was whether NLRSD had substantially complied with the terms of its Plan in good faith. As its Plan did not require, or even suggest, a specific outcome with respect to the number of black teachers, the district court erred in imposing such a requirement in order to hold that NLRSD was not unitary with respect to the SRP.

Furthermore, it is important to note that, in other areas of the Plan, specifically Student Achievement and Discipline, the court recognized that statistical disparities of far greater magnitude did not prevent the District from being unitary in those particular areas where it implemented the terms of the Plan in good faith. *See* Add.32-36, 37-39. Yet, in the context of minority recruitment, the district court abandoned this rule.<sup>2</sup>

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<sup>2</sup> Despite the judge's best efforts, NLRSD cannot ignore the real possibility that he may have been affected by listening to hours of excluded testimony from witnesses proffered by the Joshua Intervenors regarding employment issues.

**2.     *The Court Erroneously Imposed a Documentation Requirement to Determine Compliance.***

The lower court not only applied a statistical test not required for Plan compliance, but it also imposed an unspecified standard for documentation that is not found in the Plan either. App.80-82. To this day, we do not know what documentation the court expected that was not provided. What makes this especially confounding is that the court found the District was unitary with respect to its monitoring responsibilities contained in the Plan, stating, “It was definitely clear that [NLRSD] 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.” Add.43. However, it is in monitoring that one would expect documentation to occur. This confusion is compounded in light of the court’s recognition that witnesses provided considerable testimony that “the district has gone to great lengths to recruit black teachers, principals and administrators and that it notifies and encourages black people to apply to vacancies.” Add.18-19.

Further, additional and different documentation was never raised by those outside entities monitoring the District’s compliance efforts, not the Joshua Intervenors, ODM, the district court itself or any other entity, during the 23 years since the Plan was initiated. Such a requirement, or alternatively put, deficiency in monitoring, was simply never suggested. In fact, the evidence

shows it was ODM's view that "[t]he District [ ] always welcomed the assistance of the ODM and has followed up on recommendations made by the office." App.790.

Moreover, one of the primary witnesses through which NLRSD presented evidence regarding the SRP, Bobby Acklin, was found to be the "extremely credible" by the district court with respect to his testimony regarding discipline, despite "a clear disparity in the discipline, expulsions and suspensions meted out to black and white children." Add.38-39. It is difficult to understand how Mr. Acklin's testimony could be so easily disregarded when the subject was staffing which involved statistical disparities of much less magnitude than those found in the area of discipline about which Mr. Acklin also testified.

Because NLRSD's compliance must be measured against the terms of its Plan and the court instead added a statistical standard and documentation requirement not found in the Plan, it failed to apply the proper legal standard in this matter. Accordingly, this Court should reverse the district court's order denying NLRSD unitary status with respect to the SRP.

***B. The District Court's Finding that the District Did Not Submit Evidence of Adequate Documentation Regarding Its Staff Recruitment Plan Was Clear Error.***

***Standard of Review***

A “district court's factual findings, including its determination that a school district has not achieved unitary status,” are reviewed “under the clearly erroneous standard of Fed. R. Civ. P. 52(a).” *Robinson v. Shelby County Bd. of Educ.*, 566 F.3d 642, 647 (6th Cir. 2009). “A finding is clearly erroneous when ‘although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.’” *Kingman v. Dillard's, Inc.*, 2011 U.S. App. LEXIS 13670, \*6, No. 10-2636 (8th Cir. July 6, 2011) *citing* *Lisdahl v. Mayo Found.*, 633 F.3d 712, 717 (8th Cir. 2011) *quoting* *Anderson*, 470 U.S. at 573. However, “where a district court applies an incorrect legal standard which ‘taints’ or ‘infects’ its findings of facts, such findings ‘lose the insulation of [Rule] 52(a) and judgment based thereon cannot stand.’” *Manning*, 244 F.3d at 940-941, *quoting* *Corley*, 566 F.2d at 1001.

### ***Argument***

In addition to applying the wrong legal standard to its assessment of NLRSD’s compliance with its staff recruitment obligations, the District also submits that the district court was clearly erroneous in its finding that NLRSD did not adequately document its staff recruitment efforts and, therefore, was not unitary in the area of staff recruitment.

Since the inception of the Plan, NLRSD has continually documented its efforts with respect to staff recruitment and reported to the district court on issues related to the staffing component of the Plan. As set forth in detail below, the District submitted substantial documentary evidence demonstrating its compliance with and good faith commitment to the SRP.

