IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 11-2304

PULASKI COUNTY SPECIAL SCHOOL DISTRICT

Appellant

vs.

ARKANSAS DEPARTMENT OF EDUCATION (ADE)

Appellee

On Appeal from the United States District Court
for the Eastern District of Arkansas, Western Division
Case No. 4:82-cv-866DPM

BRIEF OF APPELLANT PULASKI COUNTY SPECIAL SCHOOL DISTRICT

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SUMMARY AND STATEMENT REGARDING ORAL ARGUMENT

This is an appeal from the District Court's refusal to grant unitary status and withdraw federal court supervision of the Pulaski County Special School District (PCSSD) in nine of the twelve areas submitted for review. This appeal was also consolidated with several others, all of which deal primarily with the District Court's sua sponte termination of state settlement funding resulting from the operation and litigation flowing from the 1989 settlement agreement.

Due to the complexity of the issues raised by PCSSD, due to the inconsistency of rulings which PCSSD contends exists between the adjudication of the North Little Rock School District (NLR) request for unitary status and that of PCSSD, and because of the importance of both the unitary issues and the termination of funding issues, PCSSD believes that oral argument is important not only for a complete and informed understanding of the issues but also to give this Court an opportunity to clarify whatever confusion might initially result from multiple appeals that do not all deal with the same issues.

Accordingly, oral argument is respectfully requested.

CORPORATE DISCLOSURE STATEMENT

PCSSD is a governmental entity and is therefore exempt from the corporate disclosure statement.

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JURISDICTIONAL STATEMENT

The District Court's jurisdiction is original and is based upon 28 U.S.C. § 1291. The case has been pending since 1982 with multiple appeals. PCSSD's Notice of Appeal was filed in District Court on June 14, 2011. This appeal is from a final Order that adjudicated PCSSD's claims for release from federal court supervision. Because the District Court ruled upon each of the twelve areas for which PCSSD sought release from federal court jurisdiction, the Order is final. Further, the District Court sua sponte ordered a termination of most state funding flowing from the 1989 settlement agreement. This Court stayed the financial provisions of the District Court's Order of May 19, 2011, on June 21, 2011.

STATEMENT OF ISSUES

I. Whether or not the District Court was clearly erroneous or erred as a matter of law in concluding that the District was not entitled to a release from federal court supervision in the areas of student assignment; advanced placement, gifted and talented and honors programs; discipline; school facilities; scholarships; special education; staffing; student achievement; and monitoring all as contained in its current desegregation plan known as Plan 2000, which is part of the Addendum.

> *Little Rock School Dist. v. Pulaski Co. Special School Dist. No. 1*, 237 F.Supp.2d 988, 1027 (E.D. Ark 2002), citing *Cody v. Hillard*, 139 F.3d 1197, 1199-1200 (8th Cir. 1998)
>
> *Little Rock School District et al v. North Little Rock School District et al*, 561 F.3d 746

II. Whether the Court erred as a matter of law in utilizing a single standard of review for each issue, i.e. whether or not PCSSD had complied in good faith with each provision of Plan 2000 but refusing to grant unitary status when the outcomes attained by PCSSD met or exceeded constitutional compliance even though PCSSD did not perform every task or fully implement every strategy contained in Plan 2000.

> *Little Rock School Dist. v. Pulaski Co. Special School Dist. No. 1*, 237 F.Supp.2d 988, 1027 (E.D. Ark 2002), citing *Cody v. Hillard*, 139 F.3d 1197, 1199-1200 (8th Cir. 1998)
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A. Whether or not the District Court was clearly erroneous or erred as a matter of law in coupling a complete release of federal court supervision or a clear finding of unitary status to PCSSD in the area of student assignment by requiring PCSSD to remain under court supervision because of perceived deficiencies in the reports regarding one-race classrooms.

Little Rock School Dist. v. Pulaski Co. Special School Dist. No. 1, 237 F.Supp.2d 988, 1027 (E.D. Ark 2002), citing *Cody v. Hillard*, 139 F.3d 1197, 1199-1200 (8th Cir. 1998)

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B. Whether or not the District Court was clearly erroneous or erred as a matter of law in refusing to release PCSSD or grant it unitary status in the areas of advanced placement, gifted and talented education and honors programs.

Little Rock School Dist. v. Pulaski Co. Special School Dist. No. 1, 237 F.Supp.2d 988, 1027 (E.D. Ark 2002), citing *Cody v. Hillard*, 139 F.3d 1197, 1199-1200 (8th Cir. 1998)

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C. Whether or not the District Court was clearly erroneous or erred as a matter of law in refusing to release PCSSD or grant it unitary status in the area of discipline.

Little Rock School Dist. v. Pulaski Co. Special School Dist. No. 1, 237 F.Supp.2d 988, 1027 (E.D. Ark 2002), citing *Cody v. Hillard,* 139 F.3d 1197, 1199-1200 (8th Cir. 1998)

Liddell v. Special School District, 149 F.3d 862 (8th Cir. 1998)

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D. Whether or not the District Court was clearly erroneous or erred as a matter of law in refusing to release PCSSD or grant it unitary status in the area of school facilities.

Little Rock School Dist. v. Pulaski Co. Special School Dist. No. 1, 237 F.Supp.2d 988, 1027 (E.D. Ark 2002), citing *Cody v. Hillard,* 139 F.3d 1197, 1199-1200 (8th Cir. 1998)

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E. Whether or not the District Court was clearly erroneous or erred as a matter of law in refusing to release PCSSD or grant it unitary status in the area of scholarships.

Little Rock School Dist. v. Pulaski Co. Special School Dist. No. 1, 237 F.Supp.2d 988, 1027 (E.D. Ark 2002), citing *Cody v. Hillard,* 139 F.3d 1197, 1199-1200 (8th Cir. 1998)

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F. Whether or not the District Court was clearly erroneous or erred as a matter of law in refusing to release PCSSD or grant it unitary status in the area of special education.

Little Rock School Dist. v. Pulaski Co. Special School Dist. No. 1, 237 F.Supp.2d 988, 1027 (E.D. Ark 2002), citing *Cody v. Hillard*, 139 F.3d 1197, 1199-1200 (8th Cir. 1998)

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G. Whether or not the District Court was clearly erroneous or erred as a matter of law in refusing to release PCSSD or grant it unitary status in the area of staffing.

Hazelwood School Dist. v. U.S., 433 U.S. 299, 304-310, 97 S. Ct. 2736, 2740-2743 (1977)

Little Rock School Dist. v. Pulaski Cty. Special School Dist., 663 F. Supp. 1557, 1887 U.S. Dist. LEXIS 6817 (U.S. Dist. Ct. E.D. Ark. 1987)

Wygant v. Jackson Bd. of Ed., 476 U.S. 267, 106 S. Ct. 1842, 1848 (1986)

Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S.1, 31-32, 91 S. Ct. 1276, 1283-84 (1970)

H. Whether or not the District Court was clearly erroneous or erred as a matter of law in refusing to release PCSSD or grant it unitary status in the area of student achievement.

Little Rock School Dist. v. Pulaski Co. Special School Dist. No. 1, 237 F.Supp.2d 988, 1027 (E.D. Ark 2002), citing *Cody v. Hillard*, 139 F.3d 1197, 1199-1200 (8th Cir. 1998)

Liddell v. Special School District, 149 F.3d 862 (8th Cir. 1998)

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I. Whether or not the District Court was clearly erroneous or erred as a matter of law in refusing to release PCSSD or grant it unitary status in the area of monitoring.

Little Rock School Dist. v. Pulaski Co. Special School Dist. No. 1, 237 F.Supp.d 988, 1027 (E.D. Ark 2002), citing *Cody v. Hillard*, 139 F.3d 1197, 1199-1200 (8th Cir. 1998)

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III. Whether or not the District court was clearly erroneous or erred as a matter of law in terminating funding which flowed to all three Pulaski County Districts from the operation of and litigation flowing from the 1989 settlement agreement approved by this Court.

Little Rock School District v. Pulaski Co. Special School District et al, 921 F.2d 1371

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STATEMENT OF THE CASE

This is a school desegregation case filed in 1982 which has been litigated for almost three decades with numerous appeals to this Court. For a complete history of the case see ADD5-ADD13. In 2007, NLR and PCSSD filed petitions seeking release from court supervision or "unitary status". Hearings were held separately for each district during January, February and March of 2010.

The District Court filed its decision on May 19, 2011. It found NLR to be unitary in all but one area and that PCSSD was unitary in three of the twelve subject matter areas litigated. The District Court also sua sponte ended state funding flowing from the operation and litigation surrounding the 1989 settlement agreement, a matter which was initially appealed by the Little Rock School District (LR) on May 20, 2011 (Appeal 11-2130). All appeals presented from the May 19, 2011 Order have been consolidated for disposition by this Court.

STATEMENT OF FACTS

PCSSD desegregation plan is Plan 2000. (ADD112-120) Both PCSSD and NLR filed petitions for release from federal court supervision during 2007. Back-to-back hearings were held in the winter of 2010 and a single decision of the District Court addressing the unitary status of both districts was filed May 19, 2011.

