IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

LITTLE ROCK SCHOOL DISTRICT PLAINTIFF

v. LR-C-82-866

PULASKI COUNTY SPECIAL SCHOOL DISTRICT NO. 1, ET AL DEFENDANTS

MRS. LORENE JOSHUA, ET AL INTERVENORS

KATHERINE KNIGHT, ET AL INTERVENORS

MOTION TO ENFORCE 1989 SETTLEMENT AGREEMENT

Plaintiff Little Rock School District ("LRSD") for its Motion to Enforce 1989 Settlement Agreement states:

1. LRSD moves to enforce the 1989 Settlement Agreement for the reasons set forth in the accompanying Memorandum Brief in Support of Motion to Enforce 1989 Settlement Agreement, which is hereby incorporated by reference.

2. LRSD submits the following exhibits in support of its Motion to Enforce 1989 Settlement Agreement (listed by exhibit number):

1. M-to-M Stipulation filed August 26, 1986;

2. Magnet Stipulation filed February 16, 1987

3. 1989 Settlement Agreement, as Revised September 28, 1989;

4. Interdistrict Desegregation Plan dated April 29, 1992;

5. LRSD's Revised Desegregation and Education Plan ("Revised Plan");

6. PCSSD's Plan 2000;

7. Transcript of District Court's Decision on Proposed Jacksonville Splinter District, August 18, 2003 (Docket No. 3795);

7A. Attorney General Opinion, June 4, 2003;

8. ADE Rules and Regulations Governing Public Charter Schools (October 2009);

9. State Board Transcript, March 13, 2000;

10. Attorney General Opinion dated March 8, 2000;

11. Academics Plus Application, 2001-2002;

12. Attorney General Opinion dated January 5, 2001;

13. Academics Plus Enrollment Report, April 13, 2001;

14. State Board Minutes, May 14, 2001;

15. Pulaski County Public School Enrollment by District and by Year;

16. State Board Minutes, March 15, 2004;

17. Letter from Nancy Acre to Bobby Davis, November 18, 2009;

18. 2008 Adequacy Report, December Revision, Recommendation 7;

19. ADE Legal Comments, Academics Plus Renewal Application, 2004-2005;

20. Act 463 of 2001;

21. ADE Application Evaluation, Academics Plus, 2001-2002;

22. State Board Minutes, August 11, 2008;

23. LISA Academy Application, 2004-2005;

24. State Board Transcript, Jan. 12, 2004;

25. LISA Academy Response to ADE Application Evaluation, 2004-2005;

26. State Board Minutes, Jan. 12, 2004;

27. State Board Minutes, April 12, 2004;

28. State Board Transcript, Nov. 5-6, 2007;

29. State Board Minutes, April 9, 2007;

30. LISA Charter 2007;

31. Dreamland Academy Application, 2007-2008;

32. LISA NLR Application, 2008-2009;

33. ADE Legal Comments, LISA NLR, 2008-2009;

34. ADE Desegregation Analysis, LISA NLR, Nov. 1, 2007;

35. Covenant Keepers Application, 2008-2009;

36. ADE Desegregation Analysis, Covenant Keepers, Nov. 1, 2007;

37. State Board Minutes, Jan. 15, 2008;

38. ESTEM Elementary Application, 2008-2009;

39. ESTEM Middle Application, 2008-2009;

40. ESTEM High Application, 2008-2009;

41. ADE Application Evaluation, ESTEM High, 2008-2009;

42. ADE Desegregation Analysis, ESTEM, Nov. 1, 2007;

43. State Board Transcript, Dec. 10, 2007;

44. LRSD letter to ADE opposing ESTEM Expansion, Feb. 16, 2010 ;

45. Jacksonville Lighthouse Application 2009-2010;

46. ADE Desegregation Analysis, Jacksonville Lighthouse, Oct. 30, 2008;

47. LRSD letter to ADE, Sept. 30, 2008;

48. State Board Transcript, Nov. 3, 2008;

49. Little Rock Prep Application, 2009-2010;

50. State Board Transcript, Nov. 4, 2008;

51. Arkansas Democrat Gazette, "New Charter Schools Battles Setbacks," August 9, 2009;

52. UCPC Application, 2010-2011;

53. LRSD Findings of Fact, UCPC, Sept. 29, 2009;

54. State Board Transcript, Nov. 9, 2009;

55. LRSD State Board Submission on UCPC;

56. State Board Transcript, Dec. 14, 2009;

57. State Board Transcript, Jan. 19, 2010;

58. Pulaski County Open-Enrollment Charter Schools Authorized Enrollment;

59. RICHARD D. KAHLENBERG, "Turnaround Schools That Work: Moving from Separate to Equal," p. 19 (Century Foundation 2009);

60. ADE AYP Report 2008-2009, dated Oct. 9, 2009;

61. ADE Gain Index 2008-2009, dated March 14, 2009, LRSD and Open-Enrollment Charter Schools in Pulaski County;

62. LRSD by School and by Free and Reduced Eligible, 2009-2010, Oct. 1, 2009;

63. LRSD Withdrawal Report, Benchmark Classification, 2009-2010;

64. Interdistrict Schools and Magnet Charters Percentage Black;

65. Analysis of Students Lost to ESTEM, 2008-2009;

66. Magnet Waiting List, Oct. 1, 2009;

67. KIPP letter to Kimbrell, Oct. 22, 2009;

68. United States Department of Education, Office of Civil Rights, "Applying Federal Civil Rights Laws to Public Charter Schools," (May 2000);

69. BLR's "study" of transportation required by Act 1604 of 2007;

70. Act 293 of 2010;

71. 2008 Adequacy Report.

72. Odden, Picus and Goetz, "The Arkansas Recalibration Report," (August 30, 2006).

73. 2008-2009 Annual Statistical Report Spreadsheet - Transportation Cost Per Student.

WHEREFORE, LRSD respectfully requests:

1. That the Court schedule a hearing; on these issues and enter an appropriate scheduling order allowing the parties sufficient time to develop the issues through discovery in advance of the hearing.

2. That the State Board be enjoined from approving any new open-enrollment charter school in Pulaski County or authorizing an increase in enrollment of any existing open-enrollment charter school in Pulaski County, except upon approval of the Court and on such terms and conditions necessary to ensure compliance with the "terms and spirit" of 1989 Settlement Agreement;

3. That the State Board be directed to amend the charters of open-enrollment charter schools in Pulaski County to include such terms and conditions determined by the Court to be necessary to ensure compliance with the "terms and spirit" of 1989 Settlement Agreement including, but not limited to, that the State pay the full cost of transporting economically

disadvantaged students to open-enrollment charter schools in Pulaski County;

4. That the State be directed, retroactively and until otherwise ordered by the Court, to pay LRSD the sending district incentive payment required by the M-to-M Stipulation for students who reside in LRSD but attend(ed) an open-enrollment charter school in Pulaski County;

5. That the State be directed to comply with the 1989 Settlement Agreement and to identify or develop programs, policies and/or procedures designed to provide a substantially equal opportunity for an adequate education to all students attending high-poverty schools located in LRSD;

6. That the State be directed to pay to the full cost of implementing the programs, policies and/or procedures identified or developed to provide a substantially equal opportunity for an adequate education to all students attending high-poverty schools located in LRSD;

7. That the State be directed to reimburse LRSD the actual cost of transportation of economically disadvantaged students for the 2007-2008 school year and continuing thereafter;

8. That the State be directed to retain experts approved by LRSD to review the 1989 Settlement Agreement to determine whether a race-neutral student assignment system can achieve the goals of the 1989 Settlement Agreement;

9. That the State be directed to pay LRSD its costs and attorneys' fees expended herein; and,

10. That LRSD be awarded all other just and proper relief to which it may be entitled.

Respectfully submitted,

LITTLE ROCK SCHOOL DISTRICT
Friday, Eldredge & Clark

Christopher Heller (#81083)
Khayyam M. Eddings (#200208)
400 West Capitol, Suite 2000
Little Rock, AR 72201-3493
(501) 370-1506
heller@fridayfirm.com

/s/ *Christopher Heller*

and

Clay Fendley (#92182)
John C. Fendley, Jr., P.A.
Attorney at Law
51 Wingate Drive
Little Rock, AR 72205
(501) 907-9797
clayfendley@comcast.net

CERTIFICATE OF SERVICE

I certify that on May 19, 2010, I have electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which shall send notification of such filing to the following:

Scott Richardson - Scott.richardson@ag.state.ar.us
Sam Jones - SJones@mwlaw.com
Steve Jones - sjones@jacknelsonjones.com
John Walker - johnwalkeratty@aol.com
Mark Burnette - mburnette@mbbwi.com
Margie Powell – mqpowell@odmemail.com

/s/ *Christopher Heller*

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

LITTLE ROCK SCHOOL DISTRICT		PLAINTIFF
v.	LR-C-82-866	
PULASKI COUNTY SPECIAL SCHOOL DISTRICT NO. 1, ET AL		DEFENDANTS
MRS. LORENE JOSHUA, ET AL		INTERVENORS
KATHERINE KNIGHT, ET AL		INTERVENORS

MEMORANDUM BRIEF IN SUPPORT OF
MOTION TO ENFORCE 1989 SETTLEMENT AGREEMENT

Plaintiff Little Rock School District ("LRSD") for its Motion to Enforce 1989 Settlement Agreement states:

I. Jurisdiction.

1. The Court has jurisdiction to enforce the 1989 Settlement Agreement, as revised September 28, 1989 ("1989 Settlement Agreement"). *See Little Rock School District v. Pulaski County Special School District* ("*LRSD v. PCSSD*"), 131 F.3d 1255, 1258 (8th Cir. 1997)("[T]he desegregation plaintiffs may bring proceedings to enforce the terms of the settlement agreement and the terms of the desegregation plans."). The 1989 Settlement Agreement is a consent decree, and this Court "retains ancillary jurisdiction to manage its proceedings, vindicate its authority, and effectuate it decrees." *Jenkins v. Kansas City Missouri School District*, 516 F.3d 1074, 1081 (8th Cir. 2008).

II. Introduction.

2. The 1989 Settlement Agreement controls the interdistrict movement of students in Pulaski County to "lessen racial disparities in individual schools in the Pulaski County Special School District, the Little Rock School District, and North Little Rock School District." **Ex. 7, Tr. 8/18/2003, p. 52**. Without the approval of this Court or the agreement of LRSD or the defendant school districts, the Arkansas State Board of Education ("State Board") has authorized the uncontrolled interdistrict movement of students in Pulaski County by its *unconditional* approval of open-enrollment charter schools in Pulaski County. These actions by the State violate the 1989 Settlement Agreement; the Eighth Circuit's orders in *LRSD v. PCSSD*, 805 F.2d 815 (8th Cir. 1986) and *LRSD v. PCSSD*, 778 F.2d 404 (8th Cir. 1985); the Charter Schools Act, Ark. Code Ann. § 6-23-101 through 601 and the Constitution of Arkansas, Article 14, § 1 and Article 2, §§ 2, 3 and 18.

3. In *Appeal of LRSD*, 949 F.2d 253 (8th Cir. 1991), the Eighth Circuit held that "the agreed effort to eliminate achievement disparity between the races" was one of the "crucial elements" of the 1989 Settlement Agreement from which "no retreat should be approved." 949 F.2d at 256. As a part of this effort, the State agreed to monitor the districts' compensatory education programs and to identify or develop "programs to remediate the achievement disparities between black and white students." **Ex. 3, 1989 Settlement Agreement, § III, ¶ G.** The compensatory education programs implemented by the districts failed to remediate the racial achievement disparity, and the State has failed to identify or develop any program that will. In addition, the districts' efforts to remediate the racial achievement disparity have been negatively affected and continue to be negatively affected by a school funding system that violates the

Constitution of Arkansas, Article 14, § 1 and Article 2, §§ 2, 3 and 18.

4. Based on the State's conduct described herein, LRSD respectfully requests injunctive, equitable and other necessary and proper relief.

III. Background.

A. The Defendants' Constitutional Violations.

5. In 1984, the Court found the defendants guilty of interdistrict constitutional violations including acting in concert for the purpose of preserving residential segregation. *Little Rock School District v. Pulaski County Special School District,* 584 F.Supp. 328, 353 (E.D. Ark. 1984). The Court made the following findings of fact:

> 41. The goal of preserving residential segregation has been successful. The southern and eastern parts of the Little Rock School District remain heavily black to this day. The black population of the city has expanded to the west to some extent, but the far western portions of the city remain white today. (PX 5 and 40, p. 13) Northern and northwestern parts of the city, including the area where the black West Rock clearance area was formerly located, remain virtually all-white today. (PX 5 and 40, p. 13) Similarly in North Little Rock, the residential areas near the housing projects, that is, those lying south of Interstate 40, have become substantially black. The area north of Interstate 40 has remained overwhelmingly white. (PX 5)
>
> 42. The existence and location of the housing projects, the location of other government-subsidized housing units, the failure to build projects within the geographic boundaries of the county district, and the private and public steering and redlining practices are major contributing factors to the residential segregation in Pulaski County which exists today.

LRSD v. PCSSD, 584 F.Supp. at 343.

6. Consistent with these findings of fact, the Court reached the following conclusions of law:

> 6. The predominantly segregated residential patterns of Pulaski County have been caused in a significant degree by the actions of many governmental bodies, acting in concert with each other, with the defendants, and with private

> interests, and are not solely attributable to a series of individualized private housing choices. *Hills v. Gautreaux*, 425 U.S. 284, 96 S.Ct. 1538, 47 L.Ed.2d 792 (1975); *Swann v. Charlotte Mecklenburg Board of Education, supr*a.
>
> 7. The governmental actions affecting housing patterns in Pulaski County have had a significant interdistrict effect on the schools in Pulaski County, which has resulted in the great disparity in the racial composition of the student bodies of the Little Rock district and the two defendant districts. *Swann v. Charlotte Mecklenburg Board of Education, supra*.

LRSD v. PCSSD, 584 F.Supp. at 352-53.

7. In addition to acting in concert with the defendant districts to preserve residential segregation, the Court made specific liability findings against the State Board and reaffirmed the State Board's remedial responsibilities in *Little Rock School District v. Pulaski County Special School District*, 597 F.Supp. 1220, 1227-28 (E.D. Ark. 1984). *See Little Rock School District v Pulaski County Special School District*, 778 F.2d 404, 409 (8th Cir. 1985). The Court stated:

> ***The State Board of Education has never acknowledged its affirmative duty to assist the local school districts in their desegregation efforts.*** In the performance of its statutory duties, as set forth above, the State Board has never promulgated any rules or guidelines which would encourage the local districts to eliminate discrimination in their school systems. ***These omissions have had their greatest impact on the issues of school construction, student transportation, and financial assistance to local districts.*** Had the State Board taken affirmative steps in providing incentives to local school districts to comply with desegregation requirements, desegregation within the school districts in Pulaski County would have been greatly enhanced. ***These deficiencies in the State Board's discharge of its affirmative duty to encourage desegregation in the local school districts had an interdistrict effect upon the Little Rock, Pulaski County, and North Little Rock school districts.*** Other branches of the State, as set forth in the court's earlier opinion, *Little Rock School District v. Pulaski County Special School District, supra* at 328-335, share responsibility with the State Board for these constitutional violations, but the State Board must be the remedial vehicle for their violations as well. ***The State Board therefore has remedial responsibilities with respect to this case***. [citations omitted]. The precise nature of these financial and oversight responsibilities must await further refinement of the consolidation plan and development of a budget for such consolidated district.

LRSD v. PCSSD, 597 F.Supp. at 1228 (emphasis supplied). The Eighth Circuit affirmed the

Court's imposition of remedial responsibilities on the State through the State Board. *LRSD v. PCSSD,* 778 F.2d at 411-12 n.4.

8. To remedy the defendants' constitutional violations, the Court ordered consolidation of LRSD, NLRSD and PCSSD, but the Eighth Circuit reversed finding consolidation "exceeds the scope of the violations." *Id.* 778 F.2d at 434. The Eighth Circuit directed the Court to modify its remedy consistent with the following "principles." In summary, the Eighth Circuit mandated that:

1. Each school district remain independent with its own elected board;

2. The boundaries of NLRSD remain unchanged;[1]

3. The boundaries of LRSD and PCSSD be adjusted "to produce, among other things, a student ratio within LRSD of approximately sixty percent black and forty percent white," *LRSD v. PCSSD,* 805 F.2d at 816;

4. Each district revise its school attendance zones so that each school will reasonably reflect the racial composition of the district with a variance of plus or minus twenty-five percent and that each district implement compensatory and remedial programs in "all black or nearly all black" elementary schools with the cost paid by the State;

5. Each district encourage voluntary intra- or interdistrict majority-to-minority transfers and that the State pay the cost of transportation and pay both the sending and receiving district a financial incentive;

6. The Court consider creating a *limited number* of magnet schools with the State being required to pay one-half the cost of educating magnet students and to pay regular state aid to the student's home district;

7. The Court consider PCSSD's proposals for cooperative programs; and

8. The Court consider measures to equalize the tax rates in the districts if the

[1]The Eighth Circuit stated that NLRSD's boundaries should remain unchanged because "the black-white school population of this district approximates that of the county as a whole." *Id.* 778 F.2d at 434-35.

> boundary changes result in PCSSD or LRSD losing a substantial portion of their tax bases.

Id. 778 F.2d at 435-36 (emphasis supplied).

B. The 1989 Settlement Agreement.

M-to-M Stipulation.

9. Consistent with the Eighth Circuit's remedial principles, the parties submitted the Majority-to-Minority ("M-to-M") Stipulation to the Court on August 26, 1986. "Beginning in the 1987-88 school year ***and continuing thereafter***," the M-to-M Stipulation requires LRSD, PCSSD and NLRSD to "permit and encourage voluntary majority-to-minority interdistrict transfers." **Ex. 1, M-to-M Stipulation, ¶ 1** (emphasis supplied). The M-to-M Stipulation allows students in the racial majority at their school and district to transfer to a school and district where they would be in the racial minority. **Ex. 1, M-to-M Stipulation, ¶ 2**. For the 2009-10 school year, LRSD and NLRSD are majority black, and PCSSD is majority non-black. Thus, the M-to-M stipulation allows black LRSD and NLRSD students to transfer to majority non-black PCSSD schools, and non-black PCSSD students to transfer to LRSD and NLRSD schools that are majority black. "Students who have elected to transfer shall remain students of the host district until they choose to return to the district where they reside." **Ex. 1, M-to-M Stipulation, ¶ 7**.

10. The M-to-M Stipulation requires the State Board to "pay the full cost of transporting students opting for interdistrict transfers." **Ex. 1, M-to-M Stipulation, ¶ 12**. The State also pays a financial incentive to both the sending and receiving district. **Ex. 1, M-to-M Stipulation, ¶ 13; Ex. 3, 1989 Settlement Agreement, § II, ¶ E(2)**. The financial incentive serves to encourage the districts to promote voluntary interdistrict transfers, particularly to

interdistrict schools. *LRSD v. PCSSD*, 778 F.2d at 436; *LRSD v. PCSSD*, 934 F.Supp. 299, 301 (E.D. Ark. 1996), *aff'd LRSD v. PCSSD*, 109 F.3d 514 (8th Cir. 1997).

Magnet Stipulation.

11. The parties submitted the Magnet Stipulation to the Court on February 16, 1987. **Ex. 2, Magnet Stipulation**. The Magnet Stipulation created six interdistrict magnet schools, four elementary schools (Carver, Williams, Booker, Gibbs), one middle school (Mann) and one high school (Parkview). **Ex. 2, Magnet Stipulation, p. 1**. The Magnet Stipulation requires the Stipulation Magnets to have a student population "which is fifty-percent (50%) black and fifty percent (50%) non-black" and prescribes a method for allocating magnet seats among the three districts. **Ex. 2, Magnet Stipulation, p. 5**. It requires the State Board to pay the actual cost of transporting magnet students and one-half of the cost of educating magnet students. **Ex. 2, Magnet Stipulation, p. 3; Ex. 3, 1989 Settlement Agreement, § II, ¶¶ E(1) and (4)**. In addition, each districts' magnet students are included in the district's average daily membership for the purpose of determining the district's regular state education funding. **Ex. 3, 1989 Settlement Agreement, § II, ¶ A**. The purpose of the Stipulation Magnet schools was to encourage voluntary interdistrict transfers and improve racial balance and to provide academic benefits through special programs. *See Liddell v. State of Missouri*, 731 F.2d 1294, 1310 (8th Cir. 1984).

The 1989 Settlement Agreement.

12. The 1989 Settlement Agreement, among other things, incorporated the M-to-M Stipulation and the Magnet Stipulation and resolved numerous funding issues related to those agreements. **Ex. 3, 1989 Settlement Agreement, § II, ¶¶ A, B, C, D and E**. It also

incorporated each district's intradistrict desegregation plan and the Interdistrict Desegregation Plan ("Interdistrict Plan"). LRSD has been released from its obligations under its intradistrict desegregation plan, but the NLRSD and PCSSD continue to operate pursuant to court-approved intradistrict desegregation plans.