In NLRSD's October 19, 1988 Report to Special Master Regarding the Status of Implementation of North Little Rock School District's Desegregation Plan ("1988 Report"), the District illustrated how it acted expeditiously and comprehensively to implement its original desegregation plan approved by the Court in 1987. The staff recruitment portions of the 1987 plan remained unchanged in the Plan approved by the court in 1992. App.1323-1328; App.363-390. The 1988 Report consisted of 11 volumes, which provided details and documentation of the District's compliance with the original desegregation plan, and was admitted during the hearing. App.1323-1328 (excerpt of Exhibits 10 and 10a-j introduced at the hearing). The portion regarding staff recruitment documented NLRSD's efforts regarding the recruitment budget, how teachers are notified of administrative vacancies, personnel surveys, recruitment efforts outside the District, development of recruitment materials, involvement of black community leaders, awareness of equal employment policies, recruitment advertisement, and the procurement of a firm for labor market analysis.

App.1325-1328. In addition, the 1988 Report documented follow up letters to potential applicants, announcements of vacancies, “The New Moton Guide to American Colleges with a Black Heritage,” a handbook for recruiting minority college students, personnel survey results, examples of advertising and promotional recruitment materials, documentation of relationship with Urban League and other community organizations, documentation of persons identified and promoted due to personnel surveys, and other documentation supporting NLRSD’s compliance with the Staff Recruitment provisions of its Plan at that time. App.1329-1739.

In 1994, NLRSD initiated and completed another self-audit (“1994 Self-Audit”). A complete copy of the 1994 Self-Audit detailing the status of the individual provisions of the 1992 plan was also introduced during the hearing. App.401-429 (excerpt of Exhibit 11 introduced at the hearing). In addition to further documenting those recruiting activities already discussed, the 1994 Audit documented the District’s reaching out to the Black Nurses Association in an effort to secure black applicants for school nursing positions and the District’s utilization of ministers from churches in the black community to serve on the District’s Bi-Racial Committee for the purpose of recruiting black administrators. App.417, 418.

The District also prepared and filed regular monitoring reports with the Court from 1991 to 2000, at which point ODM advised that doing so was not necessary. Tr.302-304, 1248(Acklin); Docket Nos. 1463, 1515, 1545, 1581, 1642, 1711, 1776, 1906, 2025, 2100, 2224, 2352, 2476, 2500, 2580, 2646 and 3416<sup>3</sup>. NLRSD called most, if not all, of these status reports to the district court's attention during the hearing. Tr.304(Acklin). Then, in its Proposed Findings of Fact and Conclusions of Law, NLRSD called the district court's attention to these status reports specifically in the context of staff recruitment. Add.18. These status reports contain documentation of specific efforts by the District related to its implementation of the requirements of the SRP and minutes of the District's desegregation meetings relevant to staff recruitment during the specified time periods. *See* App.1776-1799; App.1800-1809; App.1810-1820; App.1821-1832; App.1833-1840; App.1841-1845; App.1846-1867; App.1868-1874; App.1875-1888; App.1889-1910; App.1911-1926; App.1927-1949; App.1950-1960; App.1961-1973; App.1974-1980; App.1981-1986; and App.1987-1999. They also provided the racial composition of NLRSD's certified staff and new hires. App.1797-99; 1816-17; 1919-20; 1958-60; and 1993-94.

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<sup>3</sup> The relevant portions of these docket entries may be found at App.1776-1999.



For example, the March 1991 Status Report indicates that the District prepared an analysis to identify schools where there was an underrepresentation of minority staff. App.1776-1799. Minutes of the District's Desegregation Meeting included in this report also provide details about the implementation of the Plan. For example,

The Personnel Office continues its recruitment of minority educators. Since semester, we have appointed one black principal at the elementary level, thus increasing the number of black principals to nine. We have also added three administrative assistants at the elementary level, two of whom are black.

App.1776-1799.

In the January-March 1992 status report, the District details the obstacles District representatives met at career fairs:

The number of available minority applicants are fewer, and the numbers of districts recruiting them is ever increasing. The latest Labor Market Information Report prepared by the Arkansas Employment Security Division shows there to be a total of nine minority applicants in the field of education in the Little Rock-North Little Rock Metropolitan Statistical Area.

App.1837.