Of the nine issues NLR presented, the Court granted unitary status in eight, finding that NLR had substantially complied with the requirements of its 1988 desegregation plan. The Court found PCSSD had substantially complied in only three of twelve areas and denied unitary status in the other nine.

PCSSD will explain more fully in the argument section of this brief, that it believes as a matter of fact that there are several parallel topics presented in the NLR and PCSSD cases and that they were inconsistently decided. NLR was held unitary in 1) special education; 2) compensatory education (achievement); 3) discipline; 4) secondary gifted and talented; 5) school construction and facilities; and 6) monitoring. In the same areas, PCSSD was held not to be unitary. PCSSD believes as a matter of fact that more compelling reasons exist for it to be declared unitary in the same areas for which NLR was declared unitary than exist in the NLR record. Accordingly, much of this Statement of Facts contains a comparison of facts found by Judge Miller in the NLR decision and facts he found in the

PCSSD section. In the argument section, PCSSD will explain why Judge Miller was wrong in denying unitary status to PCSSD for parallel issues. PCSSD will also explain why it believes the Court applied a legal standard that was too narrow and inflexible and contrary to Eighth Circuit precedent. (Alphabetical headings and titles correspond to Plan 2000 sections.)

C. STUDENT ASSIGNMENT

The District Court made an exhaustive analysis of "regular" student assignment in PCSSD, evaluated its accomplishments and minor shortcomings and appropriately concluded PCSSD had substantially complied in good faith with this portion of Section C of Plan 2000. However, because Section C is coupled with a requirement that PCSSD monitor and submit reports for "one-race classes", and because the District Court concluded PCSSD had not done an acceptable job with these reports, the District Court's decision could be interpreted to mean it is withholding unitary status regarding student racial balance.

D. ADVANCED PLACEMENT, GIFTED AND TALENTED AND HONORS

1. The NLR Ruling

Judge Miller held that NLR's testimony in this area was typical of that it provided for other areas of its plan because a key witness overstated matters to advance her side's position. He disputed that witnesses' testimony that acceptance into the talented and gifted program (TAG) is not an honor and stated that "without

question, many students and parents view acceptance into TAG as an honor." (ADD40) He noted that NLR employs "affirmative action" to ensure that otherwise unqualified black students are accepted into TAG. (*Id.*40) He also noted NLR took great pride in its efforts to reach out to black students by receiving non-traditional, multiple source referrals to the program.

However, Judge Miller then stated: "While no credit is given to North Little Rock's position that acceptance into gifted and talented classes is not an honor, credit is given to the District for its effort to improve the number of black students enrolled in gifted and talented classes." (*Id.*41) He noted that Joshua's opposition mainly focused upon disproportional representation that cast doubt upon NLR's good faith. Joshua noted that while 55 percent of secondary students in NLR were black in 2003, only 31 percent were placed in TAG. In 2004-2005, almost 56 percent of NLR's secondary students were black but only 31.7 percent of the secondary students in TAG were black. By 2009, 57 percent of NLR's secondary students were black, but only 28.1 were in TAG and by 2010, 57 percent of NLR's secondary students were black, but only 30.5 percent were in TAG. (*Id.*42)

The Court noted this made judgment difficult because "there is a grave disparity in the number of black and white students enrolled in gifted and talented classes." (*Id.*) However, he did credit NLR for attempting to reach out to black

students to enroll them. Thus, despite great disparity, the judge concluded that NLR had acted in good faith and had substantially complied with its plan. (*Id*.)

PCSSD

Judge Miller examined PCSSD TAG outcomes in conjunction with its programs for advanced placement and honors. He concluded PCSSD was required to implement TAG standards in good faith and work toward the educational goal of increasing the number and proportion of black students participating in AP/GT and honors programs at the secondary level.

While he found NLR unitary with variances exceeding 26 percent and in 2008-2009 a variance of almost 29 percent, he faulted PCSSD when most of its variances barely exceeded 8 percent and its two most extreme variances were 24 percent and less. (*Id.* 42) (PCSSD cannot verify these latter numbers.)

During the last decade the ODM has concluded that:

- PCSSD has maintained its AP and TAG programs since ODM's 2003 positive status report without substantial change in the structure and practices of the programs. (Ex.85G; ODM August 16, 2006, p.4)
- In 2005, the District received the designation "Outstanding Gifted Program" by the Governor's Advisory Council for the Education of Gifted and Talented Children. (*Id.*)

- Mills University Studies High School was named by *Newsweek* as one of the nation's best high schools, largely because of the number of AP exams taken. In 2004-05, Mills students took 684 AP exams, or 46% of the total number taken district wide. (*Id.* 5)

- Enrollment in pre-AP and AP classes increased substantially in all six of the District's high schools between 2001-2002 and 2005-2006. Robinson increased enrollment by 294 students, a 141% increase, while Jacksonville had an increase of 372 students, a 114% increase. (*Id.*)

- PCSSD continues the high quality AP and TAG programs described in previous ODM reports. (Ex.85C; ODM September 17, 2008, p.7)

- The number of students enrolled in AP and Pre-AP courses in PCSSD's six high schools remained consistently high with only minor variations from year to year. Enrollment in the six high schools totaled 1644 during the 2006-2007 school year. (*Id.*)

- PCSSD students completed 1,397 AP exams in 2007. (*Id.*)

- PCSSD offers many AP courses at Mills attracting students from other attendance zones to desegregate Mills. (*Id.*)

- ODM reported that 383 students took AP exams during 2002 but that number grew to 730 for 2004-2005. (Ex.85G; ODM August 16, 2006, p.4)

- Black AP students increased from 85 to 239, a 181% increase. (*Id.*)

F. DISCIPLINE

North Little Rock

The Court noted there was clear disparity in the discipline meted out to black children, but the question was whether NLR acted in good faith and substantially complied with its plan obligations; it found it had. (ADD38)

The Court found the goal of the NLR plan was to ensure that black children were treated fairly. Testimony indicated NLR had taken this requirement seriously because parents and students are notified of the behavior that is expected, they are notified of students' rights to due process if a student is disciplined, that NLR has an exhaustive, progressive discipline plan requiring a number of warnings before discipline is imposed and that all disciplinary forms are reviewed by central office administrators. (*Id.*)

The Court believed Bobby Acklin's testimony when he explained that black children are not treated unfairly but receive discipline proportional to the offenses they commit. Therefore, the Court found NLR had met its burden by showing it had acted in good faith and substantially complied with its plan. (*Id.* 39)

PCSSD

PCSSD has invoked a host of programs to impact discipline, for instance:

- The Pathwise process is used to train teachers, staff and administrators school-wide and offers training in classroom management, culture, and building relationships with students to affect student behavior. (Bowles;Tr.368-373)
- The Learning Academy targets behavioral issues. (Bowles;Tr.912)
- PCSSD has Saturday school. Each secondary school has its own Student Assistance Center providing in school suspension. Students are allowed to make up assignments as an alternative to out of school suspension. (*Id*.)

Judge Miller began his discussion of discipline in PCSSD by isolating a one-time episode with a middle school student whom he thought was unfairly treated (and who probably was). Nevertheless, after recounting this episode, Judge Miller stated:

> Although much of the evidence regarding the shoving of the student was superfluous, it was with this backdrop that all of the other evidence regarding discipline was received. (ADD60)

PCSSD called Dr. Christine Rossell of Boston University as an expert witness for discipline. Her report dated December 23, 2009 was received as PCSSD Exhibit 10.

Dr. Rossell has spent 36 years researching the impact of school desegregation plans, 30 years consulting for school districts regarding educational equity, 23 years designing and analyzing surveys, 23 years designing and

analyzing school desegregation plans and 35 years teaching courses on school desegregation, educational policy, public policy and research methods. (*Id.*)

Dr. Rossell analyzed ODM Reports, court documents and PCSSD reports submitted to the court concerning enrollment, suspensions, expulsions, free and reduced lunch eligibility, and administrative staff data by school and by race between 2000 and 2009. (*Id.*) Dr. Rossell also relied on data from the office for civil rights, IES and court orders from other cases. (*Id.* 2-3)

She opined PCSSD had done an extraordinary job creating a clear and fair district wide Discipline Management Plan and the Parent/Student Handbook for Student Conduct and Discipline for both elementary and secondary schools. (*Id.*)

Dr. Rossell emphasized in particular that part of the handbooks which require acknowledgement that:

> We have received the PCSSD Handbook for Student Conduct and Discipline and although we may not agree with all the regulations, we understand that the student must adhere to them while he is at school, on the bus, at the bus stop, or in attendance at school sponsored activities. In the event that we are not entirely certain of some aspect of school policy, we will contact the principal for clarification within one (1) week after receipt of that policy.

