No. 11-2130

*In the*

# United States Court of Appeals

*for the*

# Eighth Circuit

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Little Rock School District,
Plaintiff-Appellant,

vs.

State of Arkansas, *et al.*

Defendants-Appellees

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**PULASKI COUNTY SPECIAL SCHOOL DISTRICT'S RESPONSE TO APPELLANTS' EMERGENCY MOTION FOR STAY PENDING APPEAL AND EXPEDITED APPEAL AND A TEMPORARY STAY PENDING DECISION ON THIS MOTION**

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## SUMMARY OF THE PCSSD ARGUMENT

- The 1989 Settlement Agreement was written by the parties and not by the District Court.
- After the District Court disapproved the 1989 Settlement Agreement, this Court approved it and ordered it be implemented as submitted by the parties.
- This written Agreement has no end date, and is unique among desegregation cases.
- At the time of the District Court's Decision of May 19, 2011 terminating funding, no party including the State had filed a motion asking that the Agreement be modified or changed, much less terminated.
- The abrupt termination of the Settlement Agreement funding will work a hardship upon and is unfair to the class of African American children for whom this case was brought.
- The districts were denied due process in all respects.
- The districts will likely prevail upon the merits for the reasons explained herein and the equities dictate that the stay request should be granted.

## INTRODUCTION

The PCSSD has been a defendant in this action since its inception. On Tuesday, June 14, 2011 the PCSSD filed its own separate Notice of Appeal from all aspects of the findings of fact and conclusions of law, order and judgment entered on May 19, 2011, in the United States District Court for the Eastern District of Arkansas, the Honorable Brian S. Miller presiding. This response is limited to the issues raised by the LRSD in its Emergency Motion for Stay dated June 10, 2011 ("Stay Motion"). The PCSSD will file an appropriate motion to separate the funding issues from its own separate appeal of the District Court's unitary ruling.

While the PCSSD essentially agrees with most of the introduction of the LRSD Stay Motion, it does not agree in some respects with the terminology deployed by the LRSD and the standards by which the 1989 Settlement Agreement should be evaluated. The PCSSD does agree with the substance, conclusions and requests for relief set out in the LRSD introduction. Record wise, in addition to those items listed by LRSD appearing as items numbered 1 through 9 and appearing at pp. 2-3 of its Motion, the PCSSD also calls this Court's attention to certain statements and items set out in the transcript of the motions hearing conducted by the District Court on September 30, 2009, as well as additional items from the transcript of proceedings made during the PCSSD hearing on unitary status, both of which the PCSSD understands are available to this Court from the District Court Clerk. The PCSSD also attaches Declarations of its Chief Financial Officer and Assistant Superintendent for Equity and Pupil Services which detail the revenue the District anticipated from the State and the number of interdistrict students it sent and hosted this past school year.

## STATEMENT OF FACTS

The PCSSD also essentially agrees with the LRSD statement of facts although it does not necessarily concur in all of the terminology used by the LRSD which will be addressed later in this response. However, as a general proposition, the PCSSD agrees with the description of the history of this case as set out at pp. 3-8 of the LRSD motion.

The PCSSD likewise agrees with the LRSD's statement of the standard of review as set forth at p. 8. As the PCSSD will explain later, while it may be technically correct for the LRSD to refer to the parties' 1989 Settlement Agreement as a consent decree, the literal fact is, it is a written agreement of all the parties to this case, was specifically addressed and examined by this Court in 1990, and was specifically approved by this Court to be implemented "as written by the parties". It contains neither an expiration date, sunset provision or restrictions on the use of the funds received from the State.

## ARGUMENT

The PCSSD also agrees with the LRSD exposition of the law in this circuit particularly as it relates to *Brady v. National Football League* (LRSD Motion at p. 8), *Rufo v. Inmates of Suffolk County Jail,* and *Jenkins v. Missouri* (LRSD Motion at p. 9.)

## THE LIKELIHOOD OF SUCCESS ON THE MERITS

PCSSD agrees that the District Court erred by *sua sponte* modifying the written settlement agreement of the parties without notice, without a hearing and without an opportunity to develop a factual record. It is worth noting that the District Court has heard only the unitary petitions for North Little Rock and PCSSD. The District Court has not been involved and is presumably not totally acquainted with matters such as the 1989 Settlement Agreement, its history, its specific terms and conditions, its lack of an ending date or any other sunset provision, and its silence as to any specific application and use of settlement funds generated by the student movement programs, all of which were voluntarily agreed to by the State and continued by this Court.

