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## APPELLEES' JURISDICTIONAL STATEMENT

The Appellant/Cross-Appellee School District's Jurisdictional Statement is complete and correct, with the exception that all motions to reconsider were timely filed under Rule 59 (App 470 n.2)

### STATEMENT OF THE CASE

#### A. The Liability Phase

This case is a school desegregation class action. In 1989, the plaintiffs filed a Complaint and Amended Complaint alleging that Rockford Board of Education School District No. 205 ("RSD") intentionally segregated and discriminated against African-American and Hispanic students. (R.1; R.6)

On April 2, 1993, Magistrate Judge Mahoney commenced a 24-day hearing on the merits of plaintiffs' claims. Approximately 40 witnesses testified and 150 depositions were received into evidence. (R.1088 et seq.)

On November 3, 1993, the Magistrate Judge issued his Report and Recommendation. People Who Care v. Rockford Bd. of Education, 851 F. Supp. 905 (N.D. Ill. 1994). The Magistrate Judge found that the activities of the RSD had "consistently and massively violated Brown v. Board of Education," and observed that RSD had "committed such open acts of discrimination as to be cruel and others with such subtlety as to raise discrimination to an art form." Id. at 939. The Magistrate Judge recommended that RSD should be held liable for violating the Fourteenth Amendment rights of the plaintiff class. Id. at 1207.

On February 18, 1994, Judge Roszkowski adopted most of the Magistrate Judge's findings. Id. at 933. On March 29, 1994, Judge Roszkowski entered an order finding that the entire Rockford

public school system was "a dual school system" and directing RSD "to eliminate root and branch, throughout the Public School system, all vestiges of racial, ethnic and national origin discrimination against African-American and Hispanic students." Id. (R.1560)

#### **B. The Remedial Proceedings**

All remedial issues were referred to Magistrate Judge Mahoney by consent of the parties (the "May 3, 1993 Agreement") and pursuant to Judge Roszkowski's May 5, 1993 and February 18, 1994 Orders. See, People Who Care, 851 F. Supp. at 934. Also, pursuant to the May 3, 1993 Agreement and these orders, the court appointed Dr. Eugene Eubanks as a Special Master, with authority regarding the formulation and implementation of remedies. (R.1311; R.1313)

On August 6, 1995, the Master submitted a Proposed Comprehensive Remedial Plan (the "PCRP"). (App.500) The parties commented on the PCRP and prepared for an evidentiary hearing to resolve disputed issues.

The Magistrate Judge divided the remedial hearing into three parts: (1) Educational Components/Stipulated Areas; (2) Student Assignment and Related Issues; and (3) Faculty Hiring and Placement, Student Achievement and Other Issues. (App.253-54) The CRO hearing commenced on October 16, 1995; the final part of the hearing concluded on March 27, 1996. (App.253)

#### **C. The Comprehensive Remedial Order**

The Magistrate Judge issued the Comprehensive Remedial Order ("CRO") in three segments corresponding to the three parts of the hearing. In general, the CRO builds upon a foundation of

remedial provisions embodied in the prior interim orders<sup>1</sup>, and appropriately expands these provisions in view of the findings of systemic liability and continuing vestiges of discrimination. The Magistrate Judge took a middle ground approach, rejecting more extensive remedies proposed by the Master and plaintiffs, as well as ineffective or insufficient remedies proposed by RSD. The CRO specifically finds that anything short of the CRO remedies would fail to correct the constitutional violations by RSD. (App.461)

**1. Segment One (Educational Components and Stipulated Areas)**

The first segment of the CRO addresses certain stipulated remedies and educational components of the desegregation remedy. (App.254)

a) Ability Grouping. The Magistrate Judge found that in view of continuing discrimination against minority children practiced through ability grouping, RSD would not be permitted to engage in tracking and ability grouping practices. (App.260)

b) Human Relations Program. The Magistrate Judge approved the Master's recommendation for a human relations program designed to foster the educational, attitudinal and developmental progress of staff and students in support of desegregation efforts. (App.265)

c) Curriculum and Instruction. The Magistrate Judge approved the Master's recommendation for curricula offerings and standards to ensure equity in learning opportunities for minority students. (App.267) The Magistrate Judge rejected the Master's proposal

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<sup>1</sup>The interim orders (the "Interim Order" and "Second Interim Order") arose out of contested motions filed by plaintiffs and provided some preliminary relief to the plaintiff class. (R.75; R.376)

for a mandated multi-cultural curriculum and proposals by plaintiffs regarding the duration and scope of curriculum remedies. (App.270)

d) Community Education, Involvement and Support. The Magistrate Judge adopted the portion of the Master's proposal related to fostering community and parental involvement in the desegregation process. (App.270) The Magistrate Judge rejected the Master's proposal that the RSD provide community grants and develop linkages with the business community, colleges and other organizations. (App.274)

e) Early Childhood Education. The Magistrate Judge rejected the parties' proposal for an Early Childhood Education Program on the grounds that this program was not linked to remedying intentional discrimination by RSD and was beyond the scope of RSD's operations. (App.275)

f) Bilingual Education. The Magistrate Judge approved a Bilingual Education Program to remedy the effects of unlawful segregation of Hispanic students and educational discrimination against them. (App.278)

g) Research and Development Programs. The Magistrate Judge approved the parties' stipulation concerning research, development and evaluation services related to implementation of the remedial plan. (App.282)

h) Staff Development. The Magistrate Judge adopted the recommendations of the Master regarding a Staff Development Program to address educational discrimination against minority students. (App.283)

i) Transportation The Magistrate Judge adopted the Master's recommendations concerning the elimination of RSD's discriminatory transportation practices (App 286)

j) Disposition or Acquisition of Facilities The Magistrate Judge approved a stipulation providing that RSD would not unilaterally dispose of, acquire or construct facilities during the desegregation process. (App.288)

k) Alteration of Boundaries The Magistrate Judge approved a stipulation providing that RSD would not unilaterally alter boundaries during the desegregation process. (App.288)

l) Racial Incidents The Magistrate Judge approved a stipulation providing for policies and procedures addressing racial incidents of discrimination, harassment or inequity. (App.289)

m) Funding/Budgeting The Magistrate Judge approved a stipulation relating to the process for developing the yearly budget for CRO remedies. (App.291)

## **2. Segment Two (Student Assignment and Related Issues)**

The second segment of the CRO addresses student assignment and school capacity issues.

The Magistrate Judge ordered the School District to implement a "controlled choice" student assignment plan to achieve desegregation of its elementary schools. (App.343) The controlled choice plan is voluntary to the extent that parental assignment choices are honored so long as these choices in aggregate result in school enrollments within fifteen percentage points of the district-wide average of minority students. (App.326-27)

The Magistrate Judge rejected RSD's position that controlled choice would constitute a sufficient student assignment remedy without additional provisions to remedy the gross under-capacity of schools in minority neighborhoods and inequitable transportation burdens placed upon minority students. (App.351) Accordingly, the Magistrate Judge ordered the construction and renovation of certain school facilities, together with changes in grade configurations. (App.351-61)

**3. Segment 3 (Faculty Hiring and Placement, Student Achievement and Other Issues)**

Segment 3 of the CRO addresses the remaining remedial issues.

a) Faculty Hiring and Placement. The Magistrate Judge ordered RSD to achieve a faculty with at least 13.5% minority teachers in each grade configuration (elementary, middle and high schools) as soon as practicable. (App.388) The Magistrate Judge also directed that in any reduction in force situation, the District's post-RIF minority faculty ratio must approximate the pre-RIF ratio. (App.388)

As regards faculty assignment, the Magistrate Judge held that RSD must desegregate its faculty as soon as practicable. (App.401) The Magistrate Judge ordered that the percentage of minority faculty in each elementary school should not exceed the percentage of RSD's minority faculty by more than 5% and that middle and high schools should be held to a +/- 5% standard. (App.403-4)

b). Student Achievement. The Magistrate Judge found that RSD's intentional discrimination was a substantial factor in causing an achievement gap between majority and minority students, but refused to hold RSD 100% responsible for this gap. (App.422) The Magistrate Judge held that RSD could remedy the effects of its violations in this area by: (1)

reducing the disparity in standardized test scores between majority and minority students by at least 50% within four years; or (2) bringing 90% of RSD's minority students within one year of the national norm on the Degrees of Reading Power Test and a test similarly measuring achievement in mathematics. (App.423, 489) Additionally, the Magistrate Judge approved educational programs focussing on RSD's minority students, including Reading Recovery, Success For All, and other high order thinking skills programs. (App.424) Although the Master and the plaintiffs further contended that the court should require specific reductions in disparities in grades, attendance, drop-out and graduation rates, the Magistrate Judge approved only a 20% "goal," (as opposed to a requirement), in these areas. (App.424 n.152)

c) Discipline. The Magistrate Judge ordered RSD to develop a uniform code of conduct and held that so long as disciplinary criteria were objective and all students received comparable discipline for comparable conduct, the court would not require statistical equivalence. (App.425) Citing the connection between disproportionate discipline for minority students and poor achievement outcomes, the Magistrate Judge also ordered RSD to enhance its counseling approaches and to develop alternative approaches to discipline. (App.430)

d) Extracurricular Activities. Based upon findings of a twenty year pattern of intentional discrimination affecting minority participation in cheerleading, the Magistrate Judge ordered that cheerleading squads should have minority participation at least equal to the minority enrollment percentage in a particular school. (App.434) With regard to all other extracurricular activities, the court established a "goal" (but not a requirement) of +/-15% of the percentage of minority students at each school. (App.435)

e) Within School Segregation. Based upon findings that within school segregation continued to be a widespread problem in RSD, the Magistrate Judge directed that all classes and programs, with certain narrow exceptions, come within +/-5% of the percentage of minority students in the "compliance pool," defined as the percentage of minority students at each K-12 grade level at each building. (App.437) The Magistrate Judge ordered the application of within school requirements to both regular and honors classes, but not to elective courses in secondary schools. (App.443-45)

f) Special Education. The Magistrate Judge rejected the modest remedial proposals of the plaintiffs and Master regarding special education and directed that control over special education programs be returned to RSD. (App.450)

g) Governance. The Magistrate Judge reappointed Dr. Eubanks as Master to oversee remedial areas of the CRO and identified his responsibilities and authority. (App.452)

h) Finance. The Magistrate Judge held that RSD has responsibility to fund the CRO remedies. (App.461) The Magistrate Judge estimated the cost of capital improvements under the CRO at \$48 million and operating costs for 1996 at \$23.4 million. (App.361, 463) The Magistrate Judge limited the use of funding raised pursuant to Article IX of the Tort Immunity Act, 745 ILCS 10/9-101 et seq., to \$25 million per year, with a maximum 4% increase for each of the next four years. (App.465)

#### **D. Motions for Reconsideration and Appeals**

The parties filed various motions to alter or amend segments of the CRO, which the Magistrate Judge decided on August 8, 1996. (App.468)



The parties, including the Intervening teacher and staff unions, (the "Union"), appealed from the court's orders.