13. LRSD and PCSSD continue to operate interdistrict schools pursuant to the Interdistrict Plan, as modified by subsequent court orders. LRSD's interdistrict schools are King, Romine and Washington elementary. The PCSSD's interdistrict schools are Baker, Clinton, Crystal Hill and Chenal elementary. The Interdistrict Plan required PCSSD and LRSD to "engage in early, rigorous and sustained recruitment efforts designed to maximize participation in all Interdistrict Schools." **Ex. 4, Interdistrict Plan, p. 4**. "The ideal racial composition at the interdistrict schools shall be as close to 50%-50% as possible, with the majority race of the host district remaining the majority race at the interdistrict school." **Ex. 5, LRSD Revised Plan, § 4.3; Ex. 6, PCSSD Plan 2000, p. 2**.[2]

14. The 1989 Settlement Agreement also addressed the State's liability for compensatory and remedial education programs. It provided for payments to the districts totaling $129,750,000.00. **Ex. 3, 1989 Settlement Agreement, § II, ¶ N**. The State made its last payment for compensatory and remedial education programs on January 1, 1999.

15. Concomitant with its obligation to fund compensatory and remedial education programs, the 1989 Settlement Agreement required the Arkansas Department of Education ("ADE") to monitor implementation of compensatory education programs by the districts. It provides:

[2]PCSSD Plan 2000 exempts Baker from this requirement. PCSSD Plan 2000, p. 2.

> The State shall be required (as a non-party) to monitor, through ADE, the implementation of compensatory education programs by the Districts. If necessary as a last resort, ADE may petition the court for modification or changes in such programs being implemented by the Districts (but not for a reduction in the agreed level of State funding). . . . ADE shall provide regular written monitoring reports to the parties and the court.
>
> Monitoring by the State shall be independent of that of the other parties. It is being done to ensure that the State will have a continuing role in satisfactorily remediating the achievement disparities. Any recommendations made by ADE shall not form the basis of any additional funding responsibilities of the State.

Ex. 3, 1989 Settlement Agreement, § III, ¶ A.

16. In addition to paying for and monitoring compensatory and remedial programs, the State Board "committed" to certain principles including, "There should be remediation of the racial academic achievement disparities for Arkansas students." **Ex. 3, 1989 Settlement Agreement, § III, ¶ F**. Consistent with that commitment, the 1989 Settlement Agreement provides:

> G. Remediation of Disparities in Academic Achievement
>
> The ADE, with the assistance of the Court's desegregation expert(s), will develop and will search for programs to remediate achievement disparities between black and white students. If necessary to develop such programs, the ADE will employ appropriately trained and experienced consultants in the field of remediation of racial achievement disparities and/or hire as staff members persons with such training and experience. The remediation of racial achievement disparities shall remain a high priority with the ADE.

Ex. 3, 1989 Settlement Agreement, § III, ¶ G.

17. In reaching the 1989 Settlement Agreement, the districts were concerned that the State Board would retaliate or otherwise discriminate against them because of the funding received pursuant to the agreement. To address this concern, the 1989 Settlement Agreement included the following provisions:

> In addition to any payment described elsewhere in this agreement, the State will continue to pay . . . the State's share of any and all programs for which the Districts now receive State funding. The funds paid by the State under this agreement are not intended to supplant any existing or future funding which is ordinarily the responsibility of the State of Arkansas. (**Ex. 3, § II, ¶ E.**)
>
> The settlement payments described in this agreement are exclusive of any funds for compensatory education, early childhood development or other programs that may otherwise be due to LRSD (or any successor district or districts to which students residing in the territory now within LRSD may be assigned or for the benefit of the students if the State or other entity becomes responsible for their education), PCSSD or NLRSD under present and future school assistance programs established or administered by the State. The State will not exclude the Districts from any compensatory education, early childhood development, or other funding programs or discriminate against them in the development of such programs or distribution of funds under any funding programs. (**Ex. 3, § II, ¶ F.**)
>
> * * *
>
> The State shall take no action (including the enactment of legislation) for the purpose of retaliating against the Districts (including retaliatory failure to increase State aid and retaliatory reduction in State aid) because of this Litigation or this Settlement. ***The State will enact no legislation which has a substantial adverse impact on the ability of the Districts to desegregate.*** (**Ex. 3, § II., ¶ L.**)(emphasis supplied).

C. The State's Past Violations.

18. The Court has found that the State violated the M-to-M Stipulation, Magnet Stipulation and the 1989 Settlement Agreement on numerous occasions. These Court decisions provide a framework for considering whether the State Board has violated the M-to-M Stipulation, the Magnet Stipulation and the 1989 Settlement Agreement by unconditionally approving open-enrollment charter schools in Pulaski County.

ODM Funding.

19. In 1991, the State unilaterally decided that it had no obligation to fund the Office of Desegregation Monitoring ("ODM") based on a strict reading of the 1989 Settlement

Agreement and orders of the Court and Eighth Circuit. The Court rejected the State's strict interpretation in favor of an interpretation consistent with the purpose of the agreement. The Court stated:

> The ADE correctly points out that there was no language expressly directing the state to continue its funding in the Court's October 30, 1990 order approving the interim budget. However, ***implicit in this order*** was the requirement that all parties should continue funding according to their previous obligations; otherwise, without funding, the authorization of an interim budget would have been an exercise in futility. . . . .[T]he Court's January 18, 1991 order "converted" the Office of Metropolitan Supervisor into the Office of Desegregation Monitoring, retaining the same staff and budget for an interim period. . . . Thus, while its name has been changed and the scope of its function narrowed to monitoring the parties' compliance with the settlement plans, the office still exists to assist the Court, as well as the parties, in achieving the mutual goal of constitutionally desegregated public school systems. . . . ***To construe this provision otherwise would exalt form over substance and permit the State to escape an obligation from which it was nowhere expressly released by the Eighth Circuit.***

Docket No. 1442, p. 3-4.

Workers Compensation.

20. In 1993, the State shifted responsibility for workers' compensation from the State to school districts. LRSD claimed that workers' compensation was a program under Section II, Paragraph E of the 1989 Settlement Agreement and that the shift of responsibility for workers' compensation to the District had an adverse financial impact. The Court agreed with LRSD and explained:

> When the parties were negotiating the Settlement Agreement, the Districts and Intervenors were concerned that the State would attempt to recoup the monies being used to fund the Settlement Agreement by reducing funds that were otherwise available to the Districts. Also, ***the parties knew that their ability to carry out their obligations under the Settlement Agreement was directly tied to their belief that the settlement funds, when added to the funds received in the ordinary course of business, would be sufficient to fund their desegregation obligations.*** The State's decision not to fund workers' compensation claims is an

> example of an unexpected obligation that the Districts were seeking to avoid in the Settlement Agreement.

Docket No. 2337, p. 5. The Court concluded:

> [T]he State must fund the same proportion of the cost of each of the three Pulaski County school districts' workers' compensation insurance as it pays for all the other school districts in the state beginning with the 1994-95 school year. By requiring the State to assist the Pulaski County school districts to the same degree that it is assisting others, the Districts will not be "singled out" for less favorable treatment than the other districts.

Docket No. 2337, p. 7. The Court's decision was affirmed by the Eighth Circuit. *LRSD v. PCSSD*, 83 F.3d 1013 (8th Cir. 1996).

Loss Funding.

21. Also in 1993, the State amended the funding for districts with declining enrollment known as loss funding. LRSD and PCSSD alleged that the manner in which the State treated M-to-M transfer students in calculating "loss funding" violated the 1989 Settlement Agreement. **Docket No. 2337, p. 7**. The Court agreed stating:

> [T]he State is deliberately discriminating against the Districts with respect to the provision of loss funding for a decline in enrollment related to the loss of M-to-M students. Whether a district loses a student through ordinary transfer or an M-to-M transfer, the effect on that district's enrollment is the same. No matter how the loss occurs, the disruption to a school district from a net declining enrollment is the same. However, the ADE has decided not to credit the Districts for the loss of students due to M-to-M transfers. Thus, the ADE has determined to discriminate against the three Pulaski County districts with respect to M-to-M students.

Docket No. 2337, p. 9. The Court further explained:

> The state's application of loss funding and growth funding encourages the PCSSD to lose students to neighboring predominantly white districts, not to the LRSD. ***This is contrary to the Eighth Circuit's intent to encourage voluntary majority-to-minority transfers between the Districts and to require the state to pay for***

> ***such transfers***.[3] It is clear that the decision of the ADE is not consistent with the actual language of the stipulation. ***A party may not unilaterally change the implementation or language of an agreement or order without the prior approval of the Court and/or the consent of the parties.*** If the ADE believed that the literal application of the language of the stipulation and the Settlement Agreement was inconsistent with the original intent of the parties and would work an injustice with respect to loss funding, the ***ADE should have approached the parties and petitioned the Court for a modification***.

Docket No. 2337, p. 9-10 (emphasis supplied). The Court concluded:

> The state of Arkansas needs to focus on its obligation in the settlement to give the Pulaski County school districts ***special*** consideration to enable these districts to meet their numerous and burdensome obligations under the settlement. The Court reminds the state of the Eighth Circuit's specific findings about the state's complicated and lengthy history of promotion of unconstitutional racial segregation which has led to this interminable litigation. ***The swiftest and surest way out of the federal court is to abide by the terms and spirit of this settlement Agreement, and this includes following proper procedures for modification of the settlement***.

Docket No. 2337, p. 15-16 ("special" emphasis in original, other emphasis supplied). The Court's decision was affirmed by the Eighth Circuit. *LRSD v. PCSSD*, 83 F.3d 1013 (8th Cir. 1996).

Teacher Retirement and Health Insurance.

22. In 1995, the Arkansas General Assembly enacted a new school funding formula. Under the new funding formula, school districts no longer received money specifically earmarked for teacher retirement contributions or health insurance. Instead, the money in the past earmarked for teacher retirement and health insurance was distributed under the new

[3]*See LRSD v. PCSSD*, 778 F.2d 404, 436 (8th Cir. 1985)("Voluntary intra- or interdistrict majority-to-minority transfers shall be encouraged, with the State of Arkansas being required to fund the cost of transporting students opting for interdistrict transfers and to pay benefits to the sending and receiving schools for the interdistrict transfers similar to those required to be paid in *Liddell*. All three defendant school districts in Pulaski County shall be included in this program.")

funding formula on a per student basis. The districts argued that this violated the 1989 Settlement Agreement, Section II, Paragraph E, which required that the State continue to pay the "[t]he State's share of any and all programs for which the Districts now receive State funding." The State responded that the 1989 Settlement Agreement, Section II, Paragraph L, authorized "fair and rational adjustments to the funding formula which have general applicability but which reduce the proportion of State aid to any of the Districts" and that stated that such adjustments "shall not be considered to have an adverse impact on the desegregation of the Districts." The Court found that the changes in the funding formula were neither "fair and rational" nor "of general applicability." The new funding formula was not "fair and rational" because it failed to consider the number of employees in distributing aid for teacher retirement and health insurance. **Docket No. 2930, p. 11-12**. The new funding formula was not "of general applicability" and violated of the anti-retaliation provision of the 1989 Settlement Agreement because other school districts received a greater proportion of their teacher retirement and health insurance costs than did the three Pulaski County districts. **Docket No. 2930, p. 11-12**. The Court recognized that a violation of the anti-retaliation provision did not require an intent to retaliate. "This result is precisely what the anti-retaliation clause was meant to prevent. It funds the Pulaski County districts to a lesser degree than other districts in the state. It is of no moment that the State reached this result in a mathematically consistent manner." **Docket No. 2930, p. 4-5**, *quoting LRSD v. PCSSD*, 83 F.3d 1013, 1018 (8th Cir. 1996). The Court noted "the State has not petitioned the Court for any modifications in the Agreement and the Court is bound to enforce

the terms of the Agreement." **Docket No. 2930, p. 11**.[4] The Court's decision was affirmed by the Eighth Circuit. *LRSD v. PCSSD*, 148 F.3d 956 (8th Cir. 1998).

Jacksonville Splinter District.

23. In 2003, the State Board authorized an election to create a splinter district by detaching the Jacksonville area from the PCSSD. On the motion of PCSSD, the Court directed the State Board to rescind its order authorizing the election. The Court found that the proposed Jacksonville splinter district violated the 1989 Settlement Agreement and the Eighth Circuit's orders in *LRSD v. PCSSD*, 805 F.2d 815 (8th Cir. 1986) and *LRSD v. PCSSD*, 778 F.2d 404 (8th Cir. 1985). **Docket No. 3792 and Ex. 7, Tr. 8/18/2003**. In ruling from the bench, the Court quoted from an opinion letter written by the Attorney General[5] stating:

> As a general matter, the settlement agreement and the Pulaski County Special School District's existing desegregation plan were written in the context of the Pulaski County Special School District having control over the schools in the proposed detachment area, having the benefit of the local revenue derived from taxes on property within the proposed detachment area, ***and having available the students residing in the proposed detachment area who might, through M-to-M transfers and other reassignment, be available to lessen racial disparities in individual schools in the Pulaski County Special School District, the Little Rock School District, and North Little Rock School District.*** In light of this, any detachment of a significant amount of territory from the Pulaski County School District would ***almost certainly be expected to have an impact on the Pulaski County Special School District's ability to comply with its desegregation plan and have an impact on the operation of the settlement agreement, including the agreement's provisions concerning M-to-M students and the magnet schools in the Little Rock School District.***

[4]The Court's decision on health insurance adopted the reasoning of its opinion on teacher retirement without further discussion. **Docket No. 2967**.

[5]The Arkansas Attorney General at the time was Governor Mike Beebe. The opinion letter was written by Senior Assistant Attorney General Timothy G. Gauger who is now legal counsel for Governor Beebe. The Attorney General opinion quoted by the Court is attached hereto as Exhibit 7A.

Ex. 7, Tr. 8/18/2003, pp. 52-53 (emphasis supplied). The Court concluded, "Obviously, the proposal to create a new school district in northeast Pulaski County will have an undeniable, in my opinion, profound effect on the ability of the Pulaski County Special School District to comply with those two orders, not to mention the many other desegregation obligations outlined in Plan 2000." **Ex. 7, Tr. 8/18/2003, p. 59**.

24. The Court described the process to be followed by any party that "contemplates changing the boundaries of any of the three school districts" in Pulaski County. **Ex. 7, Tr. 8/18/2003**, **p. 56**. The Court stated:

> First, come to the Court with a detailed feasibility study and specific data sufficient to allow this Court to conduct an evidentiary hearing to determine if, one, the boundary changes will substantially impact the student populations of each district; and two, the changes in the boundaries will, and I quote again, better meet the educational needs of the students of the districts involved.

Ex. 7, Tr. 8/18/2003, pp. 57-58.

25. The Court warned the State Board that "they cannot use state statutes as a shield to avoid complying with all Court orders and contractual agreements that govern and control the desegregation obligations of the parties in this case." **Ex. 7, Tr. 8/18/2008, p. 59**. Moreover, the Court made clear that "it's the effect and impact rather than the intent which is the critical inquiry under these circumstances." **Ex. 7, Tr. 8/18/2003, p. 59.**[6] The State did not appeal the Court's decision. *See LRSD v. PCSSD*, 378 F.3d 774 (8th Cir. 2004).

D. Impact of LRSD Being Unitary.

---

[6]In addition to the violations enumerated herein, the State's failure to meet its monitoring obligations is well documented in the Office of Desegregation Monitoring's, "Report on ADE's Monitoring of the School Districts in Pulaski County," filed December 18, 1997 (Docket No. 3097). See Docket No. 2045 ("ADE never followed the provisions of the settlement agreement or monitoring plan in any substantial way and, therefore, is in violation of its obligations.").

26. LRSD has been unitary for all practical purposes since 2002. The Court is currently considering whether NLRSD and PCSSD should be declared unitary. No party has asked the Court to modify or terminate the 1989 Settlement Agreement. A finding of unitary status means the districts have in good faith complied with their individual desegregation plans and remedied to the extent practicable their ***intra***district constitutional violations. It will not relieve the State or the districts from their ***inter***district obligations as set forth in the 1989 Settlement Agreement. Thus, even if NLRSD and PCSSD are declared unitary, they, along with LRSD and the State, will continue to be bound by the 1989 Settlement Agreement.

27. The 1989 Settlement Agreement makes it clear that the State's obligations under the agreement continue after all three districts are unitary. The 1989 Settlement Agreement contemplated that the districts would obtain unitary status and specifically stated, "The settlement of the State's liability, while contingent on the district court's approval, is not contingent upon court approval of any District's plan ***or a finding of unitary status for any District.***" **Ex. 3, 1989 Settlement Agreement, § IV, ¶ A** (emphasis supplied). Because the 1989 Settlement Agreement anticipated the districts becoming unitary, the districts' unitary status does not provide a basis for modifying the agreement. *See White v. National Football League*, 585 F.3d 1129, 1138 (8th Cir. 2009)("When, as here, changed conditions have been anticipated from the inception of a consent decree, they will not provide a basis for modification . . . .").

28. The Court found the State to be a constitutional violator for failing to act affirmatively to desegregate the districts and for perpetuating residential segregation. *See LRSD v. PCSSD*, 584 F.Supp. at 352-53; *.LRSD v. PCSSD*, 597 F.Supp. at 1228. The 1989 Settlement

Agreement should continue in force until the State proves that it has in good faith complied with its affirmative duty to desegregate the districts and that any current residential segregation "is not traceable, in a proximate way, to the prior violation," *Freeman v. Pitts*, 503 U.S. 467, 494 (1992). *See Jenkins v. Missouri*, 216 F.3d 720, 725 (8th Cir. 2000)("[O]nce there has been a finding that a defendant established an unlawful dual system in the past, there is a presumption that current disparities . . . are the result of the defendant's unconstitutional conduct."). Other courts have recognized that, where the State is a constitutional violator, ***inter***district relief does not end simply because the school district has remedied its ***intra***district violations. *See United States v. Bd. of School Comm'rs of the City of Indianapolis*, 128 F.3d 507 (7th Cir. 1997). *See also Berry v. Sch. Dist. of the City of Benton Harbor*, 195 F.Supp.2d 971 (W.D. Mich. 2002).

IV. Open-Enrollment Charter Schools in Pulaski County.

A. The Charter Schools Act.

29. The Arkansas Charter Schools Act of 1999 ("Charter Schools Act") authorizes the State Board to approve applications for open-enrollment charter schools. *See* Ark. Code Ann. § 6-23-101, *et seq.* Open-enrollment charter schools are public schools operated by non-profit or governmental entities based on a "charter" -- an initial five-year contract between the State Board and the operating entity. *See* Ark. Code Ann. § 6-23-103(2). An open-enrollment charter school "may draw its students from any public school district in the state." *See* Ark. Code Ann. § 6-23-103(8)(B). Public school districts are not eligible to operate open-enrollment charter schools. *See* Ark. Code Ann. § 6-23-103(4) and ADE Rules and Regulations Governing Public Charter Schools ("Charter Rules"), § 5.04 (October 2009), attached hereto as Exhibit 8.

30. The Charter Schools Act requires the applicant to first submit its application to

the local school board for the public school district where the open-enrollment charter school will be located. *See* Ark. Code Ann. § 6-23-302(d)(1). If the local school board does not approve the application, the applicant may appeal to the State Board. The State Board must hear the appeal within 45 days of receipt of the applicant's notice of appeal. *See* Ark. Code Ann. § 6-23-302(d)(2). The local school board and other affected school districts may present arguments for or against the application. At the conclusion of the hearing, the State Board may approve a charter with or without conditions. The State Board's decision is final. Ex. 8, Charter Rules §§ 9.02, 9.03 and 9.05.

31. The Charter Schools Act authorizes the State Board to include conditions in charters related to the "geographical area, public school district, or school attendance area to be served by the program," and "the methods for applying for admission, enrollment criteria, and student recruitment and selection processes." *See* Ark. Code Ann. § 6-23-306(13) and (14)(A) and Ex. 8, Charter Rules, §7.03.

32. The Charter Schools Act mandates that the State Board consider the impact of a proposed open-enrollment charter school on the ability of public school districts to comply with desegregation orders or to maintain a desegregated system of public schools. The Charter Schools Act provides:

> § 6-23-106. Impact on school desegregation efforts
>
> (a) The applicants for a public charter school, local school board in which a proposed public charter school would be located, and the State Board of Education shall carefully review the potential impact of an application for a public charter school on the efforts of a public school district or public school districts to comply with court orders and statutory obligations to create and maintain a unitary system of desegregated public schools.
>
> (b) The state board shall attempt to measure the likely impact of a proposed

> public charter school on the efforts of public school districts to achieve and maintain a unitary system.
>
> (c) The state board shall not approve any public charter school under this chapter or any other act or any combination of acts that hampers, delays, or in any manner negatively affects the desegregation efforts of a public school district or public school districts in this state.

