UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

LITTLE ROCK SCHOOL DISTRICT **PLAINTIFF**

v. **No. 4:82-cv-866 BSM/HDY**

PULASKI COUNTY SPECIAL SCHOOL DISTRICT NO. 1, et al. **DEFENDANTS**

MRS. LORENE JOSHUA, et al. **INTERVENORS**

KATHERINE KNIGHT, et al. **INTERVENORS**

RESPONSE TO LITTLE ROCK SCHOOL DISTRICT'S MOTION TO ENFORCE 1989 SETTLEMENT AGREEMENT

The Arkansas Department of Education (ADE), by and through its attorneys, Attorney General Dustin McDaniel and Assistant Attorney General Scott P. Richardson, state for their Response to Little Rock School District's (LRSD's) Motion to Enforce 1989 Settlement Agreement:

I. INTRODUCTION

LRSD, a unitary school district that has remedied the effects of segregation to the extent practicable in its schools, asks this Court to enforce the 1989 Settlement Agreement. LRSD's motion is an attempt to expand the issues in this case well beyond what is covered by the 1989 Settlement Agreement and an effort to have the Court issue orders that are in no way related to remedying the effects of past segregation, which this Court has found no longer exist within LRSD. For many reasons detailed below, LRSD's request to extend this decades old litigation should be denied.

II. THE 1989 SETTLEMENT AGREEMENT CANNOT BE EXPANDED TO UNDULY LIMIT CHARTER SCHOOLS

A. The Law of Consent Decrees Does Not Allow the Unwarranted Expansion Requested by LRSD

The 1989 Settlement Agreement is a consent decree subject to this Court's remedial authority. As a consent decree it is also subject to constitutional limitations on the federal court's judicial powers and is interpreted according to contract principals. *Harris v. Brownlee*, 477 F.3d 1043 (8th Cir. 2007). In the context of institutional reform litigation against a State, a consent decree and its enforcement against a state may only extend to violations of federal law. *Horne v. Flores*, ___ U.S. ____, 129 S.Ct. 2579 (2009). Consent decrees do not strip states of their sovereignty and federal courts must exercise caution so that enforcement of a consent decree does not displace the democratic governance of a state over its institutions. *Id.*; *Frew v. Hawkins*, 540 U.S. 431, 124 S.Ct. 899 (2004). These constitutional rules recognize that "[f]ederal courts operate according to institutional rules and procedures that are poorly suited to the management of state agencies." *Angela R. v. Clinton*, 999 F.2d 320, 325 (8th Cir. 1993).

A federal court's remedial powers even in school desegregation cases are bound by our federal system. *Missouri v. Jenkins*, 515 U.S. 70, 115 S.Ct. 2038 (1995)(*Jenkins III*). Exercise of the Court's equitable authority in this case must be directed at eliminating, to the extent practicable, the constitutional violations that gave rise to the decree. *Swann v. Charlotte-Mecklenburg Bd. Of Ed.*, 402 U.S. 1, 91 S.Ct. 1267 (1971). Courts exceed their authority if they attempt to control government activity that is unrelated to desegregation: i.e. remedying the vestiges of segregation to the extent practicable. *Id.* Any remedial order of the Court "must directly address and relate to the constitutional violation itself." *Jenkins III*, 515 U.S. at 88, 115 S.Ct. at 2049.

Equitable relief should not be granted easily and a Court should be particularly cautious about exercising its authority in a public interest case. *Salazar v. Buono*, 130 S.Ct. 1803 (U.S. 2010). When exercising injunctive powers a court must pay close attention to significant changes in the law or the circumstances surrounding the grant of relief "lest the decree be turned into an instrument of wrong." *Id.* at 1816 *quoting* Wright & Miller § 2961, at 393-394. A court called on to exercise its equitable powers over state and local authorities must resist the "temptation to blur the separation of powers, to shift the balance between the federal courts and state and local government too far toward the courts." *Jenkins v. Missouri*, 216 F.3d 720, 726 (8th Cir. 2000).

The Supreme Court has set out a three-part test to guide district courts in the proper use of their equitable authority in a desegregation case:

> In the first place, like other equitable remedies, the nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation. The remedy must therefore be related to the condition alleged to offend the Constitution.
>
> Second, the decree must indeed be remedial in nature, that is, it must be designed as nearly as possible to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.
>
> Third, the federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution.

Jenkins III, 515 U.S. at 88, 115 S.Ct. at 2049. Any remedy ordered must be subject to objective limitations and must be limited in duration. *Id.* at 98, 115 S.Ct. at 2054. Ultimately, the goal of any desegregation case is to restore the educational system to its proper place in our democracy: under the control of state and local authorities responsible to their electorate. *Freeman v. Pitts*, 503 U.S. 467, 112 S.Ct. 1430 (1992).

The LRSD's Motion to Enforce is related to none of these principles and fails to acknowledge the significant changes that have occurred in this county, the state, and this case over the last twenty years. Moreover, LRSD would have this court displace the State's authority over education in Pulaski County in order to freeze innovation in education and to deprive students in Pulaski County the benefits that would be open to students in the rest of the State.

B. Sovereign Immunity Bars Any Expansion of the 1989 Settlement Agreement

The Supreme Court has, since the passage of the Eleventh Amendment, consistently recognized the sovereignty of the states and limited the jurisdiction of the federal courts to cases or controversies that arise under federal law. *Vaden v. Discover Bank*, ___ U.S. ___, 129 S.Ct. 1262, 1272 (2009). Sovereign immunity bars suits in federal courts for legal or equitable relief against states that have not consented to federal jurisdiction. *Alabama v. Pugh*, 438 U.S. 781, 98 S.Ct. 3057 (1978).[1] Federal Courts do not have power over states to address alleged violations of state law. *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 104 S.Ct. 900 (1984). Arkansas has not consented to suit in federal court. *Gibson v. Arkansas Dept. of Correction*, 265 F.3d 718 (8th Cir. 2001). Moreover, even where the suit is directed against a state official in his or her official capacity the Eleventh Amendment still bars the suit if the judgment sought "would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from

[1] See also *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347 (1974); *Quren v. Jordan*, 440 U.S. 332, 99 S.Ct. 1139 (1979); *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 102 S.Ct. 3304 (1982).

acting, or to compel it to act." *Pennhurst*, 465 U.S. at 102 fn. 11, 104 S.Ct. at 911 (1984).

The 1989 Settlement Agreement is a limited intrusion on Arkansas's sovereignty; limited to the extent needed to remedy certain listed effects of segregation in the Pulaski County school districts. Any expansion of its terms beyond that necessary to accomplish its purposes would violate the limits on this Court's authority over the State of Arkansas.

C. Contract Principles Do Not Allow Expansion of an Agreement Beyond its Express Terms

In addition to the federalism limits outlined above, as a type of contract a consent decree may only be enforced as written. *Magic Touch Corp. v. Hicks*, 99 Ark.App. 334, 260 S.W.3d 322 (2007). Courts may not enlarge or expand the terms of a contract. *Id.*

D. The Nature and Scope of the State's Constitutional Violations Do Not Support the Expansion of the Settlement Agreement Sought by LRSD

1. The State's Obligations in the 1989 Settlement Agreement Relate Principally to Supporting the Racial Balancing Elements of the Districts' Desegregation Plans

The 1989 Settlement Agreement sets out the obligations that the State was to undertake in support of the Pulaski County districts' unitary status efforts. The purpose of the Settlement Agreement is stated in its first sentence: "achieving unitary school systems in these three districts which are free from the vestiges of racial segregation." 1989 Settlement Agreement p. 1. This theme is reiterated later in the settlement agreement where the autonomy of the PCSSD and NLRSD is recognized:

> [T]his agreement is both necessary and desirable to facilitate [PCSSD and NLRSD's] desegregation activities as well as their cooperative desegregation activities with the LRSD and others.

Ex. A, 1989 Settlement Agreement p. 9 ¶ J.