## STATEMENT OF ISSUES

1. Whether the Magistrate Judge erred in rejecting Early Childhood Education ("ECE") as a remedy despite clear evidence that ECE is within RSD's operational domain and that preschool minority children are victims of RSD's adjudicated discrimination.

2. Whether the Magistrate Judge erred in refusing to order a special education remedy on an uncontroverted record that the disproportionate placement of minority students in special education is a vestige of unlawful tracking.

3. Whether the Magistrate Judge improperly limited the School District's state law authority to utilize funding under the Tort Immunity Act to pay for the costs of implementing the court-ordered desegregation remedy, especially when the court also found that no other feasible financing alternative exists.

4. Whether the Magistrate Judge erred by failing to provide hiring subgoals for black and Hispanic teachers and by including bilingual teachers in the hiring goal when these determinations will diminish the faculty hiring and desegregation remedy.

5. Whether the Magistrate Judge abused his broad discretion in approving remedies in the following areas to eliminate the vestiges of RSD's intentional discrimination:

- (a) student achievement;
- (b) faculty hiring;
- (c) staff assignment;

- (d) discipline;
- (e) extracurricular activities;
- (f) tracking;
- (g) within school segregation; and
- (h) governance.

## **SUMMARY OF ARGUMENT**

The Magistrate Judge presided over a remedial hearing of extensive scope and depth. The CRO is carefully reasoned, and in almost all respects, provides sound remedies for RSD's constitutional violations. The propriety of these remedies should be measured under well-established desegregation standards, and the race conscious remedies are not subject to strict scrutiny review.

### **A. The Plaintiffs' Appeal**

The only aspects of the CRO that should be modified on appeal are: (1) the rejection of Early Childhood Education as a remedial component; (2) the failure to order the reevaluation of minority students placed in behavior disorder classes; (3) the restriction of RSD's state law authority to raise funding for desegregation remedies under the Illinois Tort Immunity Act; and (4) the failure to create hiring subgoals for minority teachers and to exclude bilingual teachers from staff hiring goals.

**Early Childhood Education.** The court's rejection of an Early Childhood Education ("ECE") remedy on grounds that ECE lay too far outside the responsibilities of the RSD is clearly erroneous: both the Illinois statutory scheme for local school districts and the history of RSD preschool

programs establish that ECE falls within the operational domain of the RSD. Further, the court's rejection of ECE is also erroneous because the record clearly establishes that minority preschool children are victims of RSD's adjudicated violations.

Special Education. A special education remedy of reevaluating all African-American students in Self-contained Special Education Behavior Disorder classes is warranted by uncontroverted evidence that the gross overrepresentation of minority students in such classes is a vestige of RSD's tracking violations.

Tort Immunity Act Funding. The CRO's limitation on RSD's authority to raise funds under the Tort Immunity Act to finance desegregation remedies is improper because it unnecessarily limits RSD's authority under state law and creates an impracticable limitation on funding remedies in this case.

Faculty Hiring and Placement. The faculty desegregation remedies are deficient in two respects. Hiring subgoals for Black and Hispanic teachers are needed to facilitate educational desegregation remedies and eliminate faculty racial identifiability; and bilingual teachers should have been excluded from the hiring goal, just as they were excluded from the teacher assignment provisions. Given that bilingual teachers will be concentrated in specific schools, their inclusion in the hiring goal will ultimately diminish the racial diversity of faculty in non-bilingual schools.

#### **B. The Appeals By RSD and the Union**

The arguments raised by RSD and the Union on appeal should be rejected.

Faculty Hiring and Placement. The faculty hiring and assignment remedies are supported by extensive liability findings in this case and by evidence of numerous vestiges and effects of RSD's discrimination. In each instance, the race-conscious faculty hiring, layoff and assignment

remedies are narrowly tailored and create a minimal burden on third parties. The Magistrate Judge exercised appropriate discretion in adopting a 13.5% hiring goal and in placing a ceiling or floor on minority teacher representation in each school. The court also properly created a race-conscious assignment system to desegregate the faculty within each school. Given that the teacher's contract impedes faculty desegregation, the CRO properly subordinates the teacher's contract, but only to the extent necessary to implement the remedy.

Student Achievement. The Magistrate Judge properly admitted expert testimony concerning student achievement and educational outcomes because this evidence was based upon scientific method and provided assistance to the trier of fact. The court correctly concluded that there is an achievement gap between the performance of RSD's minority and majority students and that this gap resulted in substantial part from RSD's intentional discrimination. The court properly relied upon extensive evidence in the record in making a conservative determination that RSD was responsible for 50% of this gap and adopted appropriate but flexible outcome requirements.

Ability Grouping and Within School Segregation. The CRO's remedial provisions prohibiting ability grouping and addressing within school segregation are supported by extensive evidence of intentional discrimination in these areas. The remedies are appropriately designed to achieve integration at a classroom level after decades of RSD practices that have segregated minority students and provided them with an inferior education.

Discipline. The CRO's discipline remedy -- whereby if RSD continues to use subjective discipline categories it must achieve equitable referral outcomes -- is wholly supported by the record and caselaw. The evidence establishes that the current discipline disparities are vestiges of the

RSD's adjudicated violations, and further, that those current disparities are conditions whose remediation would facilitate the achievement and student assignment remedies.

Extracurricular Activities. In view of a twenty year pattern of discrimination affecting minority participation in cheerleading, the Magistrate Judge properly ordered that cheerleading squads have minority participation at least equal to the minority enrollment percentage at a particular school. This requirement, although more demanding than other aspects of the remedy for discrimination in extracurricular activities, was narrowly tailored and did not alter the overall standard for unitary status.

Governance. The Magistrate Judge adopted appropriate provisions regarding the governance and implementation of CRO remedies. The governance provisions, including the reappointment of the Master to oversee remedial implementation, are necessitated by RSD's long history of resistance to remedial measures.

## **ARGUMENT**

### **I. The Applicable Appellate and Remedial Standards Support Affirming Most of the CRO**

#### **A. RSD and the Union Carry a Heavy Burden of Establishing an Abuse of Discretion by the District Court**

In a school desegregation case, "[o]nce a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad." Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15-16 (1971). The district court's remedial authority to "restore the victims to their rightful positions" derives from this well-recognized equitable power. Milliken v. Bradley, 433 U.S. 267, 280-81 (1977).

The burden falls upon RSD and the Union to establish that the lower court abused its broad equitable powers. U.S. v. Paradise, 480 U.S. 149, 193 (1987). That burden is made heavier by the fact that the vast majority of arguments advanced by RSD and the Union challenge factual and mixed legal/factual determinations by the court-- determinations which must be shown to be "clearly erroneous." Lorain NAACP v. Lorain Bd. of Education, 979 F.2d 1141, 1148 (6th Cir. 1992).

**B. The District Court Has Broad Remedial Authority to Eliminate the Vestiges of Discrimination**

In a school desegregation case, the remedy must eliminate every vestige of racial discrimination in the schools to the extent practicable. Freeman v. Pitts, 503 U.S. 467, 485 (1992). A current condition is a vestige, and therefore properly the subject of remediation, where it is "traceable" by a "causal link" to the original violations. Id. at 496. In determining whether a causal connection has been proven, the court need not find that the current condition would not exist "but for" the prior violations. Rather, the legal standard for causation is "contributing cause." Columbus Board of Education v. Penick, 443 U.S. 449, 465 n.13 (1979). In this regard, a court must be mindful that there may be reciprocal cause-effect relationships at work. Freeman, 503 U.S. at 497.

In addition to eliminating the vestiges of discrimination, the remediation of current conditions, *regardless of whether they are current vestiges*, is warranted if this would *facilitate* the elimination of conditions that are vestiges. Freeman, 503 U.S. at 491.

Once the vestiges of discrimination are determined, the court must determine how to eliminate those vestiges. This entails consideration of the "appropriateness" of various remedial measures. People Who Care v. Rockford Bd. of Educ., 961 F.2d 1335, 1339 (7th Cir. 1992) ("appropriate remedy for a legal wrong"). Appropriateness encompasses such factors as

effectiveness and practicability. Freeman, 503 U.S. at 497-98; Wright v. Council of Emporia, 407 U.S. 451, 462 (1972). Appropriateness also includes consideration of circumstances justifying a strong remedial response, such as the "longstanding" nature of the violations and their virulence. Milliken II, 433 U.S. at 283, or a school district's history of resistance to court orders. Morgan v. Kerrigan, 530 F.2d 401, 424 (1st Cir. 1976).

Under certain circumstances, the concept of appropriateness also encompasses an evaluation of the "necessity" of the proposed remedial measures to the attainment of the adopted goal. A necessity evaluation is made where the remedial measure would alter the contractual or state law rights of third parties. People Who Care, 961 F.2d at 1339. Such a determination asks whether the rights of the third parties, as embodied in a contract or state-law, "interfere with the remedies for violations." Id. at 1338. "Necessity," however, does not require that the remedial goal be impossible absent the contract modification. Morrow v. Crisler, 479 F.2d 960, 964 (5th Cir. 1973), cert. denied, 419 U.S. 895 (1974).

### **C. Strict Scrutiny Does Not Apply to Race-Conscious Desegregation Remedies Ordered after Liability Adjudications**

RSD and the Union contend that the strict scrutiny test should apply to race-conscious portions of the lower court's Desegregation Plan. Like someone arriving in the middle of a conversation, the appellants begin and end their discourses on strict scrutiny with happy neglect of the entire jurisprudential "conversation" preceding their arrival.

In remedying adjudicated discrimination, school boards and courts are empowered to undertake race-conscious measures. Swann v. Charlotte-Mecklenburg Bd. of Education, 402 U.S. 1, 24 (1971). As the Court observed in McDaniel v. Barresi, 402 U.S. 39, 41 (1971), in formulating

a school desegregation plan race "will almost invariably" be taken into account. Id. Without race-conscious measures, desegregation would be "severely hampered" because "[a]ny other approach would freeze the status quo that is the very target of all desegregation processes." Id.

There is a long history of judicial approval of race-conscious desegregation remedies. In U.S. v. Montgomery County Bd. of Educ., 395 U.S. 225 (1969), the Supreme Court approved the use of race-conscious outcome requirements with regard to faculty integration. The Court found that the lower court's order employing race-conscious numerical outcomes ("ratios") was warranted in light of the command in Green that desegregation plans "promise realistically to work now." Montgomery, 395 U.S. at 235-36 (emphasis in original).

Two years later in Swann, the Court reaffirmed the use of race-conscious outcome requirements with respect to faculty composition, and further approved the use of mathematical ratios in the area of student assignment. The central remedial concept of Swann is that race-based outcomes are not only appropriate in remedying segregation and discrimination, but are often necessary components of a meaningful remedy. The Court emphasized that courts may rely upon race-based outcomes, but should do so in ways which are not overly rigid. Swann, 402 U.S. at 25 (goal should be a "starting point" and not "an inflexible requirement").