It is important to remember that the District Court did not write the 1989 Settlement Agreement; the parties did, and its authors included the State. It is also important to remember that in 1989 the District Court sought to add terms and conditions to the 1989 written agreement of the parties, an attempt which this Court eschewed. It is also important to remember that while it had full opportunity to do so, the State did not attach, suggest or otherwise specify either an ending date for its voluntary financial obligations or any specific use of the sums it agreed to pay. Indeed, a fresh examination of the four corners of the 1989 Settlement Agreement strongly suggests it is an agreement of non specified duration creating at least a fact question of if, how and when it should end.

More immediately, the Court's decision came as a complete surprise to the parties including the State. Indeed, the District Court stated in the only conference held before hearing the unitary petitions of North Little Rock and the PCSSD that it was going to enforce the consent decree (the 1989 Settlement Agreement) strongly "because that's the rule of this case." See September 30, 2010 hearing transcript at page 34. See also colloquy among the parties and the Court at PCSSD transcript pp. 2357-2359 (Settlement Agreement is just "background" information).

Again, the 1989 Settlement Agreement did not originate as an order of the District Court. The District Court never specifically encouraged the parties to settle the case. Indeed, the settlement agreement arose in the context of a District Court then intent upon having a Metropolitan Supervisor dictate the terms and conditions of the operations of these three school districts, not an agreement among the three districts and the State. Further, the written agreement of the parties was inhospitably received by the District Court which made every effort to torpedo its implementation. *Id.* As this Court will recall, it took an appeal of this decision to this District Court to breathe life into and to resuscitate the 1989 Settlement Agreement. The State did not protest that effort and, as LRSD correctly observed at p. 2 of its brief, neither the State nor any party has to this day ever filed a motion asking that the financial obligations contained in the 1989 Settlement Agreement be modified much less terminated.

While the teacher retirement and health insurance payments might need to be examined more fully in a subsequent appeal after this Court's review of the stay request, it should be noted at the outset that the teacher retirement and health insurance stream of revenue is nowhere to be found in the 1989 Settlement Agreement. Rather, it was the product of litigation by the districts against the State in the late 1990s and extending into the year 2000 under which the districts successfully contended that the State had violated the anti-retaliatory provision of the settlement agreement found at section L, p. 10. The State appealed that determination. This Court affirmed the District Court's liability findings against the State and the matter was ultimately reduced to judgment.

Even though that judgment found its genesis in the 1989 Settlement Agreement, it nevertheless remains an independent free-standing money judgment secured by the districts against the State.

## <u>THE SETTLEMENT AGREEMENT IN THIS CASE IS UNIQUE AMONG DESEGREGATION CASES IN THE COUNTRY</u>

It is important to remember the history of the 1989 Settlement Agreement and to maintain and understand the distinction between it and the 1989 desegregation plans. In 921 F.2d 1371 at 1376, Judge Richard Arnold explained the context and history by which the 1989 Settlement Agreement came before this Court. He explained:

> Then, in 1988 and 1989, in a sharp departure from the adversary bitterness that had marked this controversy for over thirty years, the parties, including the Joshua intervenors, representing the injured class of black schoolchildren and citizens, LRSD, the North Little Rock School District (NLRSD) the Pulaski County Special School District (PCSSD) and the State of Arkansas <u>agreed to settle the case</u>. They submitted to the District Court comprehensive agreements covering both interdistrict and intradistrict desegregation measures – agreements referred to by the parties as the "<u>settlement plans</u>." They also submitted a <u>separate</u> but related document, called the "<u>settlement agreement,</u>" settling the <u>financial</u> liability of the State of Arkansas for something over one hundred million dollars.
>
> The District Court rejected both the settlement plans and the settlement agreement, as submitted. It purported to modify them and to order the

> unwilling parties to put them into effect as modified. It also created the Office of Metropolitan Supervisor and conferred upon the occupant of that office a wide array of powers over all three school districts, amounting virtually to a de facto consolidation of these entities. Most of the affected parties appealed. None of the parties below asked that the judgment be affirmed in its entirety…
>
> We now reverse the judgment of the District Court. In general, we direct that Court, on remand, to approve the settlement plans and <u>settlement agreement</u> as submitted by the parties.