As LRSD acknowledges, the 1989 Settlement Agreement embodied the compliance remedy issued by the Eighth Circuit in 1985. In that lengthy opinion, the Eighth Circuit explained that the liability of the State in this litigation was based simply on omission and not affirmative conduct. *Little Rock School District v. Pulaski County Special School District*, 778 F.2d 404 (8th Cir. 1985). In fact, neither Judge Woods nor the Eighth Circuit identified any affirmative conduct by the State or the State Board of Education that occurred since the 1960s upon which to base the State's liability in this case. *Id.* at 411-417; *LRSD v. PCSSD*, 597 F.Supp. 1220, 1227-28 (E.D. Ark. 1984). The Eighth Circuit placed the responsibility for the implementation of its remedy on the districts. *LRSD*, 778 F.2d at 434-436.

The remedial principles directed by the Eighth Circuit in 1985 placed few obligations on the State Board; principally they were funding obligations. *Id.* Nowhere did the Eighth Circuit mandate that the Court take over the State's control of the delivery of educational services in Pulaski County. Nor did the Eighth Circuit require that the State freeze the status quo in education in Pulaski County. The 89 Settlement Agreement did not do this either. There is simply no limit either in the Eighth Circuit's opinion or in the 1989 Settlement Agreement on the States authority to direct public education in Pulaski County. In particular, there is no prohibition on the creation of new schools in Pulaski County.

The 89 Settlement Agreement also contemplated that LRSD may not have exclusive control over all public education in the future.

> 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 LRSD (**or any successor district or districts to which students residing in territory now within LRSD may**

> **be assigned or for the benefit of such students if the State or any 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.

1989 Settlement Agreement p. 6 ¶ F (emphasis added). This same language is repeated in the section of the agreement outlining the State's payment obligations to the LRSD. Ex. A, 1989 Settlement Agreement p. 22, ¶ VI.A. and p. 24, ¶ VI.B. Clearly, the settlement agreement contemplated that LRSD would not maintain exclusive control over delivery of publicly funded education services in its boundaries; and that the State maintained its control over the direction of public education in Little Rock.

2. Remedial Nature of the Decree: Charter Schools in Little Rock and Pulaski County Support Racially Neutral Education and the Expansion of Educational Opportunities for Students in the County

As noted above, any enforcement of the 1989 Settlement Agreement "must be designed as nearly as possible to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." *Jenkins III*, 515 U.S. at 88, 115 S.Ct. at 2049. LRSD, in its Motion to Enforce, sweeps aside its unitary status and asks this Court to pretend that unitary education in LRSD has no effect. It has, on the contrary, deep effect and cannot so lightly be tossed aside.

In 2002, this Court declared LRSD unitary in all of its education operations save one area covered by its remedial plan: assessment and evaluation of programs adopted to enhance achievement of low-performing students. *LRSD v. PCSSD*, 237 F.Supp.2d 988 (E.D. Ark. 2002)(Wilson, J.). This finding was affirmed by the Eighth Circuit. *LRSD v. PCSSD*, 359 F3D 957 (8th Cir. 2004). Five years later, LRSD was declared fully unitary in the one remaining area leaving the district unitary in all of its operations and

completely released from its desegregation obligations. *LRSD v. PCSSD*, 2007 WL 624054 (E.D. Ark. 2007)(Docket # 4103). This order was affirmed on appeal as well. *LRSD*, 561 F.3d 746 (8th Cir. 2009). Thus, the purpose of the 1989 Settlement agreement has been accomplished in LRSD. Far from furthering the goals of the 1989 Settlement Agreement, LRSD's motion asks the Court to remedy a problem that no longer exists within the district. For all practical purposes, education in the Little Rock School District has been free from the vestiges of prior segregation for eight years. The vast majority of the students currently attending school in the Little Rock School District have never attended non-unitary schools. Students in LRSD have been restored "to the position they would have occupied in the absence" of segregation.

LRSD's only remaining desegregation obligation is to send and receive students across district lines under the Magnet and M to M Stipulation. Compare *LRSD*, 2007 WL 624054, with 1989 Settlement Agreement. The only reason for this continued race based transfer system is to support the desegregation efforts of the districts that have not been declared unitary. In particular, the magnet and M to M transfers relate to the school districts' obligations to bring greater racial balance to the schools by providing integrative transfers across district lines. The two remaining districts subject to this Court's remedial authority are unitary in student assignments. All remaining desegregation obligations in these districts deal with how equitably they treat their own students.

NLRSD was declared unitary as to student assignments in 1995. Docket # 2525. Thus, students have been assigned to attend schools in NLRSD on a racially neutral basis since 1995. PCSSD is the only district that has not been declared by the Court to be

unitary as to student assignments. It, however, has put before the Court its case for unitary status as to this area, among others. At trial, PCSSD made a substantial showing that it has assigned students to schools according to its desegregation plan for many years and has attained unitary status in that area. As such, the effects of segregation in the racial composition of schools in Pulaski County have been remedied to the extent practicable and any racial identifiability of public schools in the Pulaski County school districts cannot be causally related to the prior *de jure* segregation found in this case. In particular, racial imbalance in LRSD cannot be causally related to segregative acts that might have occurred decades ago. The limits LRSD proposes for charter schools would do nothing to remedy this non-existent problem. Racial imbalance, to the extent it exists in LRSD, is a result of people's private choices about where to live not any segregative policies or practices that occurred in the middle part of the last century.

This fact has several consequences that LRSD does not address in its Motion and Brief.

3. LRSD No Longer Has Standing to Impose Racial Balancing Standards on Students

A plaintiff must clearly allege facts that demonstrate that he is "the proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers." *Warth v. Seldin*, 422 U.S. 490, 518 (1975). "[T]he irreducible constitutional minimum of [Article III] standing" requires a plaintiff to demonstrate each of three propositions: 1) that he has suffered an "injury in fact," i.e. the invasion of a legally-protected interest that is not only concrete and particularized but also actual or imminent; 2) that a causal connection exists between the injury and the conduct of which complaint is made (i.e. that the asserted injury is fairly traceable to the challenged action of the defendant); and

3) that the asserted injury will be "redressed" by a favorable decision for the Plaintiff. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). Plaintiff must also demonstrate that the injury complained of falls within the "zone of interests" of the law whose protection the plaintiff seeks to invoke. *Bennett v. Spear*, 520 U.S. 154 (1997).

The plaintiff bears the burden of establishing these elements throughout his case especially when injunctive relief is sought. *Id.* "Past exposure to illegal conduct does not, in itself, show a present case or controversy regarding injunctive relief." *Bennett*, 520 U.S. at 564. A plaintiff must show that he "has sustained or is immediately in danger of sustaining some direct injury as a result of the challenged official conduct." *Los Angeles v. Lyons*, 461 U.S. 95 (1983). If plaintiff is no longer subject to the alleged unconstitutional deprivation, standing and, hence, federal jurisdiction is lost and the case should be dismissed. *Id.*

Although LRSD complains about a number of perceived effects of charter schools, none of these relate to desegregation obligations imposed on the LRSD or obligations that exist for LRSD's benefit. LRSD alleges that the charter schools affect the balance of economically disadvantaged students in its schools. Brief p. 58-62. This is not an interest that is protected by any of the obligations that remain in this case. This is a racial desegregation case and has always been; not a case dealing with poverty. LRSD alleges that it is bad policy to have additional schools in Pulaski County that have specialty programs or innovative curriculum. Brief p. 62-67. As explained below, no court anywhere has found this to be within their jurisdiction to control; the courts that have addressed this issue held that it is one for the political process not the judicial process. Moreover, LRSD cannot allege that the charters injure the districts ability to

balance the races in its schools for the benefit of its students, because it has no obligation to do so. In fact, it was released from this obligation well before any charter school was opened in Little Rock.

It should be noted here as well, LRSD complains about charter schools that are located far from its borders: i.e. Academics Plus, Jacksonville Lighthouse, and LISA Academy – North. LRSD does not allege nor does it provide evidence that these charter schools have drawn students from LRSD schools in anything more than *de minimis* numbers. LRSD Ex. 63, 2009-10 LRSD Withdrawal Report (identifying up to four LRSD students enrolling in Academics Plus). Any effect these schools might have on racial balance in LRSD would be remote at best and not likely to affect any legally protected right held by LRSD.