(*Id.* 3)

Dr. Rossell believes the handbook is clearly written and detailed, describing the levels of infractions from the least severe to the most severe and the punishment for each. (*Id.* 4)

She prepared Figure 1 showing the ratio of black students suspended as compared to the percentage of nonblack students suspended from 2000 through 2009. The ratio varied from 1.6 to 2.4. (*Id.* 5)

When Dr. Rossell compared these outcomes to the nation as a whole, the comparison demonstrated the national trend is higher, averaging approximately three times the percentage of blacks suspended as to non blacks. She concluded this is a nationwide phenomenon not limited to PCSSD. (*Id.*)

She developed Figure 2 utilizing her second index demonstrating that in 2008-2009 the black suspension rate was 69% compared to an enrollment of 44%. This resulted in a ratio much lower than the United States which has a ratio of 2.2. (*Id.*)

In sum, Dr. Rossell's conclusions reiterated by the District Court are that:

> (1) the racial disparity in suspensions in PCSSD is almost entirely caused by the differences in rates of poverty between the races, a factor that is outside the control of PCSSD schools;
>
> (2) there is no evidence of racial discrimination on the part of white administrators;
>
> (3) racial disparities in PCSSD are less than most school districts that have attained unitary status; and
>
> (4) PCSSD has complied with the discipline requirements of its court orders to the extent practicable and thus should attain unitary status in this area.

(ADD61)

Dr. Rossell testified that racial disparity outcomes in PCSSD are better than the United States as a whole. She concluded that if PCSSD's outcomes for racial disparity in student discipline are good, it does not matter if PCSSD did not complete all tasks required by Plan 2000. The Court disagreed, concluding that although Dr. Rossell's analyses may very well show PCSSD is doing better than other districts regarding racial disparity and discipline, that is not enough to find it unitary. The Court said the terms of a settlement plan are important, and concluded that if PCSSD is well positioned with respect to racial disparity and student discipline, then certainly more can be accomplished by following the terms of its plan. (*Id.* 62)

H. SCHOOL FACILITIES

North Little Rock

Judge Miller made short work of finding NLR unitary regarding school facilities. NLR did not build any new schools and received court approval to close, open or add to its facilities. He noted no new school had been built since 1969, that all students now attend the same high school, and that maintenance is the same for schools located in both black neighborhoods and white neighborhoods. (ADD43)

PCSSD

PCSSD returned to building new schools in 1992. The first of the new schools were inter-district schools required under an earlier desegregation plan were built in 1992 and 1994 with explicit court approval. (Bowles;Tr.1185) The next was Bates Elementary built to replace a temporary school facility and Fuller Elementary, again with explicit court approval. Bates has a majority African-American enrollment.

Under this section of Plan 2000 the parties agreed that PCSSD, with the help of consultants, would prepare a plan so that existing schools would be clean, safe, attractive and equal. Once the facility plan was in place, the only PCSSD requirement was to notify Joshua about new school construction or additions. (ADD116; Plan 2000 Section H(3)) It routinely included the Court and ODM in these notifications. (Exhibit 22) Through this process Maumelle Middle School, which opened in 2005, Chenal Elementary (specifically mentioned in Plan 2000) and Maumelle High School (slated to open this Fall) were sited, budgeted and built. The record is devoid of any evidence that there was any court objection made to the notices that these three schools would be built. (Exhibit 22)

Exhibit 92 refutes any discrimination in the assignment of black students to schools regardless of the age of the building. (Clowers;Tr.1215)

A 1999 facilities evaluation conducted by PCSSD indicated the inadequacies of the Harris physical plant were legion. In June 2003, Harris was transformed.

(Joshua Ex. 05; ODM 7/30/03, p.11) PCSSD made genuinely substantial improvements to the Harris buildings rather than simply superficial alterations. (*Id.*)

ODM concluded students at Harris were benefiting from an enriched academic experience in curricular areas of science and physical education/health/wellness. They had weekly access to a well equipped science laboratory and services of a fulltime science specialist. A fulltime health specialist provides physical education classes twice weekly and health education instruction once a week. Both specialists work closely with classroom teachers to assure a coordinated cohesive academic experience. (Joshua Ex. 05; ODM 7/30/03, p.20)

Exhibit 148 also establishes that a host of projects were accomplished at Harris Elementary between the years 2000 and 2010.

The District is consistent with maintenance, housekeeping, etc., district wide. (Holder;Tr.1199) Mr. Holder testified that all buildings in the District are safe and structurally sound. (*Id.*)

During 2004, a team of architects and engineers representing Arkansas' Task Force to the Joint Committee on Educational Facilities assessed each PCSSD school. The report identified specific deficiencies in each district school, repair costs and priority for addressing deficiencies. (Ex. 85G;ODM August 16, 2006, p.27)

In April 2008, PCSSD developed the *Districtwide Facility Condition and Educational Suitability Cost Summary*, combining the results of the Kahn Study with those from the state. (Ex. 85C;ODM September 17, 2008, p.18)

The District's construction committee prioritized school improvements and deemed roof repairs the most critical. (*Id.* 18)

I. SCHOLARSHIPS

PCSSD, albeit three years late, did develop a committee as required by Plan 2000 and, although not mentioned in the Court's Order, wrote a board policy outlining the scholarship program. (Bowles;Tr.1368-1369)

K. SPECIAL EDUCATION

North Little Rock

Judge Miller began his analysis of special education in NLR by noting that NLR had adopted policies and procedures to avoid misidentifying students and that somewhat consistent decreases in the number of black students placed in special education had occurred. He noted that for 1987-88 approximately 20 percent of black students were placed in special education while by 2009-2010, approximately 12 percent were so placed. (ADD20)

After noting that NLR still has an over-representation of black students and that it had failed to submit annual reports of its efforts to reduce the over-representation, he noted that these factors were not totally dispositive because "the

question is not whether North Little Rock has solved the problem but whether it made good faith efforts and has substantially complied with its plans….North Little Rock has complied with its Plan obligations and should therefore be released from Court monitoring". (*Id*. 21)

PCSSD

ODM noted that on May 4, 2000, the director of special education forwarded a description of special education standards and materials outlined in Plan 2000 to Joshua, meeting Plan 2000 deadlines. (Joshua Ex.0-4; ODM May 8, 2003, p. 47)

When Plan 2000 was approved, the state allowed an 8.3 percent standard deviation, but later changed the standard to 13.152. (*Id*. 81) Brenda Hiegel testified the District never had a citation from the state for not meeting this standard; this testimony was undisputed. (Hiegel;Tr.954)

Much of Judge Miller's criticism centers upon the District's failure to make written identification of schools with "an atypically high placement rate." (ADD81) However, Plan 2000 does not define what an atypically high placement rate is, and Joshua did not offer a definition.

The District takes the percentage of its black special education population, subtracts the regular education percentage of black students and then further deducts an 8.3 % standard deviation to determine whether the District has

disproportionality. (*Id.*) PCSSD gets an annual report from the state verifying that the District did not "trigger" in this area. (Hiegel;Tr.955)

When the state standard deviation was adjusted in 2008 from 8.3% to13.1% the District had only two schools that barely exceeded the proportion. (PCSSD Ex.75-J; Hiegel;Tr.957-958) From 2000 through 2009 the district-wide totals have been at or below the standard deviation in special education except for one year. (*Id.*)

L. STAFFING

North Little Rock

Judge Miller found that NLR failed to attain unitary status in staffing of black teachers, principals and administrators because it did not adequately document its efforts to recruit them. Bobby Acklin testified to his recruitment efforts and that many black college graduates did not want to teach in NLR because of the low salary and lack of a desire to move to Arkansas. (ADD19) Judge Miller directed NLR to maintain proof of its efforts for 24 months and he would then reconsider this area of non-compliance.

PCSSD

Judge Miller criticized the District's lack of enthusiasm (as he characterized it) for hiring additional African-American administrators. He criticized the lack of a process for grooming black teachers for these positions, criticized the former

assistant superintendent of human resources for her lack of knowledge and credited the testimony of one of Joshua's employees, Joy Springer, for testifying that former superintendents lacked enthusiasm for increasing the number of black administrators. (ADD84-85) Ms. Springer anecdotally stated that achieving racially diverse applicant pools for administrator positions was simply not a high priority. Indeed, the Court credited her anecdotal testimony that when she reviewed applicant pools for administrator positions she "thought" the pools were not racially diverse. The Court then concluded that for these reasons PCSSD had failed to show that it substantially complied with this sub-section in "good faith". (*Id.*)

In 2000 the percentage of black elementary principals was 29%; elementary assistant principals were 27%; secondary principals were 46%; secondary assistant principals were 46% and assistant superintendents were 60%.

In 2009 the percentage of black elementary principals was 44%; elementary assistant principals were 27.8%; secondary principals were 41.7%; secondary assistant principals were 42.3% and assistant superintendents were 50%.