In Pasadena City Board of Education v. Spangler, 427 U.S. 424 (1976), the Court struck down the district court's order for the year-by-year adjustment of student assignment zones, but only because it was an "inflexible requirement" improper under the dictates of Swann. Spangler, 427 U.S. at 434-35. The lack of flexibility in the order at issue in Spangler related primarily to the continued application of the student assignment outcome requirement despite evidence that



subsequent changes in residential demographics were responsible for the current racial imbalances in the student body compositions. 427 U.S. at 435

The governing principles of Montgomery, Swann, and Spangler have been routinely applied by lower courts in approving race-conscious outcome remedies in numerous school desegregation cases and should govern review of such remedies in this case. See e.g., Arthur v. Nyquist, 712 F.2d 816 (2d Cir. 1983), cert. denied, 466 U.S. 936 (1984); Morgan v. McDonough, 689 F.2d 265, 274 (1st Cir. 1982). These standards continue to be applied subsequent to the Supreme Court's decision in City of Richmond v. Croson, 488 U.S. 469 (1989). See e.g., Jacobson v. Cincinnati Bd. of Educ., 961 F.2d 100 (6th Cir. 1992); Vaughns v. Bd. of Ed. of Prince George's County, 742 F.Supp. 1275, 1293 (D.Md. 1990), aff'd without opinion, 977 F.2d 574 (4th Cir. 1992).

Appellants' contention that this court should ignore this well-established body of desegregation standards and apply the strict scrutiny standard of review should be rejected for several reasons. First, no constitutional infirmity has ever been found in race-conscious desegregation remedies so long as those remedies comply with traditional desegregation principles. No principled reasons have been offered by the Appellants-- nor are there any-- for disturbing this body of law.

Second, lower courts implementing desegregation remedies are obligated to follow the Supreme Court directives in the school desegregation setting which have sanctioned race-conscious remedies. See e.g., Green v. County School Bd., 391 U.S. 430, 439 (1968) (favoring timely and effective relief for the plaintiff victims). As the Supreme Court emphasized in Montgomery, race-conscious requirements have the "capacity to expedite, by means of specific commands, the day

when a completely unified, unitary, nondiscriminatory school system becomes a reality instead of a hope." 395 U.S. at 235-36.

Finally, a court acting after a full adversary proceeding is unlike a legislature or executive officer acting politically, voluntarily and unilaterally. Rather, a judicial decision rendered after trial is the product of the rigors of trial-- an adversary event proceeding under evidentiary and procedural rules, and presided over by an independent third party. These standards provide sufficient safeguards against arbitrary and capricious action. See Croson, 488 U.S. at 493.

In short, the question for appellate review is not whether the race-conscious components of the lower court's order meet the strict scrutiny test, but rather, whether the court's decision in this case adheres to the remedial desegregation standards set down by the Supreme Court.<sup>2</sup>

## **II. The District Court Erred in Rejecting the Proposed Early Childhood Education Remedy**

### **A. ECE is an Appropriate Facilitative Remedy**

Despite finding that an ECE program would facilitate the successful implementation of the student assignment remedies (App.276, 471), the district court rejected ECE because it believed that ECE lay "too far" outside the "responsibilities" of a school district. (App.276-78; 471-72) In reaching this conclusion, the district court expressed particular discomfort with the parent involvement component of the Proposed ECE program. (App.278) Contrary to the court's finding, ECE falls within the operational domain of the RSD under Illinois statutes and as evidenced by the history of RSD preschool programs.

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<sup>2</sup>Even if the strict scrutiny standard were applied to race conscious remedies in this case, that standard is met. See, pp.34-35.

## **1. The Illinois Statutory Scheme Authorizes ECE Programs**

Far from being too removed from the responsibilities of RSD, local school district implementation of early childhood education programs is permitted and encouraged under the Illinois School Code. As a general matter, the Illinois legislature "finds and declares" in the Illinois School Code that "[a] tremendous need exists for preschool training, both in a school setting and in the home..." (105 ILCS 225/2)

More specifically:

-- Section 2-3.62 of the School Code provides that services to local schools may include assistance in other "program areas such as . . . early childhood education." (105 ILCS 5/2-3.62)

-- Section 2-3.71 of the School Code calls for "grants to public school districts to conduct preschool educational programs for children ages 3 to 5 which include a parent education component." (105 ILCS 5/2-3.71)

-- Section 2-3.71 of the School Code provides that local district preschool programs should target "disadvantaged" children. (105 ILCS 5/2-3.71(a)(4))

-- Section 2-3.71a of the School Code provides for ISBE implementation and administration of a grant program for "model pilot early childhood parental training programs," which "include activities that require substantial participation and interaction between parent and child." (105 ILCS 5/2 3.71a (a)(4))

Under this statutory scheme, three things are clear: early childhood education falls within the purview of public education in Illinois generally; it falls within the authority and powers of local

school districts to implement and administer; and a parent involvement component is accepted under the statutory scheme.

## **2. RSD Has Operated ECE Programs**

The fact that ECE is within RSD's operational domain is evidenced by the history of RSD preschool programs. Since the early 1980's, the Rockford School District has administered some form of early childhood education. By 1986, (prior to this lawsuit), RSD had instituted the SEEK program, an early childhood education program using a curriculum with significant parent participation components. (Plaintiffs' Liability Ex.3, p.6)

After this lawsuit commenced in 1989, and as part of the 1991 agreed Second Interim Order, the RSD expanded its preschool education program. (R.376 at 46). Within the Second Interim Order the RSD expressly acknowledged that "Every provision of this order... represents the exercise by the Defendant District of its authority to act on behalf of and for the benefit of the school system and the students..." (*Id.* at 4-5)

### **B. ECE is a Warranted and Appropriate Remedy for Injuries Already Incurred**

The district court also rejected ECE on the alternative ground that ECE cannot be justified as a direct, as opposed to a facilitative remedy, because preschool minority children are not victims of the RSD's adjudicated violations. (App.277, 471-72) In reaching this decision, the district court made two mistakes: (1) despite uncontroverted evidence, it refused to find that as a matter of fact preschool minority children have sustained educational injury as a result of the RSD's adjudicated violations (App.490 n.8); and (2) it held as a matter of law that the court lacks remedial authority to recognize preschool minority children as victims of the RSD's adjudicated violations. (App.422 n.147)

**1.      Preschool Minority Children Are Victims in Fact of RSD's Adjudicated Violations**

Vestiges and effects of an adjudicated violation include educational conditions that are indirectly linked to an adjudicated violation. See Swann, 402 U.S. at 20-2.

RSD's massive acts of segregation and other educational discrimination against black and Hispanic students have contributed significantly to the low educational, housing, employment, and economic attainment of those former students. (Crain Tr.4283-4326) These impaired socio-economic conditions in turn have created in subsequent generations of incoming students reduced school readiness and reduced academic achievement. (Crain Tr.4221-24; Hoffer Tr.5094-95) In fact, the school district's own expert, Dr. Thomas Hoffer, conceded the intergenerational effect of discriminatory practices (such as tracking). (Hoffer Tr.5120-28)

In light of all this evidence, the district court erred in declining to make a "causation-in-fact determination" as to the injurious effect of the RSD's discrimination on the school readiness and educational achievement of the incoming generation of minority students. (App.490 n.8)

**2.      Preschool Minority Children Have Suffered Legally Cognizable Injuries**

In rejecting ECE, the lower court also rejected, as a matter of law, the notion that the intergenerational educational effects of the school district's discrimination on minority students entering the school system are legally cognizable injuries. (App.277-78, n.24; 490 n.8; 421-22 n.147) Whether viewed as a legal determination of the meaning of "proximate cause" in this setting, or as a legal determination of the limits of the judiciary's remedial powers, the lower court's determination is clear error.

The Supreme Court has charged school districts committing intentional acts of segregation and discrimination with the duty to remedy the ultimate educational consequences of their conduct, even where the causal path between the school district's conduct and the educational consequences passes beyond school operational boundaries, and passes through and among third parties. See e.g., Swann, 402 U.S. at 20-21 (housing segregation, as a product of private and public decision-making, may be a vestige of a school district's segregation). In the present case, the educational effects of RSD's discrimination on the second generation of Rockford minority students are in no way more "remote" from the original violations than educational effects flowing from white flight or housing choices. Moreover, the plaintiffs seek only to hold RSD remedially accountable for the educational effects of its discrimination (diminution of school readiness) and are not seeking to hold the district responsible for remedying the "extra-educational" effects themselves (housing and employment discrimination, or other socio-economic injuries).

Finally, traditional tort rules further support holding RSD legally responsible for all educational injuries to which its adjudicated violations have contributed. It is hornbook law that the egregiousness of the harm and "the degree of ... moral wrong in acting" may be important factors in determining whether a defendant is liable for resulting harm. Restatement of Torts, Second (1965), Section 435 (b). In this case, the egregious nature of RSD's conduct is no longer disputed, even by the School District, and supports broad accountability. (See R.2017, Sections 4.1, 4.6) (RSD characterizes its own conduct as "a massive and purposeful constitutional violation")

### **III. The District Court Erred in Rejecting the Proposed Special Education Remedy**

At the liability hearing, the court found that: (1) RSD engaged in intentional discrimination against minority special education students by assigning virtually all of them to schools in the Southwest Quadrant; and (2) RSD disproportionately placed and tracked African-American students in lower ability classes. People Who Care, 851 F.Supp. at 930, 1005.

In the PCRCP, the Master observed that "disproportionate placement of African-American students in SCSE BD [self-contained special education behavior disorder classes] is another manifestation of grouping and tracking." (App.544) In support of this conclusion, the Master expressly cited the Magistrate Judge's liability finding that African American and Hispanic students were disproportionately placed in lower-track classes. (App.544, citing 851 F.Supp. at 1005) In addition, since 1991 the Master has documented a continuing pattern of extreme overrepresentation of minorities in special education classes in his Analyses of Within School Integration and Quarterly Reports to the Court. (R.2129, pp.112-26) For example, during the 1995-96 school year African-American students constituted approximately 25% of the student population, but 51.5% of the students assigned to SCSE BD classes. (App.544-45)

To address these findings and disparities the Master recommended that all African American students in SCSE BD classes be re-evaluated to determine whether they had been correctly assigned. (App.543-44) The Magistrate Judge rejected the Master's recommendation on grounds that: (1) the statistical data and evidence regarding tracking presented at the liability hearing did not encompass special education; and (2) the court and the parties treated special education as a separate "category" from tracking at the liability hearing. (App.451)

The Magistrate Judge's conclusion rejecting special education remedies is erroneous because a discrete liability finding that special education was a tracking method is not a prerequisite to holding that the overrepresentation of minorities in special education classes is a vestige of tracking. In Freeman, 503 U.S. at 487, the Supreme Court reaffirmed that desegregation remedies must eliminate every vestige of racial segregation and discrimination that flows from a constitutional violation. Here, there is unrebutted testimony that the disproportionate placement of minority students in special education flows from RSD's tracking violations:

Special education is just an artifact of the tracking system. The special education program here in Rockford is leading to far disproportionate placement of minority children in behavioral disorder classes.