This Court described the agreement of the parties as unprecedented and commended the governor and the general assembly for these actions. The Court went on to explain that the settlement agreement was the product of a voluntary effort by the parties, is a contract and is indeed unique in desegregation juris prudence.

Judge Arnold further explained that:

> Following enactment of the settlement legislation, the parties again submitted the settlement agreement to the District Court…[t]he District Court rejected the settlement as written. Instead of returning the case to the docket for litigation, however, the Court then added certain conditions to the settlement, purported to approve it as so modified, and directed the parties to carry out the Court's version of the settlement…*Id.* at 1382.

The Court then spent multiple pages of its decision examining and ultimately approving the four "settlement plans" those being the desegregation plans for the three school districts and the interdistrict desegregation plan. It then turned its attention to the "financial aspects of the case" – the 1989 Settlement Agreement providing for payments by the State. *Id.* at 1388.

Judge Arnold again noted that the District Court refused to approve the agreement as submitted but instead "modified the agreement in three respects and then imposed it on the parties, over their objection." *Id.* In rejecting this approach of the District Court, Judge Arnold noted:

> A strong public policy favors agreements, and courts should approach them with a presumption in their favor. As the Seventh Circuit said in *Armstrong, supra:*
>
> > Because settlement of a class action, like settlement of any litigation, is basically a bargained exchange between the litigants, the judiciary's role is properly limited to the minimum necessary to protect the interests of the class and the public. Judges should not substitute their own judgment as to optimal settlement terms for the judgment of the litigants and their counsel. *Id.* at 1388. (Internal citations omitted.)

Judge Arnold went on to explain that courts are generally without authority to require parties to comply with a "settlement" that is different from their own agreement; that a court may reject a settlement and may indicate what modifications would make it acceptable but may not require the parties to submit to these modifications. He therefore explained it was error for the District Court to attempt to require the parties to abide by a modified "settlement agreement." *Id.* at 1389.

One of the conditions the District Court unsuccessfully attempted to impose upon the parties was how the settlement proceeds from the State were to be used. Judge Arnold explained:

> The Court directed that settlement proceeds be used only for desegregation purposes. On its face, this condition appears reasonable. If money is being paid to the districts by the State to settle the State's liability for violating the constitutional right to desegregated education, why should not the money be spent only to redress violations of this right? On analysis, however, we believe this condition is both <u>unnecessary and unwarranted</u>.
>
> Under the settlement plans, [the desegregation plans] the Districts assumed certain unconditional obligations. These obligations are not dependent upon payments by the State. Whether the State makes the payments required by the settlement agreement or not, and whether these payments are adequate to fund the Districts' obligations or not, these

> obligations remain binding…*Id.* at
> 1389 - 1390.
> [emphasis supplied]

As Judge Arnold patiently explained, the payments to the districts were not all attributable to desegregation claims. For instance, the districts claimed the State had shortchanged them for customary state aid and claimed reimbursement of desegregation expenditures made in prior years. In particular, Judge Arnold noted that the PCSSD had suffered a substantial loss of funds due to the boundary change ordered by the Court. That led to a deficit which the District proposed to cover by use of the State's settlement funds. Judge Arnold explained there was nothing unreasonable about the parties' desire to use a portion of the settlement agreement payment to cover these claims and losses. He then stated: "The District Court's Order, which would have limited future use of settlement agreement payments to "compensatory and remedial education costs"…was an abuse of discretion. *Id.* at 1390.

Thus, despite the rhetoric emanating from certain quarters of state government, the 1989 Settlement Agreement did not then, nor has it ever restricted the use of these sums toward any particular purpose. Rather, as the districts have always recognized and agreed, their obligation is to implement their desegregation plans whatever and regardless of the source of the funds.

Judge Arnold summed up the opinion by stating:

> Again, we stress that we are dealing with a settlement. The payments from the State of Arkansas are to be made voluntarily… The agreement ought to have been approved. *Id.* at 1390.

In its conclusion, the Court re-emphasized:

> [t]he parties have agreed to settle this case. Settlements are presumed to be acceptable and valid, and there was no sufficient reason for this settlement, either the plans or the <u>financial agreement,</u> to be disapproved. *Id. a*t 1393
> …
> 6. On remand, the District Court is directed to approve the parties' settlement agreement <u>as written by them</u>.
>
> [Emphasis supplied] *Id.* at 1394.