The District Court concluded that Plan 2000 required the District to "cultivate" a racially diverse pool of applicants, to extensively monitor the entire recruitment process, and to ensure that no "upward limit" is placed on the number of black teachers employed. (*Id.*) The Court noted the percentage of black faculty

ranged from 19.5 percent to 20.7 percent during the 2000 year decade. The Court concluded: "because the data confirms the existence of an upward limit on the number of black teachers, the district must show the steps it took to address the problem." (*Id*.) It was undisputed that the labor market rate was 8.32% in 2002 and had declined to 6.8% by 2008-2009. (Court's Ex.1)

The Court then discussed a policy that preceded Plan 2000 (see discussion at ADD90) which required the staffing range at each building to fall between 25 percent below to 25 percent above the overall percentage of black teachers at each organization level. The Court noted that at some point in the mid-2000s the District abandoned the target staffing range replacing it with an informal goal of having each school's faculty be at least 20 percent black.

The Court stated:

> If one piece of evidence can summarize the enduring state of affairs regarding staffing in Pulaski County, it would surely be the district's own report entitled "Appendix IX to the 2009-10 Annual Personnel Hiring and Deployment Report." Pulaski County Ex.77J. The data show that in 1984-1985, the earliest dates of record, Pulaski County's student enrollment was 23.6 percent black and its professional staff was 21.7 percent black. (*Id.*) Over twenty-five years later, the district is 44 percent black. (*Id.*) Yet the percentage of black professional staff remains at 21.1 percent. (*Id.*) (ADD92)

Dr. David J. Armor, Ph.D., PCSSD's staffing expert, received a bachelor's degree in mathematics and sociology at the University of California at Berkeley and a Ph.D. in sociology from Harvard. (Armor;Tr.17) After seven years as an

assistant and associate professor at Harvard, he joined the Rand Corporation where he researched education and desegregation issues. Dr. Armor was elected to the Los Angeles Board of Education which sets policy for the 700,000 student Los Angeles Unified School District, the second largest district in the Country. (Armor;Tr.20)

Dr. Armor left the school board to work at the Department of Defense as Principal Deputy to the Assistant Secretary for military manpower, and later became acting Assistant Secretary. He was appointed Principal Deputy to chair the Advisory Council for Overseas Schools. The Department of Defense then ran the tenth largest school system in the country. (*Id.* 22)

He joined George Mason University in 1999 as a full professor of public policy and continues today to teach and conduct research. Dr. Armor has taught courses that examined the history of desegregation and the interplay between court decisions and social science research. He is extensively published. (*Id.* 22-24)

The Court rejected Dr. Armor's expert testimony that plus or minus 15 percentage points is a good measure of whether or not PCSSD schools were racially identifiable as to staff, a measure accepted by most Court's across the country. The District Court rejected this or any other measure and simply stated "it was Pulaski County's duty to define what a 'racially identifiable' school was in order to show that it acted in good faith to avoid such an outcome". The Court

then said that Dr. Armor's plus or minus 15 percentage metric might be a good one but PCSSD could not at the eleventh hour find someone to testify that the District was generally compliant with a "widely accepted" standard not provided by the Plan. (ADD92)

Table 6 lists all district schools including the elementary schools for the past five years. It provides the percentage of black teachers and then applies the plus/minus 15% deviation. (Armor;Tr.99-100)

A few schools are outside the deviation for one to three years including College Station, Harris and Jacksonville Boys School. (*Id.* 103)

Dr. Armor testified these outcomes demonstrate compliance with maintaining teacher racial balance. Although some schools fall outside the range it is not consistent. In a year or so they fall back within range. In small schools a change of just one teacher would cause a school to fall out of range. He found no long term trends of imbalance. (*Id.* 103-104)

He explained he had never studied a district that balanced each school every year. PCSSD is very similar to other districts that have been declared unitary on this issue. (*Id.* 107)

Beginning with the 2000-2001 school year, Dr. Armor found PCSSD has maintained substantial and consistent teacher racial balance at nearly all of its schools for the past eight years. Only two schools, College Station and

Jacksonville Boys Middle, have been outside a plus/minus 15% allowance for more than one year during the past five. (Armor;Tr.92)

Dr. Armor stated, "In my opinion, the PCSSD has maintained substantial racial balance in its teacher assignments for an extended period of time, and therefore I believe it has met the requirements for unitary status in the area of teacher assignment." (Armor;Tr.97-98)

In his 2008 report he opined: "The PCSSD has adopted and implemented a desegregation plan that has been effective in meeting the requirements for unitary status that courts have established in the areas of student and staff assignment." (Ex.7 at p.1)

His testimony regarding student and teacher assignment was accepted not only by the presiding judge in *Freeman v. Pitts* but by the Supreme Court as well. (Armor;Tr.34)

According to ODM, the District continues to meet its goal of maintaining a ratio of black administrators in proportion to the ratio of black certified personnel in each preceding year. All secondary schools have at least one black administrator. (Ex. 85C;ODM September 17, 2008; p.21)

PCSSD strives to maintain a black certified population that is "in proportion to their availability in the relevant labor market." (*Id.*)

PCSSD has a non discrimination policy which states, "Further, the District

will make special efforts to employ and advance women, blacks, and handicapped persons." "The purpose of this policy is to designate personnel and operational guidelines for implementing equal employment opportunity practices and the District's plan to employ and advance women, blacks and handicapped persons." (Ex.30)

Goal 1 in the deployment report is: "To attain a ratio of black administrators in the PCSSD in proportion to the ratio of black certified personnel in the District in the preceding year." The District exceeds that goal. (Coley;Tr.1002-1003) Goal 2 is: "To employ at least one black administrator in each secondary school." The District's track record for meeting this goal is positive. (Ex.77-J)

Plan 2000 requires the District to emphasize hiring core teachers in math, science, social studies and English. The reports establish that the current core of black teachers exceeds the percentage who graduate from Arkansas colleges each year. (Coley;Tr.1000)

The percentage of district black teachers under contract for this school year exceeds the state-wide average and has for the last 10 years. Plan 2000 does not have statistical goals or quotas, but requires a racially diverse pool of applicants for both administrators and teachers. (Ex.77-J; Coley;Tr.1009-1010)

Appendix X is a separate report that describes the recruiting activities of PCSSD for minority teachers and administrators and specifically speaks to Plan

2000's requirement that the District recruit so that new teachers are selected from a racially diverse pool. (Ex.77-J; Coley;Tr.1011) If an applicant pool is not racially diverse the District re-advertises the position an additional five days. If the pool remains non-diverse the position is filled as a temporary position only. (*Id*.)

In 2007 a total of only 109 black graduates from Arkansas colleges and universities had education degrees (NLRSD Ex.99); from 2003 to 2007 only 89 black graduates, and by November 2009 fewer than 10% of licensed teachers in Arkansas were African-American. (Thompson, NLRSD Tr.352; NLRSD Ex.101; see also Court Ex.1)

Newly hired black teachers ranged from 5.3% to 9.3% statewide during the same period and African-Americans with new teacher certifications declined from 8.1% to 6.1% statewide from 2006-2007 to 2008-2009. (Court Ex.1 at 2-3)

PCSSD adopted NLRSD Ex.20 the "Welch Study." The Welch Study found the relevant labor market for these districts to be the entire state not just Pulaski and Saline counties. The Welch Study found that the pool of qualified black applicants in PCSSD's relevant labor market was 11.9%. (Ex.33) Today, that has declined to 9%. (Court Ex.1 at 1)

M. STUDENT ACHIEVEMENT

North Little Rock

At ADD33, after a long discussion of NLR Academic and Training Programs (many of them simply restatements of state standards) the Court stated:

> North Little Rock's desegregation plan does not require that the achievement disparity be reduced. It recognizes that there is a 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 the achievement disparity, however, is not required by the plan and, as demonstrated above, North Little Rock has met its obligation to implement the programs and actions described by the Plan.
>
> Data presented by North Little Rock show that although the disparity has been reduced at some grade levels, the rate of reduction is slow. Indeed, at some grade levels the achievement disparity has increased. Although it is the hope of all involved that the disparity be reduced, and reduced quickly, this is not a requirement of the Plan. (*Id.*)

Judge Miller then compared NLR to Little Rock which was only required to show "effort" and said they both had done enough. (*Id.* 34)

The Plan required NLR to develop achievement data by race and grade, originally done through disparity plans. The district then used comprehensive outcome education plans and finally switched to ACSIP plans. The ACSIP plans analyze the standardized test scores of students breaking them down by grade and ethnic group. (*Id.*)

Judge Miller stated that Joshua repeatedly complained that the ACSIP plans were not developed for NLR's desegregation plan. He noted Joshua was correct.