(Eubanks Tr.4811)

Considering this evidence and the applicable remedial standard, it is irrelevant that: (1) a particularized special education finding about tracking was not made at the liability hearing; and (2) the parties and the court treated special education as a separate "category" when organizing liability findings.

#### **IV. The Tort Fund Cap Is an Arbitrary and Impracticable Limitation on the School District's State Law Authority To Raise Funds to Implement the Desegregation Remedy**

Article IX of the Tort Immunity Act, 745 ILCS 10/9-101 et seq., establishes a comprehensive funding scheme to allow local public entities in Illinois to generate funds sufficient to satisfy liabilities relating to tort judgments and settlements. To fund its remedial obligations, first



under the Second Interim Order and later under the March 29, 1994 Declaratory Judgment Order. RSD has issued bonds and levied taxes pursuant to the Tort Immunity Act.<sup>3</sup> (App 462-63)

In the Finance segment of the Comprehensive Remedial Order, the Magistrate Judge restricted the use of this mode of financing by capping Tort fund levies at \$25 million per year, with a maximum increase of 4% per year. (App.465) The limitation on Tort funding adopted by the court is independent of its determination as to the remedies necessary to address the constitutional violations in the case, and there is no cap on the remedial budget. (App.487) Thus, the cost of the remedies may exceed the amount of funding permitted by the District Court under the Tort Immunity Act.

**A. The Tort Fund Cap Improperly Limits the School District's Authority Under State Law**

RSD's authority to raise funds under the Tort Immunity Act to finance the court-ordered desegregation remedies does not derive from the remedial powers of the district court, but arises from state law. As such, the court's order restricts the prerogatives of local authorities and intrudes upon the operation of state law.

Normally, a district court in a school desegregation case should endeavor to avoid unnecessary interference with the affairs of state and local authorities. See, Missouri v. Jenkins, ("Jenkins III") 115 S. Ct. 2038 (1995). The primary exceptions to this principle involve circumstances where: (1) a recalcitrant school district defaults in fulfilling its remedial obligations.

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<sup>3</sup>The use of the Tort Immunity Act to finance remedial activities in this case was explicitly approved by Judge Reinhard in the wake of tax objections asserting that this funding mechanism was unlawful; however, Judge Reinhard's opinion was vacated on jurisdictional grounds and the tax objections remanded to state court where they remain pending. See, In re Application of the County Collector, 96 F.3d 890 (7th Cir. 1996).

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971); or (2) state law limitations on local authorities interfere with the ability of local authorities to implement a remedy Missouri v. Jenkins, ("Jenkins II") 495 U.S. 33 (1990). The Tort Fund cap presents neither of these circumstances and instead *limits* RSD's ability to take positive steps consistent with state law toward fulfilling its constitutional obligations.

The Magistrate Judge's rationale for imposing the Tort Fund cap misconstrues certain statements in Jenkins III, which address the scope of desegregation remedies, not the method of financing them. (App.464) The Tort Fund Cap does not address concerns about remedies being excessive in scope because it does not increase or decrease the cost of implementing the CRO.

**B. The Tort Fund Cap Creates an Impracticable Limitation on Funding the Remedies in this Case and Could Lead to More Intrusive Funding Measures**

The portion of the CRO which imposes the Tort Fund Cap should also be reversed because: (1) the record establishes that RSD does not have funds available to pay for remedial programs (App.462; Schilling Test. 4142-44); (2) state law tax rate limits and referendum requirements restrict RSD from raising non-Tort Fund levies sufficiently to fund the CRO (Master's Ex. 54; App.497); and (3) it is impermissible -- either under the terms of the CRO or desegregation case law -- to fund the CRO through cuts in RSD's core educational programs. See, Bradley v. Milliken, 540 F.2d 229, 245 (6th Cir. 1976), aff'd, 433 U.S. 267 (1977).

The unavailability of alternative sources of revenue to fund operating and capital expenditures under the CRO has been reaffirmed in Orders issued by the district court on September 18, 1996, November 12, 1996 and December 6, 1996. For example, in the September 18, 1996 Order, the Magistrate Judge observed that the Education Fund is running a "significant deficit," that

funding the desegregation remedies from that fund is "unrealistic and impracticable," and that "no other feasible funding alternative [to Tort Immunity Act funding] exists at this time." (R 2387)

Because the only practicable funding mechanism that will assure that the CRO remedies are implemented is the Tort Immunity Act, it was doubly inappropriate for the Magistrate Judge to limit RSD's use of this financing source.

**V. The Plaintiff Class Is Entitled to a Remedy Which Eliminates the Vestiges of RSD's Employment Discrimination**

In the Liability Decision, Judge Roszkowski adopted all of the Magistrate Judge's factual findings as to both the District's intentional employment discrimination and the existence of faculty and staff racial identifiability. 851 F. Supp. at 923-24. The court found that RSD had engaged in intentional employment discrimination by failing to meet its own minority hiring goals over a 20 year period and by failing to recruit minority teacher and staff applicants. *Id.* at 923. The court further found that for more than 25 years minority teachers had been overwhelmingly assigned to racially identifiable minority schools, but that the racial identifiability of the teaching staff was a function of assignment provisions in the teachers' collective bargaining agreement, which allowed teachers to exercise preferences for specific vacancies based on teacher seniority and specified qualifications. *Id.* at 924.

At the remedial hearing, the court found that the current systemwide percentage (8.7%) of minority teachers in the RSD is a vestige of the RSD's adjudicated hiring discrimination, and that minority teachers are so unevenly distributed that "the District's elementary schools are racially identifiable by faculty as well as by students." (App.374, 389-90). The court also found that the RSD's long-term historical hiring discrimination had three practical consequences: (1) it depressed

the percentage of minority teachers in the local labor market, making the local market an unreliable measure of minority teacher availability (App.385-86); (2) it resulted in disproportionately greater seniority and relevant training for white teachers, which placed them at a distinct advantage over minority teachers in securing assignments at the more "desirable" and racially identifiable white (C.9) schools and in securing their jobs in the event of a layoff (App.386, 388-401); and (3) without a change in placement methods, any gains in hiring minority teachers may result in even greater racial identifiability of school faculties. (App.390-397) The court concluded that the contract "impedes [minority] hiring, recruitment and placement which unquestionably hinders the District's ability to diversity its staff." (App.397)

The court ordered three types of staffing remedies which are now under review: (1) a 13.5% hiring goal for minority teachers in each grade configuration (App.388); (2) a reduction in force mechanism to preserve the RSD's minority hiring gains in the event of a lay-off (App.388); and (3) a teacher assignment procedure which allows RSD limited opportunities to directly place minority teachers into school assignments for desegregative purposes and places a cap and/or floor on their distribution in each school (App.402-404). The court also enjoined the collective bargaining agreement to the extent it would prevent implementation of the CRO. (App.405)

Overall, the hiring, layoff and assignment remedies ordered by the district court were necessary, appropriate and well within the court's discretion. Plaintiffs appeal only two discrete components of these remedies: (1) the court's failure to create separate hiring goals for Black and Hispanic teachers; and (2) the inclusion of teachers hired specifically for bilingual programs in satisfying the overall hiring goal.

**A. The District Court's Failure to Create Hiring Subgoals for Black and Hispanic Teachers was an Abuse of Discretion**

The test of an appropriate desegregation remedy is whether it "promises realistically to work, and promises realistically to work now." Green, 391 U.S. at 439. In the context of faculty desegregation, the Supreme Court has interpreted this requirement in favor of setting fixed ratios for faculty desegregation, on the principle that "specific commands" improve the speed and efficacy of the remedy by creating concrete compliance standards. Montgomery County, 395 U.S. at 235-36.

In seeking to achieve faculty diversity, both black and Hispanic teachers must be represented adequately. As uncontroverted evidence in the record reflects, a racially diverse staff: (1) serves the goal of fostering a positive desegregated school climate and providing all racial groups a voice within the faculty to change the discourse and culture within the school; (2) changes the status quo of a segregated system; and (3) enhances cultural understanding and interactions by exposing all students to teachers of different races and backgrounds. (Harris Tr.1736-38, 1744; Parish Tr.1804-1806, 1832, 1841-44; Levine Tr.1885-89; Crain Tr.2127-35, 2085; PX26) See also, McLaughlin v. Boston School Committee, 938 F.Supp. 1001, 1009-1015 (D.Mass. 1996) (recognizing benefits of a racially and ethnically diverse educational environment).

The overall benefits of a racially diverse faculty are undermined, however, when the hiring goals are so unspecific, as here, that they literally allow the hiring of a minority faculty that is entirely black or entirely Hispanic, not proportionally black and Hispanic. To avoid such anomalous results, racial subgoals have been used routinely in both court-ordered and voluntary teacher hiring and assignment desegregation remedies. See e.g., Tasby v. Wright, 713 F.2d 90 (5th Cir. 1983); Lorain NAACP v. Lorain Bd. of Educ., 768 F.Supp. 1224, 1228 (N.D. Ohio 1991), rev'd on other

grounds, 979 F.2d 1141 (6th Cir. 1992). Here, hiring subgoals for African-American and Hispanic teachers in a ratio of 3 to 1, respectively, are supported by the evidence in the record, which shows that the ratio of Black to Hispanic teachers nationally is approximately 2 to 1 and in Illinois is approximately 4.5 to 1 (PX210, p. 5 and attachment 2, p. 1).

**B. The Inclusion of Bilingual Teachers in the Hiring Goal Undermines the Faculty Desegregation Remedy**

In the present case, the inclusion of bilingual teachers in the overall hiring goals also undermines the effectiveness of the hiring and assignment remedies. If bilingual teachers count toward the overall achievement of the hiring goal, but are not included in the faculty assignment goals, the presence of minority faculty in non-bilingual schools will be greatly diminished.

To illustrate this point under current conditions, more than 25% of the minority elementary teachers in the District's schools are teaching in bilingual programs (26 bilingual teachers out of 97 total minority elementary teachers). (App. 403) Consequently, there are only 71 minority teachers to diversify the staff at the 37 elementary schools without bilingual programs -- an average of only 1.9 minority teachers per school.

The problem will continue in the future: assuming the unlikely event that the percentage of minority teachers in bilingual programs were to remain constant, if the RSD fully achieved the mandated goal of 13.5% minority faculty, the adjusted percentage of minority faculty distributed in the RSD's non-bilingual elementary schools would be approximately 10%. Under a +/- 5% faculty assignment standard, schools with only 5% minority faculty could be in compliance.

An affirmative action program created to desegregate school faculties must be designed to yield minority teachers in sufficient numbers that they can be meaningfully distributed throughout

the system. See Fort Bend Indep. School Dist. v. City of Safford, 651 F.2d 1133, 1137 (5th Cir. 1981). The inclusion of bilingual teachers in meeting the hiring goal, especially when coupled with the lack of hiring subgoals, leads to the undesirable result that students in non-bilingual programs will have a significantly less diverse faculty than their peers in bilingual programs, or, worse still, will continue to attend schools with racially identifiable faculties.