33. LRSD does not challenge the Charter Schools Act as written. The statute expressly prohibits the State Board from approving an open-enrollment charter school "that hampers, delays, or in any manner negatively affects the desegregation efforts of a public school district or public school districts in this state." Ark. Code Ann. § 6-23-106(c). Rather, the State Board's application of the statute violates this prohibition.

B. Open-Enrollment Charter Schools in Pulaski County.

Academics Plus.

34. The State Board first considered an application for an open-enrollment charter school in Pulaski County on March 13, 2000. Pulaski County School, Inc. ("PCS") sought to open a secondary school to be known as Academics Plus beginning in the 2000-2001 school year. The proposed school was to be located in the PCSSD in the City of Maumelle. The City of Maumelle was five percent black according to the 2000 Census. PCS proposed opening Academics Plus for grades six and seven (100 students) and adding a grade level each year until it served grades 6 through 12 and up to 500 students. **Ex. 9, SB Tr. 3/13/2000, p. 20-21**. PCSSD rejected PCS's application because "the location of this open-enrollment charter school will have a negative impact on the District's desegregation objective." **Ex. 10, AG Opinion, March 8, 2000, p. 3**.

35. Before considering PCS's application, the State Board requested an opinion from

the Attorney General ("AG") concerning the impact on desegregation in Pulaski County. By letter dated March 8, 2000, the AG, in his capacity as legal counsel for the State Board, noted the State Board's affirmative duty under the 1989 Settlement Agreement and Charter Schools Act to assess the impact of open-enrollment charter schools on desegregation in Pulaski County. The AG explained to the State Board the potential impact of open-enrollment charter schools as follows:

> In general almost any charter school has at least the potential to interfere with or otherwise make it more difficult for nearby school districts to comply with certain aspects of any court-ordered desegregation obligations. ***This is particularly so when the proposed charter school will attract students of a particular race or ethnicity that would otherwise have attended school in a nearby district,*** and that nearby district is under an obligation to strive for or meet goals or targets concerning the racial makeup of their student body. In addition, because state funding for school districts is based in part on attendance, an argument can be made that a charter school that attracts students who would otherwise have attended school in the desegregating district will have a financial impact on the desegregating district that makes it more difficult to comply with its desegregation obligations in an indirect and more general way.

Ex. 10, AG Opinion, March 8, 2000, p. 2. Specifically with regard to PCS's application, the AG noted deficiencies including the failure to "outline a specific plan, which would be implemented in conformity with federal court orders and the desegregation plans of the three Pulaski County school districts, that would ameliorate or minimize any adverse effect on those districts' ability to comply with their desegregation obligations" and the failure to make a clear commitment to provide transportation to students wanting to attend the school. **Ex. 10, AG Opinion, March 8, 2000, p. 3**. For these reasons, the AG recommended that PCS's application for an open-enrollment charter school in Maumelle be denied. **Ex. 10, AG Opinion, March 8, 2000, p. 3.**

36. During the State Board hearing on PCS's application, PCSSD objected based on

the potential impact on the PCSSD's ability to meet its racial balance requirements at nearby schools and the loss of PCSSD students who might otherwise choose to attend a Stipulation Magnet or another district's school using an M-to-M transfer. **Ex. 9, SB Tr. 3/13/2000, pp. 12-14**.

37. A representative of the AG also appeared at the State Board hearing on Academics Plus. Deputy AG Sammye Taylor warned the State Board that the AG had "very strong concerns" about the impact of Academics Plus on desegregation in Pulaski County. Academics Plus took the position that the desegregation impact was speculative because its future enrollment was unknown. **Ex. 9, SB Tr. 3/13/2000, p. 26.** The AG noted that the Charter Schools Act mandated that the State Board to carefully review the potential impact on desegregation orders. **Ex. 9, SB Tr. 3/13/2000, p. 45-46**. The Attorney General concluded, "To suggest that a response to that statutory duty, that we don't know if our charter will affect the Pulaski County Special School District's ability to comply is, in my view, a failure to adhere to the statutory standard of compliance." **Ex. 9, SB Tr. 3/13/2000, p. 46.**

38. The State Board voted unanimously not to grant a charter for Academics Plus. **Ex. 9, SB Tr. 3/13/2000, p. 61**. In moving to reject the application, State Board member James McLarty explained:

> I don't know what your impact would have on the deseg agreement. I look at the requirement and it says -- the law says that we must measure the likely impact and I appreciate that you can't say for certain, you don't know until you try it. But we are not, I think, permitted in our view to speculate on that. We must measure the likely impact.

Ex. 9, SB Tr. 3/13/2000, p. 59.

39. PCS again applied to open Academics Plus beginning in the 2001-2002 school

year. **Ex. 11, A+ Application 2001-2002, p. 1**. PCS made the following commitments in its application:

a. To comply with the racial balance requirements for neighborhood schools as set forth in PCSSD's desegregation plan and to use a weighted lottery[7] if oversubscribed to ensure compliance;

b. To actively recruit black students from LRSD;

c. To provide transportation to those students needing it; and,

d. To "meet all other obligations in hiring faculty and staff, maintaining diversity on the Board of Trustees of Pulaski County Charter School, Inc. (PCS) and in any other areas of the desegregation order."

Ex. 11, A+ Application 2001-2002, pp. 2-4 and 26. PCS also stated in its application that it would provide the State Board with early enrollment data to facilitate the State Board's review of its desegregation impact. **Ex. 11, A+ Application 2001-2002, p. 4**. Finally, PCS's application stated, "Pulaski Charter School, Inc, (sic) requests that if the State Board of Education cannot grant approval for the Academics Plus (A+) Charter School, that it grant an approval that is conditional upon a favorable ruling or directive from the federal court that oversees the desegregation order in Pulaski County." **Ex. 11, A+ Application 2001-2002, p. 4**.

40. Academics Plus' application included a desegregation analysis intended to comply with Ark. Code Ann. § 6-23-106(a). Academics Plus asserted that the small number of students that would be enrolled at the school would not have a material impact on desegregation

[7]With a weighted lottery, the names of black students would be placed in the pool of applicants two or more times so that random selection should result in a specified percentage of black students.

in Pulaski County. **Ex. 11, A+ Application 2001-2002, p. 3-4**.

41. The State Board again requested an opinion from the AG on the desegregation impact of Academics Plus. By letter dated January 5, 2001, the AG first incorporated its previous opinion letter dated March 8, 2000. The AG noted the State's obligations regarding the Stipulation Magnets and the M-to-M Stipulation and warned the State Board that:

> If a substantial number of the students that will attend A+ are students who otherwise would have attended a magnet school in the LRSD or who would have participated in the M-to-M Transfer program, an argument could be made that by approving A+ the State will have sanctioned the creation of a school that will hinder the Pulaski County Districts' efforts to increase enrollment in magnet schools or increase participation in the M-M Transfer program.

Ex. 12, AG Opinion, Jan. 5, 2001, p. 2.

42. The State Board did not ask PCS to seek or obtain this Court's approval. On January 8, 2001, the State Board conditionally approved Academics Plus subject to a review of its enrollment as of April 15, 2001.

43. PCS submitted Academics Plus' April 15, 2001 enrollment report to the State Board, and the State Board reviewed the report at its May 14, 2001 meeting. The report indicated that the 6th Grade class would be 55 percent black and the 7th Grade 60 percent black.

Ex. 13, A+ Enrollment Report, April 13, 2001, p. 1.

44. Academics Plus' projected enrollment did not comply with the racial balance requirements for PCSSD neighborhood schools – the standard with which Academics Plus promised to comply in its application. PCSSD's desegregation plan incorporated the Eighth Circuit's racial balance standard, *LRSD v. PCSSD,* 778 F.2d at 435-36, and required the attendance zone for neighborhood schools to reasonably reflect the racial composition of the District with a variance of plus or minus twenty-five percent of the percentage of black

enrollment at each organizational level (elementary and secondary) with a minimum enrollment of 20 percent black. For the 2000-2001 school year, PCSSD secondary schools were 34 percent black. The allowable variance in racial composition is calculated by multiplying 34 percent by 25 percent (.34 x .25 = .085). Adding 8.5 percent to 34 percent, the maximum black enrollment at PCSSD neighborhood schools was 44.5 percent in 2000-2001. **Docket 4229, ODM 12/9/2008, pp. 1-3, 15**. Thus, Academics Plus' projected enrollment exceeded the maximum percentage for black students at PCSSD neighborhood schools. Even so, the State Board unanimously voted to accept the projected enrollment as satisfying the condition for approval of the school. **Ex. 14, SB Minutes, May 9, 2001, p. 5**.

45. As an interdistrict school of choice, Academics Plus was more closely analogous to a Stipulation Magnet or Interdistrict School. Stipulation Magnets and Interdistrict Schools are supposed to have between 50 and 55 percent black students. **Docket 4229, ODM 12/9/2008, p. 50**. While its 6th grade projected enrollment of 55 percent black students complied with this standard, the 7th grade projected enrollment of 60 percent black did not.

46. PCS knew that the admission process for Academics Plus should be consistent with the Magnet Stipulation and Interdistrict Plan. A PCS representative met with the ODM and ADE legal counsel in November of 1999 to discuss compliance with the 1989 Settlement Agreement. PCS described the meetings as follows:

> On Friday, November 19, 1999 members of the Board of Trustees and the Mayor of Maumelle met with [ODM Monitor] Ann Brown to discuss the impact of A+ on the desegregation order. The Board also queried Ms. Brown on the procedures for conducting a random, anonymous selection of students that would be in compliance with the desegregation order. At the suggestion of Ms. Brown, Donna Watson contacted Donna Creer and Sandy Luehrs of the Magnet Review Committee Office to discuss the best method for implementing such an admission process. Additionally, at the suggestion of Ms. Brown, Dr. Charity Smith,

> Director for Accountability, and Theresa Wallent, Staff Attorney, Arkansas Department of Education were contacted about the student admission process and the possibility of A+ being subject to majority to minority transfer of students between districts**.**

Ex. 11, A+ Application 2001-2002, p. 23.

47. Academics Plus' official October 1, 2001 enrollment was 35 percent black. **Ex. 15, Enrollment, p. 1**. While this placed it within the acceptable range for a PCSSD neighborhood school, it did not comply with the racial balance requirements of the Magnet Stipulation or Interdistrict Plan. Academics Plus' enrollment has never complied with the racial balance requirements of the Magnet Stipulation or Interdistrict Plan. Academics Plus' official October 1 enrollment has ranged from a high of 35 percent black in 2001-2002 to a low of 12 percent black in 2009-2010. **Ex. 15, Enrollment, pp. 1 and 9**. Academics Plus fell below 20 percent black required for PCSSD neighborhood schools in the 2008-2009 school year (15 percent black), but the State Board never took any action to hold Academics Plus accountable.

48. Academics Plus has never complied with the racial balance requirements of the Magnet Stipulation or Interdistrict Plan, at least in part, because it never followed through on its commitment to provide transportation. In its 2001-2002 application, Academics Plus demonstrated that it understood that it would be necessary to provide transportation to allow poor, black LRSD students to attend the school. **Ex. 11, A+ Application 2001-2002, p. 4**. Moreover, the State Board knew or should have known that the lack of transportation would prevent poor, black LRSD students from attending Academics Plus. During the 2004 hearing on Academics Plus' renewal application, transportation problems were cited as one reason for Academics Plus' decreasing black enrollment. **Ex. 16, SB Minutes, March 15, 2004, p. 2**. When Academics Plus had financial problems in 2005, it submitted a plan to the State Board that

included the following proposal:

> We could recruit disadvantaged students and bus them to/from school. We could receive lots of federal money due to increasing our numbers of disadvantaged students. Most Title Funds are driven by our numbers of disadvantaged students. ***They do not live in the area nor do they have the means to get to our school. Many have expressed interest but [do] not have the means to get to our school.***

Ex. 17, Acre Letter dated Nov. 18, 2005 (emphasis supplied). Academics Plus eventually raised money from private sources to resolve its financial difficulties but has never provided transportation so poor, black LRSD students would have the means to attend the school.

49. Charter schools receive the same amount of transportation funding as traditional school districts.[8] Charter schools, as well as traditional school districts, receive a set amount of money per student known as "foundation funding." See Ark. Code Ann. § 6-23-502(a). The foundation funding amount is designed to meet the State's obligation to provide all students a substantially equal opportunity for an adequate education. For the 2009-2010 school year, the foundation funding amount was $5,905.00. *See* Ark. Code Ann. § 6-20-2305 (a)(2)(A). Of this amount, $286.00 is designated as transportation funding. **Ex. 18, 2008 Adequacy Report, p. 56**. The State has recognized that transportation is necessary to provide all students a substantially equal opportunity for an adequate education – in particular disadvantaged students. The State's 2008 Adequacy Report, December Revision, stated:

> The [House and Senate] Education Committees have determined that state-funded transportation for public education may be a necessary component to providing students with an equitable opportunity for an adequate education to the extent that a student would not otherwise be able to realize this opportunity but for such transportation being provided by the state.

[8]It is true that charter schools were not eligible for transportation aid under the High Cost Transportation Funding Formula Act, Ark. Code Ann. § 6-20-1701 to 1716 (repealed by Act 2138 of 2005).

Ex. 18, 2008 Adequacy Report, p. 56.

50. In addition to the lack of transportation, Academics Plus' ability to maintain a racially balanced school was impaired by the State Board's failure to require that the school be racially balanced. The charter issued by the State Board incorporates the charter application and ADE's legal comments. Both erroneously adopted the racial balance standard for PCSSD neighborhood schools. ADE's legal comments stated:

> Ark. Code Ann. § 6-23-306 does provide for a weighted lottery when required to comply with a court order or the Title VI of the Federal Civil Rights Act, etc. The applicant will have to show that the lottery is needed to "maintain a racial balance that includes between 20 and 41 % minority enrollment in line with the Pulaski County School District's desegregation terms."

Ex. 19, ADE Legal Comments, ¶ 1. Thus, the State Board authorized Academics Plus to operate as a PCSSD neighborhood school even though it had no attendance zone and could enroll students from anywhere in Pulaski County -- just like Stipulation Magnets and Interdistrict Schools.

51. Nothing in the Charter Schools Act prevented the State Board from requiring Academics Plus to be racially balanced. Ark. Code Ann. § 6-23-306, as amended by Act 463 of 2001 (effective February 28, 2001), specifically authorized a weighted lottery where necessary to comply with a desegregation order. Act 463 of 2001 amended the Charter Schools Act by adding the following paragraph to Ark. Code Ann. § 6-23-306 (6)(no racial discrimination) and (14)(student selection process):

> The charter may allow use of a weighted lottery in the student selection process when necessary to comply with Title VI of the Federal Civil Rights Act of 1964, Title IX of the Federal Education Amendments of 1972, the equal protection clause of the Fourteenth Amendment of the United States Constitution, ***a court order***, or a federal or state law requiring desegregation.

Ex. 20, Act 463 of 2001, § 1 (emphasis supplied). Act 463 of 2001 included the following emergency clause:

> It is found and determined by the General Assembly that current charter school enrollment requirements do not allow ***charter schools located in districts under court ordered desegregation*** to select students in a manner necessary for compliance with the court order; that desegregation efforts could be hampered; and this act is immediately necessary to facilitate compliance.

Ex. 20, Act 463 of 2001, § 1 (emphasis supplied).

52. Similarly, no governing federal law or regulation prevented the State Board from requiring Academics Plus to comply with the racial balance requirements of the Magnet Stipulation or Interdistrict Schools. ADE staff's evaluation of Academics Plus' application stated, "A weighted lottery may be admissible under [United States Department of Education] guidelines if the recruiting process does not result in a student population that is in line with the requirements of the Desegregation Court Order." **Ex. 21, ADE App. Eval. 2001-2002, p. 1**.

53. The State Board has twice renewed Academics Plus' charter: March 15, 2004 and April 9, 2007. Academics Plus' current charter authorizes it to serve grades K-12 with a maximum enrollment of 650 students through the 2011-2012 school year. **Ex. 22, SB Minutes Aug. 11, 2008, p. 4**. No desegregation impact analysis was done by the State Board before renewing Academics Plus' charter or before approving increases in Academics Plus' enrollment. And the State Board has not conducted any type of ongoing review of the impact of Academics Plus on the 1989 Settlement Agreement.

LISA Academy.

54. On January 12, 2004, the State Board approved a second open-enrollment charter school in Pulaski County. The LISA Foundation sought to open a secondary school (grades 6-8)

for 200 students to be known as LISA Academy beginning in the 2004-2005 school year. The LISA Foundation proposed adding a grade level each year until the school served grades 6 through 12 and up to 450 students. **Ex. 23, LISA Application 2004-2005, p. 3**. The proposed school was to be located in downtown Little Rock at Union Station, 1400 W. Markham Street. **Ex. 23, LISA Application 2004-2005, p. 2**. Because of its downtown location, the LISA Foundation projected the school's enrollment would be 61 percent black. **Ex. 24, SB Transcript 1/12/2004, p. 93**. LISA Academy stated it would not provide transportation to its students. **Ex. 23, LISA Application 2004-2005, p. 45**.

55. The application for LISA Academy included the following desegregation analysis:

> As an open-enrollment charter school, LISA Academy expects to draw (sic) majority of its students from throughout Pulaski County and few from the surrounding counties. LISA Academy will serve a diverse students (sic) population that is reflective of the Pulaski county (sic). LISA Academy will be in compliance with court orders and statutory obligation (sic) regarding desegregated public school policy and maintain a unitary system of desegregated public school (sic). Furthermore, LISA Academy will meet all other obligations in hiring faculty and staff, (sic) maintain diversity in other areas of the desegregation order. LISA Academy is also committed to abide (sic) all other federal and state civil rights laws.

Ex. 23, LISA Application 2004-2005, p. 48-49.

56. During the hearing on its application, the LISA Foundation promised to use a weighted lottery if oversubscribed to ensure desegregation compliance. **Ex. 24, SB Transcript 1/12/2004, p. 93**. This was not part of its application submitted to ADE, **Ex. 23, LISA Application 2004-2005, pp. 26-27**, although it did state it would use a weighted lottery in its response to ADE's evaluation of its application. **Ex. 25, LISA Response, p. 4**.

57. The State Board did not request an Attorney General's opinion on the impact of

LISA Academy on the 1989 Settlement Agreement.

58. ADE staff and legal counsel recommended that the State Board conditionally approve LISA Academy's charter subject to review of its April 15 enrollment. **Ex. 24, SB Transcript 1/12/2004, pp. 87 and 92**. State Board member Mary Jane Rebick moved to condition approval of LISA Academy's charter on preparation of a formal study of the desegregation impact, but her motion failed for lack of a second. **Ex. 26, SB Minutes 1/12/2004, p. 5**. State Board member Luke Gordy moved for unconditional approval stating, "I would rather see us move that we approve this charter with the thought in our minds that if it comes April 15th and it does negatively affect deseg, then we have every right to rescind the charter." **Ex. 24, SB Transcript 1/12/2004, p. 93**. Gordy's motion was seconded and passed by a vote of 5-3. **Ex. 26, SB Minutes 1/12/2004, p. 6**.

59. On April 12, 2004 (before the school opened), the State Board approved a request by the LISA Foundation to move the school from downtown Little Rock to a predominately white area in west Little Rock. Despite concerns being raised about the LISA Academy's ability to attract black students at the new location without providing transportation, the State Board approved the move. **Ex. 27, SB Minutes 4/12/2004, p. 6**.

60. LISA Academy's October 1, 2004 enrollment was 52 percent black. Not surprisingly given its west Little Rock location and the lack of transportation, LISA Academy's black enrollment dropped to 24 percent for 2005-2006 and has remained less than 30 percent through the current school year. **Ex. 15, Enrollment, pp. 4-9**. The LISA Foundation has admitted that the most common reason for students withdrawing from LISA Academy is the lack of transportation. **Ex. 28, SB Transcript, Nov. 5-6, 2007, p. 214**.

61. One reason cited by the State Board for approving LISA Academy was the fact that there were waiting lists for the Stipulation Magnets. **Ex. 24, SB Transcript 1/12/2004, pp. 95-96**. The State Board viewed the waiting lists for Stipulation Magnets as evidence of the need for LISA Academy. "I'm very interested in this school opening for [children on the Stipulation Magnet waiting lists]," one State Board member commented. **Ex. 24, SB Transcript 1/12/2004, p. 95-96**. In other words, the State Board approved LISA Academy, at least in part, for the express purpose of attracting students who would otherwise seek to attend a Stipulation Magnet.