This status report also contains evidence of an agreement between the District and a local black college, Philander Smith College, regarding the assignment of student teachers in the District. App.1837, 1839-1840.

Minutes of the District Desegregation Team Meeting contained in the April-June 1993 status report detailed, among other things, that the director of personnel discussed that the District had already “offered letters of commitment to four minority applicants for the 1993-1994 school year, but at [that] time they have not accepted. He discussed the disadvantage [the D]istrict encounters with salary competition.” App.1884.

The July-September 1993 Status Report includes a progress report from the director of personnel to the superintendent that, among other things, contains the following,

We have had some success in assisting minority applicants as they enroll in a new teaching field that requires a [college credit] Deficiency Removal Plan by the [ADE]. The [NLRSD] Board of Education has established a fund for tuition reimbursement for teachers enrolling in college courses that will give them certification in an area of critical shortage. The first priority for disbursing those funds are to those applicants that are contributing to the requirements of the Desegregation Plan.

App.1895.

The October-December 1993 status report includes information that, of the five certified vacancies the District had at the beginning of the semester, each had a contract or a letter of commitment indicating that it would be filled by a black applicant. App.1917. Among other things, the report also provided that “[a] computer program has been developed that will show staff assignment

by race and gender for each campus[, which] will allow a continuing staff analysis to be made and give first consideration to those buildings or curriculum areas that show the greatest under-representation of black staff members.” App.1917. This report also included documentation that retirement had led to lower numbers of black staff. App.1925.

The January-March 1994 status report lists specific recruitment efforts by NLRSD, including the District’s practice of offering letters of commitment to minority candidates before knowing the school or grade level at which the teacher would be placed. App.1933. It also provided that the District “recently filled four vacancies with four minority certified staff.” App.1936.

The April-June 1995 status report sets forth, among other things, the District’s efforts around that period of time, including, the District’s implementation of a policy that allows the superintendent to allocate twenty five hundred dollars for tuition reimbursement for minority teachers. App.1976, 1980. This report also documented that letters of commitment had been given to three minority teachers for the upcoming school year. App.1976.

After 2001, NLRSD continued to self-monitor and submitted its documentation and reports to ODM, which the district court had charged with monitoring the compliance of the parties with their desegregation plans in this case. Tr. 1222-1223(Acklin); *see also LRSD*, 921 F. 2d at 1388; *LRSD*, 769 F.

Supp. at 1486, 1495. Therefore, its efforts regarding the implementation of the plan may be found in ODM's reports to the district court. During the hearing, ODM reports for the years 2004 and 2008 were introduced as evidence. These ODM reports highlighted specific efforts of the District related to its minority recruitment efforts. For example, the 2004 ODM Report details NLRSD's multiple minority recruitment efforts during that time period, including the Districts' recruitment of African American educators through the network of local black churches and businesses, its networking with regional and national organizations for the purpose of recruiting African Americans, its participation in career fairs to recruit African American teachers at seven in-state universities in 2002-03, and the inclusion of black patrons in the screening and interview committees for administrative positions. App.1759-1762.

Similarly, the 2008 ODM report specifies eleven recent activities by NLRSD related to its compliance with the SRP including,

In addition to in-state university visits and attending ADE's Recruitment Fair, the NLRSD is working with Teach Arkansas (a part of the ADE's non-traditional license program).

Further minority recruitment efforts include participating in numerous education loan and grant forgiveness/reimbursement programs such as: Minority Teacher Scholars Program (MTSP); Minority masters fellow (MMF); and State Teacher Assistance Resource (STAR).

The district uses on-line nationwide teacher recruitment services to advertise vacancies and to promote the benefits of pursuing a teaching career in the NLRSD...

In the past four years, the discretionary funds for minority teacher tuition reimbursement have increased.

Since 2004, the district has increased the number of minority teachers at the secondary level.

App.765-766.

Finally, ODM concluded its 2008 Report noting that NLRSD had not only substantially complied with its plan and did so in good faith, it also “demonstrated good faith efforts to address the more intractable area[] of staff recruitment . . .” App.790.

As established during the hearing, NLRSD now uses the Minority Teacher and Administrative Recruitment Plan (“MRP”) required by the ADE to detail its recruitment efforts related to compliance with the SRP. Tr. 2643 (Thompson); App.554-563. The first MRP is found in the July-September 1998 Status Report. App.1993-99. The District also provided a copy of its 2009-2010 MRP as an example of the documentation the District had kept on its recruiting efforts in recent years. App.554-563. The MRP, which is annually submitted to the ADE, provided specific examples of NLRSD’s recent efforts related to minority recruitment in each of the following areas: budget, vacancy notification, interest surveys, contacts with colleges and universities, community

activities, involvement with professional associations, regional and national conferences, recruitment advertising, as well as other areas. App.554-559.