**C. The Objections Made by RSD and the Union to the Hiring and Staff Assignment Remedies Should Be Rejected<sup>4</sup>**

**1. The District Court Properly Directed Affirmative Measures to Remedy RSD's Employment Discrimination**

The Union concedes that "[t]here is no doubt that students... have a right to attend schools free from discrimination, and that injury to students caused by the School District's past discrimination against minority teacher applicants must be remedied." (REA Br.21) The Union contends, however, that the injuries to the minority students can be sufficiently remedied simply through the "elimination of the noxious practice and its open, aggressive repudiation." (REA Br. 22)

This argument is contrary to the facts in this case and to long-standing desegregation jurisprudence. As early as Green, the Supreme Court held that it was remedially insufficient for a school district to merely stop its unconstitutional practice of segregating pupils on the basis of race because the "effects" of the school district's violations were not addressed by such action. Green, 391 U.S. at 440. In the present case, as well, the district court was justified in finding that the mere

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<sup>4</sup>Due to space limitations, plaintiffs incorporate by reference arguments fully briefed before the district court concerning the inapplicability of strict scrutiny to race conscious faculty desegregation remedies in school desegregation cases, (R.1657, 26-46), and the necessity of contract subordination to achieve those remedies. (R.1634, 125-133).

cessation of RSD's unlawful conduct would not remedy the effects of RSD's employment discrimination and in ordering the combination of a hiring goal and certain teacher assignment measures.

In addition to finding that there are continuing effects of RSD's employment discrimination on the composition of the RSD faculty, the court also found that these effects would obstruct the remediation of student assignment discrimination. (App.400) The court observed that racially identifiable faculties -- a result in part of the RSD's employment discrimination -- would "severely undermine[...]" the controlled choice student assignment remedy. *Id.*

In short, unless affirmative remedial measures are implemented in response to RSD's adjudicated employment discrimination, the overall remedy afforded to minority students will be minimized and obstructed.

## **2. The Hiring Goal and Assignment Remedies Are Fully Supported by the Record and Caselaw**

RSD mischaracterizes the lower court's analysis in arguing that the hiring remedy was not the product of a strict labor market analysis utilized in employment discrimination cases. While the court acknowledged that a labor market analysis need not serve as the basis for a faculty hiring remedy in a desegregation case (App. 380-81, citing Morgan v. Kerrigan, 530 F.2d 431 (1st Cir. 1976)), the court nevertheless opted for this conservative approach. (App.381)

RSD also challenges the court's finding that the percentage of minority teachers in the relevant labor market is 13.5% and asserts that in light of the current percentage of minority teachers in RSD, RSD is already unitary in its teacher hiring. Such an argument--that no remedy exists for an adjudicated hiring violation--has been rejected out of hand in other school desegregation cases.



For example, in Morgan v. Kerrigan, 530 F.2d at 433, the court held that approving a hiring goal less than the current percentage of minority teachers in the school district "would entirely nullify the court's previous finding of constitutional violations in the recruitment and hiring of faculty and . . . would [permit] backtracking rather than constituting remedial relief."

Moreover, the 13.5% hiring goal adopted by the court is amply supported by evidence presented by the plaintiffs' and RSD's labor market experts. (App.381-87, 685, 695-701) It was well within the discretion of the Magistrate Judge to reject the conclusions reached by Defendant's expert, Evelyn Freeman, and to establish a hiring goal using labor market data which was essentially common to both experts. See Parents in Action v. Hannon, 506 F.Supp. 831 (N.D.Ill. 1980). First, the court rejected Ms. Freeman's analysis because of the heavy weighting she gave to the local market as a primary source of teachers for the RSD and because she ignored the negative impact of the contract and placement system on the RSD's applicant flow. (App.385-6) The court concluded that the figures for the availability of minority teachers in the local market were inherently unreliable because the RSD's prominence as an employer in the area, coupled with its long history of race discrimination, had artificially depressed the number of minority teachers locally. Id.

The court also rejected the assumption underlying Ms. Freeman's analysis that Chicago is not a viable source of minority teachers for the RSD. (App.386-87) After reviewing the evidence presented, the court determined that "Defendant has unfairly seized upon Rockford's relative lack of success in recruiting from Chicago," and concluded that eliminating Chicago from the labor pool is unwarranted. (App.387)

Finally, RSD asserts, without any support whatsoever, that the court abused its discretion by imposing a 5% ceiling on the percentage of minority teachers in each elementary school and a

-- 5% compliance standard in the middle and high schools. In fact, these standards are consistent with the ranges employed in other desegregation cases. See, Jacobson v. Cincinnati Bd. of Education, 961 F.2d 100, 102 (6th Cir. 1992).

### **3. The Hiring and Desegregation Remedies Do Not Violate the Equal Protection Clause**

The Union concedes that "where necessary to correct injury caused to minority students by employment discrimination, race-conscious remedies may be used in teacher hiring and assignment." (REA Br.18). Nonetheless, the RSD and Union challenge the specific assignment and layoff remedies ordered, arguing that: (1) those remedies are subject to strict scrutiny review; and (2) the remedies do not meet strict scrutiny because they are not narrowly tailored.

#### **a. Race Conscious Remedies are Fundamental to the Desegregation Process and Are Not Subject to Strict Scrutiny**

As discussed earlier in this brief at pp.15-18, strict scrutiny does not apply to judicially ordered race-conscious remedies in a desegregation case. This provides the short answer to any narrow tailoring argument.

#### **b. Even if the Faculty Remedies are Subject to Strict Scrutiny, They Satisfy that Test**

Even if strict scrutiny were applied to the race conscious remedies ordered in this case, the remedies are narrowly tailored and meet this test. The hiring, assignment and lay-off remedies are necessary and more effective than alternative remedies; they are flexible because they are limited in their application; and they were conservatively calculated, using labor market statistics for the hiring goal and using equilibrium principles for the layoff and assignment remedies.

The hiring goal is flexible and achievable. It has no deadline date and does not exclude non-minority applicants. Realistically, the number of Black and Hispanic teachers that will need to be hired to fulfill the 13.5% hiring goal will be approximately 70. Considering that the RSD's total teaching staff is approximately 2000, and its normal attrition rate during the last several years was 50-80 teachers, the hiring goal is not unduly burdensome. (PX141, PX207)

The layoff remedy is a narrowly tailored protective device. It preserves existing minority faculty percentages in the event of a layoff, and is *not* a tool for achievement of the hiring goal. Minority teachers do not have layoff protection *per se*; nor do white teachers as a group lose their contractual and seniority rights. Reverse seniority will be suspended in a layoff only in those limited instances when it is necessary to balance its racial impact. (App.388)

Finally, the teacher assignment remedy is narrowly tailored and does not arbitrarily or unnecessarily impinge upon the rights of third parties. It does not force any incumbent teacher to involuntarily transfer; nor does it strip incumbent teachers of their contractual transfer and assignment rights. It allows the RSD, *during designated intervals*, to directly place newly hired (or willing incumbent) minority teachers into schools which are out of compliance with faculty desegregation standards. For the remaining time, the contractual assignment provisions remain fully in effect. Thus, the assignment remedy places only minimal burdens upon incumbent teachers by diminishing their placement choices under circumstances where they would impede faculty integration.<sup>5</sup>

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<sup>5</sup>The Union's argument that the faculty assignment remedy is improper because there was no finding of intentional discrimination by RSD in faculty assignments completely misses the point that a court's remedial authority in a desegregation case may even extend to areas of the school system in which no vestiges of discrimination are found. See, Vaughns, 742 F. Supp. at 1291 (faculty

#### 4. The Subordination of Contractual Rights Is Necessary to the Remedy

The district court properly held that alteration or modification of the collective bargaining agreement is necessary to integrate the District's schools. The evidence presented in the lower court established that application of the race-neutral assignment provisions of the union contract has caused RSD's segregated faculty, obstructed efforts to diversify its staff, and impeded its minority hiring success. (App 386, 394-95)

First, the liability opinion found the teacher's contract to be the operational cause of the RSD's segregated faculty. 851 F Supp. at 924. Simply stated, history has shown that when faculty assignment has been primarily seniority driven and teachers have been afforded the opportunity to exercise their choice about where to teach based on that seniority, white teachers have been more likely to choose racially identifiable white schools and minority teachers have been more likely to choose racially identifiable minority schools. (App.389-97, 680-81)

Moreover, the disparity in seniority between majority and minority teachers is a vestige of RSD's employment discrimination. (App.395-97) As in Morgan v. Burke, 926 F.2d 86, 89-90 (1st Cir. 1991), cert. denied, 503 U.S. 983 (1992) "over the years, because of the disincentives and obstacles depressing minority recruitment, the seniority system had become one dramatically favoring white teachers and staff, and . . . any substantial layoff of faculty in order of reverse

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desegregation remedy approved despite absence of finding of staff assignment discrimination); Kromnick v. School Dist. of Philadelphia, 739 F.2d 894, 904-5 (3rd Cir. 1984) (assignment plan to integrate faculty is considered remedial even when it does not follow a liability finding in the faculty assignments area). See also, Wittmer v. Peters, 87 F.3d 916, 919 (7th Cir. 1996). (race-based promotions implemented in prison system not violative of equal protection, even though not remedial).

seniority, as provided for in the collective bargaining agreements, would undo in a day what had taken years to accomplish."

Furthermore, the evidence demonstrated that seniority provisions of the teacher's contract have caused faculty segregation to worsen as more minority faculty have come into RSD during the last several years. Dr. LaLonde opined that faculty segregation may grow even worse if the assignment procedures continue to be applied as the number of new minority hires grows. (App.657)

Considering all this evidence, the court unquestionably had authority to subordinate the teacher's contract. The authority to take such action turns on whether subordination of the contract is necessary to the desegregation remedy, and in particular whether the agreement impedes, disrupts or interferes with the desegregation plan. Little Rock School Dist. v. Pulaski County Special School Dist., 839 F.2d 1296, 1314-16 (8th Cir.), cert. denied, 488 U.S. 869 (1988). Provisions of a collective bargaining agreement must yield if necessary to vindicate the constitutional rights of students to a unitary system. People Who Care, 961 F.2d at 1338.

Here the evidence conclusively showed and the lower court found that operation of the contract continues to create and perpetuate segregation of faculty and that it impedes, and is inconsistent with, an effective desegregation remedy. (App.386, 395-97) The balance of competing interests between the plaintiff class and teachers who would be affected by alteration of the contract weighs heavily in favor of the school children and their parents. Morgan v. O'Bryant, 671 F.2d 23 (1st Cir. 1982). The interest of the plaintiff class in a desegregated school system is a compelling one of a constitutional magnitude. In contrast, what is at stake for affected teachers is a short term denial of some placement opportunities; and for some, the *possibility* that in particularized

circumstances, and only in the event of a layoff, they may be effected by a layoff from which they might otherwise be insulated.<sup>6</sup>

## **VI. The Magistrate Judge Properly Admitted Expert Testimony Regarding Student Achievement and Educational Outcomes**

The Magistrate Judge properly admitted into evidence expert testimony concerning student achievement gaps between minority and majority students that are vestiges of the School District's intentional discrimination. The testimony presented by the plaintiffs' and Master's experts easily meets the standard under FRE Rule 702 and Daubert v. Merrell Dow Pharmaceuticals, 113 S. Ct. 2786 (1993), that an expert must testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. Id. at 2796.