The Court concluded however that ACSIP plans allow NLR to monitor the achievement disparity and assess the efficacy of compensatory programs. Each plan provides achievement data for three consecutive years allowing NLR to monitor achievement disparity. The plans set priorities and goals for each school, sometimes specifically targeting one group of students. They also direct that certain programs or actions be evaluated and monitored. The impact of actions and programs on student achievement is a common theme. For these reasons, Judge Miller concluded the ACSIP plans are appropriately used by NLR to evaluate and assess student achievement and compensatory programs. Through the ACSIP plans, NLR has met its obligations under the Plan. (*Id.* 35)

PCSSD

Section M of Plan 2000 is headed Student Achievement. It has two sub-sections. The first requires PCSSD to continue its home school counselor program. Judge Miller found it had complied in good faith with this provision. (*Id.* 93)

The second sub-section requires PCSSD to "implement a plan designed by Dr. Stephen Ross ("Ross")" to improve student achievement. Judge Miller found PCSSD has not implemented the Ross Plan. (*Id.* 98)

Judge Miller quoted that part of the original Ross Plan requiring PCSSD to:

> Decrease the performance gap between white students and African-American students through the systematic design/selection and

> implementation of intervention programs that provide effective remediation and/or adaptation to individual or group needs.

According to these goals, the County must in good faith implement and comply with a plan to improve general educational achievement while making good-faith efforts to close the achievement gap between white and black students. The County must do more than simply increase student achievement across the board; it must pay particular attention to black students and the achievement disparities that exist between them and white students. (*Id.* 94)

As with NLR, Judge Miller noted the County's ACSIP plans were not specifically created to implement the Ross Plan but that their focus on data, monitoring and school improvement made them a viable apparatus for Pulaski County to meet its Plan 2000 obligations. However, simply because Pulaski County had ACSIP plans did not mean that it was meeting its obligations. It had to show that its ACSIP plans specifically or effectively addressed the general goals set forth in the Ross Plan and those goals included specifically targeting black students to decrease the achievement gap. (*Id.* 95)

Dr. Goodwin has a Ph.D. in educational leadership. While on staff at UALR in 2004-2005 she was engaged by the District to study the implementation and progress toward attainment of Plan 2000 educational goals. (Goodwin;Tr.2169-2170)

Dr. Goodwin obtained and relied upon copies of all District ACSIP plans for 2004-2005 and analyzed whether the ACSIP plans addressed the goals in the education plan. (Goodwin;Tr.2172)

ACSIP plans have three priorities: Literacy, math and climate.

Dr. Goodwin explained she utilized explicit data (i.e. the stated goal) and implicit data (i.e. procedures that helped the schools meet the goal set) to determine if the District was actually using procedures to meet their goals. (Goodwin;Tr.2173)

Dr. Goodwin concluded that the ACSIP plans from each of the 36 district schools addressed the goals in the Ross Education Plan referred to in Plan 2000. (Goodwin;Tr.2180)

Question two was whether the goals were being implemented and she concluded they were.

The schools were increasing the percent of students scoring proficient or above the Benchmark and EOC exams. Between 2004 through 2006 steady increase occurred in proficiency in math and literacy for both black students and white students. (Goodwin;Tr.2184-2187)

Eighty-nine percent of the schools reduced the number of discipline problems and classroom disruptions caused by all students, regardless of race.

Twenty-four percent of elementary schools, fifty-nine percent of middle schools and fifty percent of high schools addressed goals to increase student attendance and reduce suspensions and grade retentions for all students. (Goodwin;Tr.2182)

Dr. Goodwin agreed that the State proficiency standards of comparing percent proficient and advanced together by grade by population is the proper way to make the comparison and her research confirms this. (Goodwin;Tr.2217)

Dr. Goodwin agreed that African-American students who scored proficient increased by 8.74% in math and increased 8.52% in literacy. (Goodwin;Tr.2218)

Judge Miller also discussed the Research Group and its evaluation of PCSSD's failings to infuse the FEPSI process into the ACSIP's. The group found that although PCSSD had increased student performance across the board, the achievement gap and proficiency on Benchmark and end of course exams had actually grown from 2004 to 2006. The County did offer a report prepared in 2009 showing it had focused special attention on black students and actually lowered the achievement gap. (ADD96)

The report presented data showing that at some grade levels and subject areas, the number of black students scoring proficient on the Benchmark Exam increased at a greater rate between 2005 and 2009 than the number of non-black students. The report also pointed to a number of programs the County claimed reduced the achievement gap. (*Id*.)

The Court then noted that Joshua asserted, just as it did in the NLR hearing, that these data did not show that Pulaski County was actually lowering the achievement gap. Joshua contended that by focusing exclusively on the number of students considered "proficient" by the Arkansas Department of Education, the data actually masks ongoing and pervasive gaps in student achievement. Joshua contended this is because two students who score proficient on the Benchmark may still be separated by a dramatic achievement gap in terms of their mastery of the Arkansas frameworks. That is, a student who scores at the bottom of the proficient range may have a dramatically different score from a student who scores at the top of the same proficient range. (*Id.* 97) Joshua also asserted that the County data ignores the continuing achievement disparities between students who score proficient and advanced, and between students who score basic and below. Joshua contended that data which simply distinguish between proficient and not proficient is too narrow to independently demonstrate the County is impacting the achievement gap.

The Court then did hold that consistent with the holdings it made regarding North Little Rock, it would be unreasonable to hold Pulaski County to the standard put forth by Joshua. (*Id.* 98)

The Ross Plan specifically required the district to design and implement programs to narrow the achievement gap between white and black students

including specific interventions targeted at individual and group needs. Overall, the data and testimony indicate that Pulaski County is increasing student achievement across the board. However, the data and testimony do not indicate that Pulaski County is making a good-faith effort to specifically target the achievement gap. (*Id.* 98-99)

Exhibit 50 demonstrates implementation of the Ross Plan as of 2002. It emphasizes student achievement, and confirms that one of the strategies was to decrease the performance gap between white and African-American students. (Bowles;Tr.1258-1259)

The achievement gap decreased in math by 9% from 2005-2009. In 2005 38% of PCSSD black students scored proficient on the benchmark in math and by 2009 had increased to 63%. In literacy, the achievement gap decreased by 6% from 2005 to 2009. (Bowles;Tr.1323-1324)

At grade four mathematics by 2009 the achievement gap decreased from 28 points to 21 points; in literacy, the gap decreased by 4% from 2005 to 2009. (Bowles;Tr.1328)

The gap at sixth grade decreased in math by 8% from 2005 to 2009; for seventh grade by 4%. (Bowles;Tr.1331-1332)

Dr. Ross was the director of the CREP center until he retired a year ago. (Strahl;Tr.682) Jack Strahl is employed by the Center for Research and

Educational Policy at the University of Memphis. (Strahl;Tr.682)

Currently, there are three instruments used in the District by CREP. They are a school climate inventory survey that teachers take, a second survey teachers take regarding school-wide programs, and the "observation" (SOMS). CREP takes data from all three instruments and forms a "picture" of the school. (Strahl;Tr.686-687)

Strategies are created based on the SOMS to improve low scores. (Ex.42; Strahl;Tr.691)

FEPSI is an acronym for Formative Evaluation Process in School Improvement. The crux of the formative evaluation is comparing data to make decisions for future school improvement. (Strahl;Tr.698)

The aggregate report to PCSSD is the result of its contract with CREP to obtain collected formative evaluation data in schools implementing school-wide programs. (Ex.56; Strahl;Tr.704)

Charles Nowak is an ACSIP supervisor with the Arkansas Department of Education ("ADE"). His responsibilities are to assist schools in writing individual ACSIP plans and to evaluate them to assure they meet minimum state and federal qualifications. (Nowak;Tr.570)

The Districts' schools are required by law to write an ACSIP plan. The plan drives instruction at each school location. (Ex.95; Nowak;Tr.577)

ACSIP is an evolution from COE, CCOE into ACSIP. The ACSIP plan sets out priorities that are designed to improve student learning and teacher instruction in the classroom. (Nowak;Tr.579)

Data from ADE shows PCSSD has improved the learning of black students every year and in some cases has outperformed the state. Data also shows that the gap between blacks and non-blacks has decreased every year in PCSSD. The District's goal is for achievement to go up and for the achievement gap between black and non black students to close (Nowak;Tr.586-587)

A criterion-referenced test ("CRT") was developed and identified by cutoff scores for each level of achievement identified as "advanced," "proficient," "basic" and "below basic." PCSSD is decreasing its achievement gap; the District's achievement gap is lower than the state average. (Ex.95; Nowak;Tr.588)

The District Court has previously noted in this case that "socioeconomic factors are the root cause for most, if not all, of the achievement gap." *Little Rock School Dist. v. Pulaski County Special School Dist. No. 1*, 237 F. Supp.2d 988, 1036-40 and 1074 (E.D. Ark. 2001). The District Court has stated "other courts have recognized that the academic achievement gap, which is a nationwide phenomenon, should not prevent a school district from being declared unitary, unless there is evidence this achievement gap was caused by *de jure* segregation." See *Berry v. School Dist. Of City of Benton Harbor*, 195 F. Supp. 2d 971, 996

(W.D. Mich. 2002).

N. MONITORING

North Little Rock

In monitoring, the Court simply said: "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." (ADD43) That is the extent of the Court's analysis and ruling.