The MRP provided details of the District's plan for future minority recruitment as well as its recent efforts that had proven successful. For example, it provided the following facts regarding the use of technology in recruiting minority applicants.

In the last four years the money which in the past was spent on hardcopy advertisements has been redirected to technology for internet-based job advertisement and on-line applicant tracking systems. Both of which have shown to be more beneficial for the recruitment of minority applicants...

App.557.

The internet-based advertisement assists with recruiting for minority applicants on a more regional and national level than the traditional local and state level advertising, thus enhancing the pool of minority applicants...

App.558.

[NLRSD plans] to continue the use of the Search Soft online applicant tracking system... promptly allowing building principals to contact minority applicants.

App.559.

The MRP also provides specific illustrations of the results of its minority recruitment efforts; for example, it reflects that campus recruitment for 2009-2010 resulted in the hiring of six black recent graduates. App.558. Furthermore,

the MRP provides the District's response to a criticism by ODM in 2008 relating to the SRP and describes its remedy for the area of ODM's concern. App.559.

A review of the Desegregation Team Minutes is also revealing. For example, the Desegregation Team Minutes support that the Desegregation Team was concerned about NLRSD's minority staff recruitment efforts. The Minutes of April 1, 2008 summarize an extensive discussion between Ms. Margie Powell of ODM and NLRSD staff members regarding their recruiting efforts. App.1740-1746. The lack of goals and timetables is mentioned, but there is also a discussion of the low number of minorities obtaining teaching degrees, and Mr. Acklin's unsuccessful attempts to sign a minority teacher on the spot at a recruitment fair at Southern University for five years in a row. App.1745. The Minutes of November 11, 2008 reflect the discussion by NLRSD staff members of the MRP and the increase in minority hires beginning in the 2004-2005 school year and the efforts undergone to accomplish those increases. Those minutes also reflect that the need for minority hiring had been emphasized by the NLRSD School Board and Superintendent. App.1748. The December 9, 2008 Desegregation Team Minutes reflect a discussion of staff recruitment efforts and acting responsively to ODM's report recommendations in this section of the Plan. App.1755.

In light of the fact that documentation of its staff recruitment efforts was not an express requirement under its Plan, the District did not anticipate that the court would require it to submit every item of documentation of its efforts in this area. During the hearing, NLRSD attempted to provide the court documentation illustrative, not exhaustive, of its efforts, while at the same time attempting to avoid overburdening the court with over twenty years of paper related to its implementation of its Plan. Nonetheless, in the area of staff recruitment, the District either introduced or directed the district court's attention to substantial documentation of its compliance with the Plan, all of which was part of the record. Accordingly, the district court's finding that the NLRSD failed to document its minority recruitment efforts and was, therefore, not unitary with respect to that section of its Plan was clearly erroneous, especially in light of the fact that this finding was tainted by the application of the wrong legal standard as set forth above.

Accordingly, this Court should reverse the district court's finding that NLRSD failed to substantially comply with its Plan.

**II. THE DISTRICT COURT ERRED IN MODIFYING SUA SPONTE THE SETTLEMENT AGREEMENT TO TERMINATE IMMEDIATELY THE FUNDING OBLIGATIONS FOR MAGNET SCHOOL OPERATIONS AND PREVIOUS VIOLATIONS OF THE SETTLEMENT AGREEMENT AND IN ORDERING THE PARTIES TO SHOW CAUSE WHY THE FUNDING FOR MAJORITY TO MINORITY TRANSFERS SHOULD ALSO BE ENDED.**



*LRSD, et al. v. NLRSD, et al.*, No. 11-2130 (8<sup>th</sup> Cir.) has been consolidated with the present matter on appeal. The appellate brief of the Little Rock School District (“LRSD”) in that matter is well-reasoned. The positions and arguments regarding the district court’s order set forth in LRSD’s Appellate Brief are equally applicable to NLRSD. In order to avoid unnecessary duplication and pursuant to Rule 28(i) of the Federal Rules of Appellate Procedure, NLRSD adopts the positions and arguments of the LRSD’s Appellate Brief.