### **A. The Expert Testimony Concerning Student Achievement and Educational Outcomes was based upon Scientific Knowledge**

In order to qualify as "scientific knowledge," testimony must be based on scientific method as opposed to subjective belief or unsupported speculation. Id. at 2796-97. In Daubert, the Supreme Court identified a non-exhaustive list of considerations that bear on this issue, including: (a) whether the theory or technique can be (and has been) tested; (b) whether the theory or technique has been subjected to peer review or publication; (c) the known or potential rate of error for a scientific technique; and (d) the extent to which a technique has "widespread acceptance" in the relevant scientific community. Id. Some of the factors mentioned in Daubert are not readily applicable in

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<sup>6</sup>In connection with its arguments against modification of its contract rights, the Union also asserts that it should receive a new trial in light of execution of a new teacher's contract after the close of the remedial hearing. The Magistrate Judge properly denied this motion because Rule 60(b) does not apply to evidence that did not exist at the time of the initial hearing. Peacock v. Bd. of School Comm'rs, 721 F.2d 210, 214 (7th Cir. 1983).

all cases, such as cases involving social science opinions. See, Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311, 1317 (9th Cir. 1995).

In this case, the Magistrate Judge correctly concluded that the testimony of Drs. Crain, Shapiro, Levine and Parish was based on scientific knowledge. Dr. Crain, plaintiffs' expert, is a professor of sociology and education at Columbia University and has studied the outcomes and effects of desegregation on minority students for thirty years. (Crain Tr.980-81) Dr. Crain's testimony about the effects of segregation on educational achievement was based upon standard accepted methodology in the social science field, including his own qualitative field studies, data from widely accepted national data bases, including longitudinal and cohort data bases, other researchers' materials that have been published and subjected to peer review, and mega-analysis, a process of re-analysis of other researchers' materials and findings. (Crain Tr.991, 987-96, 4274-75, 4277)

The testimony of the Master's experts (Drs. Shapiro, Levine and Parish) also qualified as scientific knowledge. Dr. Shapiro, has taught university level courses related to student performance and employed standard statistical methods, including multiple regression analysis to analyze RSD data. (Shapiro Tr.4544-46, 4553-54; Master's Ex. 58) Similarly, Dr. Levine formed his opinions after studying achievement scores and other RSD data and employed well-tested methodology subjected to peer review. (Levine Tr.4965-77; App.480) Finally, Dr. Parish based his opinions upon years of experience in the field of education and organization culture and reliable and accepted methods of sociological study, including interviews with RSD teachers, students and parents, on-site observations and the collection and review of data. (Parish Tr.4633, 4639-41;

Master's Ex. 60; App 481) As the Magistrate Judge suggested, Dr. Parish's opinions are equally admissible as personal observations of conditions in Rockford. (App 481)

**B. The Expert Testimony Concerning Student Achievement and Educational Outcomes Provided Assistance to the Trier of Fact**

The second requirement under FRE 702 and Daubert is that the testimony will assist the trier of fact to understand or determine a fact in issue. Here, as specifically found by the trier of fact, (the Magistrate Judge), this standard is "easily met." (App.479) The technical nature of data relating to student achievement and the fact that the effects of segregation and educational discrimination on student achievement are at the core of this case render the testimony of Drs. Crain, Shapiro, Levine and Parish "extremely relevant." (App.479)

**C. The School District Offered No Plausible Grounds for Excluding the Expert Testimony**

The School District's various arguments for excluding the testimony of the plaintiffs' and the Master's experts mischaracterize the actual testimony at the remedial hearing.

As discussed in more detail in the next section, it is simply incorrect for RSD to assert that these experts were unable to testify concerning the cause of the achievement gap or to quantify the effects of the District's unlawful conduct with respect to that gap. (RSD Br.45). To the contrary, Dr. Crain testified that the effects of segregation produced a tangible loss in the order of 3/10 to 4/10 of a standard deviation in minority achievement, (Crain Tr.4279), that the disparities in achievement test scores in RSD are statistically significant, (Crain Tr.4331), that apart from segregation, educational discrimination has had a detrimental impact on minority student achievement, (Crain Tr.4281-82), and that ultimately, if RSD had not engaged in any form of discrimination, there would be no performance gaps between minority and majority students. (Crain Tr.4326)



To the same effect, Dr. Shapiro testified that differences in reading comprehension and mathematics scores in RSD were 20 NCEs between African-American and non-minority students and that, in his opinion, the 20 NCE difference measured the performance difference attributable to discrimination by RSD. (Master's Ex. 58) Dr. Levine also opined that achievement gaps are related to the intentional discrimination of RSD. (Levine Tr.4972-74, 5008-9)

The School District grossly exaggerates about the testimony of its expert, Dr. Butler, when it argues that his testimony suggests that the methodology employed by Drs. Crain, Shapiro, Levine and Parish was inadequate. As the Magistrate Judge correctly found, merely because the parties' experts disagree about a conclusion or use different methodology does not make the testimony of either party inadmissible. (App.481)

Even if Dr. Butler had expressed such opinions, he lacked the qualifications to provide credible criticism of the testimony of the other experts. Dr. Butler admitted that he has never conducted any research, taught any courses, or published any materials in the area of student achievement outcomes, and does not consider himself an expert in tests, measurements or achievement scores. (Butler Tr.5184, 5239-40)

## **VII. The Achievement Remedy Ordered by the District Court Is Proper in All Respects**

### **A. The Liability Findings Address the Negative Effect of RSD's Unlawful Conduct upon Minority Student Achievement**

Contrary to the RSD's contention, (RSD Br.30), the district court made several specific findings in its 1993 liability decision relating to the negative impact of the RSD's adjudicated violations on minority student achievement. The findings are summarized by the district court in the CRO (App.407-08), and address the impact on achievement of violations such as student

assignment segregation, discriminatory tracking practices, and discrimination in school facilities (Id.)

In its liability decision, the district court also found that (1) RSD was fully aware of the link between its discriminatory student assignment practices and the impaired achievement of minority students, and (2) despite being apprised of that link, RSD on numerous occasions rejected recommendations that it address low minority achievement through a change in student assignment practices. (851 F.Supp. at 1035-36, 1042). These facts were before the court and properly considered by it when it made its 50% incremental effects determination. See, Dayton Bd. of Education v. Brinkman, 443 U.S. 526, 541 (1979) ("the Court of Appeals was also quite justified in utilizing the Board's failure to fulfill its affirmative duty--and indeed its conduct resulting in increased segregation--to trace the current, systemwide segregation back to the purposefully dual system of the 1950's and the subsequent acts of intentional discrimination")

**B. The District Court Properly Applied the Requirements of Jenkins III**

The RSD complains that the district court ignored the command of Jenkins III that it make an incremental effects determination. (RSD Br.32)

RSD has misconstrued the district court's statement that "identifying the incremental effect that segregation has had on student achievement is unnecessary." (App.419) In its Order on the motions to reconsider (App.468), the district court explained that it meant that because RSD's adjudicated violations include more than just "segregation," (i.e., educational discrimination), its incremental effects finding relates to more than just the effects of segregation. (App.489-90)

As the district court correctly perceived, there is no requirement under Jenkins III that the court further parse the incremental effects determination according to type of discrimination by the

RSD. See Dayton, 443 U.S. at 540-41 (it is not necessary to show "with respect to each individual act of discrimination precisely what effect it had on current patterns of segregation."). Rather, it was sufficient to allocate remedial responsibility by determining the incremental effect of the totality of the RSD's adjudicated violations.

**C. The Record Fully Supports the District Court's Incremental Effects Determination and Its Remedial Directives**

Contrary to RSD's claim that the lower court "flouted" the commands of Jenkins III by failing to consider the effects of factors beyond the control of the RSD, (RSD Br.32), the district court carefully considered all the relevant evidence.

**1. The District Court applied a Sound Methodology to the Incremental Effect Issue**

After identifying the current achievement disparity as 35 percentile points or 20 NCE on standardized tests (App.418), the lower court proceeded to determine what portion of that current disparity or "gap" is attributable to the RSD's adjudicated violations, i.e., what portion of the gap is a "vestige" of the RSD's discrimination. (App.164) In making this determination, the court rejected the notion that the RSD is liable for indirect causation (i.e., multigenerational effect) (App.171 n.147) and further explicitly removed the impact of "external" or socio-economic factors from the incremental effects calculus. (App.419) By accounting for the effects of these external factors, and considering the history and nature of RSD's violations, the court then properly attributed the remaining increment of the disparity to RSD's violations.

**2. The District Court's Incremental Effects Determination is Supported by the Evidence and is Not Clear Error**

The undisputed evidence indicates that school segregation and intentional educational discrimination negatively affect the educational achievement of minority students. See e.g., CRO summary of expert testimonies (App.412, 414-416; Willis Tr.4512-13; Parish Tr.4633; Crain Tr.4278-83) RSD itself concedes that "intentional discrimination may negatively impact minority student achievement" (RSD Br.32). Accordingly, the issue is not whether RSD's violations have damaged minority achievement, but rather, "what percentage of the achievement gaps can be attributed to the intentional segregation and tracking practices." (App.418)

Acknowledging that the increment could not be determined with mathematical precision (App.421), the lower court proceeded to carefully weigh the evidence. The court relied on the testimony of the Master's expert, Dr. Levine, that poverty may account for approximately 23 to 30% of the achievement gap. (App.422 n.148; Levine Tr.4973) The evidence before the court was that poverty is associated with a plethora of family and social characteristics, and that poverty level is a reliable proxy for a wide range of socio-economic factors. (Crain Tr.4319; Butler Tr.5189; Hoffer Tr.5111, 5136; DX 2 at 7) The inference which the lower court reasonably drew from the evidence was that the remaining 70 to 77% of the achievement gap was due to something other than socio-economic factors. (App.422 n.148; Hoffer Tr.5136-37)

The district court also looked to 1995 data on standardized achievement tests in the RSD, which was presented in a form which took into account eligibility for subsidized lunch. Evidence in the record established that subsidized lunch status is a credible and reliable proxy for socio-

economic status (App.410 n.140; Hoffer Tr.5111). The 1995 achievement data established the following:

- The average gap across all grade levels between "free lunch" whites and "free lunch" blacks was 10.5 NCE in reading and 10.4 NCE in math. In other words, there is a 10 NCE difference between the scores of poor black students and poor white students. Even when the socio-economic status is accounted for, there still remains a gap which is a full 50% of the overall gap. (App.410-11; Crain Tr.4333-34; 4336)
- Similar disparities in the free lunch category were present with respect to white and Hispanic scores. (App.410-11)
- There is only a small difference between the scores of "free lunch" minority students and non- free-lunch minority students. (Levine Tr.4978; Crain Tr.4336)

Based on this record, and the testimony of the experts regarding achievement effects, the district court could have made an increments determination much higher than 50%. (See, Levine Tr.4973) (70 to 77% of achievement gap not accounted for by poverty). However, erring on the side of being conservative, the court found that while the RSD was responsible for "at least" 50% of the gap, the court would fix the proportion of RSD's responsibility at 50% and not higher. (App.422)

### **3. It is Irrelevant That the Increment Cannot Be Measured with Mathematical Certainty**

At times, RSD appears to argue that because the increment cannot be exactly measured, the lower court erred in making any educated apportionment. But mathematical precision has never been required in the law generally with respect to apportionment of damages. As in many cases, the

court "had before it the best evidence of damages which the nature of the case admits [and the fact] that this evidence might not permit a mathematically precise apportionment of damages is irrelevant." Transpower Constructors v. Grand River Dam Auth., 905 F.2d 1413, 1417 (10th Cir. 1990). In the school desegregation setting, in particular, courts have recognized that it would be futile to insist upon mathematical precision. See Armstrong v. O'Connell, 463 F.Supp. 1295, 1302 (E.D. Wisc. 1979).