**<u>THE LRSD MOTION ACTUALLY UNDERSTATES THE LEGAL STATUS AND SIGNIFICANCE OF THE 1989 SETTLEMENT AGREEMENT</u>**

Beginning at p. 8 and continuing through p. 11, the LRSD sets out an argument that the Eighth Circuit's pronouncements and rules for modification of consent decrees should have guided the District Court and should govern the ultimate disposition of this issue. In fact, it appears that the LRSD has somewhat confused the distinctions between the 1990 decision of this Court and the Appeal of Little Rock School District, 940 F.2d 253 (8th Cir. 1991). The second opinion dealt <u>exclusively</u> with modification standards for the desegregation plans and did <u>not</u> address the 1989 Settlement Agreement. The 1991 decision begins by noting that: "On December 12, 1990, we approved a comprehensive settlement of the Pulaski County, Arkansas School desegregation case."

The balance of the decision deals exclusively with changes the parties proposed to their individual desegregation plans and the tri-district desegregation plan because of the passage of time. Nothing in that appeal and none of the issues dealt with the 1989 Settlement Agreement which, as previously noted, the Court ordered to be implemented as written by the parties as its holding in the 1990 appeal. Accordingly, the disputed modifications referred to in the Appeal of LRSD at p. 6 were in the context of proposed modifications to the desegregation plans <u>not</u> the 1989 Settlement Agreement which, after all, was a written contract settling the financial obligations of the State of Arkansas. The 1989 settlement agreement is not a desegregation plan. Rather, it is a settlement agreement calling, in substantial part, for the payment of money to these districts.

Accordingly, it is respectfully submitted that some standard more strict than <u>Rufo</u> should attend an effort by the District Court, or anyone else, to change, terminate or otherwise impact the vitality of the written settlement agreement which settled the financial obligations of the State.

The State at least implicitly if not directly, recognized that it would take a new agreement of the parties to modify the settlement agreement. ACA 6-20-416, first passed in 2007 authorized the Attorney General to seek modification or enter into a new or an amended consent decree or settlement agreement. However, the statute requires this be done via a “post-unitary” agreement with the districts. As subsection b(3) makes clear: “Before any agreement is entered into pursuant to subsection (b), the proposed post-unitary agreement shall be submitted to the Legislative Council for review and approval”. Nowhere within 6-20-416 does the General Assembly suggest the State could move unilaterally to modify or terminate the 1989 Settlement Agreement.

The PCSSD believes that 6-20-416 does provide the proper framework for a negotiated phase-out of the monies received from the State. See generally 6-20-416 subsection (b). Again, despite what the State may represent today, this statutory section, which was amended to make technical corrections in 2009, should be the guiding light for the parties to agree upon a reasoned and rational phase-out of these funds as well as the programs, such as the magnet schools and the M-to-M transfers, which generate the funds.

Of course, this may be an issue to be taken up after the stay issue is decided. However, the PCSSD believes it appropriate to make this distinction and pose this question and this issue as this Court considers the issue of a stay.

## REGARDLESS OF THE APPLICABLE STANDARD, IT IS CLEAR THE DISTRICTS WERE DENIED DUE PROCESS

As LRSD correctly observes, the hearings were limited to compliance issues with each district's desegregation plan with the ultimate question being in which areas the districts were or were not entitled to a declaration of unitary status. There was no evidence proffered, received or requested regarding the 1989 Settlement Agreement. Indeed, as previously observed, the District Court had made it clear at the only other conference it held with the parties that it was not going to consider any other issues beyond the NLRSD and PCSSD compliance with their desegregation plans. Accordingly, and again regardless of the standard to be applied, there was no record developed or evidence received upon which the District Court could make the "findings" that it made. Because the 1989 Settlement Agreement does not impose restrictions upon the use of the settlement proceeds, there was no basis for the District Court to find that receipt of these funds had become an "impediment" to the districts' attainment of unitary status. Because there is no restriction on the use of the funds, there is logically no basis for the District Court to find then or ever that the districts are "wise mules" who have sat down on the job so that the money would continue.

## IRREPARABLE HARM

The PCSSD believes that this issue is best explored in terms of fairness or lack thereof to the students.

The magnet school stipulation of the parties, which includes the State, guarantees that students who are recruited to the magnet schools have the opportunity to complete the grade level of the school they elect to attend. For instance, a kindergarten student who is signed up for Carver Math and Science School for the 2011-2012 school year is (or perhaps was) guaranteed, absent extraordinary circumstances, the right to attend Carver until completing the 5th grade. Students at Horace Mann and Parkview have the opportunity to attend those schools for up to three years.