4. LRSD's Assignment of Students to Schools by Race is Constitutionally Suspect

Not only is LRSD freed from its desegregation obligations, its unitary status means that assigning students to schools in LRSD or restricting enrollment in LRSD schools on a strictly racial basis is constitutionally suspect. *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 127 S.Ct. 2738 (2007)("*Parents Involved*"). *Parents Involved* dealt with two school districts one in Seattle, Washington, the other in Louisville, Kentucky. The Louisville school district had been declared unitary in 2000, but continued to assign students to schools based on the percentage of black and non-black enrollment at the school. *Id.* at 2754. (The magnet and M to M stipulation use this same binary classification for student eligibility.) Although the issues divided the Supreme Court, a majority of the Justices agreed that restricting enrollment in schools simply based on race violated the Constitution, even in a

district recently declared unitary. *Id.* at 2792 (Kennedy, J. concurring)(schools may not treat "each student in different fashion solely on the basis of a systematic, individual typing by race").

It should be noted that none of the charter schools or their supporting organizations have been found to have violated the constitution. This is significant because the Court's remedial authority is only justified by constitutional violations. *Jenkins III*, 515 U.S. 70, 115 S.Ct. 2038 (1995). In the absence of a constitutional violation the Court does not have authority over persons who are not parties to the case. The Seattle School District's experience in *Parents Involved* suggests strongly that placing racial restrictions on enrollment at the charter schools would not be constitutional.

E. Even in School Districts Subject to Desegregation Obligations, Charter Schools Have Been Found a Permissible Method to Provide Integrated Education Options to Students

Case law in the Eighth Circuit and other Circuits recognize the State's authority to permit the creation of charter schools and that charter schools may further the goal for providing quality integrated education to students. In 1999, the Kansas City Metropolitan School District (KCMSD) challenged the Missouri State Board of Education's decision to remove the KCMSD's state accreditation. *Jenkins v. Missouri*, 73 F.Supp.2d 1058 (W.D. Mo. 1999). As part of this effort, the KCMSD alleged that Missouri's allowing the creation of charter schools in Kansas City was significantly interfering with the district's ability to desegregate. *Id.* at 1065-1066. At the time, the KCMSD was not unitary, was still operating under a desegregation plan, and was still subject to the remedial supervision of the federal court. *Id.* Missouri's charter school law at the time allowed the creation of charter schools in only two cities: Kansas City and St. Louis. The

school districts in both cities were subject to long-standing desegregation cases that were the subject of numerous appeals. *Jenkins III*, *supra*; *Liddell v. Special School Dist.*, 149 F.3d 862 (8th Cir. 1998)(desegregation of vocational education schools).

The charter school laws at issue in *Jenkins* allowed charters only in Kansas City and St. Louis. Missouri law also required KCMSD to fund the Kansas City charter schools out if its own budget. *Jenkins*, 73 F.Supp.2d at 1065. The district court summarized the financial impact of the charters as follows:

> Fifteen charter schools have opened in the KCMSD during the 1999-2000 school year. These fifteen charter schools have enrolled 4,354 students, 3,072 of which are former KCMSD students. Based on this enrollment figure, the KCMSD will have to pay an estimated $23.8 million to the charter schools within its boundaries in fiscal year 2000. The KCMSD will not be able to reduce expenditures by that same amount, however, and anticipates an operating deficit for fiscal year 2000 of $3.4 million

Id. KCMSD also expressed apprehension about future charter schools that were or may be authorized in the district. In particular, KCMSD officials testified that at the time of the hearings two additional charter schools were scheduled to be opened in Kansas City that would enroll approximately 480 students the following school year. *Id.* Due to Missouri's removal of its accreditation, KCMSD officials further testified that charter school applications would increase and more students would leave the KCMSD for the charter schools as people sought alternatives to KCMSD's unaccredited schools. *Id.*

The district court did not credit KCMSD's arguments and took a very different view of the situation. The court noted that while the charter schools may have had an adverse impact on the KCMSD's operations, they may also have had a positive impact on the subject of the litigation: desegregated education for the schoolchildren in Kansas City. *Id.* at 1066 fn. 2. In fact, the court noted that the increase in charter schools "may be just as likely to advance the quality and unitariness of education for Kansas City

pupils. Additionally, one might hope, as the state legislature apparently does, that the competition created by charter schools may further improvements in the education that the KCMSD provides." *Id.*

The school district argued, similar to the arguments LRSD makes here, that the academic performance of the district combined with the charter school options negatively affected its desegregation efforts in that "academically motivated students" would leave the district which, in turn, would "hurt the KCMSD's test scores as well as the academic environment of the District's classrooms." *Id.* at 1069.

The court found that if this happened it was unlikely to be caused by the state's actions:

> A student's decision to leave the District for a charter school is more likely to be motivated, however, by his or her realization that the KCMSD is not, in fact, providing the education needed. The potential that students would come to this conclusion existed long before the State Board voted to designate the KCMSD as unaccredited.

Id. at 1077. Far from impeding the KCMSD's desegregation efforts necessitating expanded court oversight, the court found these things reason to hold that KCMSD was unitary and should be released from court supervision. The district court found that court oversight had turned into an impediment to effective education and innovation in the district and that the complexity of the problems faced by the district illustrated the need to have the court step out of the way to allow the KCMSD to chart its own course for the future. *Id.* at 1077-1079. KCMSD was, thus, held unitary.

The plaintiffs appealed the unitary status finding to the Eighth Circuit. *Jenkins v. Missouri*, 216 F.3d 720 (8th Cir. 2000). The Eighth Circuit sitting *en banc* reversed the district court's unitary status based solely on the lack of notice given by the district court

that it was going to consider KCMSD's unitary status at the hearing. *Id*. Judge Heaney[2] in his concurrence noted that "[i]t is, of course, appropriate for the State to create charter schools." *Id*.

1. Other Desegregation Cases have Approved Charter Schools

The State is aware of two other cases dealing with charter schools in the context of an ongoing desegregation case: *Berry v. School District of the City of Benton Harbor*, 56 F.Supp.2d 866 (W.D. Mich. 1999)(denying one charter school and approving another), and *Cleveland v. Union Parish School Board*, 570 F.Supp.2d 858 (W.D. La. 2008)(denying charter school) *see also Cleveland v. Union Parish School Board*, 2009 WL 1491188 (W.D. La. May 27, 2009)(unpublished)(approving same charter school). Both are district court cases and neither case resulted in an appellate decision. Both cases also dealt with school districts that had not been declared unitary and that were still subject to significant desegregation obligations.

a. Berry v. School District of the City of Benton Harbor

In *Berry*, the district court was asked to approve two charter schools to operate in the School District of the City of Benton Harbor ("BHASD") in the 1999-2000 school year: the Benton Harbor Community Academy (Academy) and the Benton Harbor Charter School ("BHCS"). Berry, 56 F.Supp.2d at 868. Prior to these petitions, the *Berry* court had previously allowed a charter school to open in BHASD: the Countryside Charter School. *Id.* at 869. In ruling on the petitions the *Berry* court examined only "the potential impact state funding may have on the court's ability to remedy the defendants' past constitutional violations." *Id.* at 870. The court specifically rejected any suggestion

[2] Judges Heaney and McMillian along with Judge Gibson authored the opinion reversed by *Jenkins III*, for judical overreaching in revising and expanding the desegregation decree in *Jenkins. Jenkins v. Missouri*, 11 F.3d 755 (8th Cir. 1993) reversed by *Jenkins III*, 515 U.S. 70, 115 S.Ct. 2038 (1995).

that it review the "advisability and effectiveness of charter schools" because it found that to be a political question properly reserved to the democratic processes. *Id.* The court examined only whether the proposed charter schools would have a student body with some level of integration, some level of diversity in the staff and board, and whether "any verifiable effects caused by funding public school academies in Benton Harbor will adversely affect the ability of the remaining defendants to meet their obligations under the remedial order." *Id.* at 871-872.

As to the Academy, the court rejected its petition because it provided insufficient information. *Id.* at 872-873. As such, the court was unable to assess the desegregative impact of the proposed charter school.