62. The State Board failed to comprehend how the waiting lists for Stipulation Magnets work. The Stipulation Magnets must have an enrollment of between 50 and 55 percent black. This sometimes results in Stipulation Magnets having both empty seats and a waiting list. A Stipulation Magnet with 55 percent black enrollment may have empty seats with black students on the waiting list who may only be admitted along with a non-black student so that the racial balance percentage does not rise above 55 percent black. Historically, about 90 percent of the students on waiting lists for Stipulation Magnets are black. **Ex. 28, SB Transcript, Nov. 5-6, 2007, p. 301**. These black students may be denied a seat at a Magnet School as a result of non-black students electing to attend charter schools.

63. On April 9, 2007, the State Board renewed LISA Academy's charter for five years. **Ex. 29, SB Minutes, April 9, 2007, p. 29**. LISA Academy's current charter authorizes it to serve grades 6 through 12 with a maximum enrollment of 600 students through the 2011-2012 school year. **Ex. 30, LISA Charter 2007, ¶ 1**. No desegregation impact analysis was done by the State Board before renewing LISA Academy's charter or before approving increases in LISA Academy's enrollment. At the hearing on its renewal application, LISA Academy reported that

it had been oversubscribed and used a random lottery to select students. **Ex. 29, SB Minutes, April 9, 2007, p. 107**. Presumably, a weighted lottery could have been used to increase the percentage of black students attending LISA Academy to between 50 and 55 percent black, consistent with the Magnet Stipulation and Interdistrict Plan.

Dreamland Academy.

64. The third open-enrollment charter school in Pulaski County approved by the State Board was Dreamland Academy. Dreamland Academy proposed an elementary school (300 students, K-5) to be located in Little Rock targeting at-risk and special needs students. **Ex. 31, Dreamland Application 2007-2008, p. 2**. Dreamland Academy was unique in that it did not request any waivers from State law or ADE rules. **Ex. 31, Dreamland Application 2007-2008, p. 38**. Dreamland Academy also represented that it would provide transportation to students residing within a two-mile radius of the school. **Ex. 31, Dreamland Application 2007-2008, p. 34**. LRSD approved Dreamland Academy because of its target population, because it promised to provide transportation and because it did not request any waivers, and thus, would not have an unfair competitive advantage over LRSD schools.

65. Dreamland Academy opened for the 2007-2008 school year in a predominately black Little Rock neighborhood. Since opening, Dreamland Academy's enrollment has been over 90 percent black and over 90 percent economically disadvantaged students.

66. Upon information and belief, Dreamland Academy has not provided transportation as promised in its application, and thus, as required by its charter. Dreamland Academy's 2008-09 Annual Statistical Report compiled by ADE showed that Dreamland Academy spent only $1,780.00 for student transportation – only $5.40 per student.

LISA Academy North Little Rock.

67. The State Board approved three additional open-enrollment charter schools in Pulaski County to open beginning the 2008-2009 school year: LISA Academy North Little Rock ("LISA NLR"), Covenant Keepers and ESTEM. The State Board conducted hearings on these applications over the course of two days, November 5 and 6, 2007.

68. The State Board first considered the application for LISA NLR. The LISA Foundation proposed opening a school (300 students, K-8) and adding one grade (50 students) each year until K-12 with a total enrollment of 500. The LISA Foundation proposed locating the school in a former Best Buy store in a commercial area across Interstate 67/167 from North Little Rock's McCain Mall. **Ex. 32, LISA NLR Application, 2008-2009, p. 2**. Despite not being within walking distance of any residential area, LISA NLR stated it would not provide transportation to its students. **Ex. 32, LISA NLR Application, 2008-2009, p.36**. As to the school's desegregation impact, the application stated:

> The LISA Academy - North Little Rock will serve grades K through 12 grades (sic) having maximum 500 students. The potential students enrolling in LISA Academy - North Little Rock will come from all (sic) North Little Rock area. As an open-enrollment charter school, LISA Academy - North Little Rock expects to draw a majority of its students from throughout North Little Rock and few from surrounding cities such as Fayetteville (sic). LISA Academy - North Little Rock will serve a diverse students (sic) population that is reflective of the North Little Rock (sic). LISA Academy - North Little Rock will be in compliance with court orders and statutory obligation (sic) regarding desegregated public school policy and maintain a unitary system of desegregated public school (sic). Furthermore, LISA Academy - North Little Rock will meet all other obligations in hiring faculty and staff, (sic) maintain diversity in other areas of the desegregation order. LISA Academy - North Little Rock is also committed to abide (sic) all other federal and state civil rights laws.

Ex. 32, LISA NLR Application, 2008-2009, p. 44.

69. The LISA Foundation proposed using a weighted lottery to ensure desegregation

compliance stating, "Weighted lottery will be used if the number of minority student application (sic) is below the state requirements, in the case of higher overall demand than the school capacity." **Ex. 32, LISA NLR Application, 2008-2009, p. 27**. However, ADE's legal comments adopted by the State Board and incorporated into LISA NLR's charter indicated that LISA NLR could not use a weighted lottery. ADE's legal comments stated, "Ark. Code Ann. § 6-23-306 only provides for a weighted lottery when required to comply with a court order or Title VI of the Federal Civil Rights Act, etc. ***The application does not state what court order or federal law would require it to conduct a weighted lottery based on race in the initial enrollment process.***" **Ex. 33, ADE Legal Comments, ¶ 1** (emphasis supplied).

70. ADE legal counsel prepared for the State Board a "desegregation analysis" for LISA NLR. First, ADE noted the State Board's obligation under Ark. Code Ann. § 6-23-106 to carefully review the desegregation impact and the statute's prohibition on the State Board approving an open-enrollment charter school that negatively impacts desegregation. It then reported the 2006-2007 enrollment by race for LRSD, NLRSD and PCSSD. It concluded with the following "analysis" of the issues:

> As will be the case in any proposed charter school, the State Board must be cognizant that it may not approve any proposed charter school application with the purpose or intent to create racially segregated schools. As the Supreme Court noted in *Missouri v. Jenkins*, 515 U.S. 70, 115 (1995):
>
> > [I]n order to find unconstitutional segregation, we require that plaintiffs "prove all of the essential elements of de jure segregation -- that is, stated simply, a current condition of segregation resulting from intentional state action directed specifically to the [allegedly segregated] schools." *Keyes v. School Dist. No. 1*, 413 U.S. 189, 205-206 (1973) (emphasis added). "[T]he differentiating factor between de jure segregation and so-called de facto segregation . . . is purpose or intent to segregate." Id., at 208 (emphasis in original).

a.) De Facto Analysis

Obviously, there is no enrollment data for the applicant, so it is difficult to conclude that the application for the proposed charter school could be viewed as creating a segregated school.

b.) De Jure Segregative Intent Analysis

The Department is aware of pending desegregation orders affecting the Little Rock, North Little Rock and Pulaski County Special School Districts (*Little Rock School District, et al. v. Pulaski County Special School District, et al.*, Cause No. 4:82-cv-00866-WRW, In the United States District Court-Eastern District of Arkansas), so the State Board should satisfy itself that its action granting a charter to this applicant would not exacerbate a current condition of segregation which may be present (as evidenced by the court order) in the affected school districts.

However, should there be any objection to the proposed charter school, particularly any objection based upon an alleged segregative effect of the proposed charter school, the State Board should evaluate those objections thoroughly and carefully, and satisfy itself that there is a legitimate non-racially segregative intent or purpose for the establishment or creation of the LISA Academy.

Ex. 34, ADE Deseg. LISA NLR, p. 2.

71. ADE's desegregation analysis failed to comply with the requirements of Charter Schools Act, Ark. Code Ann. § 6-23-106. First, it identified the wrong standard advising the State Board that it "may not approve any proposed charter school application with the purpose or intent to create racially segregated schools." **Ex. 34, ADE Deseg. LISA NLR, p. 2**. Purpose or intent are irrelevant under the Charter Schools Act. It required the State Board to consider the "*impact*" on the 1989 Settlement Agreement -- regardless of the applicant's intent. *See* Ark. Code Ann. § 6-23-106(a) and (b). Second, the Charter Schools Act required the State Board to "measure the likely impact" of LISA NLR. *See* Ark. Code Ann. § 6-23-106(b). Instead, ADE simply noted that "there is no enrollment data for the applicant," even though it had been

previously warned by the AG that simply saying "we don't know . . . fail[ed] to adhere to the statutory standard of compliance." **Ex. 9, SB Transcript, 3/13/2000, p. 46**.

72. Representatives of LRSD, NLRSD and PCSSD appeared before the State Board and testified LISA NLR would have a negative impact on desegregation in Pulaski County. The Districts told the State Board:

a. That the additional choice options presented by open-enrollment charter schools were making it more difficult for PCSSD to comply with the racial balance requirements at its neighborhood schools;

b. That the proposed location of the school, along with the lack of transportation, will result in LISA NLR's enrollment being less black, more affluent and higher performing than the Districts' neighborhood schools and the Stipulation Magnets;

c. That the LISA Foundation had a poor record of recruiting black and low-income students to LISA Academy;

d. That the lack of transportation disproportionately impacts black students;

e. That LISA Academy and Academics Plus were attracting students, in particular non-black students, that would otherwise apply to Stipulation Magnets resulting in open seats at some Stipulation Magnets because of the lack of non-black students;

f. That most students leaving the Districts to attend Academics Plus and LISA Academy were already high-performing students;

g. That LISA NLR would not offer anything not already available at traditional public schools in Pulaski County; and,

h. That students performing poorly at LISA Academy and Academics Plus were being permitted to withdraw during the school year and to return to traditional public schools. **Ex. 28, SB Transcript, Nov. 5-6, 2007, pp. 86-92 and 208-214**.

73. During the State Board hearing, the LISA Foundation stated that it would be willing to comply with the racial balance requirements in the Magnet Stipulation. **Ex. 28, SB Transcript, Nov. 5-6, 2007, p. 196**. A State Board member asked ADE legal counsel whether the State Board could impose such a requirement. ADE legal counsel advised the State Board that they could not stating:

> [A]s I've pointed out repeatedly, the ***state law requires*** that they cannot intentionally segregate with regards to any component or aspect of race, gender or anything like that. Now, they can target and recruit and take actions in that area and, as they I've indicated with their previous answers, they're doing that and seeking to do that. Beyond that, ***they are not able to issue a weighted lottery unless they are directed to do so under Title 6, Title 9 or by way of a court order***, nor can they even do a random anonymous lottery until they have more applicants than they have slots available. They are simply required by law to be race neutral in the opening of the doors and which students they will allow to attend their ***school district.***

Ex. 28, SB Transcript, Nov. 5-6, 2007, p. 197 (emphasis supplied).

74. The State Board accepted the advice of counsel and unconditionally approved LISA NLR for five years through the 2011-2012 school year. LISA NLR opened for the 2008-2009 school year. For 2008-2009, LISA NLR was 35 percent black and 26 percent economically disadvantaged students; for 2009-2010, LISA NLR is 33 percent black and 26 percent economically disadvantaged students. **Ex. 15, Enrollment, pp. 1-9**. For comparison, for 2009-2010 the NLRSD is 59 percent black and 61 percent economically disadvantaged students. **Ex. 15, Enrollment, p. 9**.

Covenant Keepers.

75. The State Board next considered the application of Covenant Keepers. Covenant Keepers proposed opening the secondary school (180 students, grades 6-8) during the 2008-2009 school year and adding one grade each year serving grades 6 through 12 with a total enrollment of 430. **Ex. 35, CK Application, 2008-2009, p. 4**.[9] Covenant Keepers proposed locating the school in predominately black southwest Little Rock. With regard to its proposed enrollment, Covenant Keepers stated, "CK will admit students almost exclusively through a lottery system weighted to maintain a racial balance in line with the Little Rock School District's terms." **Ex. 35, CK Application, 2008-2009, p. 26**. With regard to transportation of students, Covenant Keepers incorrectly stated, "The state does not provide transportation funding to charter schools." **Ex. 35, CK Application, 2008-2009, p. 33**.

76. As to the school's desegregation impact, Covenant Keepers' application stated:

> As an open-enrollment charter school, Covenant Keepers College Preparatory Charter School expects to draw students from throughout Pulaski County and a small portion of Saline County. The founders of Covenant Keepers College Prep envision a school that will serve a diverse student population that is reflective of this large geographic area from which students come. We firmly believe that the charter school will not negatively impact the racial balance of Little Rock or Pulaski County Special School and North Little Rock School Districts. Additionally, CK will meet all other obligations in hiring faculty and staff, maintaining diversity on the Board of Trustees of City of Fire Community Development, Inc. (CFCD) and in any other areas of the desegregation order. As a public charter school, it will abide by all other federal and state civil rights laws.

Ex. 35, CK Application, 2008-2009, p. 4. Covenant Keepers also asserted that the small number of students that would be enrolled at the school would not have a material impact on desegregation in Pulaski County. **Ex. 35, CK Application, 2008-2009, p. 4**.

---

[9]During the State Board hearing, Covenant Keepers indicated they would be adding 60 students with the addition of each new grade level. (2007-11-05-06, Tr. 248)

77. ADE provided the State Board the same "desegregation analysis" for Covenant Keepers that it did for LISA NLR. ***Compare* Ex. 34, ADE Deseg. LISA NLR and Ex. 36, ADE Deseg. CK**. As discussed above, ADE's "desegregation analysis" failed to comply with the requirements of Ark. Code Ann. § 6-23-106.

78. LRSD's Board of Directors did not approve Covenant Keepers' application, and LRSD representatives appeared before the State Board to oppose the application. LRSD first incorporated the reasons given for objecting to LISA NLR. **Ex. 28, SB Transcript, Nov. 5-6, 2007, p. 224**. It additionally argued:

a. That Covenant Keepers' proposed curriculum was the same as a Stipulation Magnet (Parkview) that was not currently full;

b. That Covenant Keepers' enrollment will not be diverse; and,

c. That the loss of enrollment to charter schools and the concomitant loss of State education funding threatened the survival of LRSD.

Ex. 28, SB Transcript, Nov. 5-6, 2007, pp. 224-29.

79. The State Board tabled Covenant Keepers' application until its December meeting to allow it to provide additional documentation related to its facility. It was tabled again in December for the same reason. The State Board unconditionally approved Covenant Keepers at its January 15, 2008 meeting. **Ex. 37, SB Minutes 1/15/2008, p. 3**.

80. Covenant Keepers opened for the 2008-2009 school year in a predominately black Little Rock neighborhood. Since opening, Covenant Keeper's enrollment has been over 80 percent black and over 80 percent economically disadvantaged students (84 percent in both categories in 2009-2010). **Ex. 15, Enrollment, pp. 8-9**.

ESTEM.

81. The State Board also approved ESTEM to open for the 2008-2009 school year. ESTEM submitted three separate applications for an elementary school (grades K-4, 360 students), middle school (grades 5-8, 396 students) and high school (grades 9-12, 400 students) all to be located in the former Arkansas Gazette building in downtown Little Rock. ESTEM proposed opening the high school with 100 students in grade 9 in 2008-2009 and adding a grade level (100 students) each year until it serves grades 9 through 12. **Ex. 38, ESTEM Elem. Application, p. 1; Ex. 39, ESTEM Middle Application, p. 1**; **Ex. 40, ESTEM High Application, p. 1.** All the applications were identical with the exception of grade level specifics, and the State Board conducted a single hearing on the three applications.

82. With regard to enrollment, the ESTEM applications stated, "Students will be admitted exclusively through a lottery system weighted to maintain a racial balance that includes between 20 and 41 % minority enrollment in line with Pulaski County Special School District's desegregation settlement terms." **Ex. 40, ESTEM High Application, p. 24**. ADE's evaluations of the applications described this as a strength stating, "A system for guaranteeing an acceptable racial balance is included." **Ex. 41, ADE App. Eval. ESTEM High, p. 5**. Even so, ADE's legal comments indicated that ESTEM was not eligible to use a weighted lottery stating:

> Ark. Code Ann. § 6-23-306 only provides for a weighted lottery when required to comply with a court order or Title VI of the Federal Civil Rights Act, etc. The applicant will have to show that its proposed use of a weighted lottery falls within § 6-23-306's provisions. Additionally, the proposed charter facility location lies within the boundaries of the Little Rock School District and not the Pulaski County Special School District.

Ex. 41, ADE App. Eval. ESTEM High, p. 5.

83. With regard to transportation, ESTEM stated, "The facility is on the Central Arkansas Transit route and is located within less than half a mile of the entry and exit facility for all bus routes in Pulaski County. Funds have been budgeted to buy each student a monthly pass." **Ex. 40, ESTEM High Application, p. 28**.

84. ESTEM's desegregation analysis was a single sentence: "The school's small number of students will have no statistically significant impact of (sic) racial balances at any of the three Pulaski County schools." **Ex. 40, ESTEM High Application, p. 30**.

85. ADE provided the State Board the same "desegregation analysis" for ESTEM that it did for LISA NLR and Covenant Keepers. ***Compare* Ex. 34, ADE Deseg. LISA NLR; Ex. 36, ADE Deseg. CK; and Ex. 42, ADE Deseg. ESTEM**. As discussed above, ADE's "desegregation analysis" failed to comply with the requirements of Ark. Code Ann. § 6-23-106.

86. LRSD did not approve ESTEM, and representatives of LRSD and NLRSD appeared at the State Board hearing to speak against the applications. They testified:

a. That the ESTEM schools will not serve the purpose of the Charter Schools Act of expanded learning opportunities for low-achieving students;

b. That the ESTEM schools' advanced placement curriculum is already available within LRSD, NLRSD and PCSSD; and,

c. That the ESTEM schools are designed to attract students who are already high achieving but want to be educated separately from low-achieving students. **Ex. 28, SB Transcript, Nov. 5-6, 2007, pp. 273-75**.

87. In response, ESTEM claimed that it expected its student population to mirror that of LRSD meaning 61 percent of its students would be economically disadvantaged. **Ex. 28, SB**

Transcript, Nov. 5-6, 2007, p. 299. ESTEM cited the waiting list for Stipulation Magnets as evidence of the need for the schools and noted that 90 percent of students on the waiting list were black. **Ex. 28, SB Transcript, Nov. 5-6, 2007, pp. 273-75**. The State Board then questioned LRSD about these facts, and LRSD explained that the waiting list was 90 percent black because there were not enough non-black students applying for Stipulation Magnets. **Ex. 28, SB Transcript, Nov. 5-6, 2007, pp. 301-302**.

88. The State Board tabled the ESTEM applications because of concerns about its facility lease. The State Board approved the ESTEM applications on a single vote at its December 10, 2007 meeting. **Ex. 43, SB Transcript, Dec. 10, 2007, p. 80**.

89. The State Board approved ESTEM in violation of the Arkansas Charter Schools Act prohibition on multiple charter schools operating on the same campus. Ark. Code Ann. § 6-23-304(c)(2) provides: "An open-enrollment public charter applicant's school campus shall be limited to a single open-enrollment public charter school per charter . . . ." All three ESTEM charter schools are located on the same campus.

90. For 2008-2009, ESTEM was 54 percent black and 39 percent economically disadvantaged students; for 2009-2010, ESTEM is 48 percent black and 32 percent economically disadvantaged students. **Ex. 15, Enrollment, pp. 8-9**. The decline in black and economically disadvantaged enrollment is likely due to the lack of transportation which disproportionately impacts poor, black students. A similar decline occurred at LISA Academy and Academics Plus where the transportation burden caused poor, black students to withdraw and return to traditional public schools that provide transportation. **Ex. 15, Enrollment, pp. 1-9**. For comparison, for

2009-2010 LRSD is 68 percent black and 70 percent economically disadvantaged students. **Ex. 15, Enrollment, pp. 8-9**.

91. On February 19, 2010, the State Board approved ESTEM's request to expand enrollment at its elementary school (from 360 to 495), middle school (from 396 to 500) and high school (from 400 to 500). Neither ADE, the State Board or ESTEM prepared a desegregation analysis related to the expansion request. LRSD objected to the expansion as a violation of the 1989 Settlement Agreement and an impediment to improving African-American achievement by further segregating African-American students in high poverty, neighborhood schools. **Ex. 44, LRSD letter to Kimbrell opposing E-stem, Feb. 16, 2010**. Although LRSD submitted its objection to the UCPC, legal counsel for ADE and Arkansas Commissioner of Education Tom Kimbrell, LRSD's objection was not provided to State Board members for consideration. The State Board approved the increases in enrollment for the middle school and high school. The State Board declined to increase the enrollment at the elementary school because the elementary school was placed on "alert" status after its African-American students failed to make adequate yearly progress in literacy.

Jacksonville Lighthouse.

92. On November 3 and 4, 2008, the State Board approved two additional open-enrollment charter schools to open in Pulaski County for the 2009-2010 school year: Jacksonville Lighthouse ("Lighthouse") and Little Rock Preparatory Academy ("Little Rock Prep").

93. Lighthouse Academies, a national charter school organization, proposed a K-12 school for 650 students to be located in downtown Jacksonville. **Ex. 45, Lighthouse**

Application, p. iii. The school would open for the 2009-2010 school year for grades K-6 and expand one grade level each year until K-12. **Ex. 45, Lighthouse Application, pp. iii-v**. Lighthouse targets students who are two to three years behind academically and helps those students reach proficiency by the 8th grade. **Ex. 45, Lighthouse Application, p. 6**.