We respectfully submit it would be a breach of faith, if not of contract, to abruptly end the programs (because of the end of funding) to which those students, with the assent of their parents, were recruited, and for which matriculation was promised.

If those students must return in substantial numbers to their home districts, a reasonable period for adjustment, both as to time and funding, should be permitted. Under the current assumed timetable, which would require a return of students this August, this will result in further injury to districts already struggling to maintain credibility, restore parental confidence and involvement, impair their opportunity to fairly compete with private and charter schools, and frustrate an equitable transition of these students to programs commensurate with the magnet schools.

## IMPACT ON OTHER PARTIES

The impact upon the PCSSD will be negative. Not only will the cut off of funds work a hardship if the PCSSD is required to continue its financial support of the magnet schools, but it will also be harmed if the magnet schools are abruptly discontinued and a large number of these students suddenly return to PCSSD schools at the eleventh hour. Under state law, notices of non-renewal of teachers must be done by May 1 of each year and the staffing decisions were made under the assumption that the magnet and other interdistrict programs would be continued into the foreseeable future and at least until next year.

## PUBLIC INTEREST

This issue is closely allied with several of the others. It serves no useful public interest to abruptly discontinue programs such as the magnet schools which have become institutionalized since their inception in the mid-1980s. It also does not serve the public interest to abruptly and without notice carve substantial portions of revenue from the budgets of these districts particularly without an order addressing the expenditure side of the equation such as the expenses required of the PCSSD to pay for its students to be educated at the magnet schools and to transport them to those schools. If the settlement agreement is somehow subject to being terminated by judicial decree, rather than a reasoned agreement after negotiation by the parties, then at a minimum logic and fairness dictate a phase-out that will have the least educational and emotional impact on those most directly affected by it. Those are the students including the class members for whom this case was brought.

## CONCLUSION

For all of these reasons, the request for stay should be granted.

Respectfully submitted,

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*/s/ M. Samuel Jones, III*
M. Samuel Jones III (76060)

*Attorneys for Pulaski County Special School District*

CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2011, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which shall send notification of such filing to the following:

- **Mark Terry Burnette**
  mburnette@mbbwi.com
- **John Clayburn Fendley , Jr**
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*/s/ M. Samuel Jones, III*

I hereby certify that on June 17, 2011, I mailed the document by United States Postal Service to the following non CM/ECF participants.

Mr. Robert Pressman
22 Locust Avenue
Lexington, Massachusetts 02173

Judge H. David Young
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*/s/ M. Samuel Jones, III*

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**DECLARATION OF ANITA FARVER**

My name is Anita Farver, and I am the Chief Financial Officer for the Pulaski County Special School District. For fiscal year 2010-2011, the District projected receipt of majority-to-minority funding of $9,578,721.00, of which $8,090,598.00 had been received as of May 24, 2011. The District anticipated receiving teacher retirement and health insurance payments of $7,034,378.01, of which $6,592,099.08 had been received as of May 24, 2011. The District projected receiving magnet and majority-to-minority transportation reimbursement of $3,100,000.00, of which $2,124,669.28 had been received as of May 24, 2011. It is our understanding that the State will not make the balance of the teacher retirement and insurance or the transportation payments originally scheduled to be made on or about June 20, 2011 and that we will not receive any teacher retirement, health insurance or transportation reimbursement going forward.

I so state under penalty of perjury.

Anita Farver

Anita Farver
Chief Financial Officer
Pulaski County Special School District

# DECLARATION OF DR. BRENDA BOWLES

I, Brenda Bowles, make the following declaration pursuant to 28 U.S. C. 1746 and state as follows:

1. I am over the age of 18. I am the Assistant Superintendent for Equity and Pupil Services for the Pulaski County Special School District (PCSSD).

2. As part of my job duties as Assistant Superintendent for Equity and Pupil Services, I can state that for the current school year the PCSSD sent 758 students to the stipulation magnet schools in the Little Rock Schools and sent 681 students to the Little Rock and North Little Rock school districts as part of the majority-to-minority transfer program.

3. The Pulaski district hosted 941 majority-to-minority transfer students from the Little Rock and North Little Rock districts.

I state under penalty of perjury that the foregoing is true and correct.

Executed on this 16 day of June, 2011.

Dr. Brenda Bowles

Dr. Brenda Bowles