The BHCS, however, did provide information about its anticipated enrollment which lead the district court to approve the charter school over the objection of the school district. BHCS proposed to serve 540 students in K through 5th Grade initially and expand its enrollment one grade each year until enrollment expanded to 1180 students in K through 12th grade. *Id.* at 874. Due to its recruitment activities BHCS was able to provide enrollment information which the court summarized as follows:

> As of June 14, 1999, BHCS has received 326 applications for enrollment. Ten of those applications are from students who currently attend school in Coloma, and none from current students in Eau Claire. Of the 258 of these applicants who identified their race, all but three students are black. Of the total 326 applicants, 318 are residents of the Benton Harbor Area School District, 218 of whom attended BHASD schools in 1998-99, and 52 more of whom did not disclose where they previously attended.

Id. at 875. BHASD in the 1999-2000 school year was majority African-American (about 90%) and had experienced significant shifts in its student population (out migration of white students and in migration of African-American students) while the inter-district desegregation remedy was in place. *Id.* at 882-883; *Berry v. Benton Harbor*, 195

F.Supp.2d 971, 979 (W.D. Mich. 2002). BHCS was also able to present evidence that it anticipated employing "reasonably diverse" faculty and staff. *Berry*, 56 F.Supp.2d at 877. Accordingly, the court granted the charter school's motion to operate in the school district. Because the school district was still not unitary as to student assignments, however, the court held that the BHCS would be required to engage in a good faith attempt to recruit a student body that was 85-95% African-American. A key factor in the court's decision was that the BHCS's proposed enrollment would, after six years of operation, be approximately 20% of the enrollment of the school district. *Id.* at 884.

b. Cleveland v. Union Parish School Board

In *Cleveland* the district court was asked to approve the creation of D'Arbonne Woods Charter School (DWS) in a non-unitary district for the 2008-09 school year. *Cleveland v. Union Parish School Board*, 570 F.Supp.2d 858 (W.D. La. 2008); *Cleveland*, 2009 WL 1491188 (W.D. La. May 27, 2009)(unpublished). Louisiana law required charter schools to be subject to any court-ordered desegregation plan in place in the district in which the charter was located. *Cleveland*, 570 F.Supp.2d at 866-867. The court noted that by this law "the State invited the Court into the charter school process for the specific purpose of considering effects on desegregation." *Id.* at 868. Union Parish in 2000 was 69.8% white and 27.9% black. *Cleveland*, 570 F.Supp.2d at 859. The school aged population in the parish was 59.8% white and 37.4% black. *Id.* DWS proposed to enroll 225 students all but eight of which were white and only two of which were African-American. *Id.* at 866. Twenty-one people applied for teaching positions with DWS, of which only two were African-American. *Id.* The court described the question before it as "whether opening a virtually all white public charter school at the formerly all

white Rocky Branch school would undermine desegregation." *Id.* at 868. The court held that the operation of a school of all white students, with an all white faculty, in an area far removed from areas where African Americans lived in the parish, would undermine the desegregation obligations of the school district. *Id.* at 870.

DWS returned to court the next year to seek approval with a different set of facts. *Cleveland*, 2009 WL 1491188 (page references are to the Westlaw star pagination). DWS had increased its student recruitment efforts such that 297 students had applied for enrollment: two Native Americans (0.6%), 51 African-Americans (17%), 24 Hispanics (8%), and 220 White students (74%). *Id.* at 3. Enrollment was projected to be 216 students: 51 African-American (23.6%) and 139 white students (64%). *Id.* at 5. The school had not had much change in its faculty and staff applicant pool, but did show recruitment efforts aimed at providing diversity in staff. *Id.* Given this change, the district court found that DWS should be allowed to operate beginning in the 2009-10 school year as it would "neither undermine the continuing desegregation efforts of [the school district] nor promote resegregation." *Id.* at 7. The court did require (as did Louisiana law) that DWS comply with the desegregation decree in effect in Union Parish and, without explanation, the court required that a third of its enrollment be minority students. *Id.*

For both courts, so long as the proposed charter schools provided some level of integration in their student body and staff, the schools were allowed and found to be consistent with the desegregation obligations imposed on the school districts in which they proposed to locate. No court doubted the State's authority to authorize charter schools within the desegregating school districts. As will be shown below, charter

schools in Pulaski County provide unitary education and options to parents and children in the County.

F. Charter Schools in Arkansas Provide Racially Neutral Education Options to Parents and Students

The Arkansas General Assembly expended the creation of charter schools in 1999. Act 890 of 1999. The Charter Schools Act was passed "to provide opportunities for teachers, parents, pupils, and community members to establish and maintain public schools that operate independently from the existing structures of local school districts." Ark. Code Ann. § 6-23-102. The goal of the Act is to improve student learning; to expand learning opportunities for students, especially low-achieving students; to encourage innovation in teaching methods; to create new professional opportunities for teachers, including the opportunity for greater involvement in the learning program at a school site; to expand the educational options for parents and students within the public school system; and to hold the newly created charter schools accountable for student achievement. Id.

Three types of charter schools were allowed to be created: Conversion Charter Schools, Open-Enrollment Charter Schools, and Limited Public Charter Schools. Ark. Code Ann. § 6-23-101, et seq. A "Conversion Charter School" is an existing school operated by an existing public school district "that has converted to operating under the terms of a charter approved by the local school board and the state board." Ark. Code Ann. § 6-23-103(3). Each of the three Pulaski County school districts operate conversion charter schools or have applied to operate conversion charter schools in their districts without seeking leave from the Court to do so. An "Open-Enrollment Public Charter School" is a newly created school operating under the terms of a charter granted by the

State Board of Education. Ark. Code Ann. § 6-23-103(8); see also 20 U.S.C. § 7221i(1). LRSD challenges only open-enrollment charter schools. A "Limited Public Charter School" is an existing public school operated by a traditional public school district that converts to operation under a limited public charter. Ark. Code Ann. § 6-23-103(6). The undersigned is not aware of any limited public charter schools operating in Pulaski County.

For all three types of charter schools, state law requires the potential impact on desegregation efforts to be assessed as follows:

> (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.

Ark. Code Ann. § 6-23-106. The State Board authorizes charter schools, and it has denied more charters than it has granted. The charter decisions in 2009 are an example of this. Last year, the State received applications proposing eight open enrollment charter schools and four conversion charter schools. Only two open enrollment charter schools were approved (Urban Collegiate Prep and KIPP Blytheville) and two conversion charter schools were approved (Cloverdale Aerospace Conversion Charter and Lincoln Academy of Excellence in Forrest City).

1. Conversion Charter Schools

A school district may apply to convert a traditional public school into a Conversion Charter School in order to adopt research-based school or instructional designs focused on improving student and school performance, to address school improvement status, or to partner with other public school districts or public schools to address student needs in a given geographical area. Ark. Code Ann. § 6-23-201, et seq. Application for conversion charter school status must be made to and approved by the State Board of Education. Id. Applications are required to contain a number of items including "a plan for school improvement that addresses how the conversion public charter school will improve student learning and meet state educational goals." Ark. Code Ann. § 6-23-201(b) and 6-23-306. Students attending conversion charter schools are funded exactly the same as any other public school student attending a school under the authority of a school district. Ark. Code Ann. § 6-20-2303(3); 6-20-2305. Conversion charter schools function much like traditional public schools except that they may receive exemptions from certain state regulations identified in their application and charter. Ark. Code Ann. § 6-23-201. Conversion charters are only exempted from the laws and regulations identified in their application approved by the State Board. There are no limits on the number of conversion charter schools that may be granted by the State Board.

2. Open-Enrollment Charter Schools

An "eligible entity" may apply to the State Board to operate an Open-Enrollment Charter School. Ark. Code Ann. § 6-23-301, et seq. An eligible entity is defined as a public institution of higher education, a private nonsectarian institution of higher

education, a governmental entity, or a nonsectarian not-for-profit organization. Ark. Code Ann. § 6-23-103(4). An application for an open-enrollment charter school must contain, among a number of other things, a demonstration of parental support for the school and must "[d]escribe a plan for academic achievement that addresses how the open-enrollment public charter school will improve student learning and meet the state education goals." Ark. Code Ann. § 6-23-302(c). An open-enrollment charter application is first submitted to the local school board of the public school district in which the proposed open-enrollment public charter school will operate. Ark. Code Ann. § 6-23-302(d)(1). If the application is disapproved by the local school board, then the applicant may appeal that decision to the State Board of Education. Ark. Code Ann. § 6-23-302(d)(2). The local school district may appear before the State Board and present its position on the charter application. Id.