94. Lighthouse's application made the following representation regarding transportation:

> LHA has significant experience with all phases of the RFP and contracting processes. LHA will lease one or more buses and periodically employ a driver(s) for the purposes of providing transportation for field study. The school may decide to provide daily transportation to and from school in the future. We will, at all times, comply with any requirements for transportation written into our students' IEPs.

Ex. 45, Lighthouse Application, p. 30.

95. With regard to its desegregation impact, Lighthouse stated:

> JLCS is a public, open-enrollment charter school created to bring excellent educational opportunities to all children. We will adhere to all applicable federal laws and all civil rights laws. We are an open-enrollment school that we may draw students from anywhere in the state. At full enrollment the school will reach 650 students over a seven year period. The impact appears to be very small.

Ex. 45, Lighthouse Application, p. 37.

96. ADE provided the State Board the same "desegregation analysis" for Lighthouse that it did for LISA NLR, Covenant Keepers and ESTEM. ***Compare* Ex. 34, ADE Deseg. LISA NLR; Ex. 36, ADE Deseg. CK; Ex. 42, ADE Deseg. ESTEM; and Ex. 46, ADE Deseg.**

Lighthouse.[10] As discussed above, ADE's "desegregation analysis" failed to comply with the requirements of Ark. Code Ann. § 6-23-106.

97. On September 30, 2008, LRSD submitted a letter to ADE requesting that no additional open-enrollment charters schools be approved in Pulaski County until the State Board complied with Ark. Code Ann. § 6-23-106 and conducted a meaningful review of their impact on the 1989 Settlement Agreement. **Ex. 47, LRSD Letter, Sept. 30, 2008**. Neither ADE nor the State Board responded to LRSD's letter.

98. The State Board conducted a hearing on Lighthouse's application on November 3, 2008. A PCSSD representative spoke against the application stating that the resulting loss of State funding would jeopardize PCSSD's efforts to obtain unitary status. She noted that three of six elementary schools in the Jacksonville area were already out of compliance with PCSSD's racial balance requirements, and the proposed admission process had no provision to prevent additional schools from moving out of compliance. **Ex. 48, SB Transcript, pp. 113 and 127**. She also noted that four of six elementary schools in the Jacksonville area are "doing great" academically. **Ex. 48, SB Transcript, p. 113**.

99. A representative of Lighthouse responded to PCSSD's concerns arguing that the State Board should not "hypothesize" that the school would not be racially balanced. **Ex. 48, SB Transcript, pp. 129-130**.

---

[10]ADE's desegregation analysis was the same, word for word, as its desegregation analysis done for the last group of charters with the exception of the "De Jure Segregative Intent Analysis." The following sentence was added to that paragraph: "However, the Little Rock School District has been declared fully unitary by the United States District Court; that decision is currently on appeal to the 8th Circuit Court of Appeals." **Ex. 46, ADE Deseg. Lighthouse, p. 2**.

100. ADE legal counsel, Jeremy Lasiter, was asked to comment on the issue of desegregation, and he provided the following guidance:

> Perhaps the biggest problem -- I think it's already been identified by a few members of the Board, and even some of the folks that have testified before you today -- ***is that no one is clairvoyant. So we're not going to know what the makeup of these schools are going to be.*** That's why, if you look at the desegregation analysis that we put together for you, we point out that ***the thing that you need to primarily consider is whether the application presents a legitimate, non-racially segregated intent or purpose.*** Because we just simply can't determine at this point what the numbers are going to be. With this analysis, we try very hard not to take sides one way or the other. We want to instead provide both sides with an opportunity to give you the best shot as far as the really hard numbers on what may or may not happen in terms of any desegregation impact. I hope that answers your question. It's kind of vague on purpose but –
>
> DR. WILLIAMS: Yeah . That's good enough. Thank you.
>
> CHAIRMAN LAWSON: Well, Mr. Lasiter, just a little follow-up though, if I could. The issue really is one of intent. Would that be fair?
>
> MR. LASITER: That's right. Because the other part of the analysis at this point is really speculative, because we can't fill in those blanks. (SB 2008-11-03, Tr. 140-41)
>
> * * *
>
> MR. COOPER: Well, if it's intent, let's just make it clear. Is it Lighthouse's intent to do anything to upset the racial balance in Jacksonville or the Jacksonville area?
>
> MR. RONIN: Absolutely not. (SB 2008-11-03, Tr. 142)

101. At the conclusion of the hearing, the State Board unanimously voted to unconditionally approve a five year charter for Lighthouse. **Ex. 48, SB Transcript, pp. 144-45**.

Little Rock Prep.

102. Collegiate Choices, Inc. applied to open Little Rock Prep for the 2009-2010 school year. It planned to open the school with 108 fifth graders and to add a grade level each year until serving grades five through eight and 430 students. **Ex. 49, LR Prep Application, p. 27**. The application stated that Little Rock Prep would target low-income communities in central/downtown Little Rock. **Ex. 49, LR Prep Application, p. 3**. Because these communities are primarily black, Little Rock Prep expected its enrollment to be at least 75 percent black. **Ex. 49, LR Prep Application, p. 39**.

103. As to transportation, Little Rock Prep's application stated:

> Little Rock Prep does not plan to provide transportation to and from school. However, if the school demonstrates a need to provide transportation for its students, the Board of Trustees will make an annual decision regarding transportation.

Ex. 49, LR Prep Application, p. 34.

104. As to its desegregation impact, Little Rock Prep's application stated:

> Little Rock Preparatory Academy is currently planning to pull students from the following school districts: Little Rock, Pulaski County Special, and North Little Rock. Out of the total number of fourth grade students who attend school in those districts, Little Rock Preparatory Academy anticipates having a student population of over 75% African American. Therefore, Little Rock Prep will not impact the public school districts efforts to comply with court orders and statutory obligations to create and maintain a unitary system of desegregated public schools.

Ex. 49, LR Prep Application, p. 39.

105. On November 4, 2008 the State Board conducted a hearing on the application for Little Rock Prep. A representative of LRSD appeared and spoke against the application stating:

a. That open-enrollment charter schools in Pulaski County are racially identifiable as "white" (Academics Plus, 21 percent black) and "black" schools (Dreamland Academy, 93 percent black);

b. That the issue is not the "intent" of the applicant, but the impact of the school on the State's and Districts' ability to comply with the 1989 Settlement Agreement;

c. That the 1989 Settlement Agreement contemplated that students now attending charter schools would be available for M-to-M transfers and other transfers to alleviate racial disparities in the Districts;

d. That the 1989 Settlement Agreement contemplated that Districts would have the students and concomitant funding necessary to discharge their desegregation obligations;

e. That the State cannot use a State law to shield it from its Constitutional obligations;

f. That the State should have obtained Court approval for open-enrollment charter schools in Pulaski County;

g. That LRSD's unitary status has no impact on the Districts' or the State's obligation to comply with the 1989 Settlement Agreement;

h. That LRSD's analysis of students leaving to attend charter schools showed that those students, on average, are higher achieving and less likely to be eligible for free or reduced-price meals than the students remaining in LRSD neighborhood schools;

i. That high poverty schools are much less likely to be successful than economically desegregated schools;

j. That its difficult for LRSD to offset the loss of State funding because a small number of students leave many different schools;

k. That, in addition to regular State funding, LRSD loses incentive payments made pursuant to the 1989 Settlement Agreement for M-to-M transfers and Stipulation Magnet students in the same way prohibited by the Court in its decisions on loss funding, workers' compensation, teacher retirement, health insurance and the Jacksonville splinter district;

l. That the State Board has failed to meaningfully evaluate charter schools to determine whether they are providing greater student academic growth than traditional public schools; and,

m. That the State Board should impose conditions on open-enrollment charter school in Pulaski County to ensure no negative impact on desegregation. **Ex. 50, SB Transcript, pp. 3-19 and 43**.

106. LRSD summarized the impact of charter schools as follows, "It's hurting our desegregation ability in both magnet schools and M-to-M schools. We're getting greater and greater concentrations of low-achieving students in the Little Rock School District, with greater concentrations of poverty and less money to educate those kids. That's the impact." **Ex. 50, SB Transcript, p. 17**.

107. In response, Little Rock Prep stated it was willing to agree to use a weighted lottery to ensure compliance with the 1989 Settlement Agreement. **Ex. 50, SB Transcript, p. 55**. However, ADE legal counsel again advised the State Board that state law prohibited discrimination in the admission process, and thus, the use of a weighted lottery. **Ex. 50, SB Transcript, p. 46**.

108. The State Board voted to approve a five-year charter for Little Rock Prep without any conditions to ensure compliance with the 1989 Settlement Agreement. **Ex. 50, SB Transcript, p. 89**. For 2009-2010, Little Rock Prep was 91 percent black and 86 percent economically disadvantaged students. Little Rock Prep reported that only 60 of 108 students enrolled in the school actually showed up. **Ex. 51, ADG 8/9/2009, "New Charter Schools Battles Setbacks."** Little Rock Prep founder Latoya Goree investigated the reason these students did not show up, and all those that she could contact indicated it was due to the lack of transportation.

Little Rock Urban College Preparatory Charter School for Young Men.

109. Little Rock Urban Prep, Inc. applied to open Little Rock Urban College Preparatory Charter School for Young Men ("UCPC") for the 2010-2011 school year. The application stated the school would be located in the building of a former truck dealership at 4601 S. University in LRSD. It proposed creating an all boys school for grades K-8 with an enrollment of 696 students. Little Rock Urban Prep, Inc. promised to "focus recruitment efforts toward high poverty students" and anticipated that "85% of UCPC's enrollment will be minority." **Ex. 52, UCPC Application, pp. 15 and 32.**

110. With regard to transportation, the UCPC application stated, "Although there is no requirement for charter schools to provide transportation, Little Rock Urban Collegiate Public Charter School for Young Men is on the Central Arkansas Transit bus route. Funds have been budgeted to buy a monthly bus pass for Free/Reduce lunch students only that chooses (sic) to use the public bus system to get to and from school." **Ex. 52, UCPC Application, p. 28**.

111. The UCPC application contained the following desegregation analysis: "[S]ince there is no enrollment data for the applicant UCPC charter school until the actual date of student enrollment, it is impossible to conduct a true *de facto* analysis at this time. However, given low number of students to be enrolled and given the fact that the demographic populations generally most at risk of high poverty is the minority populations. (sic) We do not foresee a segregated (sic) impact on LRSD or other school districts." **Ex. 52, UCPC Application, p. 32**.

112. By letter dated September 29, 2009, LRSD submitted written findings to the State Board objecting to the unconditional approval of UCPC because of the potential negative impact on desegregation. To minimize the negative impact of UCPC, LRSD suggested the following conditions be placed on UCPC's charter:

a. Student recruitment efforts must be directed toward low-achieving students;

b. During the student registration process, the school must provide LRSD, NLRSD and PCSSD with weekly updates of their students who have applied for admission to the school;

c. At least 80 percent of new enrollees each year must qualify for free or reduced-price meals and/or be performing at the basic level or below on the Arkansas Benchmark Exam;

d. The school must require parents to sign a "contract" agreeing that the student remain at the school for the entire school year;

e. The school must provide counseling services as required by ADE Accreditation Standards, § 16.01 Guidance and Counseling;

f. The school must provide an alternative learning environment for suspended/expelled students, or alternatively, the school must reach an agreement with LRSD to provide an alternative learning environment for suspended/expelled students;

g. Transportation must be provided to students who reside within LRSD and who qualify for free or reduced-meals;[11]

h. Transportation must be provided as required by the IEP of special education students; and,

i. The school must hire a CEO/School Leader who has a proven record of success in a high-poverty school or who has successfully completed a urban charter school training program such as a Building Excellent Schools Fellowship. **Ex. 53, LRSD Findings UCPC.**

113. The State Board hearing on UCPC began on November 9, 2009. The State Board postponed taking action on the application to allow the applicant, ADE legal counsel and LRSD to submit legal briefs. **Ex. 54, SB Transcript, Nov. 9, 2009, p. 171.** In its brief, LRSD argued that its proposed conditions were necessary to ensure that UCPC actually serve its purported target population of high-poverty students; that UCPC hired a CEO/School leader with a reasonable chance of success in a high-poverty educational setting; that UCPC would not return its most difficult students to LRSD; and, that economically disadvantaged and special education

[11]Federal regulations specifically allow a students' free and reduced-price meal status to be used for other programs including "free or reduced-price bus transportation" with parental consent. *See* Disclosure of Children's Free and Reduced Price Meals and Free Milk Eligibility Information in the Child Nutrition Programs, 72 Fed. Reg. 10885, 10889 (2007) (codified at 7 C.F.R. § 226.23).

students were not denied an opportunity to attend the school because of a lack of transportation. **Ex. 55, LRSD Submission re UCPC.**

114. The State Board resumed the hearing on UCPC on December 14, 2009. The State Board voted to approve UCPC's charter with one of the conditions suggested by LRSD – that at least 80 percent of new enrollees at UCPC qualify for free or reduced-price meals or be performing at basic or below on the Benchmark exam. **Ex. 56, SB Transcript, Dec. 14, 2009, pp. 74, 76-78.** Notably, this was less than the 85 percent high-poverty students UCPC stated in its application that it anticipated serving, and as discussed above, the other "no excuses"[12] open-enrollment charter schools located in LRSD (Dreamland Academy, Covenant Keepers and Little Rock Prep) easily satisfied this criteria. **Ex. 15, Enrollment, pp. 7-9.** Even so, UCPC suggested it might take legal action to overturn the State Board's imposition of this enrollment criteria.

115. At the request of Commissioner Kimbrell, the State Board reconsidered the condition at its January 19, 2010 meeting. Commissioner Kimbrell first cited "practical problems" in implementing the condition, **Ex. 57, SB Transcript, Jan. 19, 2010, p. 4**, although he never acknowledged that the other "no excuses" charter schools had no problem meeting the criteria. **Ex. 15, Enrollment, pp. 7-9.** LRSD was not given an opportunity to address the State Board and provide them with this information. More importantly, Commissioner Kimbrell

[12]"No excuses" is a phrase commonly used to describe schools that seek to improve the academic achievement of economically disadvantaged students in a high-poverty educational setting. *See, e.g.,* SAMUEL CASEY CARTER, "No Excuses: Lessons from 21 High-Performing High Poverty Schools," (Heritage Foundation 2000).

advised the State Board that it was "not in the best interest of children" to intentionally create a high-poverty school. **Ex. 57, SB Transcript, Jan. 19, 2010, p. 4**. He stated:

> But from a practical side and from a practitioner's side, let me tell you that putting these two conditions[13] upon any school, whether it's a traditional public school, and making sure that the makeup of the school has not only poor children but children that are poor-performing as a large majority -- although a school may set itself as a charter to educate poor children, ***we can't negate the fact that in order to do a successful job of educating poor children we also have to have a critical mass of poor high-performing children.***

Ex. 57, SB Transcript, Jan. 19, 2010, p. 5. Commissioner Kimbrell noted that a high-poverty school environment "guarantees that the school will remain a school listed on School Improvement for not making AYP [Adequate Yearly Progress under the State's accountability system]." **Ex. 57, SB Transcript, Jan. 19, 2010, p. 8**. He further noted that high-poverty schools have a difficult time hiring highly qualified staff. **Ex. 57, SB Transcript, Jan. 19, 2010, p. 9**. Commissioner Kimbrell concluded, "From a practical and professional perspective, it is my opinion that putting these two conditions on this charter school will not lead to anybody's success." **Ex. 57, SB Transcript, Jan. 19, 2010, p. 9**.

116. As noted above, LRSD suggested the enrollment criteria to ensure that UCPC actually serve its purported target population of high-poverty students and did not follow the course of Academics Plus and LISA Academy and become a "magnet" charter – draining LRSD neighborhood schools of "a critical mass of poor high-performing children." State Board member Dr. Ben Mays acknowledged this problem stating:

---

[13]Commissioner Kimbrell discussed "two conditions" even though LRSD's proposal adopted by the State Board required "new enrollees" to UCPC to meet only one of the two criteria. **Ex. 53, LRSD Findings UCPC., p. 4**.

> Well, we just have this history of schools -- charter school applicants coming before us with a proposal for one set of demographic targets and then, when it's all said and done, if they get the charter and they're going down the road, the demographic is totally different from what they were chartered to do. And we've done a poor job of policing that . . . .

Ex. 57, SB Transcript, Jan. 19, 2010, p. 15-16. Dr. Mays further acknowledged that traditional public schools also need a "critical mass of poor high-performing children." He stated:

> DR. MAYS: And my primary reason for saying this is your point about the critical mass of better students to serve as inspiration for students that need some inspiration. But that goes both ways. You know, if the charter schools siphon off the students that inspire their fellows in the public schools, in the traditional public schools, then you leave a void there too. So we've got to make sure that we keep a balance in both.
>
> COMMISSIONER KIMBRELL: Yes, sir. I agree.

Ex. 57, SB Transcript, Jan. 19, 2010, p. 17.

117. State Board member Alice Mahony also noted the lack of monitoring and accountability. She stated:

> MS. MAHONY: Part of that contract that the charter schools sign is an annual report to the State board members. The past two years the only annual report that we've gotten is from KIPP Schools. We've not gotten another annual report.
>
> COMMISSIONER KIMBRELL: You are exactly correct and that is the Department's responsibility to insure those reports are done and submitted to you, and they have not been doing that.

Ex. 57, SB Transcript, Jan. 19, 2010, p. 13. Commissioner Kimbrell recognized ADE's complete failure to monitor charter schools and hold them accountable and proposed a "charter school review council" to do just that. **Ex. 57, SB Transcript, Jan. 19, 2010, pp. 9-10**. Following Commissioner Kimbrell's assurance that UCPC would be held accountable for serving its target population of high-poverty students, the State Board unanimously voted to

remove the enrollment criteria adopted at the December 14, 2009 meeting. **Ex. 57, SB Transcript, Jan. 19, 2010, pp. 16, 18 and 20**.

118. On March 10, 2010, the State Board considered a request by UCPC to move from 4601 S. University, 72204, to 6711 W. Markham, 72205. LRSD objected to the move because UCPC would be moving away from the very students it promised to serve. Given the experience of Academics Plus, LISA Academy and Little Rock Prep, UCPC's target population, high-poverty students living in the 72204 and 72209 area codes will be forced to abandon the school because of the lack of transportation. Despite LRSD's objection, the State Board approved the move by a vote of 4-2.

119. In summary, eight[14] open-enrollment public charter schools currently operate in Pulaski County, and one additional open-enrollment charter school will open in the 2010-2011 school year. In 2009-2010, open-enrollment charter schools in Pulaski County enrolled 3179 students. **Ex. 15, Enrollment, p. 9**. In 2010-2011, open-enrollment charter schools will be authorized to enroll 4726 students. Even if no additional open-enrollment charter schools are approved, that number will increase in 2012-2013 to 5442 – 10 percent of all students attending public schools in Pulaski County. **Ex. 58, Charters' Authorized Enrollment.**

[14]This number counts the three ESTEM charters as one charter school and does not count the Arkansas Virtual Academy. Upon information and belief, the Arkansas Virtual Academy is an open-enrollment public charter school that serves students throughout Arkansas via the internet. The address for this school is in Little Rock, but the LRSD is not including it among the open-enrollment public charter school operating in Pulaski County.

C. Impact of Open-Enrollment Charter Schools on Desegregation.

1. Impact on Racial Balance

120. The State Board has imposed no enrollment criteria on open-enrollment public charter schools in Pulaski County designed to ensure compliance with the 1989 Settlement Agreement, the Interdistrict Plan, the intradistrict desegregation plan of PCSSD, orders of this Court and orders of the Eighth Circuit. Despite express statutory authority to consider race when necessary to comply with desegregation orders (Ark. Code Ann. § 6-23-306(6)(A) and (14)(C)), the State Board has refused to exercise this authority. As a result, open-enrollment charter schools in Pulaski County are some of the most racially and economically segregated schools in Pulaski County. **Ex. 15, Enrollment, p. 9**. The "no excuses" charters are all racially identifiable "black" schools; the "magnet" charters are middle-class, "white" schools. **Ex. 15, Enrollment, p. 9**.

a. Impact of "No Excuses" Charter Schools

121. The "no excuses" charter schools within the boundaries of LRSD (Dreamland Academy, Covenant Keepers and Little Rock Prep) are racially identifiable black schools -- 91, 84 and 91 percent black, respectively. **Ex. 15, Enrollment, p. 9**. More importantly, the "no excuses" charter schools in LRSD are all high-poverty schools – 92, 84 and 86 percent economically disadvantaged students, respectively. **Ex. 15, Enrollment, p. 9**. As Commissioner Kimbrell explained, high-poverty schools are not "in the best interest of children." **Ex. 57, SB Transcript, Jan. 19, 2010, p. 4**. High-poverty schools typically lack highly-qualified teachers and principals, engaged parents and "a critical mass" of high-achieving students. **Ex. 57, SB Transcript, Jan. 19, 2010, pp. 5 and 9**); **Ex. 59, Kahlenberg,**

Turnaround Schools, p. 19. "Mountains of research suggest that the reason high-poverty schools fail so often is that economic segregation drives failure: it congregates the children with the smallest dreams, the parents who are the most pressed, and burnt out teachers who often cannot get hired elsewhere." **Ex. 59, Kahlenberg, Turnaround Schools, p. 19.**

122. Mountains of research also suggest that economically disadvantaged children can become high-achieving students. As Century Foundation Senior Fellow Richard D. Kahlenberg explains:

> In discussing the difficulties of making high-poverty schools work, it is important to draw a distinction between the problems associated with concentrations of school poverty and beliefs about the ability of poor children to learn. Many people confuse the first with the second. ***Evidence suggests that children from all socioeconomic groups can learn to high levels if given the right environment.*** High-poverty schools, however, do not normally provide the positive learning environment that children need and deserve.