**D. The Lower Court's Remedial Requirements are Appropriate and Fully Supported by the Evidence**

**1. The District Court's Achievement Remedy is Appropriately Specific and Goal-Oriented and is Sufficiently Flexible**

After finding RSD responsible for a substantial portion of the current achievement disparity, the court ordered RSD to close 50% of that gap within four years. (App.423) Relying on evidence that such a goal was feasible (see below), the court further observed that "it is important to specify goals when working to improve student performance. Without goals... educators have difficulty focusing on improving the performance of 'laggard' groups." (App.414, citing Levine Tr.4891-93; MX 63 at 4; see also Eubanks Tr.4831, 4867-68; 4872, 4885; Levine Tr.4985; Crain. Tr.4345; Parish Tr.4629, 4665; Willis Tr.4485-86)

In adopting the specific goal of reducing the achievement disparity by 50% over 4 years, the court built a significant measure of flexibility into its order. First, as an alternative to closing by 50% the gap in the standardized test scores, the court offered RSD the option of bringing 90% of minority students in the school district to within one grade level of the national norm on alternative reading and math tests. (App.423)

Second, the CRO contains other mechanisms which provide for flexibility in reaching goals, including the achievement goals. For instance, the CRO provides for regular assessment of the educational interventions ordered for the purpose of measuring their effectiveness. (App 424) In addition, the CRO governance provisions contain a mechanism by which the RSD may raise practicability problems with the court-appointed Master as they arise, and appeal to the court any decisions by the Master relating to those problems. (App 452-53). Finally, the court's order explicitly provides that the Master may "waive, for good reason, the percentage requirements of this order and that the Master's decision is appealable to the court.

**2. The District Court's Feasibility Findings are Fully Supported on the Record and Do Not Constitute Clear Error**

As noted above, the court ordered the RSD to reduce the racial disparity in achievement scores by 50% over a four-year period. Considering that the disparity generally is 35 percentile points (on a standardized test), the 50% goal calls for an average annual increase in minority scores of 4.3 percentile points. In adopting that goal, the district court relied on the testimony of several expert witnesses<sup>7</sup> that annual progress at the even higher rate of 5 percentile points is reasonably feasible given vigorous and good faith efforts by the RSD at implementing the desegregation and educational improvement components of the CRO. See Eubanks Tr.4829-30; Levine Tr.4984-85; Crain Tr.4338-39; Parish Tr.4665-66; Shapiro Tr.4574. In particular, Dr. Levine testified at length

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<sup>7</sup>In support of its claim that this remedy is not feasible, the RSD cites testimony to the effect that the gap will take many more than four years to close. (RSD Br.36-37) The RSD's reliance on this testimony is misplaced. First, the witnesses all were referring to closing the *entire* gap. Second, Dr. Crain's estimate of 25 years to close the entire gap was based on his opinion that a portion of that gap is attributable to multigenerational effects, which would take much longer to eradicate. (Crain Tr.4342-43)

regarding the experiences of other school districts in raising test scores.<sup>8</sup> Even the RSD's own expert, Dr. Hoffer, agreed that educational interventions can effectuate improvements in achievement. (Hoffer Tr.5131-34, 5117)

The RSD tries to make something of the fact that Drs. Crain and Parish, who supported the Master's goals, could give no guarantees that the RSD could achieve such results. (RSD Br.37) But in all events the standard is reasonable feasibility not absolute certainty, and a "judgment call" by professional educators is an ample predicate for the remedy ordered in this case. Cf. Wittmer v. Peters, 87 F.3d 916, 920 (7th Cir. 1996) (reasonable social science judgments about the efficacy of proposed measures are sufficient support for measures)

#### **VIII. Given the School District's Blatant Discrimination in Tracking and Ability Grouping, the District Court Properly Limited Ability Grouping in the RSD**

##### **A. The Findings From the Liability Trial and the Remedial Hearing Support the District Court's Ability Grouping Remedy**

To appreciate the need for the CRO provisions proscribing ability grouping, a more thorough description of the School District's adjudicated discrimination in this area is required. More than "a form of intentional discrimination," (RSD Br.13), the School District's ability grouping practices constituted "the most egregious and blatant form of intentional discrimination against minority schoolchildren." (App.260) As determined in the liability opinion and cited in the CRO, RSD's ability grouping practices were not supported by any trustworthy academic theory, provided unequal opportunities to learn, and served no remedial function for African-American and Hispanic students.

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<sup>8</sup>As regards the court's alternative goal-- 90% of minority students within one of grade level on alternative test measures-- and contrary to the contention of the RSD that there was "no showing that this was possible," (RSD Br.38), the record also demonstrates feasibility. (Levine Tr.4985-88)



(851 F. Supp. 915, 940, 946-47, 958, 999, App.260) Minority students were disproportionately enrolled in slow track, low ability classes, while white students were overenrolled in high track college preparatory classes. (851 F. Supp. 942; App.260)

The tests which RSD used to separate students were not valid for predicting future achievement and were culturally biased. (851 F. Supp. 948-59) Even if the tests had been valid, RSD applied them unreliably, invalidly, and inconsistently: RSD routinely assigned students to classes which did not match their test scores. (851 F. Supp. at 958)

Racially identifiable tracking in the RSD continues to this day. The Special Master has advised the court that in many cases, "Basic Courses" have been merely retitled "Regular Classes," with the net effect being that instead of having four tracks, RSD now has three. (App.262 n. 15) Many honors classes remain racially identifiable white, while basic classes remain identifiably minority. Id.; see Master's Ex. 56, Table 3 (identifying minority enrollment in regular and honors classes).

**B. The Ability Grouping Remedy Was Well Within the District Court's Discretion**

Given all the findings of intentional discrimination in this area and the vestiges of discrimination which remain, the court ordered the School District to eliminate all ability grouping except for (1) a stand alone gifted program which contains a minimum minority enrollment, and (2) academic and social support programs to help minority students succeed in heterogeneous classes. (App.262, 446-49)

This order is supported by two sets of remedial principles. First, the remedy is appropriate to overcome RSD's intentional discrimination in its ability grouping and tracking practices. See McNeal v. Tate County School Dist., 508 F.2d 1017 (5th Cir. 1975). Second, the remedy facilitates

the overall desegregation process. See Reed v. Rhodes, 455 F. Supp. 569, 598 (N.D. Ohio 1978) (ordering the elimination of ability grouping and tracking despite "no evidence of discriminatory use in the past")

The School District's brief, although citing some ability grouping cases at pp 14-15, fails to recognize that these cases involve the standard for determining whether a school district has discriminated in the area of ability grouping, not the proper remedy once discrimination has been established.

**C. Because RSD Stipulated to the District Court's Ability Grouping Remedy Under the Comprehensive Remedial Order, the RSD Should be Prohibited From Appealing the Ability Grouping Remedy**

During the Comprehensive Remedial hearing, the School District entered into a stipulation in which it agreed to the Master's proposed ability grouping remedy, excluding provisions relating to entrance requirements for magnet schools and alternative programs. (R.1922, p.2) In light of this stipulation, the School District is precluded from its present broad appeal of the ability grouping remedy. See Wilson v. Wilson, 46 F.3d 660, 667 (7th Cir. 1995).

**IX. Given the School District's History of Within School Segregation, the District Court's Within School Segregation Remedy Is Appropriate**

**A. The Plus/Minus 5% Compliance Standard Is Appropriate and Tailored to Remedy RSD's Intentional Within School Segregation.**

Within school segregation was and is the most pervasive student enrollment problem in the District. (App.437) As part of the within school segregation remedy, the court ordered that the racial composition of all classes come within +/- 5% of the racial composition of students eligible to be enrolled in each class section. (App.443) This remedy is appropriate for two reasons: (1) as

previously discussed, race conscious remedies are required to overcome race conscious discrimination; and (2) without a  $\pm 5\%$  standard, the permissible variation in the racial composition of classes would render the within school discrimination remedy meaningless.

In the present case, the Magistrate Judge noted that within school segregation remedies "can best be thought of as an extension of the racial fairness guidelines under the student assignment plan." (App.439) Under the CRO, the within school compliance range is actually  $\pm 20\%$ ; schools may vary  $\pm 15\%$  in racial composition, and within the classrooms of those schools, classes may vary another  $\pm 5\%$ . Because the within classroom requirements are grafted onto the between school compliance range, RSD's proposed remedy ( $\pm 15\%$  at the classroom level) would produce an effective within school compliance range of  $\pm 30\%$  and allow a class of 30 students to have anywhere from 2 to 20 minority students. (App.440) The district court properly concluded that these variations were too broad to establish a meaningful within school discrimination remedy and ordered a  $\pm 5\%$  standard at the classroom level.

**B. Exempting Compensatory Education Programs From Within School Integration Requirements Would Effectively Render the Ability Grouping Remedy Meaningless**

If the School District could exempt Compensatory Education programs from within school integration requirements, RSD's curriculum would remain as it existed prior to remedial implementation: stigmatized remedial core classes disproportionately filled with minority students. Even when proposed remedial programs are supplemental, a scheduling conflicts exemption could still lead to racially identifiable classes. For example, if a remedial program exempted from compliance guidelines were offered first period, then other first period classes might remain racially identifiable.

In all events, the CRO is sufficiently flexible to address any legitimate concerns that may arise. The Master may grant a waiver where within school integration requirements are incompatible with insuring that remedial programs reach victims of the RSD's discrimination (App 449)

**C. The CRO Properly Allows the Master to Determine Which Classes Are Core and Which Classes Are Elective**

The School District's argument that allowing the Master to determine core and elective classes usurps local authority is entirely without merit. In the present case, the district court found that RSD "has a long history of course manipulation" to maintain discrimination. (App.483) In formulating the CRO, the court feared that RSD would simply relabel core courses not in compliance as electives in order to avoid a violation. (App.445) As such, allowing the Master to determine core and elective classes is an appropriate remedy tailored to RSD's long history of course manipulation and within school segregation.