An authorized open-enrollment charter school is funded by general revenue through state foundation funding and other sources available to public schools. Ark. Code Ann. § 6-23-501-502. Open-enrollment charter schools do not receive any funding from the uniform rate of tax under Amendment 74 to the Arkansas Constitution and do not receive any money from any millages levied by school districts. Ark. Const. Art. 14 § 3; Ark. Code Ann. § 6-23-502. Open-enrollment charter schools have not been given taxing authority by the State, unlike school districts. Ark. Const. Art. 14 § 3.

Arkansas law does not place geographic limitations on where Open-enrollment charter schools may locate. *Compare Jenkins v. Missouri*, 216 F.3d 720, 726 (8th Cir. 2000)(noting that Missouri only allowed charter schools to be located Kansas City or St. Louis). The law does, however, express a preference for locating open-enrollment

charter schools in school districts that have a higher percentage of students eligible for free and reduced lunch than the state average, districts that are in academic distress, or districts in school improvement status. Ark. Code Ann. § 6-23-304. The General Assembly has provided that the State Board "may grant no more than a total of twenty-four (24) charters for open-enrollment public charter schools" in the state. Ark. Code Ann. § 6-23-304(c).

Enrollment in these charter schools is open to any student in the State. Arkansas law specifically prohibits Open-enrollment charter schools from engaging in "discrimination in admissions policy on the basis of gender, national origin, race, ethnicity, religion, disability, or academic or athletic eligibility" except as required by federal law. Ark. Code Ann. § 6-23-306. If an open-enrollment charter school receives more applicants than the school is able to accept (i.e. is over-subscribed), then it must use a "random, anonymous student selection method that can be described in the charter application." Ark. Code Ann. § 6-23-306(14). An over-subscribed charter may only give preference to children of founding members of the eligible entity holding the charter and siblings of currently enrolled students. Ark. Code Ann. § 6-23-306(14)(B)(ii). An over-subscribed charter may use a weighted lottery when necessary to comply with federal law. Ark. Code Ann. § 6-23-306(14)(C).

Open-enrollment charter schools are subject to all laws and regulations applicable to every publicly funded school in the state. Applications[3] to create open-enrollment charters, like conversion charter schools, may request exemption from requirements of the law. Ark. Code Ann. § 6-23-201(b)(6)(conversion charters); 6-23-302(c)(4)(open-

[3] Once a charter school application is approved by the local school district or the State Board, the application becomes the "charter" under which the school then operates.

enrollment charters). The charters must, however, describe their plans for improving student learning and must "[o]utline the proposed performance criteria that will be used during the initial five-year period of the open-enrollment public charter school operation to measure its progress in improving student learning and meeting or exceeding the state public education goals." Ark. Code Ann. § 6-23-302(c)(2), (3). These criteria must be in the application and subsequent charter before the State Board may grant the charter. Ark. Code Ann. § 6-23-303.

3. Limited Charter Schools

Arkansas law allows a public school to apply to the State Board for limited public charter school status. Ark. Code Ann. § 6-23-601. This status allows, with the permission of the State Board, a school to be exempt from certain statutorily specified employment requirements of Arkansas law. Ark. Code Ann. § 6-23-601(b)(1). Limited charter schools are, otherwise, subject to the same regulations and laws as other schools under the authority of a school district. Limited charter school students are funded in the same way as other students attending schools under the authority of school districts. There are no limited charter schools in Pulaski County.

G. Pulaski County Charter Schools Provide an Educational Setting that is As Integrated As the Traditional Public Schools

There are two conversion charter schools currently operating in Pulaski County: Ridgeroad Middle School operated by the North Little Rock School District for grades Seven and Eight; and Felder Learning Academy operated by the Little Rock School District for grades Six through Twelve. PCSSD requested and was denied permission to open two conversion charter schools for the 2010-11 school year. LRSD requested and was eventually granted permission to turn Cloverdale Middle School into a conversion

charter school for the 2010-11 school year. Ex. B, SBE Minutes. LRSD was, actually, an early adopter of the charter school format as a method to enhance learning for low performing students. It utilized a charter school as part of its remedial obligations it undertook in this case. *LRSD*, 470 F.Supp 2d 963, 972, 978, 996 (E.D. Ark. 2004)(noting LRSD's completion of evaluation of programs designed to remediate achievement including a charter school).

There are ten open-enrollment charter schools operating in Pulaski County:

1. Academics Plus – Kindergarten through Twelve (Opened 2001),
2. Covenant Keepers College Preparatory Charter School – Six through Nine (Opened 2008),
3. Dreamland Academy of Performing and Communication Arts – Kindergarten through Fifth grades (Opened 2007),
4. E-STEM Public Charter Elementary School – Kindergarten through Four (Opened 2008),
5. E-STEM Public Charter Middle School – Five through Eight (Opened 2008);
6. E-STEM Public Charter High School – Nine and Ten (Opened 2008);
7. Jacksonville Lighthouse Charter School – Kindergarten through Six (Opened 2009);
8. LISA Academy – Six through Twelve (Opened 2004);
9. LISA Academy – North Little Rock – Kindergarten through Nine (Opened 2008); and
10. Little Rock Preparatory Academy – Fifth grade (Opened 2009).

It is appropriate to think of E-Stem as one K-12 charter school. See LRSD Memorandum Brief in Support of Motion to Enforce 1989 Settlement Agreement (Dk. # 4442) p. 63 fn. 15. One more charter school has been approved for the 2010-2011 school year in Pulaski County: the Urban Collegiate Prep Charter School ("UCPC"). LRSD Ex.

52. Most of the open-enrollment charter schools have adopted as their purpose to provide enhanced educational experience for low-performing students in particular. LRSD Exs. 31 (Dreamland), 35 (Covenant Keepers), 45 (Jacksonville Lighthouse), 49 (Little Rock Prep), 52 (UCPC). The remaining charters have as their purpose to provide enhanced educational experience beyond what is available in the traditional public schools in the area. LRSD Exs. 11 (Academics Plus), 23 (LISA Academy), 38-40 (E-Stem). All of the charter schools have expressed a commitment to improving performance of low-performing students and a goal to close achievement gaps.

In the 2009-2010 school year the Pulaski County charter schools served a predominately minority population of students. Ex. C, Updated Analysis of Racial Segregation in Pulaski County Charter and Traditional Public Schools (OEP Report). The open-enrollment charter schools tended to have a student body with some level of integration. Id. All of the schools are specifically prohibited from accepting only a single race of student. Ark. Code Ann. § 6-23-306(6). Of these charter schools Academics Plus enrolled the largest percentage of white students (82%). Twelve percent of its students were African-American, which is roughly twice the percentage of African-Americans residing in Maumelle. Ex. Y, Census Data Maumelle. Academics Plus has a more racially balanced student body than what was approved in *Berry* and a slightly less racially balanced student body than what was approved in *Cleveland*. Academics Plus is located outside LRSD's borders and likely has little, if any, effect on racial balance in LRSD's schools.

Little Rock Prep, Covenant Keepers, and Dreamland have the highest percentage of African-American students of the charter schools. These schools were established for

the purpose of raising the performance of persistently low performing students with a particular focus on closing the black/white achievement gap. LRSD Exs. 49, 35, & 31. As noted in the OEP report, these schools attract African-American students from predominately African-American schools in the LRSD. Thus, their existence actually helps LRSD's schools to become more racially balanced. Ex. C, OEP Report p. 12-15.

In the 2009-2010 school year, 90% (58 of 64) of Little Rock Prep's Fifth grade students were African-American. Ex. D, Charter Enrollment Table. The next geographically closest school to Little Rock Prep is King Elementary. In the 2009-2010 school year, 89% (612 of 688) of King's students were African-American. Ex. E, ODM 2009-10 Enrollment Report. Only two of Little Rock Prep's students that year were white compared to 62 white students at King. Cf. Ex. D and Ex. E. As compared to the 2008-09 school year, King lost twenty-eight white students. Ex. E, ODM 2009-10 Enrollment Report. Since LRSD was declared unitary as to student assignments, King's enrollment has shifted from 50% African-American (277 of 555) to its current 89% African-American enrollment (612 of 688). Id. This enrollment shift occurred steadily over that seven year period and was well underway before most of the open-enrollment charter schools began operations in Little Rock. King is in Whole School Improvement Year 1 for failure to meet academic standards. Ex. F, School Improvement Report.