Ex. 59, Kahlenberg, Turnaround Schools, p. 5 (emphasis supplied). It is true that talented, well-trained individuals have created positive learning environments despite a high-poverty student population. But this is by far the exception rather than the rule. As Kahlenberg has observed:

> Successful high-poverty public schools that beat the odds paint a heartening story that often attracts considerable media attention. In 2000, the conservative Heritage Foundation published a report, entitled *No Excuses*, meant to show that high-poverty schools can work well. The author proudly declared that he "found not one or two [but] twenty-one high-poverty high performing schools." Unfortunately, these twenty-one schools were dwarfed by the seven thousand high-poverty schools identified by the U.S. Department of Education as low performing.

Ex. 59, Kahlenberg, Turnaround Schools, p. 13. Moreover, the reported success of KIPP and other highly-touted "no excuses" charter schools "rely on a model—self-selected students, high rates of attrition, generous funding from philanthropists, and super-human efforts by young

teachers without families—that is not scalable generally to high-poverty schools." **Ex. 59, Kahlenberg, Turnaround Schools, p. 18**.

123. The "no excuses" charter schools within the boundaries of LRSD for which data is available have not been able to replicate KIPP's success – despite getting only self-selected students whose parents/guardians have the resources to provide transportation. As contemplated by Commissioner Kimbrell, both Dreamland Academy and Covenant Keepers have been unable to make Adequate Yearly Progress ("AYP") toward proficiency as required by the State's accountability system. **Ex. 60, ADE AYP Report, 2008-2009, p. 1**. The State's accountability system also produces a "gain index" for schools based on student growth on longitudinal testing. A school's gain index is then converted to a "school performance gain rating" from five for "schools of excellence for improvement" to one for "schools in need of immediate improvement." Only Dreamland Academy has been open long enough to have a school performance gain rating. It received a one -- a school in need of immediate improvement. **Ex. 61, ADE Gain Index**.

124. The State Board's creation of racially and economically segregated "no excuses" charter schools is inconsistent with the "spirit and terms" of the 1989 Settlement Agreement. An implicit goal of the 1989 Settlement Agreement was to reduce the number of racially-identifiable black, high-poverty schools. In its 1985 remedial order, the Eighth Circuit directed each district to revise its school attendance zones so that each school reasonably reflected the racial composition of the district as a whole. *LRSD v. PCSSD*, 778 F.2d at 435. Recognizing that this might not be possible, the Eighth Circuit ordered:

> If the four all or nearly all-black schools as conditionally allowed by this Court in *Clark v. Board of Education of Little Rock*, 705 F.2d 265 (8th Cir. 1983), are

> retained in LRSD, compensatory and remedial programs of the type that we required for the nonintegrated schools in St. Louis shall be put into effect for the four schools. *See Liddell v. State of Missouri*, 731 F.2d at 1312-18. The additional cost of these programs shall be paid for by the State of Arkansas.

Id. The number of "all or nearly all-black schools" turned out to be six. Even so, the plan was to desegregate these schools, identified as "incentive schools." The Interdistrict Plan provided, "The incentive schools will be desegregated in phases through a combination of white recruitment into incentive schools, and by reserving a designated number of seats in each incoming kindergarten class for the enrollment of white students." **Ex. 4, Interdistrict Plan, p. 4**.

125. Unfortunately, only one incentive school was able to desegregate. Rockefeller Elementary was able to recruit and retain white students by way of an early childhood magnet program. It dropped from 85 percent black in 1988-1989 to 59 percent black in 1997-98. Rockefeller remained racially balanced through 2003-04 when it was 58 percent black. **Docket No. 4280, ODM Racial Balance Report, Dec. 14, 2009, p. 27**. That changed in 2004-2005 (the same year LISA Academy opened) when Rockefeller jumped to 68 percent black. For the 2009-2010 school year, Rockefeller is 84 percent black; 80 percent of its students are economically disadvantaged. **Docket No. 4280, ODM Racial Balance Report, Dec. 14, 2009, p. 27**; **Ex. 62, LRSD by School and by Free and Reduced Eligible, 2009-2010**.

126. There are already too many high-poverty schools within LRSD. For the 2009-2010 school year, 70 percent of LRSD's students are economically disadvantaged. LRSD has 34 high-poverty schools – defined as schools with an enrollment of 70 percent or more economically disadvantaged students. **Ex. 62, LRSD by School and by Free and Reduced Eligible, 2009-2010**. *See* Ark. Code Ann. § 6-20-2305(b)(4)(A)(ii) (providing for additional

funding for school districts where 70 percent or more of students qualify for free or reduced-price meals). *See also* 20 U.S.C. § 1021(11)(A)(ii)(I) (defining a "high-need school" to include schools where 60 percent or more of students qualify for free or reduced-price meals); 42 U.S.C. § 1769(g)(3)(A)(ii) (defining a "high-poverty school" as a school where 50 percent or more of students qualify for free or reduced-price meals). Seventeen of LRSD's high-poverty schools have 90 percent or more economically disadvantaged students. **Ex. 62, LRSD by School and by Free and Reduced Eligible, 2009-2010**. Because "no excuses" charter schools students come from many different LRSD schools, the opening of a high-poverty charter school does not result in the closing of a high-poverty, LRSD school. It just adds to the number of high-poverty schools operating within LRSD -- raising the total of 37 for 2009-2010.

b. Impact of "Magnet" Charters

127. The Eighth Circuit authorized the creation of a "limited number" of interdistrict magnet schools in Pulaski County. *LRSD v. PCSSD*, 778 F.2d 404 at 436. The parties agreed to six interdistrict magnet schools in the Magnet Stipulation and 1989 Settlement Agreement. **Ex. 2, Magnet Stipulation; Ex. 3, 1989 Settlement Agreement, § II, ¶ D**. Open-enrollment "magnet" charter schools negatively affect operation of the 1989 Settlement Agreement by draining non-black students and high performing students from the traditional public schools in Pulaski County. **Ex. 15, Enrollment, p. 9**; **Ex. 63, LRSD Withdrawal Report 2009-2010; Ex. 64, Interdistrict Schools and Magnet Charters Percentage Black**; **Ex. 65, Analysis of Students Lost to ESTEM, 2008-2009**.

128. As discussed above, the 1989 Settlement Agreement requires LRSD's magnet schools maintain a "50-50" black and non-black racial balance. All of the "magnet" charters are

less than 50 percent black: For 2009-2010, Academics Plus is 12 percent black and 25 percent economically disadvantaged students; LISA Academy is 29 percent black and 24 percent economically disadvantaged students; ESTEM is 48 percent black and 32 percent economically disadvantaged students; and LISA NLR is 33 percent black and 26 percent economically disadvantaged students. For comparison, LRSD is 68 percent black and 70 percent economically disadvantaged students. **Ex. 15, Enrollment**, **p. 9**. As of October 1, 2010, LRSD magnets had 363 empty seats, and 3028 students on waiting lists: 2658 black and 370 non-black. **Ex. 66, Magnet Waiting List, Oct. 1, 2009**.

129. The loss of non-black students to "magnet" charters has denied black students the opportunity to attend Stipulation Magnets. In 2008-09, three[15] new charter schools opened in LRSD (two "magnet" charters and one "no excuses" charter), and LRSD lost a total of 816 students, 410 of whom were white. **Docket No. 4229, ODM Racial Balance Report 2008-2009, p. 36**. The number of vacancies at the Stipulation Magnets jumped by 105 (from 268 to 373). In total, the number of magnet transfers from NLRSD and PCCSD was down 12 percent (171 students). **Docket No. 4229, ODM Racial Balance Report 2008-2009, p. 56**. Since 2007-2008, the number of white students attending Stipulation Magnets has declined by 10 percent (163 students). **Docket No. 4280, ODM Racial Balance Report 2009-2010, p. 51**.

130. The Eighth Circuit authorized a "limited number" of magnet schools for a reason. Research shows that too many magnet schools increases segregation and white flight. CHRISTINE H. ROSSELL, *School Desegregation in the 21st Century*, p. 96 (2002). Dr. Rossell explains:

[15]ESTEM is actually three separate charter schools but for our purposes it will be considered a single school.

> Although magnet schools are the only way to desegregate black schools in a voluntary desegregation plan, there is such a thing as too many magnet schools. Having a lot of magnet schools can be inefficient because the magnets compete against each other, dispersing the available whites among to many schools so that no school has enough whites to attract more whites.

ROSSELL *id.* at 104. The State Board has done nothing to assess whether the non-black population in Pulaski County justifies the creation of additional magnet schools in the form of magnet charters.

131. As to location, Rossell's research suggests that magnet schools should be located in black neighborhoods. "Magnets should rarely be placed in white neighborhood schools because (a) they are not usually needed there – blacks will transfer to white schools without any special incentive other than free transportation – and (b) magnets in white neighborhoods may be a disincentive for whites to transfer out." ROSSELL *id.* at 97-98. The State Board has not required magnet charters to be located in black neighborhoods.

132. As to racial balance, Rossell's research suggests that the percentage of white parents willing to send their children to magnet schools varies inversely to the percentage of black students at a school. ROSSELL *id*. at 100. *See also* Dr. David Armor, Tr. 1996-05-15, p. 138 ("It is my belief that a stable integration plan that's based on neighborhood schools with voluntary options needs to have integrated schools that are either 50/50 or even slightly majority white in order to maintain a stable white population."). According to parent surveys, if a magnet school is 50 percent white and 50 percent minority, 21 percent of white parents are definitely willing to send their children to magnet schools in black neighborhoods; the number decreases to 13 percent if the school is 75 percent minority. ROSSELL. *id.*

133. Thus, research suggests that magnet charters in Pulaski County have two advantages over the Stipulation Magnets in attracting white students. First, the Pulaski County magnet charters are more attractive to white parents because they have a higher percentage of white enrollment. *See* JACK BUCKLEY AND MARK SCHNEIDER, "Charter Schools: Hope or Hype," p. 133 (Princeton University Press 2007) ("[I]t is clear from our existing data that parents care about the racial composition of schools as reflected by their search processes . . . [D]espite an unwillingness to admit this in telephone or face-to-face interviews, they are also seeking out schools with a lower percentage of black students."). Second, they are more convenient for white parents because they, with the exception of ESTEM, are located in white neighborhoods. These advantages make it difficult for the Stipulation Magnets, Interdistrict Schools and LRSD schools with magnet programs, located in black neighborhoods, to recruit white students. *See* Rossell at 97-98.

134. As suggested by this research, LRSD's Interdistrict Schools and schools with magnet programs designed to attract white students have lost white enrollment with the proliferation of "magnet" charters. LRSD's Revised Desegregation and Education Plan ("Revised Plan") defined a truly desegregated school as a school between 40 and 60 percent black.[16] **Ex. 5, Revised Plan**. In 2001-2002 when LRSD was declared unitary, LRSD had 17 truly desegregated schools. In 2008-2009, LRSD had only 12 truly desegregated schools.[17] They were the six Stipulation Magnets (all between 50 and 55 percent black) plus Baseline

[16]LRSD's Revised Plan § 3.1.2 required LRSD to revised its attendance zones to create as many truly desegregated schools (schools between 40 and 60 percent black) as possible.

[17]This number does not include the early childhood center being operated at Fair Park Elementary which was 41 percent black in 2008-2009.

Elementary (58 percent black)[18], Dodd Elementary (54 percent black)[19], Pulaski Heights Elementary (45 percent black), Terry Elementary (60 percent black) and Pulaski Heights Middle (51 percent black) and Central High (55 percent black). As of October 1, 2009, the number dropped to 10 as Baseline Elementary increased to 63 percent black and Terry increased to 61 percent black. **Docket No. 4280, ODM Racial Balance Report 2009-2010.**

135. The schools that were truly desegregated in 2001-02 included two of LRSD's three interdistrict schools: King Elementary and Washington Elementary. King was truly desegregated from 1994-1995 though 2003-2004 ranging from 50 percent black to 56 percent black. Washington was truly desegregated or very close to truly desegregated through 2003-2004 ranging from 52 percent black to 62 percent black. Beginning when LISA Academy opened in 2004-2005, King and Washington saw a steady increase in black enrollment. By 2008-2009, both were racially identifiable black schools: King at 83 percent black and Washington at 92 percent black. As of October 1, 2009, King was 89 percent black, and Washington was 93 percent black. **Docket No. 4280, ODM Racial Balance Report 2009-2010.**

136. Two additional truly desegregated schools in 2001-2002 were LRSD's schools with magnet programs: Rockefeller Elementary (early childhood magnet program) and Dunbar Middle School (gifted and talented magnet program). Rockefeller Elementary School was truly desegregated from 1997-1998 through 2003-2004, with the exception of 2000-2001 when it was

[18]Baseline was 84 percent black in 2001-2002. Baseline's reduction in black enrollment has been due to an increase in the number of Hispanic students. In 2008-09, Baseline had 324 students but only 23 white students.

[19]Dodd was 61 percent black in 2001-2002. As with Baseline, Dodd's reduction in black enrollment has been due to an increase in the number of Hispanic students. The number of white students attending Dodd has dropped four years in a row to a low of 52 as of October 1, 2009.

61 percent black. Dunbar Middle School was truly desegregated from 1995-1996 through 2003-2004 when it was 58 percent black. Again, beginning with the opening of LISA Academy in 2004-2005, both saw a steady increase in black enrollment. By 2008-2009, both were racially identifiable black schools at 81 percent black. As of October 1, 2009, both were 84 percent black. **Docket No. 4280, ODM Racial Balance Report 2009-2010.**

137. Another truly desegregated school in 2001-2002 was McDermott Elementary. McDermott was truly desegregated from 1991-1992 through 2003-2004 ranging from 49 percent black to 59 percent black. Beginning when LISA Academy opened in 2004-2005, McDermott moved from 56 percent black to 62 percent black. In 2008-2009, it was 65 percent black. As of October 1, 2009, McDermott was 73 percent black. **Docket No. 4280, ODM Racial Balance Report 2009-2010.** If nothing changes, it is likely that McDermott's black enrollment will continue to increase.

c. Impact of the Lack of Transportation.

138. The Eighth Circuit specifically ordered that the State pay for the interdistrict transportation of students, *see LRSD v. PCSSD*, 778 F.2d at 436, and accordingly, the 1989 Settlement Agreement requires the State to pay for the transportation of M-to-M and Stipulation Magnet students. **Ex. 3, 1989 Settlement Agreement, § II, ¶ E(4) and (5)**. Notwithstanding the directive of the Eighth Circuit and the 1989 Settlement Agreement, the State Board has not required open-enrollment charter schools in Pulaski County to provide transportation -- even when the charter school represented in its application that it would provide transportation. The lack of transportation has a disproportionate impact on black students who are more likely to be economically disadvantaged and to lack the resources to provide their own transportation.

2. Financial Impact.

139. LRSD's enrollment was stable with modest increases each year from 2003-2004 to 2007-2008. In 2008-2009, three new open-enrollment charter schools opened in Pulaski County, and LRSD's overall enrollment declined by 816 students. **Docket No. 4280, ODM Racial Balance Report 2009-2010.** This decline in enrollment will cost LRSD approximately $5 million in regular state education funding in the 2009-2010 school year.

140. LRSD also loses revenue as a result of fewer students taking advantage of M-to-M transfers and attending the Stipulation Magnets. All students attending open-enrollment charter schools have voluntarily transferred from their neighborhood schools, and absent the option of attending an open-enrollment charter school, may have decided to transfer to a Stipulation Magnet or to a school in another district using an M-to-M transfer. The loss of Stipulation Magnet and M-to-M students will result in LRSD losing the incentive payments required by the 1989 Settlement Agreement.

141. It is difficult for LRSD to reduce expenses to offset the loss of revenue related to the loss of students to open-enrollment charter schools. The loss of a small number of students from many different schools does not permit a concomitant reduction in expenses for school buildings, certified and non-certified staff and transportation.

3. Impact on Student Achievement.

142. The right secured in *Brown* was the right to an equal educational opportunity. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). In 1991, the Eighth Circuit identified the provisions of the 1989 Settlement Agreement from which "no retreat should be approved" by the Court. Among those provisions was the "agreed effort to eliminate achievement disparity between the races," *Appeal of LRSD*, 949 F.2d at 256, as set forth in the 1989 Settlement Agreement, § III, ¶ G. Open-enrollment charter schools in Pulaski County are negatively affecting the ability of LRSD to provide African-American students an equal educational opportunity by disproportionately enrolling non-black, already high-achieving students.

143. The State Board's failure to require open-enrollment charter schools to provide transportation creates a barrier to enrollment for students living in poverty who lack the resources to provide their own transportation, thus, it leaves the poorest of the poor, most of whom are black, in high-poverty, neighborhood schools. Education research indicates that "when public schools educate poor students separately from other students, the high-poverty schools do not normally provide an equal, or even adequate, education to their students." *See, e.g.*, RICHARD D. KAHLENBERG, *All Together Now: Creating Middle Class Schools through Public School Choice* (Brookings Institute Press 2003), p. 2. While individual "effective" high-poverty schools exist, they have been the product of extraordinarily gifted teachers and principals, and no school district anywhere in the United States has been able to make high-poverty schools work on a systemic basis." KAHLENBERG, *All Together* pp. 86-88; DAVID RUSK, "To Improve Public Education, Stop Moving Money, Move Families," *Abell Report*, v. 11 (June-

July 1998), p. 4 ("[D]espite several decades of trying, there are no examples of high-poverty, big city school systems that have produced high achievement levels.").

144. In addition, students who choose to attend open-enrollment public charter schools tend to come from families that value education and to outperform their peers on standardized tests. Even if these students are economically disadvantaged, their parents are more educated, have higher aspirations for their children, and are more likely to help their children at home and volunteer at school than other parents of economically disadvantaged students. *See* JOHN WITTE, "The Milwaukee Voucher Experiment: The Good, the Bad, and the Ugly." *Phi Delta Kappan* 81,1 (September 1999): 59-64. Traditional public schools suffer from the loss of these parents who are educated and involved and who can be a potent force for change. Moreover, the loss of these relatively higher performing students will make it more difficult for their former schools to make AYP and avoid being labeled as "needing improvement" under the State's accountability system -- further stigmatizing these schools and making it more difficult for them to attract middle-class students.

145. A report prepared by the University of Arkansas, Office for Educational Policy ("OEP"), confirmed that charter schools are further concentrating students living in poverty in LRSD. According to the report, 65 percent of LRSD students qualified for free or reduced-price meals during 2008-2009, but only 38 percent of LRSD students who transferred to charter schools qualified for free or reduced-price meals. NATHAN C. JENSEN AND GARY W. RITTER, "An Analysis of the Impact of Charter Schools on the Desegregation Efforts in Little Rock, Arkansas," p. 11 (Table 6) (2009). For the 2009-2010 school year, 70 percent of LRSD students are economically disadvantaged while only 28 percent of students attending Pulaski County

"magnet" charters are economically disadvantaged and only 42 percent of all students attending Pulaski County charter schools are economically disadvantaged. **Ex. 15, Enrollment, p. 9**.

146. Former LRSD students now attending Pulaski County "magnet" charter schools were more likely to be high-achieving students *at the time they left LRSD*. With limited data available, LRSD's analysis indicates that a disproportionately large percentage of students leaving LRSD to attend a "magnet" charter scored proficient or advanced on the Arkansas Benchmark Exam. **Ex. 63, LRSD Withdrawal Report 2009-2010; Ex. 65, Analysis of Students Lost to ESTEM, 2008-2009**.. LRSD has requested complete data from ADE, but ADE has refused to provide the data citing the federal student education record privacy law ("FERPA"). Upon information and belief, ADE's refusal to provide LRSD data on charter school students based on FERPA was a pretext to prevent LRSD from assessing the impact of open-enrollment charter schools.