PCSSD

The Court agreed that Pulaski County had consistently allowed Joshua to copy "all records relating to Pulaski County's compliance with the plan and to allow Joshua an opportunity to meet with the assistant superintendent for desegregation or staff members responsible for implementing particular sections of the plan." (*Id.* 104) The testimony was unchallenged that the District complied with all requests for documentation and had been responsive to Joshua's requests for meetings as required. The Court then held that PCSSD had consistently submitted reports showing:

(a) the enrollment in each school year by race;

(b) the enrollment in gifted and talented programs, honors programs, and advanced placement classes by school and by race;

(c) the make-up of special education programs: (i) by disability category, including Section 504, by race, and by sex; and (ii) by school, by race and by sex; provided that the system may comply with this reporting requirement by providing copies of materials submitted to ADE, as long as they include all information designated in this paragraph;

(d) For each school and the system, the number of instances of each form of discipline, by race and by sex; for each school and the system, the number of students receiving each form of discipline, by race and sex;

(e) the racial make-up, in each school, of (i) the administrators, (ii) the faculty, (iii) other professional staff, and (iv) support staff;

(f) the racial make-up, by category, of the various categories of administrators, faculty, support staff, and other workers employed in PCSSD.

(*Id.* 105)

The Court credited PCSSD for its school equity monitoring summaries tracking "most of the required data from 2002-2009." (Exhibit 73A-G) These reports show enrollment in each school by race, suspensions and expulsions by race, the number of students receiving special education services, the racial make-up of the school staff, and the number and racial make-up of students in talented and gifted programs, advanced placement and pre-advanced placement courses. The Court noted that PCSSD had prepared separate and specific reports to track a variety of data including gifted and talented programs, advanced placement programs by race, special education reports by race, discipline reports by race, the annual personnel hiring and deployment reports by race, the gender of Pulaski administrators and staff and that the reports provided by ODM indicated "that

Pulaski County has submitted this data on time and in good faith". The Court concluded at ADD 107 by saying "This does not, however, relieve Pulaski County of its duties to continue implementing this provision in good faith until it is declared entirely unitary and excused from court supervision."

The Court found the District prepared and furnished the reports required by Plan 2000 Section N to the ODM and the Joshua Intervenors on or near their due dates including:

Racial Isolation/Single Race Classes Reports; Racial/Gender Composition Reports, 2001 through 2010. (PCSSD Ex.5A-J)

Annual Recruitment Reports, 2006 through 2008. (PCSSD Ex.8A-C)

Interdistrict Equity & Pupil Services Annual Survey, (Magnet/ M to M counts), 2001 through 2008. (PCSSD Ex.9A-H)

Counseling Services Reports for Home School Counselors, 2000 through 2009. (PCSSD Ex.66A-G)

Monitoring & Compliance Reports 2000 through 2009. (PCSSD Ex.72A-H)

Monitoring & Compliance Summaries 2000 through 2009. (PCSSD Ex.73A-H)

Talented and Gifted Enrollment Reports 1999 through 2010. (PCSSD Ex.74A-K)

Special Education Desegregation Monitoring Reports, 1999 through 2009.

(PCSSD Ex.75A-J)

Annual Discipline Reports 2000 through 2009. (PCSSD Ex.76A-H)

(Because the word and line limitations of this Court's rules preclude an adequate recital and summary of the record made below, the reader is respectfully invited to review the more than 900 proposed findings of fact and conclusions of law submitted to the District Court on June 24, 2010 docket# 4469 which, we submit, are well documented and which will appear as part of the deferred appendix.)

SUMMARY OF THE ARGUMENT

This Court is simultaneously considering the District Court's findings that NLR was unitary in eight of the nine issues presented and the findings that PCSSD was not unitary in nine of the twelve issues it presented.

PCSSD believes there are six parallel or overlapping issues. They are 1) special education; 2) compensatory education and achievement; 3) discipline; 4) secondary gifted and talented education; 5) school construction and facilities; and 6) desegregation monitoring.

Of the six overlapping issues, PCSSD submits that its outcomes and efforts are at least equal to and in many cases exceed the efforts and outcomes of NLR. Yet, the District Court granted unitary status to NLR and denied it to PCSSD in these parallel issues. As we will explain more fully in our argument section, PCSSD believes that: 1. The District Court's rulings were clearly erroneous as to PCSSD in the areas of special education; achievement; discipline; secondary gifted and talented education; school construction and facilities and desegregation monitoring; and 2. The District Court failed to apply recognized precedent in this circuit which would warrant a finding of unitary status in the areas of discipline and achievement in PCSSD because although PCSSD did not implement every element of Plan 2000 in these areas, the District Court nevertheless noted that its "outcomes" were either "good", better than the national average or better than most

other districts which had been declared unitary, referring to undisputed testimony of experts called by PCSSD.

Applicable precedent from the *Liddell* line of cases stands for the proposition that if a defendant in a desegregation case attains outcomes compliant with constitutional commands despite the fact that it has not implemented each and every item of a remedial decree or plan; nevertheless, the outcomes warrant a finding of unitary status and release from court supervision.

ARGUMENT

PCSSD respectfully submits that a fair reading of NLR and PCSSD sections of the District Court's Findings of Fact and Conclusions of Law strongly suggests they were written from different points of view. The NLR section generally recited fewer activities, described fewer programs and almost invariably less positive results than did the discussion of PCSSD activities, programs and outcomes.

Part of this may be because NLR actually promised far less than did PCSSD, but the District Court nevertheless approved NLR's plan in 1988. Generally stated, it appears that because NLR promised little but met its modest promises, it managed to attain a finding of unitary status in most areas.

PCSSD respectfully submits that any fair reading of the facts for each district suggests PCSSD was held to a higher standard and greater expectations. Accordingly, in the six overlapping areas of 1) special education; 2) compensatory education and achievement; 3) discipline; 4) secondary gifted and talented education; 5) school construction and facilities; and 6) desegregation monitoring, PCSSD structured its Statement of Facts to compare and contrast the matters found in Judge Miller's Order, matters that were essentially if not entirely undisputed to outcomes derived wherever possible from ODM reports, given the District Court's

statement that he was disappointed with the testimony of many of PCSSD witnesses (although he spoke likewise about many of those from NLR).

No party appealed the NLR grant of unitary status and, therefore, those findings are final. PCSSD respectfully submits that when the record made by PCSSD is compared to the record made by NLR for the same six overlapping areas, the inescapable conclusion is PCSSD should have been declared unitary in those same areas and that the District Court's failure to so find was clearly erroneous.

Further, the District Court faulted PCSSD for failure to perform some of the tasks to which it committed. These failures are true to varying degrees. However, in those areas, which include discipline and student achievement, PCSSD produced uncontroverted evidence, even evidence that was credited by the District Court, that its outcomes, despite its failure to perform each task, were good, were better than the outcomes in the other Pulaski Districts, were often better than the rest of the state of Arkansas and often met or exceeded outcomes reported by other unitary districts. For instance, in Plan section F Discipline, Dr. Rossell determined that the District's racial disparity numbers are better than the United States as a whole. (ADD61).

PCSSD does not disagree with Judge Miller's invocation of *Cody v. Hillard.* Judge Wilson noted that *Cody* "recognized that 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." *LRSD v. PCSSD*, 237 F.2 Supp. 2d 988 at 1035 (E.D. Ark. 2002). (ADD16) It is by this standard that, in part, PCSSD believes it was short changed by the District Court's overall analysis. Although it failed to perform some tasks set out in Plan 2000, it nevertheless realized outcomes sufficient to warrant a finding of unitary status.

There is precedent in this Circuit in accord emanating from *Liddell*. In *Liddell v. Special School District*, 149 F.3d 862, this Court dealt with the issue of whether or not divisions of the St. Louis School District ("SSD") had achieved unitary status in vocational education. Before the last appeal, the District Court found that "SSD's failure to exert good faith efforts to establish a city vocational education facility and failure to provide a quality program preclude a conclusion that SSD has achieved unitary status." (*Id.* 862) However, the District Court also found that despite SSD's failure to comply in good faith with the 12 point program previously outlined there were no vestiges of de jure discrimination in the racial composition of faculty and staff, transportation, extracurricular activities, and facilities and that SSD's policies did not discriminate against students based on race. Because of this, as required by *Freeman v. Pitts*, 503 U.S. 467 (1968), SSD had achieved partial unitary status in operating the vocational education program. (*Id*. 862)

Those appealing contended that SSD's failure to meet each of the twelve ordered goals outlined in the 1996 report precluded a finding of partial unitary status. In rejecting this requirement, the Court of Appeals noted: "We did not hold or imply that each of the twelve ordered goals as outlined…must be achieved to meet constitutional requirements for the establishment of a unitary district…We, therefore, do not affirm that portion of the District Court's opinion holding that the twelve outcome-based "quality education goals" it adopted in 1993 are constitutionally required…. (*Id.* 871)

PCSSD submits this applies to discipline and achievement here. The twelve goals ordered from the report of the vocational oversight office are the substantial legal equivalent of the tasks outlined in Plan 2000 for discipline and achievement. Even if PCSSD did not meet or attain each of the plan goals, it did attain the over-arching goal of attaining results for a substantial period of time in the areas of discipline and achievement that meet or exceed constitutional muster and that meet or exceed the outcomes reported and approved by other school districts that have attained unitary status.