**D. Minimum Minority Enrollment Requirements for Gifted and CAPA Programs Are Necessary to Eliminate Discrimination in These Formerly Segregated Programs**

Gifted Programs and CAPA (Creative and Performing Arts) classes are forms of ability grouping which (1) were an explicit part of the District Court's liability finding and (2) continue to have low minority enrollment. (App.439-446) With "a great deal of hesitance," the district court allowed Gifted and CAPA programs to continue to operate. (App.446) However, to protect against the possibility that these programs would remain vestiges of RSD's ability grouping discrimination, the district court required a minimum minority enrollment at each entry grade level. (App.446) Given RSD's history of using these high status programs as enclaves for the white students, the

district court's remedy strikes an appropriate balance between eliminating within school discrimination and eliminating these specialty programs.

**X. The Discipline Remedies Ordered by the Court Are Warranted**

Contrary to the assertions of the RSD, the lower court's discipline remedy is wholly supported by the record and by caselaw, both as an appropriate response to the discipline disparity which is a vestige of the RSD's adjudicated violations and as a facilitative remedy.

In addition to the liability finding that race-based perceptions of RSD staff "resulted in the disproportionate referral of minority students for disciplinary problems," (App.426), citing People Who Care, 851 F.Supp at 1004), the evidence at the remedial hearing established that current racial disparities in discipline are causally linked to the RSD's adjudicated violations. As the Master explained, the RSD's failure to adequately engage minority students academically and socially in the schooling and learning process, including through discriminatory tracking, "directly contributes to the disparity in discipline referrals and discipline sanctions." (App.540; Shapiro Tr.4567-68) In turn, these disparities contribute to impaired minority achievement. (Eubanks Tr.4804; Willis Tr.4512-13; Shapiro Tr.4569; Parish Tr.4633) In addition, the discriminatory culture in RSD -- a dimension of which is staff racial and cultural assumptions -- is itself a vestige of the RSD's violations and taints the RSD's use of subjective categories of discipline. (Willis Tr.4484, 4487, 4511-14; Parish Tr.4630-32, 4638-39, 4677)

Apart from the need for a discipline remedy to eliminate there current vestiges of the RSD's violations, remedial measures in this area would also facilitate the achievement remedy (by keeping minority students in the classroom more often) and the student assignment remedy (by addressing

cultural problems arising in newly desegregated schools). (App 430, 537-38, Parish Tr 4669, Levine Tr 5033)

For both these reasons, the Master recommended as one part of a "comprehensive approach" (Eubanks Tr 4805), that RSD be required to achieve equity in the suspension rate where discipline is based upon the subjective categories of "disruptive behavior", "insubordination", and "verbal abuse." (App 540, 425-26; Eubanks Tr 4805-06) The district court adopted a less restrictive version of the Master's recommendation, requiring only that the RSD insure that there is no disparity in the *referral rates* for these categories *if* the RSD continues to use them. (App 430)

The RSD's contention that the district court exceeded its authority in ordering this remedy is meritless. First, the cases upon which the RSD relies are inapposite. Unlike the present case, in Coalition to Save Our Children v. Stated Bd. of Educ., 90 F.3d 752 (3d Cir. 1996), Keyes v. Congress of Hispanic Educators, 902 F.Supp. 1274 (D.Col. 1995), and Tasby v. Estes, 643 F.2d 1103 (5th Cir. 1981), the courts found that there was no causal link between the school district's violations and the current racial disparities in discipline. Coalition, 90 F.3d at 775; Keyes, 902 F.Supp. at 1304; Tasby, 643 F.2d at 1108.

Secondly, by requiring that there be no racial disparity in the interim outcomes (*i.e.*, the referrals as opposed to the final disciplinary action) if the RSD continues the use of the subjective categories, the lower court has simply acted to ensure that RSD *in fact* administers its discipline code nondiscriminatorily. By even allowing the continued use of these subjective categories, the court has acted less restrictively than it did with regard to tracking, which was similarly based on RSD's subjective and discriminatory assumptions and was abolished. Given that the court would have been justified in taking stronger measures regarding subjective discipline categories, the more

moderate approach of requiring equity in referral rates if RSD continues to use these categories is clearly appropriate as a safeguard against discriminatory abuses.

**XI. The Magistrate Judge Ordered an Appropriate Remedy for Discrimination Affecting Minority Participation in Cheerleading**

The Magistrate Judge's determination that RSD's cheerleading squads should have a minimum minority participation equal to the minority enrollment percentage at a particular school is supported by an extensive record and comports with the relevant remedial standards.

In the liability opinion, the court made extensive findings that minority students were not afforded an equal opportunity to participate in extracurricular activities and were discriminated against by RSD through such devices as subjective selection criteria and inequitable transportation policies. (851 F. Supp. at 1181-84) As regards cheerleading, the court specifically held that RSD engaged in a 20 year pattern of intentional discrimination against minority students. (*Id.* at 1182-83) According to the testimony of RSD former Superintendent Bowen and other witnesses, the cheerleader selection process was historically manipulated to exclude black cheerleaders, resulting in cheerleading squads that were all-white. (*Id.*) The few black cheerleaders who were chosen were "not universally accepted" by school staff and were frequently jeered, booed and even physically threatened. (*Id.* at 1183)

As regards extracurricular activities generally, the CRO rejects the stronger remedies sought by plaintiffs and establishes a "goal" of minority participation in extracurricular activities of +/-15% of the total minority students at a school. (App.433-35) The *only* extracurricular activity where the court went farther was cheerleading, where the court held that the extensive evidence of discrimination required that cheerleading squads in the RSD have a minimum minority participation

equal to the minority enrollment percentage at a particular school. (App.183) The Magistrate Judge observed that this requirement, although "more demanding" than other aspects of the remedy for discrimination in extracurricular activities, was narrowly tailored and did not alter the overall standard for unitary status. (App.482)

The cheerleading remedy is amply supported by the record and comports with case law holding that race-based outcome requirements are appropriate (and often necessary) components of remedying the effects of prior discrimination. See e.g., Swann, 402 U.S. at 25. The cases cited in the School District's brief are inapposite inasmuch as they do not relate to appropriate remedial measures for adjudicated discrimination but the question of when a school district has attained unitary status. See, e.g., Quarles v. Oxford Municipal Separate School District, 868 F 2d 750, 757-58 (5th Cir. 1989) (school district attained unitary status with regard to extracurricular activities in view of finding that there was no evidence of further discrimination during nineteen year remedial phase of case).

## **XII. The Magistrate Judge Adopted Appropriate Provisions Regarding the Governance and Implementation of CRO Remedies**

### **A. The Present Governance Provisions Reflect a Structure Previously Agreed to by the School District**

In its brief, RSD fails to provide important background relating to governance issues. In 1991, Dr. Eugene Eubanks was appointed to monitor the Second Interim Order. (R.373) Subsequently, in a May 5, 1993 Order, Judge Roszkowski appointed Dr. Eubanks as Special Master with the responsibility to develop and oversee the implementation of the remedies in this case. (R.1313) Dr. Eubanks was originally recommended to the court by RSD; the authority conferred



upon him regarding the Second Interim Order was by consent of RSD as well as order of the court, and the authority conferred upon him as Special Master in May 1993 was by consent of both RSD and the Union, as well as order of the court. (R.373; R.1310; R.1313)

In the CRO, the Magistrate Judge reappointed Dr. Eubanks as Master to oversee all remedial areas of the CRO. (App.452) The court explicitly declined to make Dr. Eubanks a system-wide master, rejecting a proposal made by the Union for a system-wide master. (R.1794) The governance structure under the CRO mirrors the provisions of the prior orders. The only significant change made by the CRO is that, with the concurrence of RSD, the operation of the Planning and Implementation Committee ("PIC") has been suspended, and its functions assumed by the Master. (App.455-56) The Master's decisions remain appealable to the court as provided under the prior agreed orders and in accord with the Federal Rules of Civil Procedure. (App.453)

In short, the CRO governance structure continues the prior structure ordered by Judge Roszkowski, which has been in place for almost six years without challenge. (App.486)

**B. There is a Strong Evidentiary Basis for the Governance Provisions**

According to the School District, the CRO provisions relating to governance and implementation are improper because "there were no witnesses or evidence presented on the issue of governance." (RSD Br.57) Nothing could be farther from the truth: the record is filled with evidence bearing on the need for an effective administrative structure.

In the first place, the Magistrate Judge made an explicit finding in the CRO, (App.349), that "the District is unable to consistently support remedies in this case." The court cited the School Board's flip-flop on its commitment to controlled choice as evidence of this problem. (Id.)

The Magistrate Judge then elaborated on this finding in his ruling on the School District's motion to alter or amend:

The court finds, as Judge Roszkowski did almost three years ago, [that] a Master is necessary to implement the remedies ordered by this court. The District's prior record of noncompliance and delays in implementing ordered [interim] remedies necessitates this appointment."

(App.486)

The court went on to specifically identify numerous examples of RSD's remedial misconduct and recalcitrance. (App.486) In addition, many other examples of the School District's failure to adequately implement the Second Interim Order are thoroughly documented in the Master's Quarterly Reports, which reflect incidents of RSD's noncompliance extending to every area of school operations, including within school integration, student assignment, community and parent relations, administration, education services, facilities and transportation, staff, employment and assignment and discipline.<sup>9</sup> See, R.2139.

**C. The School District Retains Substantial Control and Input with Regard to its Administration**

The School District complains that "control of the RSD has been handed over to the Master."  
(RSD Br.58)

To the contrary, the court explicitly declined to make Dr. Eubanks a system-wide master and carefully limited the Master's authority to the remedial matters specified in the CRO. As the Magistrate Judge observed, the bulk of the decision-making process has been left with the Board

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<sup>9</sup>Recent events confirm the that the CRO governance provisions are critically important. Last month, the School Board's refusal to fund final and unappealed remedial obligations led to the initiation of contempt proceedings against the School Board and its members.

and school administrators "as long as the District's actions are in accordance with the CRO remedies and do not discriminate against minority children." (App.487) In addition, the court returned control of some entire areas to the Board, (such as Special Education), directed RSD alone to take the initiative in other areas, (developing a Human Relations program, deciding assignment practices at the District's secondary schools), and ordered authority shared by RSD and the Master in others (the administrative structure of Controlled Choice). (App.486-87)

### CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that this court affirm the CRO, except for the provisions appealed from by plaintiffs relating to Early Childhood Education, the Tort Funding Cap, Special Education and Faculty Hiring.

Respectfully submitted,

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Date: January 21, 1997

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### **CERTIFICATE OF COMPLIANCE WITH VOLUME LIMITATIONS**

By order dated January 8, 1997, this Court granted Plaintiffs-Appellees/Cross-Appellants' motion to file an oversize brief to the extent that it does not exceed 120% of the type volume limitations of Circuit Rule 32(d). Calculated according to Circuit Rule 32(d)(2)(C), Plaintiffs' Brief contains 16,314 words. Plaintiffs' attorneys prepared this brief using WordPerfect 6.0a. Because 16,800 words is 120% of the volume limitation contained in Rule 32(d), Plaintiffs-Appellees/Cross-Appellants' Brief complies with the volume limitations established in this Court's January 8, 1997 Order.

  
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