D. Open-Enrollment Charter Schools in Pulaski County Required Court Approval.

147. The 1989 Settlement Agreement created a countywide, interdistrict student assignment system that was intended to govern the interdistrict movement of students within Pulaski County. By authorizing open-enrollment charter schools in Pulaski County, the State Board unilaterally removed students from the interdistrict student assignment system created by the 1989 Settlement Agreement. This change in the interdistrict student assignment system in Pulaski County required Court approval. As the Court explained to the State with regard to loss funding, "A party may not unilaterally change the implementation or language of an agreement or order without the prior approval of the Court and/or the consent of the parties." **Docket No. 2337, p. 9-10**

148. The State Board's unconditional approval of open-enrollment charter schools cannot be distinguished from the creation of the Jacksonville splinter district enjoined by this Court in 2003. Charter schools are just small school districts that have no boundaries. During a 2008 charter school hearing, State Board member Brenda Gullett commented:

> Something just occurred to me as we're sitting here. You know, a K through 12, whether it's a charter school or whatever, is basically a school district. And we don't allow school districts to operate with under 350 people now. They consolidate. So it occurs to me that, you know, we've got another name for it -- it's charter school.

Ex. 48, SB Transcript, Nov. 3, 2008, pp. 171-72; **Ex. 67, KIPP letter, Oct. 22, 2009**. As with the Jacksonville splinter district, the State Board should have obtained Court approval before authorizing open-enrollment charter schools in Pulaski County.

149. In May 2000, the United States Department of Education, Office of Civil Rights, issued guidance to charter schools seeking to open in districts operating under desegregation orders. It advised charter schools that, "[i]f your jurisdiction is under a desegregation court order, the appropriate LEA may need to have the court approve any new school, including a charter school." **Ex. 68, OCR Charter School Guidance, p. 8**. Consistent with this guidance, Academics Plus offered to obtain Court approval when it applied for the first open-enrollment charter in Pulaski County. **Ex. 11, A+ Application 2001-2002, p. 4**. In other jurisdictions under a desegregation order, charter schools have requested, and sometimes obtained, court approval. *Compare Cleveland v. Union Parish School Board*, 570 F.Supp.2d 858 (W.D. La. 2008) *with Berry v. School District of the City of Benton Harbor*, 56 F.Supp.2d 866 (W.D. Mich. 1999).

150. Even if the State Board did not believe Court approval was required, the State Board should have sought guidance from the Court. In its 2003 order, the Court stated:

> I find it quite troubling that the Arkansas Department of Education and the State Board of Education would take even the first step necessary to create a new detached school district from territory now included in the Pulaski County Special School District, without at least notifying the Court that it has received a request to form such a new district, and ***then seeking guidance from the Court regarding whether approving an election to create a new school district might violate the 1989 Settlement Agreement, orders of this Court, and orders of the Eighth Circuit.***

Ex. 7, Tr.8/18/2003, p. 59 (emphasis supplied). The Court also issued this warning:

> In expressing my concern with the action by the State Board, I'm not assuming that they are bad people or acted with bad purpose.[20] To the contrary, I assume they are good people. But I can only conclude that their reasoning processes were in vapor lock when they voted to allow this election. And I would hope in the future that they would take a more careful look at it. I will say this. ***If any other similar type issue comes up, . . . I would more than likely seriously consider measures more stern than attorney's fees.***

Ex. 7, Tr.8/18/2003, p. 63 (emphasis supplied). Open-enrollment charter schools certainly present a "similar type issue." The State Board's refusal to seek guidance from the Court shows the State Board lacks a good faith commitment "to abide by the terms and spirit" of the 1989 Settlement Agreement. **Docket No. 2337, p. 16.**

E. Charter Schools Conclusion.

151. The State Board's acts and omissions described herein violated the 1989 Settlement Agreement; the Eighth Circuit's orders in *LRSD v. PCSSD*, 805 F.2d 815 (8th Cir. 1986) and *LRSD v. PCSSD*, 778 F.2d 404 (8th Cir. 1985); Charter Schools Act; and the Constitution of Arkansas, Article 14, § 1 and Article 2, §§ 2, 3 and 18. In particular, the State Board committed the following violations:

---

[20]The Court did not inquire into whether the State Board acted with segregative intent explaining that "it's the effect and impact rather than the intent which is the critical inquiry under the circumstances." Tr.8/18/2003, p. 64.

a. The State Board failed to seek or obtain this Court's approval to operate a system of public schools inside Pulaski County outside the requirements of the 1989 Settlement Agreement;

b. The State Board failed to require enrollment criteria or an admission process for open-enrollment charter schools in Pulaski County to ensure compliance with the "terms and spirit" of the 1989 Settlement Agreement;

c. The State Board failed to require open-enrollment charter schools in Pulaski County to provide transportation to ensure compliance with the "terms and spirit" of the 1989 Settlement Agreement;

e. The State Board failed to carefully review the desegregation impact of open-enrollment charter schools in Pulaski County before approving and renewing charters;

f. The State Board failed to require applicants for open-enrollment charter schools to meet their burden of establishing that there will be no negative impact on desegregation before approving or renewing their charters;

g. The State Board failed to consider the educational impact resulting from the districts' loss of affluent and higher-performing students to open-enrollment charter schools;

h. The State Board failed to consider the financial impact resulting from the districts' loss of affluent, higher-performing students to open-enrollment charter schools;

i. The State Board failed to consider the cumulative desegregation impact of open-enrollment charter schools in Pulaski County;

j. The State Board failed to conduct any post-approval desegregation impact analysis for open-enrollment charter schools in Pulaski County; and,

k. The State Board failed to monitor and evaluate open-enrollment charter schools in Pulaski County as required by the Charter Schools Act.

V. Remediation of the Achievement Disparity.

152. The State has not in good faith complied with its obligations under the 1989 Settlement Agreement with respect to monitoring compensatory education programs and remediating the academic achievement disparity between African-American and white students. ADE's failure to meet its monitoring obligations is well documented in ODM's "Report on ADE's Monitoring of the School Districts in Pulaski County," filed December 18, 1997 (Docket No. 3097). **Docket No. 2045** ("ADE never followed the provisions of the settlement agreement or monitoring plan in any substantial way and, therefore, is in violation of its obligations.").

153. In light of the State's failure to monitor, LRSD agreed to assess its programs designed to improve black achievement as a part of its Revised Plan. LRSD has expended considerable time and resources to evaluate key programs designed to improve African-American achievement. The financial impact of charter schools and the failure of the State to adequately fund student transportation will negatively affect LRSD's ability to continue to evaluate programs designed to improve African-American achievement.

154. The State has also not fulfilled it commitment to "remediation of the racial academic achievement disparities for Arkansas students." **Ex. 3, 1989 Settlement Agreement, § III, ¶ F**. Consistent with this commitment, the State agreed to "***develop*** and . . . search for programs to remediate achievement disparities between black and white students. ***If necessary to develop such programs***, the ADE will employ appropriately trained and experienced consultants in the field of remediation of racial achievement disparities and/or hire as staff

members persons with such training and experience. The remediation of racial achievement disparities shall remain a high priority with the ADE." **Ex. 3, 1989 Settlement Agreement, § III, ¶ G** (emphasis supplied). The compensatory education programs implemented by the districts failed to remediate the racial achievement disparity, and the State has failed to identify or develop any program that will.

155. Additionally, the 1989 Settlement Agreement must be construed as a contract under Arkansas law. *See Pure Country, Inc. v. Sigma Chi Fraternity*, 312 F.3d 952, 958 (8th Cir. 2002). All Arkansas contracts include an implied duty of good faith -- "an implied promise between the parties that they will not do anything to prevent, hinder or delay the performance of the contract." 2009 AMI Civil § 2426. *See Country Corner Food & Drug, Inc. v. First State Bank & Trust Co.*, 332 Ark. 645, 966 S.W.2d 894 (1998). The State breached the implied duty of good faith by failing to fund public schools as required by the Constitution of Arkansas, Article 14, § 1 and Article 2, §§ 2, 3 and 18, during the time the Districts were receiving payments for compensatory education programs designed to remediate the racial achievement disparity. *See Lake View School District v. Huckabee*, 363 Ark. 520, 210 S.W.3d 28, 29-30 (2005) ("This Court's determination that Arkansas' public school funding system does not pass constitutional muster dates back twenty-two years. *See DuPree v. Alma Sch. Dist. No. 30*, 279 Ark. 340, 651 S.W.2d 90 (1983)."). Moreover, the 87th General Assembly's failure to fund student transportation in the manner recommended by its own experts suggests that the State's school funding system once again "does not pass constitutional muster." **Ex. 69, Wilson FOIA Response, pp. 7-8.** While the State did make payments to the Districts for compensatory and remedial education programs as required by the 1989 Settlement Agreement, the Districts'

ability to remediate the racial achievement disparity was negatively affected and continues to be negatively affected by a State funding system that violates the Constitution of Arkansas, Article 14, § 1 and Article 2, §§ 2, 3 and 18.

VI. Compliance with the Arkansas Constitution

A. Constitutional Provisions at Issue.

156. The Constitution of Arkansas, Article 2, §§ 2, 3 and 18:

§ 2. Freedom and Independence.

> All men are created equally free and independent, and have certain inherent and inalienable rights, amongst which are those of enjoying and defending life and liberty; of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness. To secure these rights governments are instituted among men, deriving their just powers from the consent of the governed.

§ 3. Equality before the law.

> The equality of all persons before the law is recognized, and shall ever remain inviolate; nor shall any citizen be deprived of any right, privilege or immunity, nor exempted from any burden or duty, on account of race, color or previous condition.

§ 18. Privileges and Immunities – Equality.

> The General Assembly shall not grant to any citizen or class of citizens privileges or immunities which upon the same terms shall not equally belong to all citizens.

157. The Constitution of Arkansas, Article 14, § 1:

§ 1. Free School System.

> Intelligence and virtue being the safeguards of liberty and the bulwark of a free and good government, the State shall ever maintain a general, suitable and efficient system of free public schools and shall adopt all suitable means to secure to the people of Arkansas the advantages and opportunities of education. The specific intention of this amendment is to authorize that in addition to existing constitutional and statutory provisions the General Assembly and/or public school

> districts may spend public funds for the education of persons over twenty-one (21) years of age and under six (6) years of age, as may be provided by law, and no other interpretation shall be given to it.

B. Arkansas School-Funding Decisions.

158. *DuPree v. Alma School District No. 30*. In *DuPree v. Alma Sch. Dist. No. 30*, 279 Ark. 340, 651 S.W.2d 90 (1983), eleven school districts challenged the school-funding system based on the equality provisions (Article 2, §§ 2, 3 and 18) and the education article (Article 14, § 1) of the Arkansas Constitution. The school districts contended that the school-funding system resulted in a "great disparity" in funds available to school districts but the funding received by school districts was "unrelated to the educational needs of any given district." *DuPree*, 279 Ark. at 342, 651 S.W.2d at 91. The trial court ruled in favor of the school districts, and the Arkansas Supreme Court affirmed. *DuPree*, 279 Ark. at 343, 651 S.W.2d at 91.

159. In affirming, the Arkansas Supreme Court noted that it was "undisputed" that "there are sharp disparities among school districts in the expenditures per pupil and the educational opportunities available as reflected by staff, class size, curriculum, remedial services, facilities, materials and equipment." *DuPree*, 279 Ark. at 344, 651 S.W.2d at 92. The question was whether these disparities violated the equality provisions (Article 2, §§ 2, 3 and 18) and the education article (Article 14, § 1) of the Arkansas Constitution. The Arkansas Supreme Court held they did and explained:

> We can find no legitimate state purpose to support the system. It bears no rational relationship to the educational needs of the individual districts, rather it is determined primarily by the tax base of each district. The trial court found the educational opportunity of the children in this state should not be controlled by the fortuitous circumstance of residence, and we concur in that view. Such a system only promotes greater opportunities for the advantaged while diminishing the opportunities for the disadvantaged.

DuPree, 279 Ark. at 345, 651 S.W.2d at 93. Thus, a school-funding system that "bears no rational relationship to the educational needs of the individual districts" violates the Arkansas Constitution's mandates of equality and of a general, suitable and efficient school system. *Id.*

160. The Arkansas Supreme Court rejected the State's argument that "local control" justified the disparities in funding and educational opportunity. The Court identified two fallacies in this argument:

> First, to alter the state financing system to provide greater equalization among districts does not in any way dictate that local control must be reduced. Second, as pointed out in *Serrano*, *supra*, 135 Cal.Rptr. at 364, 557 P.2d at 948, "The notion of local control was a 'cruel illusion' for the poor districts due to limitations placed upon them by the system itself.... Far from being necessary to promote local fiscal choice, the present system actually deprives the less wealthy districts of the option." Consequently, even without deciding whether the right to a public education is fundamental, we can find no constitutional basis for the present system, as it has no rational bearing on the educational needs of the districts.

DuPree, 279 Ark. at 346, 651 S.W.2d at 93. The Court made clear that "[u]ltimately, the responsibility for maintaining a general, suitable and efficient school system falls upon the state." *DuPree*, 279 Ark. at 349, 651 S.W.2d at 95. "If [a school district] fails, the state government must compel it to act, and if [a school district] cannot carry the burden, the state must itself meet its continuing obligation." *Id.* (*quoting Robinson v. Cahill*, 303 A.2d 274, 295 (N.J. 1973)).

161. *Lake View I*. On September 19, 1994, the Lake View School District ("Lake View") filed an amended complaint against the State alleging that the school-funding system violated the equality provisions (Article 2, §§ 2, 3 and 18) and the education article (Article 14, § 1) of the Arkansas Constitution. *Lake View v. Tucker*, 323 Ark. 693, 694, 917 S.W.3d 530, 531 (1996) ("*Lake View I*"). By order entered November 9, 1994 ("1994 Order"), the trial court

ruled that the funding system violated the equality provisions (Article 2, §§ 2, 3 and 18) of the Arkansas Constitution, "as it has no rational bearing on the educational needs of the district," and that the system also violated the education article (Article 14, § 1) of the Arkansas Constitution by "failing to provide a general, suitable, and efficient system of free public education." *Lake View I*, 323 Ark. at 532, 917 S.W.3d at 695. The trial court stayed the effect of the 1994 Order to allow the General Assembly time to enact and implement appropriate legislation in accordance with its opinion. The Arkansas Supreme Court rejected an appeal of the 1994 Order concluding it was not a final, appealable order because of the stay. *Lake View I*, 323 Ark. at 533, 917 S.W.2d at 697.

162. *Lake View II*. The General Assembly responded to the 1994 Order by enacting Acts 916, 917 and 1194 of 1995 ("1995 legislative acts"), which effectively repealed the funding system that was the subject of the 1994 Order. *Lake View v. Huckabee*, 340 Ark. 481, 485-86, 10 S.W.3d 892, 894-95 (2000) ("*Lake View II*"). In 1996, Lake View filed an amended complaint again seeking a declaration that the 1995 legislative acts violated the equality provisions (Article 2, §§ 2, 3 and 18) and the education article (Article 14, § 1) of the Arkansas Constitution. *Lake View II*, 340 Ark. at 486, 10 S.W.3d at 895. In April of 1997, Acts 1307 and 1361 of 1997 ("1997 legislative acts") became law and amended or repealed the school-funding system established by the 1995 legislative acts. *Lake View II*, 340 Ark. at 487-88, 10 S.W.3d at 896. On May 29, 1997, Lake View filed an amended complaint challenging the constitutionality of both the 1995 and 1997 legislative acts. *Lake View II*, 340 Ark. at 488, 10 S.W.3d at 896. On August 17, 1998, the trial court issued a final order dismissing Lake View's amended complaint for failure to state a claim because the 1995 and 1997 legislative acts were presumed

constitutional and no facts were alleged supporting a lack of rational basis for those acts. *Lake View II*, 340 Ark. at 492, 10 S.W.3d at 899. Lake View appealed. On appeal, Lake View argued that the trial court erred in dismissing its amended complaint without a trial on the merits on the constitutionality of State initiatives since 1994. The Arkansas Supreme Court agreed and remanded the case for trial. *Lake View II*, 340 Ark. at 495, 10 S.W.3d at 900.

163. *Lake View III*. A trial on the constitutionality of State initiatives since 1994 was conducted over 19 days in September and October of 2000. On May 25, 2001, the trial court entered a final order ("2001 Order") concluding that the school-funding system remained unconstitutional under the equality provisions (Article 2, §§ 2, 3 and 18) and the education article (Article 14, § 1) of the Arkansas Constitution. *Lake View v. Huckabee*, 351 Ark. 31, 45, 91 S.W.3d 472, 479 (2002)("*Lake View III*"). Both Lake View and the State appealed. *Id.* The Arkansas Supreme Court noted that "[t]he 2001 school-funding formula is essentially the same as what was in place in 1994." *Id*.

164. After explaining in detail the school-funding system, the Arkansas Supreme Court considered the trial court's declaration that the school funding system was not "adequate" in violation the education article, Article 14, § 1. Interpreting the education article, the Court stated, "There is no question in this court's mind that the requirement of a general, suitable, and efficient education system of free public schools places on the State an absolute duty to provide the school children of Arkansas with an adequate education." *Lake View III*, 351 Ark. at 66-67, 91 S.W.3d at 492.

165. The State argued that the 2001 Order should be reversed because it is impossible to define an adequate education. The Arkansas Supreme Court described the State's argument as follows:

> The keystone of the State's adequacy argument is that an adequate education in Arkansas is impossible to define. We observe that on this point, the Department of Education and the General Assembly may be at odds. In her 1994 order, Judge Imber stated that there had been no studies on the per-student cost to provide "a general, suitable and efficient" educational opportunity to Arkansas schoolchildren. In 1995, the Arkansas General Assembly seized upon that theme and called for an adequacy study:
>
> > (c) The State Board of Education shall devise a process for involving teachers, school administrators, school boards, and parents in the definition of an "adequate" education for Arkansas students.
> >
> > (d) The State Board shall seek public guidance in defining an adequate education and shall submit proposed legislation defining adequacy to the Joint Interim Committee on Education prior to December 31, 1996.
> >
> > Act 917 of 1995, § 6(c-d).
>
> Despite this directive from the General Assembly, nothing has been done by the Department of Education, and seven years have passed. Judge Kilgore echoed this in his 2001 order:
>
> > Pursuant to Act 917 of 1995, and in order that an amount of funding for an education system based on need and not on the amount available but on the amount necessary to provide an adequate educational system, the court concludes an adequacy study is necessary and must be conducted forthwith.
>
> Stated simply, the fact that the Department of Education has refused to prepare an adequacy study is extremely troublesome and frustrating to this court, as it must be to the General Assembly.
>
> * * *
>
> In short, the General Assembly is well on the way to defining adequacy while the Department of Education, from all indications, has been recalcitrant.

Lake View III, 351 Ark. at 56-57, 91 S.W.3d at 486-87.

166. In rejecting the State's adequacy argument, the Arkansas Supreme Court identified four deficiencies in the school funding system:

> [T]his court is troubled by four things: (1) the Department of Education has not conducted an adequacy study; (2) despite this court's holding in *DuPree v. Alma Sch. Dist. No. 30, supra*, that equal opportunity is the touchstone for a constitutional system and not merely equalized revenues, the State has only sought to make revenues equal; (3) despite Judge Imber's 1994 order to the same effect, neither the Executive branch nor the General Assembly have taken action to correct the imbalance in ultimate expenditures; and (4) the State, in the budgeting process, continues to treat education without the priority and the preference that the constitution demands. Rather, the State has continued to fund the schools in the same manner, although admittedly taking more steps to equalize revenues.

Lake View III, 351 Ark. at 71, 91 S.W.3d at 495. For these reasons, the Court concluded that "the State has not fulfilled its constitutional duty to provide the children of this state with a general, suitable, and efficient school-funding system." *Lake View III*, 351 Ark. at 72, 91 S.W.3d at 495. Accordingly, the Court affirmed the trial court's finding "that the current school-funding system violates the Education Article of the Arkansas Constitution." *Id.*

167. The Arkansas Supreme Court next considered the trial court's finding that the school-funding system was inequitable in violation of Article 2, §§ 2, 3 and 18 of the Arkansas Constitution. The State argued that equality required the State to equalize per-student revenue available to school districts. The Court rejected this argument citing its decision in *DuPree*. "It is clear to this court that in *DuPree*, we concentrated on expenditures made per pupil and whether that resulted in equal educational opportunity as the touchstone for constitutionality, not on whether the revenues doled out by the State to the school districts are equal." *Lake View III*, 351 Ark. at 74, 91 S.W.3d at 497. As in *DuPree*, the Court found no rational basis for a school

funding system that "in no way corrects the inherent disparities" in per-student expenditures among school districts. *Id.*

168. The State offered two justifications for disparities in per-student expenditures: local control and the need to fund other state programs. *Lake View III*, 351 Ark. at 78, 91 S.W.3d at 499. As to local control, the Arkansas Supreme Court stated, "We rejected the argument of local control in *DuPree* in no uncertain terms." *Id.* "Deference to local control is not an option for the State when inequality prevails, and deference [to local control] has not been an option since the *DuPree* decision." *Lake View III*, 351 Ark. at 79, 91 S.W.3d at 500. As to the need to fund other state programs, the Court stated, "[T]he State's claim that the General Assembly must fund a variety of state programs in addition to education and that this is reason enough for an inferior education system hardly qualifies as a legitimate reason." *Lake View III*, 351 Ark. at 78, 91 S.W.3d at 499-500. Accordingly, the Court affirmed the trial court's finding that the school-funding system violated the equality provisions of the Arkansas Constitution. *Lake View III*, 351 Ark. at 79, 91 S.W.3d at 500.