In the 2009-10 school year, 88.7% (163 of 193) of Covenant Keepers Sixth through Ninth grade students were African-American. Ex. D, Charter School Enrollment Table. The next geographically closest middle school to Covenant Keepers is Cloverdale Middle. In the 2009-10 school year, 80% (498 of 623) of Cloverdale's students were African-American. Ex. E, ODM 2009-10 Enrollment Report. At the time LRSD was

declared unitary in student assignments (2001-02 school year), Cloverdale's student population was 88% African-American. Id. Cloverdale is in year seven school improvement for failing to meet academic standards. Ex. F, School Improvement Report. It is one of Arkansas's persistently lowest achieving schools. Ex. G, Persistently Lowest Achieving Schools List. Cloverdale is currently being converted to a charter school by LRSD. Ex. H, Cloverdale Conversion Charter School Application. LRSD stated in the Cloverdale application, without analysis, that converting that school to a charter school open to any student in the county to attend would have no negative impact on the ability of any school district to desegregate. Ex. H, Cloverdale Conversion Charter School Application p. 25. Cloverdale is not and has never been a stipulation magnet school or an interdistrict school under the 89 Settlement Agreement.

In the 2009-10 school year, 90% (240 of 265) of Dreamland Academy's K-5 students were African-American. Ex. D, Charter School Enrollment Table. The next geographically closest elementary school to Dreamland is Geyer Springs Elementary. In the 2009-10 school year, 83% (219 of 263) of Geyer Springs' students were African-American. Ex. E, ODM 2009-10 Enrollment Report. At the time LRSD was declared unitary, 86% (275 of 320) of Geyer Springs' students were African-American. In the year Dreamland opened (2007-08), Geyer Springs lost three white students and sixteen African-American students as compared to the 2006-07 school year. Ex. E, ODM 2009-10 enrollment report. From the time LRSD was declared unitary through the year before Dreamland opened (2006-07), Geyer Springs lost eight white students and gained twenty-six African-American students. Id. Geyer Springs is in Whole School Improvement

Year 3 for failure to meet academic standards for several years. Ex. F, School Improvement Report.

These figures illustrate the findings in the OEM Report: few of the students transferring to charter schools actually come from LRSD schools. Ex. C, OEP Report. For many of these students, LRSD offers a more racially isolated school environment or one that is not significantly less racially isolated. The students in grades 1-12 transferring from LRSD to the open-enrollment charter schools never constituted more than 2.6% of LRSD's total enrollment. Ex. C, OEP Report p. 7. For most years, the number of students transferring was less than half of this. Of those students transferring, most transfers came from LRSD schools that were already racially imbalanced or the transfers had little effect on the racial balance in the schools. Id. at 12-15, 26. Most students transferring entered a more diverse school environment than they had been in before. Id. at 26.

Moreover, all of the charter schools are required to be non-discriminatory in their enrollment and hiring. The charter schools were established for the purpose of providing integrated, enhanced educational experiences. This purpose combined with their detachment from the school districts has produced well integrated student bodies at most of the charter schools in Pulaski County without the need for racial gerrymandering of the type used in the County for decades. Ex. D, Charter School Enrollment Report. It should be noted as well that the charter schools are borne of democracy. Each of the open-enrollment charter schools in Pulaski County were started by groups of people who moved past complaining about education problems in the school district and are trying to do something about it: namely provide a better option. LRSD's motion is not motivated

by concern for education, but from a desire to put a stop to the people in its district attempting to take on the problems in education there. LRSD's problems long predated the charter schools. Ex. I, LRSD Annual Report (noting that 23 of LRSD's 42 schools were in school improvement; 17 in Year 3 or more). Any restriction on the charter schools would work a disservice to the students and parents in Pulaski County.

H. Charter Schools are Not Having a Significant Impact on LRSD's Funding.

Since the 2005-06 school year, LRSD's total revenue has been over $300 million. Ex. J, LRSD Annual Statistical Report (ASR) 2005-06; Ex. K, LRSD ASR 2006-07; Ex. L, LRSD ASR 2007-08; Ex. M, LRSD ASR 2008-09. In the 2008-09 school year LRSD's total revenue was $306 million. Ex. M, LRSD ASR 2008-09. This revenue gave LRSD $11,878 in revenue per pupil. Id.; Ex. E, ODM 2009-10 Enrollment Report (showing total LRSD enrollment at 25,721). Its ASR shows that LRSD did experience a decline in total revenue from 2007-08 to 2008-09 of around $10 million. Its total unrestricted revenue from State and local sources, however, increased by almost $2 million in that same time frame. The ASR also shows that LRSD's revenue from magnet school programs decreased by $29 million from 2007-08 to 2008-09. According to the OEP report in the 2008-09 school year LRSD only transferred out 586 students in grades 1-12 to charter schools. Ex. C, OEP Report p. 7. This is nowhere near enough students to explain a $29 million change in funding. Foundation funding was set at $5,789 for the 2008-09 school year. Act 272 of 2007 section 3. Total district enrollment dropped by 816 students between those two school years. Ex. E, ODM 2009-10 Enrollment Report. That drop represents only $4.7 million in foundation funding; roughly 1.5% of LRSD's revenue. It should be noted as well that LRSD's total enrollment from the time they were

declared unitary to the 2009-10 school year actually increased from 25,367 ADM in 2001-02 to 25,777 ADM in 2009-10; an increase of 410 students. Over this same time frame, ODM shows that LRSD has lost only twelve students from the stipulation magnet schools. Ex. E, ODM 2009-10 Enrollment Report p. 50-51. In total, participation in the magnet and M to M programs increased by 194 students from the 2007-08 school year to the 2008-09 school year; and it decreased by only forty-six (46) students from 2002-03 school year to the 2009-10 school year.[4] Ex. E, ODM 2009-10 Enrollment Report p. 56. Thus, the numbers do not bear out LRSD's assertion that it is losing revenue or student population to the charter schools in significant enough numbers to have any kind of substantial effect on its revenue or enrollment.

Moreover, the LRSD has several significant funding advantages over the charter schools. The charter schools have fewer funding sources to draw upon to maintain their operations. They do not have taxing authority and do not receive funding from any millages on property. They are not eligible for facilities funding either. Voters in the LRSD, for example, have chosen to support the district with 46.4 total mills on some of the highest valued property in the State. The 2008-09 ASR's for the charter schools demonstrate the revenue advantage that traditional public schools have over the charter schools. Ex. O, Charter School 2008-09 ASRs.

I. Charter Schools Conclusion

As demonstrated above, the Charter Schools in LRSD are helping to provide innovative educational options that assist in providing integrated educational options in

[4] LRSD discusses and cites the Court to the Interdistrict Desegregation Plan. The Interdistrict Desegregation Plan does not list the State as a party to that agreement. It controls how the districts will coordinate their administration of the interdistrict programs. It does not contain substantive obligations for the State.

Pulaski County. LRSD, a district with no obligation to balance its schools, has not demonstrated any need to impose the unduly restrictive limits on charter schools that it suggests. Nor does LRSD explain what authority this Court has to impose racially exclusionary rules on the Charter Schools. Moreover, the small number of students transferring to the Charter Schools are having little, if any, impact on the LRSD, and no impact on the desegregation obligations that LRSD has been freed from. For the reasons outlined above, the Court should deny LRSD's Motion to Enforce. Because LRSD's arguments are legally unsupported, there is no need to engage in lengthy discovery in the matter; LRSD's motion should simply be denied.

III. LRSD'S LAKEVIEW CLAIMS ARE WITHOUT MERIT

There are two simple responses to LRSD's allegations regarding violation of the Arkansas Constitution. First, the State is immune in federal court from claims that it violated the State Constitution and from what is, in effect, a complaint for damages based on a different case that LRSD litigated in state court. *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 102 fn. 11, 104 S.Ct. 900, 911 (1984). Second, Arkansas's school funding system does not violate the Arkansas Constitution. *Lake View School Dist. No. 25 v. Huckabee*, 370 Ark. 139, 257 S.W.3d 879 (2007)(*LakeView 2007*).[5] LRSD was a party to the *LakeView* litigation and is bound by the finding in *LakeView 2007* that the State's funding system is constitutional.