In the final analysis, Judge Miller required Pulaski County to prove by a preponderance of the evidence that it had substantially complied in good faith with each section in Plan 2000. (*Id.* 17) This requirement was too strict.

1. STUDENT ASSIGNMENT

Judge Miller, after an exhaustive analysis of racial balance outcomes in PCSSD over the past decade concluded at ADD48 that:

> Pulaski County has been successful in meeting the plan standard for student assignment required under this section. Although the numbers are not perfect, Plan 2000 does not require that they be so. The majority of elementary and secondary schools have met the plan standards for seven or more years since Plan 2000 came into effect.

PCSSD submits that this statement means PCSSD is unitary in student racial balance and student assignment. However, the same section of Plan 2000 presents the requirement PCSSD create and maintain "one-race class reports." Judge Miller found those reports inadequate. (*Id.*) However, in this respect, Judge Miller did not adhere to the "substantial compliance" standard but required that "all of the requirements of Plan 2000" had to be met in respect of the one-race class reports. (ADD49) [emphasis supplied] PCSSD respectfully submits that it detailed substantially complied regarding the one-race class reports as detailed *infra* in its Statement of Facts, and that Judge Miller's refusal to so designate them is clearly erroneous. Also to be considered is the fact that these circumstances and reports affect only a handful of students in the entire District. (See Exhibit 5A-J)

PCSSD has two additional observations: 1. the subject matters are separate, distinct and not logically linked even though they appear in the same section of the plan. Accordingly, PCSSD requests this Court clarify that PCSSD is in fact unitary in student racial balance (as distinguished from interdistrict student racial

balance for which the District Court clearly found PCSSD unitary) or 2. that if the Court of Appeals agrees with this linkage, that it reverse the District Court's finding that the one-race class reports were deficient and conclude that it substantially complied with the requirements of Plan 2000. Accordingly, PCSSD will confine its discussion in this section to why the District Court was clearly erroneous in concluding that the one-race classroom reports were somehow deficient.

The One-Race Class Reports were Appropriately Prepared and Utilized

Contrary to the District Court's statements, PCSSD offered full and rational explanations for (a) why it occasionally encountered one-race classes and (b) how they were addressed. For instance, if only two female or two black or non-black students were in a particular grade, the two students of the same race were kept in the same class rather than segregating them, thus creating a one-race classroom. If there were only two students of a particular race in a grade and the parents did not want them separated, the parents could choose to keep them in the same class, thus also causing a one-race class. A class might have only two black or non-black students; if one moved from the District, this caused a one-race class. Also, Bayou Meto Elementary is a court-approved, remote isolated majority white school exempt from the District's racial balance requirements and has only a 2 percent black population. Accordingly, most of its classes are one race. (Bowles;Tr.1036)

Occasionally, self-contained special education resource classes may be one-race because of their very small size. PCSSD also has an automobile lab/car shop class selected primarily by non-black students. English second-language classes are likely all Hispanic. If there is a reason for a one-race class, the District includes a written narrative in the report listing the causal factors and monitors these classes, writing a report each semester and providing it to all the parties. (Bowles;Tr.1038-1040)

2. ADVANCED PLACEMENT, GIFTED AND TALENTED AND HONORS PROGRAMS

In its Statement of Facts pp. 5-6 PCSSD compared its outcomes to those found by the District Court in NLR. Simply stated, PCSSD outcomes are better than those found for NLR. Yet, NLR was declared unitary, and PCSSD was not.

Several times the District Court commented there was still significant racial disparity in enrollment in PCSSD. The Court said that "such recent and incomplete progress does not suggest that the District has acted in good faith concerning its obligation to these areas." (ADD50)

However, the District' Court's analysis for PCSSD was incomplete. Indeed, if this Court compared the outcomes reported by the District Court at

(*Id.* 52) to the outcomes in NLR, (*Id.* 42), one readily sees that PCSSD outcomes are better year in and year out. (However, PCSSD cannot explain the source of the District Court's proportions cited for either District.) Disproportion is substantially

less in PCSSD; this is true both school by school and year by year for secondary schools as a group.

At (ADD53), the Court faulted PCSSD for failure to implement the eight goals set forth in the 1998-1999 guidelines. However, in comparing the outcomes for PCSSD to NLR, the inescapable conclusion is PCSSD's circumstances are more nearly like the SSD in charge of vocational education in *Liddell*, which we examined *supra*.

While PCSSD is not certain of the source of PCSSD TAG numbers utilized by the Court, a comparison of Exhibits 74A-K to the corresponding October enrollment counts for PCSSD (Exhibit 85A; ODM dated December 11, 2009) shows for the last ten years' reviewed PCSSD's differential fell well within the 8 percent self-imposed threshold and with the exception of years 2008-09, had a difference that was 4.5 percent or less. This squares with comments made by ODM and awards from the state.

Accordingly, the same results should have applied here, and PCSSD should have been declared unitary in this area. The Court's reasoning was clearly erroneous.

DISCIPLINE

After seeming to credit the testimony and conclusions of Dr. Rossell beginning at ADD60-ADD62, the District Court concluded: "If it is currently in a

good position with respect to racial disparity and student discipline, then certainly more can be accomplished by following the terms of its plan." (ADD60-ADD62)

This is a point where the District Court was too strict. Desegregation cases teach us the ultimate goal is a constitutional school district. A plan may prove more ambitious than the constitution commands. Indeed, the District Court said so at the outset of its opinion concluding that because PCSSD's plan exceeded the "*Green* factors" then compliance with its plan was compliance with *Green*.

Logically, less than complete compliance with the Plan could and did result in compliance with *Green*. (Discipline is not even one of the *Green* factors.) Dr. Rossell supplied the analysis and the undisputed facts drawn largely from ODM reports to establish PCSSD is compliant with the constitution in discipline. Even if strict adherence to its plan provision might or could have resulted in better outcomes, that is not what the law requires. The law requires primarily due process. The performance and outcomes of PCSSD in discipline are more than sufficient, particularly as compared with those of NLR, to require a unitary finding. The District Court's conclusions in this regard are both clearly erroneous and wrong as a matter of law.

In contrast to PCSSD, the judge made no comment upon programs or policies calculated to actually reduce discipline. Rather, his focus in NLR seemed

to be upon whether or not students were treated fairly after they had committed offenses. (*Id*.)

PCSSD presented evidence summarized at pp. 7-11 that it actually tried to reduce discipline episodes. In the final analysis, the due process efforts were the same; the distinction is PCSSD actually tried to modify behavior.

As early as 1998, ODM recognized that schools alone cannot remedy discipline problems. ODM concluded that parents must send their children to school better prepared with the proper social skills needed to participate in the school culture, with a desire to learn and be successful, and with the willingness to become positive contributors to society. (Joshua Exhibit 0-2; ODM March 18, 1998; p.101)

FACILITIES

The District Court made much of the cost differentials among the three most recent schools built by PCSSD. Yet, the Court ignored the time differential during which these schools were built and the undoubted effects of inflation on those costs. The Court's statement that this differential "begins to erode one's confidence that the District has tried to fairly allocate its limited resources," (ADD76), ignores at least two other facts: 1. the Court's own conclusion that the District was unitary in the area of allocation of school resources (*Id.* 43&80) and 2. the fact that the initial schools built during the initial phases of desegregation

plan implementation, were required to be built in racially neutral areas to accommodate majority to minority transfer students. Those were Crystal Hill and Clinton built in 1992 and 1994 and then Bates Elementary, the first school required under Plan 2000, replacing two schools that hosted majority black student bodies.

Yet, Judge Miller received testimony and then acted upon a clamor from Joshua about the location of these schools. He used the location of these schools to cast doubt upon the good faith of PCSSD. (*Id.* 78)

This analysis was grossly unfair because PCSSD followed the court-approved process contained in Plan 2000 for the construction of these schools with precision. (Ex.22)

Also, to the extent PCSSD has schools it admittedly wishes to improve or replace; it has not disproportionately assigned African-American students to them. (Ex.92) This evidence was not disputed.

Judge Miller criticized PCSSD for the location and costs of the three newest schools. But the price comparisons set out at page 75 ignore cost escalation and inflation between the time Daisy Bates was opened in 2001 and Maumelle Middle in 2006. Plus, Bates was an elementary school and Maumelle Middle, just that. (ADD76)

Judge Miller's comments concerning the location of the newest facilities in PCSSD also ignores irrefutable facts. The first is that the first two schools were

built with court approval in racially neutral areas to accommodate the inter-district majority to minority transfer program which has been a tremendous success.

He also ignores the fact that the next school built, Bates, was built as required by a predecessor desegregation plan to replace schools in poor condition located in black communities. The three schools since then were first part of Plan 2000 (Chenal Elementary) and second were built according to the process laid out in Plan 2000. It is simply unfair for Joshua and indeed the District Court to engage in Monday morning quarterbacking about the location of those schools. If Joshua seriously desired to oppose them at that time then, as Judge Wilson directed: "file a motion". (Letter/Order; Docket# 4155 ADD111) Joshua did not.