169. Frustrated by the State's failure to understand its holding in *DuPree*, the Arkansas Supreme Court provided the State clear guidance as to what the constitution required:

> It is the State's responsibility, first and foremost, to develop forthwith what constitutes an adequate education in Arkansas. It is, next, the State's responsibility to assess, evaluate, and monitor, not only the lower elementary grades for English and math proficiency, but the entire spectrum of public education across the state to determine whether equal educational opportunity for an adequate education is being substantially afforded to Arkansas' school children. It is, finally, the State's responsibility to know how state revenues are being spent and whether true equality in opportunity is being achieved. Equality of educational opportunity must include as basic components substantially equal curricula, substantially equal facilities, and substantially equal equipment for obtaining an adequate education. The key to all this, to repeat, is to determine what comprises an

> adequate education in Arkansas. The State has failed in each of these responsibilities.

Lake View III, 351 Ark. at 79, 91 S.W.3d at 500. The Court stayed issuance of its mandate until January 1, 2004 to give the State "time to correct this constitutional disability in public school funding and time to chart a new course for public education in this state." *Lake View III*, 351 Ark. at 97, 91 S.W.3d at 511.

170. *Lake View IV*. The State failed to comply with the Arkansas Supreme Court's mandate in *Lake View III*. On January 22, 2004, the Arkansas Supreme Court recalled its mandate to consider "what remedy or writ is necessary to assure compliance." *Lake View v. Huckabee*, 355 Ark. 617, 142 S.W.3d 643 (2004). The Court appointed Masters to examine and evaluate legislative and executive action taken since November 21, 2002. *Lake View v. Huckabee*, 356 Ark. 1, 2-3 144 S.W.3d 741, 742 (2004). On April 2, 2004, the Masters filed their report with the Court. On June 18, 2004, Court issued a supplemental opinion. *Lake View v. Huckabee*, 358 Ark. 137, 189 S.W.3d 1 (2004)("*Lake View IV*").

171. In its supplemental opinion, the Arkansas Supreme Court praised the work of the General Assembly, in particular legislative action taken in the Second Extraordinary Session of 2004 -- after the Court recalled its mandate -- and described the legislative accomplishments as "truly impressive." *Lake View IV*, 358 Ark. at 158, 189 S.W.3d at 15. The Court rejected the argument that "if this court does not serve as a 'watchdog' agency to assure compliance full compliance with *Lake View III*, the General Assembly will not complete or fully implement what it has already begun." *Lake View IV*, 358 Ark. at 159, 189 S.W.3d at 16. The Court stated, "Admittedly, some measures, and specifically funding measures and those related to facilities and equipment, have not been brought to fruition. But we presume they will be, as we presume

that government officials will do what they say they will do." *Lake View IV*, 358 Ark. at 160, 189 S.W.3d at 16. Accordingly, the Court released jurisdiction and issued its mandate.

172. On April 14, 2005, various parties filed motions alleging that the State had failed to do what it said it would do and asking the Arkansas Supreme Court to recall its mandate. The Court scheduled oral arguments on the motions for May 19, 2005. *Lake View v. Huckabee*, 362 Ark. 251, 252-53, 208 S.W.3d 93, 94 (2005). The movants alleged "that the General Assembly reneged on its legislative commitments and failed to comply with the landmark legislation passed during the Second Extraordinary Session of 2004." *Lake View v. Huckabee*, 362 Ark. 520, 522, 210 S.W.3d 28, 29 (2005). On June 9, 2005, the Court recalled its mandate and reappointed the Masters. The Masters were directed to file a report on or before September 1, 2005. *Lake View v. Huckabee*, 362 Ark. at 522-23, 210 S.W.3d at 29.

173. *Lake View V*. After receiving the Masters' report, the Arkansas Supreme Court again found the school-funding system unconstitutional. *Lake View v. Huckabee*, 364 Ark. 398, 415, 220 S.W.3d 645, 657 (2005) ("*Lake View V*"). The Court identified a number of deficiencies. Most importantly, the Court held "that the General Assembly failed to comply with Act 57 and Act 108 in the 2005 regular session and, by doing so, retreated from its prior actions to comply with this Court's mandate in [*Lake View III*]." *Lake View V*, 364 Ark. at 411-12, 220 S.W.3d at 654-55. Act 57 of the Second Extraordinary Session of 2004 ("Act 57) imposes a duty on the General Assembly to assess, evaluate and monitor the entire spectrum of public education across the state and to evaluate the amount of state funds needed based on the cost of providing all children a substantially equal opportunity for an adequate education. *Lake View V*, 364 Ark. at 412, 220 S.W.3d at 655 n.4. The Court noted:

> [T]he [General Assembly] interim committees made no request to the Department of Education for any information before the 2005 regular session, or even during that session. Thus, vital and pertinent information relating to existing school district revenues, expenditures, and needs was not reviewed. Without that information, the General Assembly could not make an informed funding decision for school years 2005-2006 and 2006-2007. We have no doubt that the decision to freeze the previous year's [foundation-funding amount] of $5,400 for purposes of 2005-2006 is a direct result of this lack of information.

Lake View V, 364 Ark. at 412, 220 S.W.3d at 655. The Court explained:

> [T]he linchpin for achieving adequacy in public education is the General Assembly's compliance with Act 57 of the Second Extraordinary Session of 2003. Without a continual assessment of what constitutes an adequate education, without accounting and accountability by the school districts, without an examination of school district expenditures by the House and Senate Interim Committees, and without reports to the Speaker of the House and the President of the Senate by September 1 before each regular session, the General Assembly is "flying blind" with respect to determining what is an adequate foundation-funding level.

Lake View V, 364 Ark. at 411-12, 220 S.W.3d at 654-55.

174. Act 108 of the Second Extraordinary Session of 2003 creates the Educational Adequacy Fund to ensure a fully-funded system of public education. The Arkansas Supreme Court held the General Assembly violated Act 108 because "[e]ducation needs were not funded first." *Lake View V*, 364 Ark. at 413, 220 S.W.3d at 655. Rather, the General Assembly established the amount of school funding "based upon what funds were available - not by what was needed." *Lake View V*, 364 Ark. at 413, 220 S.W.3d at 655-56.

175. Based on the General Assembly's failure to comply with Act 57 and Act 108, among other deficiencies, the Arkansas Supreme Court held that "the public school-funding system continues to be inadequate" and that "our public schools are operating under a constitutional infirmity which must be corrected immediately." *Lake View V*, 364 Ark. at 415, 220 S.W.3d at 657. As in *Lake View III*, the Court held that the General Assembly and

Department of Education should have time to cure the deficiencies. Accordingly, the Court stayed issuance of its mandate until December 1, 2006. *Lake View V*, 364 Ark. at 416, 220 S.W.3d at 657.

176. On November 30, 2006, the Arkansas Supreme Court deferred issuance of its mandate an additional 180 days and reappointed the Masters to evaluate the State's compliance with *Lake View III*. *Lake View v. Huckabee*, 368 Ark. 231, 234, 243 S.W.3d 919, 920-21 (2006). The State was directed to furnish the Court with any information related to constitutional compliance within 30 days. *Id*.

177. *Lake View VI*. The Masters filed an interim report on March 16, 2007 and a final report on April 26, 2007. On May 31, 2007, the Arkansas Supreme Court adopted the Masters reports in a unanimous opinion. *Lake View v. Huckabee*, 370 Ark. 139, 145, 257 S.W.3d 879, 883 (2007) ("*Lake View VI*"). The Court's opinion detailed steps taken by the State to address each deficiency identified in *Lake View V*. More importantly, the Court emphasized the State's commitment to "continual assessment and evaluation" and adopted the Masters' finding that the State "understands now that the job for an adequate education system is 'continuous' and that there has to be 'continued vigilance' for constitutionality to be maintained." *Lake View VI*, 370 Ark. at 145, 257 S.W.3d at 883. The Court concluded:

> We hold that the General Assembly has now taken the required and necessary legislative steps to assure that the school children of this state are provided an adequate education and a substantially equal educational opportunity. . . . What is especially meaningful to this court is the Masters' finding that the General Assembly has expressly shown that constitutional compliance in the field of education is an ongoing task requiring constant study, review, and adjustment. In this court's view, Act 57 of the Second Extraordinary Session of 2003, requiring annual adequacy review by legislative committees, and Act 108 of the Second Extraordinary Session of 2003, establishing education as the State's first funding priority, are the cornerstones for assuring future compliance.

> Because we conclude that our system of public-school financing is now in constitutional compliance, we direct the clerk of this court to issue the mandate in this case forthwith.

Lake View VI, 370 Ark. at 145-46, 257 S.W.3d at 883.

C. Current School-Funding System.

178. Act 293 of 2010 ("Act 293") appropriates tax dollars for public education for the 2010-2011 school year (fiscal year beginning July 1, 2010 and ending June 30, 2011). **Ex. 70, Act 293 of 2010.**

179. Act 293 includes the appropriation for foundation funding (§ 1, Item 58). Foundation funding is a per student amount paid by the State to school districts based on school districts' average daily membership ("ADM"). For the 2010-2011 school year, school districts will receive $6,023.00 per student in foundation funding. *See* Ark. Code Ann. § 6-20-2305(a)(2)(B). The process for determining the foundation funding amount is set forth in Act 57, Ark. Code Ann. § 10-3-2101, *et seq*. Act 57 requires the House Committee on Education and the Senate Committee on Education to, among other things, "Assess, evaluate, and monitor the entire spectrum of public education across the State of Arkansas to determine whether equal educational opportunity for an adequate education is being substantially afforded to the school children of the State of Arkansas and to recommend any necessary changes." Ark. Code Ann. § 10-3-2102 (a)(1).

180. Pursuant to Act 57, the House and Senate education committees prepared and submitted to the General Assembly an "Amended Adequacy Report" by letter dated December 30, 2008 (hereinafter, "2008 Adequacy Report"). **Ex. 71, 2008 Adequacy Report**. The 2008 Adequacy Report includes a foundation funding matrix as Appendix E. The purpose of the

foundation funding matrix is to provide a rational basis for the foundation funding amount by estimating the actual cost of providing students an adequate education. **Ex. 71, 2008 Adequacy Report, p. 5.** For example, for the 2008-2009 school year, the foundation funding amount of $5,789.00 per student was made up of the following components of an adequate education:

Matrix Calculation (per student amounts)	2008-2009
School Level Salaries and Benefits	$4,013.90
School Level Resources	524.60
Operations and Maintenance	581.00
Central Office	383.50
Transportation	286.00
TOTAL	$5,789.00

181. The 2008 Adequacy Report included the following recommendation concerning transportation funding:

> 7. **Recommendation:** The issue of whether to change the amount of funding in the matrix for public school transportation is referred to the Education Committees for consideration***. The Education Committees recommend that the amount of $24,584,000 in General Revenue Funding be provided each year of the upcoming biennium to the Public School Fund to be utilized for Enhanced Transportation Funding.*** This Enhanced Transportation Funding is in addition to the $286 per ADM currently provided in the Funding Matrix and will be distributed to school districts in accordance with the distribution methodology developed by the BLR. [Bureau; Legislative Research]
>
> **Rationale:** The current funding matrix provides $286 per student to fund K-12 student transportation, but evidence was presented that rising costs are causing many school districts to spend more than $286 per student. Richard Wilson, Assistant Director for Research Services of the BLR, told the Education Committees that the amount that districts spend on transportation appears to exceed the $286 provided in the matrix in some cases. However, the committee was not presented with complete data from the school districts to make a final recommendation. Therefore the committee recommended that the Education Committees continue to study the transportation issue.
>
> ***The Education Committees have determined that state-funded transportation for public education may be a necessary component to providing students with an***

> ***equitable opportunity for an adequate education to the extent that a student would not otherwise be able to realize this opportunity but for such transportation being provided by the state.*** There is currently no data available to determine each district's essential route miles for students whose access to an equitable opportunity for an adequate education would be prevented by disability, poverty, distance, or geography. However, that determination is not required at the present time, as the committees' recommendation for the distribution methodology for the Enhanced Transportation Funding, which is in addition to the foundation funding matrix amount, utilizes a function of each district's historical route miles that is *well above this minimum adequacy standard*.

Ex. 71, 2008 Adequacy Report, p. 56 (emphasis supplied).

182. Act 293 does not include the additional $24,584,000 in enhanced transportation funding recommended in the 2008 Adequacy Report. This means that schools districts that spend more than $286.00 per student for transportation, such as LRSD, must pay transportation costs using funds intended to pay for other components of an adequate education.

183. The 2008 Adequacy Report's recommendation of $24,584,000 in enhanced transportation funding was based, at least in part, on the transportation study required by Act 1604 of 2007 ("Act 1604"). Act 1604 required the Bureau of Legislative Research ("BLR") to conduct a transportation efficiency study. *See* Ark. Code Ann. § 6-19-123. BLR reported its findings to the House and Senate education committees on or about October 14, 2008, in preparation for the 2009 regular session of the General Assembly. **Ex. 69, BLR Transportation Study.** Based on a sample of school 30 school districts, BLR found per student transportation cost ranged from $103.00 to $982.00 and averaged $390.00 – well in excess of the $286.00 per student provided as a part of foundation funding. **Ex. 69, BLR Transportation Study, p. 2**. BLR explained that the $286.00 per student provided as a part of foundation funding was based on the 2004-2005 average transportation cost increased for inflation for the 2007-2008 school

year. The amount of transportation funding has not been increased since the 2007-2008 school year. **Ex. 69, BLR Transportation Study, p. 6.**

184. The BLR noted that a 2006 report on educational adequacy prepared by State paid experts recommended that transportation funding be removed from foundation funding. The report, "The Arkansas Recalibration Report," dated August 30, 2006, was prepared by Allen Odden, Lawrence O. Picus and Michael Goetz for the House and Senate committees on education. **Ex. 72, Ark. Recalibration Report**. The report recommended that school districts be reimbursed their actual cost of transportation until a standards-based transportation funding formula can be developed. **Ex. 72, Ark. Recalibration Report, p. 79**. The report recognized the need to "find a way to allocate transportation funds that more accurately reflects the realities of individual school districts." **Ex. 72, Ark. Recalibration Report, p. 61**. The report anticipated "proposing a method of funding transportation costs that will vary by district depending on district characteristics (i.e. population density, road condition, distances and number of students transported, etc.)." **Ex. 72, Ark. Recalibration Report, p. 61**. In short, the $286.00 per student included in foundation funding for transportation for the 2007-2008 school year was intended to be a one-time, stop-gap measure that would be replaced with standards-based transportation formula "that more accurately reflects the realities of individual school districts." **Ex. 72, Ark. Recalibration Report, pp. 61 and 80**.

185. BLR presented its transportation efficiency study to the House and Senate education committees on October 14, 2008. BLR presented to the committees "for their consideration a new K-12 transportation funding model that can arguably predict and distribute transportation funding among all Arkansas school districts with improved efficiency and

accuracy." **Ex. 69, BLR Transportation Study, p. 1**. Consistent with the recommendations of the Arkansas Recalibration report, BLR's proposed methodology incorporated the following variables: cost, ADM, district area (square miles), number of students transported, daily linear route miles, and number of buses. **Ex. 69, BLR Transportation Study, p. 10**. As quoted above, the House and Senate education committees recommended adopting BLR's proposed methodology for the distribution of enhanced transportation funding. **Ex. 71, 2008 Adequacy Report, p. 56**.

186. Rejecting the recommendation of the House and Senate education committees, Act 293 continues to fund transportation using the arbitrary amount of $286.00 per student for the 2010-2011 school year. For the 2008-2009 school year (the latest year for which data is available), 180 of the 245 school districts in Arkansas spent more than $286.00 per student for transportation. LRSD spent $646.07 per student on transportation. The State average was $386.71 per student. **Ex. 73, Transportation Cost per Student.** The State's failure to fully fund student transportation forces school districts such as LRSD to spend money on transportation that was intended for other components of an adequate education.

D. Arkansas Constitution - Conclusion.

187. The State's failure to fully fund transportation as required by the Arkansas Constitution has had a negative impact on LRSD's ability to provide African-American students a substantially equal opportunity for an adequate education and to remediate the racial achievement disparity. In 2008-2009, LRSD spent $15,696,838.58 on student transportation, including Magnet and M-to-M transportation, and received from the State $6,948,644.56 under the funding formula and $4,514,529.00 under the 1989 Settlement Agreement (reimbursement

for the actual cost of Magnet and M-to-M transportation). **Ex. 73, Transportation Cost per Student**. Thus, even taking into account the additional transportation funding LRSD receives because of the 1989 Settlement Agreement, LRSD spent $4,233,665.02 more on student transportation than it received from the State in 2008-2009. This $4.2 million was meant to be spent on other components of an adequate education such as teachers' salaries and classroom supplies. Moreover, the discrepancy between what LRSD spends and what the State pays has likely grown over the past two school years.

VII. Periodic Review.

188. The 1989 Settlement Agreement established a race-conscious interdistrict student assignment process. Race-conscious student assignment systems should be subject to "periodic review" to determine whether racial preferences are still necessary. *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003). A periodic review of the 1989 Settlement Agreement should be conducted to determine whether a race-neutral student assignment system can achieve the goals of the 1989 Settlement Agreement. *See Grutter*, 539 U.S. at 339.

VIII. Prayer for Relief.

WHEREFORE, LRSD respectfully requests:

1. That the Court schedule a hearing on these issues and enter an appropriate scheduling order allowing the parties sufficient time to develop the issues through discovery in advance of the hearing.

2. That the State Board be enjoined from approving any new open-enrollment charter school in Pulaski County or authorizing an increase in enrollment of any existing open-

enrollment charter school in Pulaski County, except upon approval of the Court and on such terms and conditions necessary to ensure compliance with the "terms and spirit" of 1989 Settlement Agreement;

3. That the State Board be directed to amend the charters of open-enrollment charter schools in Pulaski County to include such terms and conditions determined by the Court to be necessary to ensure compliance with the "terms and spirit" of 1989 Settlement Agreement including, but not limited to, that the State pay the full cost of transporting economically disadvantaged students to open-enrollment charter schools in Pulaski County;

4. That the State be directed, retroactively and until otherwise ordered by the Court, to pay LRSD the sending district incentive payment required by the M-to-M Stipulation for students who reside in LRSD but attend(ed) an open-enrollment charter school in Pulaski County;

5. That the State be directed to comply with the 1989 Settlement Agreement and to identify or develop programs, policies and/or procedures designed to provide a substantially equal opportunity for an adequate education to all students attending high-poverty schools located in LRSD;

6. That the State be directed to pay to the full cost of implementing the programs, policies and/or procedures identified or developed to provide a substantially equal opportunity for an adequate education to all students attending high-poverty schools located in LRSD;

7. That the State be directed to reimburse LRSD the actual cost of transportation of economically disadvantaged students for the 2007-2008 school year and continuing thereafter;

8. That the State be directed to retain experts approved by LRSD to review the 1989 Settlement Agreement to determine whether a race-neutral student assignment system can achieve the goals of the 1989 Settlement Agreement;

9. That the State be directed to pay LRSD its costs and attorneys' fees expended herein; and,

10. That LRSD be awarded all other just and proper relief to which it may be entitled.

Respectfully submitted,

LITTLE ROCK SCHOOL DISTRICT
Friday, Eldredge & Clark
Christopher Heller (#81083)
Khayyam M. Eddings (#200208)
400 West Capitol, Suite 2000
Little Rock, AR 72201-3493
(501) 370-1506
heller@fridayfirm.com

/s/ *Christopher Heller*

and

Clay Fendley (#92182)
John C. Fendley, Jr., P.A.
Attorney at Law
51 Wingate Drive
Little Rock, AR 72205
(501) 907-9797
clayfendley@comcast.net

CERTIFICATE OF SERVICE

I certify that on May 19, 2010, I have electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which shall send notification of such filing to the following:

Scott Richardson - Scott.richardson@ag.state.ar.us
Sam Jones - SJones@mwlaw.com
Steve Jones - sjones@jacknelsonjones.com
John Walker - johnwalkeratty@aol.com
Mark Burnette - mburnette@mbbwi.com
Margie Powell – mqpowell@odmemail.com

/s/ *Christopher Heller*