[5] LRSD in its brief adopts the convention of numbering the many opinions in the *LakeView* case. The Arkansas Supreme Court has adopted the convention of referring to the *LakeView* opinions by year of decision. *Fort Smith School Dist. v. Beebe*, 2009 Ark. 333, ___ S.W.3d ___ (2009). This brief will utilize the Arkansas Supreme Court's convention since it makes reference to the opinions more clear than a simple numerical system.

A. Sovereign Immunity Deprives the Court of Jurisdiction from Addressing Issues of State Law

As explained above, the 1989 Settlement Agreement is a limited intrusion on the sovereignty of the State of Arkansas that extends only to certain enumerated obligations related to bringing about desegregated education in Pulaski County.

The State of Arkansas's sovereign immunity bars the federal courts from exercising jurisdiction over all but a limited number of cases. "[T]he States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today." *Alden v. Maine*, 527 U.S. 706, 713, 119 S.Ct. 2240, 2247 (1999). Arkansas has not consented to suit in federal court. *Gibson v. Arkansas Dept. of Correction*, 265 F.3d 718 (8th Cir. 2001).

The Supreme Court has recognized a limited exception to the Eleventh Amendment where the suit seeks to prohibit action by an official capacity defendant that violates the U.S. Constitution. *Ex parte Young*, 209 U.S. 123, 155-56, 28 S.Ct. 441 (1908). No money damages are available in such a case; it allows injunctive relief only. *Gibson*, 265 F.3d 718. Sovereign Immunity bars federal court from hearing disputes that are a matter of state law. *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 102 fn. 11, 104 S.Ct. 900, 911 (1984).

This case does not proceed under the *Ex Parte Young* fiction; it is a suit against the State itself. As such, it likely exceeds the permissible boundaries of litigation in federal court against the State. Any expansion of the case beyond what is necessary to achieve the purpose of the 89 Settlement Agreement renders the case even more suspect.

LRSD's argument in its Motion to Enforce based on the *LakeView* decisions essentially asks the Court to award money damages for what it alleges is past

unconstitutional conduct. The court has no authority to award monetary damages against the State in favor of one of the State's institutions. *Pennhurst, supra*. Moreover, LRSD points to no part of the 1989 Settlement Agreement that would authorize the Court to take control of the State education funding system and direct the State how to manage its funding system in order to comply with the State's Constitution.

> A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment.

Pennhurst, 465 U.S. at 106, 104 S.Ct. 900, 911.

B. The State Education Funding System Including the Transportation Component is Constitutional and LRSD is Bound By that Ruling

The portion of LRSD's motion regarding the State educational funding system's compliance with the Arkansas Constitution is barred by *res judicata*. As LRSD acknowledges in its Brief, LRSD was a party to the *Lake View* case that proceeded for years under the same theories that LRSD presses here. *See e.g. Lake View 2005*, 364 Ark. 398, 220 S.W.3d 645 (2005). In *Lake View*, LRSD joined other parties in challenging the funding matrix, the foundation funding amounts and how they were determined, and the effect of transportation on the adequacy of the State's funding system. Accordingly, Plaintiffs claims are barred by *res judicata* as their claims were or could have been fully and finally decided in that prior action. *Murphy v. Jones*, 877 F.2d 682 (8th Cir. 1989)(*res judicata* elements: "(a) the prior judgment was rendered by a court of competent jurisdiction; (b) the prior judgment was a final judgment on the merits; and (c) the same cause of action and the same parties or their privies were involved in both

cases.") *Arkansas Office of Child Support Enforcement v. Willis*, 347 Ark. 6, 59 S.W.3d 438, 444 (Ark.2001). (issue preclusion elements: "(1) the issue sought to be precluded is the same as that involved in earlier litigation; (2) the issue must have been actually litigated; (3) the issue must have been determined by a valid and final judgment; and (4) the determination must have been essential to the judgment."); *Liberty Mut. Ins. Co. v. FAG Bearings Corp.*, 335 F.3d 752, 761-62 (8th Cir.2003)(stating "[w]here the first and second actions are both based on an evaluation of the same historical facts, a litigant seeking to introduce newly discovered evidence otherwise in existence at the time of the first suit may not argue that the facts have changed in the time period between the two actions ... to avoid the preclusive effect[s] of the first decision").

Claims either decided by a state court or that are inextricably intertwined with a state-court decision are barred under *Rooker-Feldman*. *D.C. Ct. of Appeals v. Feldman*, 460 U.S. 462, 483 n. 16 (1983). A claim is inextricably intertwined if its success depends on a finding that the state court was wrong or would effectively reverse or void the state court's ruling. *Fielder v. Credit Acceptance Corp*., 188 F.3d 1031, 1036 (8th Cir. 1999). The doctrine bars both straight forward and indirect attempts to "undermine state court decisions." *Prince v. Ark. Bd. of Examiners in Psychology*, 380 F.3d 337 (8th Cir. 2007)(*quoting Lemonds v. St. Louis Co*., 222 F.3d 488, 492 (8th Cir. 2000)).

Transportation costs were one of the great many issues litigated in the *Lake View* case. *See Lake View 2005*, 364 Ark. at 402, 220 S.W.3d at 648 (noting factual findings on effect of foundation funding on increased transportation costs); *Lake View 2002*, 351 Ark. 31, 49, 91 S.W.3d 472, 481 (2002)(noting effect of funding system on transportation costs). One of LRSD's lawyers recently attempted to raise transportation as an adequacy

issue with the Arkansas Supreme Court, making the same arguments that are made here. *Walker v. Arkansas State Bd. of Educ.*, 2010 Ark. 277, ___ S.W.3d ___ (2010). In *Walker*, the Supreme Court specifically noted in response to the argument that transportation funding is inadequate that "as it currently stands, our educational system is constitutionally firm." *Id.* That ruling springs from *Lake View*, a case where inadequate transportation funding was one of the many issues litigated. The Arkansas Supreme Court decided with finality in 2007 that the educational funding system complies with the Arkansas constitution.

Moreover, what LRSD asks of this court is something that the Arkansas Supreme Court specifically refused to do each time LRSD asked it to: direct the state to fund a sum certain for a component of educational funding. *Lake View 2005*, 364 Ark. at 415, 220 S.W.3d at 645 ("Whether an increase is necessary is for the General Assembly to determine, after its compliance with existing legislation and its assessment of the relevant information necessary for fixing funding levels in the current biennium, including available revenues, surplus funds, and expenditures by the school districts.").

LRSD's argument is also substantively wrong. *Lake View* stands for the proposition that the General Assembly must conduct a thorough review of the education funding system and make evidence based decisions regarding any proposed increases in educational funding. *Lake View 2005, supra*. Transportation funding was raised as an issue in the 2009 session of the General Assembly as reflected by the Adequacy Report. LRSD Ex. 71. However, the General Assembly did not find that adequacy required the State to fund every mile every school bus in the State drives. If school districts are inefficient in their busing, then that is the district's cost to bear. What the General

Assembly did decide is that transportation "may" be a necessary component for adequacy; not that it is. If transportation is a component of adequacy then it is only needed "to the extent that a student would not otherwise be able to realize this opportunity but for such transportation being provided by the state." LRSD Ex. 71, p. 56. LRSD's restrictive reading of this language cannot turn it into something it is not. The Adequacy Sub-committee recommended "Enhanced Transportation Funding;" not additional funding required by adequacy. The General Assembly, based on the information and review provided by the Adequacy Sub-committee, determined that the current proportions in the funding matrix were sufficient to provide transportation to those students who may not "be able to realize [an adequate] opportunity but for" transportation being provided. Id. If the districts choose to do more, that is their business. The General Assembly's determination based on the evidence before it was that adequacy did not require the proposed expansion of transportation funding. Thus, it satisfied the mandate in *Lake View* and has maintained adequacy in educational funding. LRSD cannot challenge that finding in this forum and its motion asking this Court to direct the state in how to fund the state's education system consistent with the state's Constitution should be denied.