The Court recognizes that after the Kahn study, which PCSSD dutifully performed, it found itself in a dilemma, particularly with the failure of the millage campaign. It could elect on one extreme to build no new schools but be able to demonstrate that all its schools were equally old and inferior, or it could make choices about which new schools to bring online first and endure the inevitable criticism and jealousy that their selection would create. The Court should not fault PCSSD for electing the latter course even though the Court might have made different decisions or set different priorities if it had been assigned that role by Plan 2000. It was not.

As the Statement of Facts pp. 11 to13 establishes, concerns about schools

such as Harris are simply exaggerated.

I. SCHOLARSHIPS

Plan 2000 requirements for "scholarships" were very narrow. The District met these narrow requirements by passing a board policy on April 20, 2003 providing for the future award of scholarships. The District concluded it did not have the funds to finance the scholarships but stated it would do so when funds were available. (Bowles;Tr.1369-1372)

Perhaps the current availability of lottery scholarships will more than substitute for the modest program the District policy envisioned. In any event, PCSSD literally did what Plan 2000 required and should not be denied unitary status because of financing.

K. SPECIAL EDUCATION

Districtwide, the participation rates in secondary special education between black and white students have always fallen below the 8.3% threshold for each of the 10 years presented. PCSSD Exhibits 75-A through 75-J confirm this through a simple mathematical calculation of black and white student special education participation rates. A further factual recital is at pp.15.

No reporting of schools was triggered because PCSSD, as a whole, has not experienced a year in which there were any high placement (e.g., participation exceeding threshold) rates Districtwide.

One can take exhibits 75-A through 75-J, and by simple mathematics determine that only the following schools ever exceeded a black placement rate of 8.3%: Jacksonville Junior High, 8.6%, 10.0%, and 10.8% for the years 2001-04, Jacksonville High School, 8.4% and 9.3% for the years 2003-05; Sylvan Hills Junior/Middle School, 11.8% and 9.1% for the years 2000-03; and Sylvan Hills High School, 11.0% and 10.1% for the years 1999-00 and 2001-02.

With these results, one cannot reasonably assert that these were "atypically high" placement rates, because the schools exceeded state thresholds only slightly; also, in no more than nine occasions were there instances of secondary schools exceeding the 8.3% threshold over a 10-year period. Sylvan Hills Junior/Middle School exceeded the threshold by 3.5% points in 2000-01, while Jacksonville High narrowly exceeded the threshold by 0.1% in 2003-04.

Nearly all of these (nine) instances, albeit rare, occurred in the first half of the 10-year reporting period. This is significant because it confirms a declining placement rate since Plan 2000 was approved.

Given this how could it logically be said the District ever had an "atypically high rate" that would have activated the provision for special plans and notifications to alert schools that their rate was atypically high? The District Court's findings in this area are clearly erroneous.

STAFFING

Judge Miller's findings regarding the recruitment for administrative positions in PCSSD are perhaps the prime example of how, we respectfully submit, the Order in many instances exalted form over substance. The "findings" fly in the face of the statistical outcomes sustained by PCSSD for more than a decade. (ADD84) (See Statement of Facts pp. 16-23.)

The "findings" are based largely upon anecdotal evidence and seem dismissive of the outcomes. They cannot be reconciled with a conclusion PCSSD failed to perform in the area of administrative staffing "in good faith" and are clearly erroneous.

Equally puzzling are the District Court's findings regarding "recruitment" of teachers. This "finding" was made by the District Court despite undisputed evidence regarding the graduation rate of black students available for recruitment in Arkansas.

The Court's existential leap to a conclusion that the "data" showed PCSSD had "imposed" an upward limit on the number of black teachers defies examination. (ADD85) Indeed, given the ever declining graduation rate of black students, PCSSD respectfully submits that it should have been complimented on maintaining the percentages it has for over a decade rather than being criticized for not having increased them. This finding was clearly erroneous.

The District Court's inference that the proportion of black educators should

reflect the proportion of black students has been repeatedly and emphatically rejected by previous district courts, this Court and the Supreme Court. As has been held, the "proper [statistical] comparison . . . 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." *Little Rock School Dist. v. Pulaski Cty. Special School Dist.*, 663 F. Supp. 1557, 1987 U.S. Dist. LEXIS 6817 (U.S. Dist. Ct. 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. v. U.S.*, 433 U.S. 299, 53 L. Ed. 2d 768 (1977).

In determining whether there is an underutilization of African-Americans as teachers and administrators, the statistical comparison of black *teachers* in a district to the percentage of black *students* in the district has been rejected as irrelevant; the proper comparison is to the percentage of black educators in the relevant labor market area. *Hazelwood School Dist. v. U.S.*, 433 U.S. 299, 304-310, 97 S. Ct. 2736, 2740-2743 (1977).

In *Wygant v. Jackson Bd. Of Ed.*, 476 U.S. 267, 276, 106 S. Ct. 1842, 1848 (1986), the Supreme Court also noted that "[c]arried to its logical extreme, the idea that black students are better off with black teachers could lead to the very system the Court rejected in *Brown v. Board of Ed*, 347 U.S. 483 (1954) (Brown I)."

Also, it is certainly worth noting that the criticism leveled by ODM in 2008-2009 would have literally required PCSSD to deploy and rely upon a quota rather than "best efforts". (*Id.* 85) (See Exhibit 85C at p. 21-22)

As to the "core areas" (ADD87-89) the data shows PCSSD is doing as well as it "practically" can. (Court's Exhibit 1)

The District Court's discussion of sub-section D regarding allocating teachers to avoid racially identifiable schools hoists PCSSD upon the petard of outdated discredited law which would otherwise sanction a quota. By the time Plan 2000 was adopted, such quotas and ratios had become constitutionally suspect *Hazelwood*, and the "goal" in itself is suspect for the same reasons.

Plan 2000 was agreed to by Joshua and PCSSD and approved by the District Court. If it lacked a definition of what constituted a "racially identifiable school", then common sense would dictate that the District supply the Court with a standard. It did this through the testimony of Dr. Armor. Dr. Armor's analysis of teacher assignments in PCSSD actually examined the more rigorous requirements of the 1992 Plan and Exhibit 7 and 7(a) make this clear. Of course, this indicates substantial compliance with Plan 2000 which has no such statistical requirements. The District Court's rejection of Dr. Armor's standard and his conclusion that the District was well within constitutional limits concerning staffing patterns was clearly erroneous.

ACHIEVEMENT

The Court found PCSSD unitary regarding its home school counselor program.

The NLR program and testimony was not substantially different from that presented by PCSSD except that PCSSD presentation was far more comprehensive and detailed. In short, if this Court will examine the comparison contained under this heading in the "statement of facts" one will see PCSSD in fact appropriately implemented the Ross Plan, appropriately utilized the elements of the Ross Plan, appropriately targeted the goals of reducing the achievement gap between black and white students, realized substantial progress in reducing the achievement gap and detailed those successes at length. (See Statement of Facts at pp. 23-32) Accordingly, the District Court finding PCSSD is not unitary in this area is simply clearly erroneous.

MONITORING

While the Court initially focuses upon a single monitoring instrument which took time to develop and which ODM initially rejected, the Court gave insufficient consideration to its other findings. While the Court and ODM may not have been satisfied with the initial monitoring instrument from 2000, as Judge Miller noted, the evidence demonstrates that Pulaski County has acted in good faith and

substantially complied with section N which in fact covers most desegregation related data.

It is respectfully submitted that the scope of the data and the comments concerning these individual reports (see Statement of Facts pp. 33-35) should work a reversal of the District Court's failure to find the District unitary in respect of Part 1 of Section N, because the finding is clearly erroneous. Also, to the extent the District Court found the District unitary in discrete areas and to the extent this Court reverses other individual findings in particular areas covered by monitoring, then the District should be excused as well from having to continue monitoring in areas in which either the District Court or this Court declares it unitary.

CONTINUATION OF SETTLEMENT FUNDING

PCSSD, because of space limitations, joins in the arguments and requests for relief presented by LR and NLR in this appeal.

CONCLUSION

For all of the foregoing reasons, the decisions of the District Court should be reversed, clarified as necessary, PCSSD declared unitary in all areas, the settlement sums restored and for all other proper relief.

CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2011, I electronically filed Appellant's brief, Addendum and Appendix 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 system.

By: */s/ M. Samuel Jones, III*

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I certify that this Brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B). The total number of words in the Statement of Case, Statement of Facts, Summary of Argument and Argument is 12,003. I further certify pursuant to Rule 28A(c) of the Eighth Circuit Rules of Appellate Procedure that the word processing software used to prepare this Brief is Word 2007 and that the brief and Addendum electronically filed are virus free. We are proceeding by permission of this Court with a deferred Appendix.

Dated: July 22, 2011

By: */s/ M. Samuel Jones, III*