At pages 17 through 24 of LRSD’s brief, it details the violations of the State’s obligations under the consent decree. It should be noted that the State’s efforts to avoid its obligations in this case predates the 1989 Settlement Agreement.

In determining the remedy for interdistrict violations of the defendants, this Court held:

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 State of Arkansas will be required to pay the customary state aid to any pupils attending these schools, plus an additional one-half of the cost of educating the students attending them.**

*LRSD*, 778 F.2d at 436 (emphasis supplied).

The ink was barely dry on the parties' 1987-88 magnet school stipulation before the State was adopting a funding mechanism for magnet schools that actually resulted in the State paying *less* for magnet school students than for regular students in the districts, in clear contravention of the letter and intent of this Court's order. *See* Interim Funding Recommendations, Docket No. 1169 (March 10, 1989) (App.2110-2127), adopted by the district court, *LRSD v. PCSSD*, 716 F. Supp. 1162, 1164 (E.D. Ark. 1989). Regular state funding was then calculated on a district's weighted average daily membership (WADM). *Id.* The State adopted a process whereby the district sending a student to a magnet school would not have that student counted in its WADM and, therefore, would receive *no* funds for the education of that student while the district remained responsible for one-half the cost of educating its student at the magnet school. *Id.*

The districts challenged this process and a hearing was held by Special Master Aubrey McCutcheon. In his Interim Funding Recommendations, Master McCutcheon found that "[f]rom a strictly financial perspective, under the [State] formula, the school districts would have more of an 'incentive' to expel or drop a student from the rolls than to send a student to a magnet school...". App. 2119. He then directed that the magnet funding should be changed to what was intended, *i.e.*, the district sending a student would have that student counted in

its WADM and would receive the related state aid and the State would separately pay one-half the cost of educating the student at the magnet school.

Thus, there is a consistent pattern evinced over twenty years of the State's resistance to providing the remedy for its constitutional violations. Certainly, it has revealed, by its repeated violation of the settlement agreement to which it agreed, that it begrudges every penny it must pay whether under a settlement agreement into which it entered to limit its liability or simply pursuant to the remedial orders of this and the district court.

## Conclusion

For the foregoing reasons, NLRSD requests that the decision of the district court regarding NLRSD's unitary status with respect to the Staff Recruitment Plan be reversed and for all other just and proper relief. In addition, NLRSD requests that the decision of the district court regarding the termination of state funding related to magnet schools and the State's past violations of the 1989 Settlement Agreement be vacated, and for such other relief as is set forth in the brief of *LRSD v. State of Arkansas*, Appeal No. 11-2130.

Respectfully submitted,

Jack, Nelson, Jones & Bryant, P.A.  
2800 Cantrell Road, Suite 500  
Little Rock, Arkansas 72202  
Telephone: 501-375-1122  
Facsimile: 501-375-1027

/s/Stephen W. Jones

Stephen W. Jones, Ark. Bar No. 78083  
[sjones@jacknelsonjones.com](mailto:sjones@jacknelsonjones.com)

/s/Debby A. Linton

Debby A. Linton, Ark. Bar No. 2001146  
[dlinton@jacknelsonjones.com](mailto:dlinton@jacknelsonjones.com)

/s/Mika Shadid Tucker

Mika Shadid Tucker, Ark. Bar No. 2006055  
[Mika.tucker@jacknelsonjones.com](mailto:Mika.tucker@jacknelsonjones.com)

Attorneys for Defendant/Appellant  
North Little Rock School District

## **Certificate of Compliance**

I hereby certify that this brief complies with the type/volume limitation of Rule 32(a)(5) and (7) of the Federal Rules of Appellate Procedure. This brief was prepared in Microsoft Word 2007 using Times New Roman 14 point font. It contains 13,264 words, according to the word count generated by Microsoft Word, including the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure. I further certify that this brief complies with the requirements of 8<sup>th</sup> Cir. R. 28A(h)(2) because it has been scanned for viruses and is virus-free.

/s/Stephen W. Jones

Stephen W. Jones

Attorney for Defendant/Appellant

North Little Rock School District

## **Certificate of Service**

The undersigned counsel for Defendant/Appellant hereby certifies that the foregoing brief was filed electronically on this 25<sup>th</sup> day of July, 2011, with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF sytem.

/s/Stephen W. Jones

Stephen W. Jones

Attorney for Defendant/Appellant

North Little Rock School District