IV. THE STATE HAS COMPLIED WITH THE 1989 SETTLEMENT AGREEMENT

A. The State Has Many Programs to Remediate the Achievement Gap

As the LRSD has learned over the years, the achievement gap between African-American and white students is very difficult to close. There is no one program that will work in every school or school district. The reason for this is that achievement gaps are deeply affected by factors that occur outside of the schools that the schools do not have

control over. David J. Armor, "Can N.C.L.B. Close Achievement Gaps?" in No Child Left Behind and the Reduction of the Achievement Gap, (Alan R. Sadovnik, et al. eds. 2008); see also David J. Armor, Maximizing Intelligence (2003); David J. Armor, Desegregation and Academic Achievement, in School Desegregation in the 21st Century, 147-188 (Christine H. Rossell, et al. eds 2002)(concluding that "it is quite clear that the racial composition of student bodies, by itself, has no significant effect on black achievement, nor has it reduced the black-white gap to a significant degree.") What has been shown to have a significant effect on closing the achievement gap is "raising academic standards, greater basic skills instruction, more remedial programs, improved alignment of curriculum to test content, better preparation for standardized tests, and so forth." Id. at 184. In these areas, the State of Arkansas leads the nation.

Arkansas recently applied for millions of dollars in the second round of the federal Department of Education's Race to the Top grant program. Ex. P, RTTT Application. The State's application catalogues many of the State-wide initiatives that have been adopted over just the last ten years that have helped make Arkansas a leader in education nationally. Id. at p. 30-34. LRSD participates in most, if not all, of these programs. Some highlights:

- Rigorous curriculum – Arkansas has adopted the Smart Core Curriculum which provides a rigorous K-12 curriculum to advance student learning and prepare students for the 21st century job market.

- Increased funding for K-12 education – Since 2004 K-12 funding in Arkansas has increased by $1.2 billion. Ex. P, RTTT Application p. 17. For LRSD, state and local revenue increased by over $58 million in the six years since the 2002-2003 school year. ($177,916,010 in state and local revenue in 2002-03, Ex. N, 2002-03 ASR, compared to $236,503,374 in state and local revenue excluding "magnet school programs" in 2008-09. Ex. M, LRSD 2008-09 ASR). An increase nearly equal to an additional $10 million every year to the LRSD.

- AP Testing Funded by the State – Arkansas now requires all high schools to offer AP courses and pays for students to take the AP tests. This has significantly increased student participation in AP college-readiness courses including participation by low-income and minority students.

- Benchmark testing – District officials testified at length during the NLRSD and PCSSD unitary status hearings about Arkansas's Benchmark testing for tracking the educational progress of students and their ability to meet educational goals and how the test results enhance teacher and administrator's ability to address the educational needs of individual students.

- Longitudinal student performance tracking – Arkansas has in place a system track student performance "longitudinally" meaning the system tracks a students performance and need for as long as that student is in the Arkansas public education system so that teachers and administrators in schools can track the student's performance and needs throughout his/her educational career. Ark. Code Ann. § 6-15-433, Ex. P, RTTT Application p. 32.

- Arkansas Better Chance for School Success program (ABC) – the State's ABC program provides pre-K education to over 25,000 three and four-year-olds every year including pre-K students in LRSD. Ex. P, RTTT Application p. 33; Ex. S, ABC Fast Facts. It is a nationally recognized program. Id. For the 2010-11 school year the State appropriated $116,619,375 to fund the program. Act 293 of 2010. In 2007, the National Institute for Early Education Research found that the ABC program was giving children a significant advantage in starting their educational career. Ex. R, ABC Study. One purpose of the ABC program was to expand access to pre-K education for low income children. Ark. Code Ann. § 6-45-102.

As reflected in the monthly Project Management Tool filed with the Court the State engages in numerous activities in the school districts to support the districts in providing high quality education and remediation of the achievement gap. There are many, many more state initiatives and programs that can be pointed to that have been adopted by the State to assist school districts, including LRSD, in increasing the educational performance of their students. LRSD's suggestion that the State is not actively engaged in enhancing educational experiences for students, including minority and low-income students, is simply untrue.

Charter Schools also fit into this overall effort of pushing for higher educational outcomes for all students. The early indications are that charter schools in the State are having a positive impact on education in the state, and in particular for low-income and minority students. Ex. T, CREDO Report. It should be noted, however, that the State is engaging in systematic and continued review of the charter schools in Pulaski County and the rest of the State to ensure that the charter schools are operating in compliance with their charters. A charter review council has been established at the Arkansas Department of Education for this purpose. It is meeting regularly to assess the charter schools.

LRSD itself has embraced the charter school model as part of its efforts to increase student learning by introducing innovation to the learning environment. Ex. H, Cloverdale Conversion Charter School Application. The district, in fact, adopted the model early on and included a charter school in the list of programs that it had adopted to comply with its desegregation plan requirement to address the achievement gap. Ex. U, LRSD Desegregation and Education Plan Compliance Report, March 15, 2001, p. 63-64 (Docket # 3410). Although an evaluation of the charter school found it effective in addressing the educational needs of the students enrolled and the LRSD had committed significant resources to opening the charter school, it was closed after only two years of operation. Ex. V, LRSD Charter School Evaluation (Docket # 3745).

The U.S. Department of Education also believes that charter schools are a way to introduce innovation and enhanced learning into a state's educational system. In fact, the Race to the Top grant process specifically evaluates states for "[e]nsuring successful conditions for high-performing charter schools and other innovative schools." Ex. Q, RTTT Evaluations. The State lost points in this area for not doing enough in the area of

charter schools. Id. Some reviewers were critical of the State's support for charter schools and noted that the State has denied the majority of the fifty-one applications for charter schools it has received. Id. at p. 12, 32. Further restrictions on charter schools as requested by LRSD may have negative effects on the State's ability to compete for federal Race to the Top funds, of which LRSD would receive a significant portion. Moreover, LRSD would place this Court at odds with the rest of the federal government on the use of charter schools as part of the State's educational system.

The innovations and advancements adopted by the State have lead to advancements in student performance. Ex. W, June 15, 2010 ADE News Release Benchmark Score improvements. Students across the State showed gains on the State Benchmark testing for 2010 including some narrowing of the achievement gap between African-American and white students. Id. LRSD students also showed gains in performance on the benchmark exams. Ex. X, June 15, 2010, LRSD News Release. African-American and economically disadvantaged students also made gains in their benchmark scores this year in the LRSD. Id.

As noted above, there is no one program, no one policy, no one initiative that will remediate the achievement gap or that will push all students to proficiency. Nor will remediation of the achievement gap occur overnight. These are lessons that the school districts have learned in this litigation. Ironically, the LRSD itself requested and was granted release from the "goals in the 1990 Plan regarding achievement disparities [which] may never be met regardless of the effort put forth by LRSD." *LRSD*, 237 F.Supp.2d 988, 1018 (E.D. Ark. 2002). Suffice it to say, the State has many programs in place to improve academic achievement and it monitors the districts for progress in

executing that task. Accordingly, LRSD's motion regarding remediation of achievement disparity should be denied.

V. PERIODIC REVIEW

The State welcomes LRSD's suggestion for a review of the 1989 Settlement Agreement. That review will show that the 1989 Settlement Agreement is an out-dated document that is no longer necessary to provide integrated education in Pulaski County.

VI. CONCLUSION

WHEREFORE, the State of Arkansas requests that LRSD's Motion to Enforce the 1989 Settlement Agreement be denied, and for all other relief to which it is entitled.

Respectfully submitted,

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ATTORNEYS FOR STATE OF ARKANSAS AND ARKANSAS DEPARTMENT OF EDUCATION

CERTIFICATE OF SERVICE

I hereby certify that on June 18, 2010, I 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:

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I, Scott P. Richardson, Assistant Attorney General, do hereby certify that I have served the foregoing and a copy of the Notice of Electronic Filing by depositing a copy in the United States Mail, postage prepaid, on June 18, 2010, to the following non-CM/ECF participants:

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/s/ Scott P. Richardson
SCOTT P. RICHARDSON