EIGHTH CIRCUIT COURT OF APPEALS

LITTLE ROCK SCHOOL DISTRICT **APPELLANT**

v. **No. 11-2130**

STATE OF ARKANSAS, et al. **APPELLEE**

RESPONSE TO MOTION FOR STAY PENDING APPEAL

The Arkansas Department of Education (ADE), by and through its attorneys, Attorney General Dustin McDaniel, Assistant Attorney General Scott P. Richardson, and Assistant Attorney General Ali Brady, state for their Response to Motion to Stay:

Over a year and a half ago, the District Court asked the parties and the State four questions about the future progress of this case. The second question posed by the District Court was "[i]f the districts have not reached unitary status, what are the impediments to the districts reaching unitary status?" The State responded, in part, as follows:

> A strange irony of this case is that the large financial payments by the State to the three districts have actually become a significant impediment to termination of Court oversight. [As a result of those payments] the districts have significant motivation to avoid unitary status in order to maintain the additional funding. Indeed, this funding provides such a strong incentive that the LRSD, already declared unitary itself, now opposes the efforts of the other districts to be declared unitary. . . . Should the Court determine that twenty years after the signing of the 1989 Settlement Agreement, the PCSSD or the NLRSD is not unitary in some respects, the Court should nevertheless take immediate steps to use the additional funding received by the Districts under the Agreement as an incentive to motivate the rapid resolution of the case. The Court can achieve this result by providing firm cutoff dates for the State funding as a consequence of any failure by a district promptly to attain unitary status. This should give the Districts the needed incentive to ensure that any areas of non-compliance are promptly eliminated and ensure that the students of the districts attend desegregated schools.

Ex. P, DE# 4261, State's Response to Order Setting Status Hearing, filed Sept. 15, 2009. With this pleading the State of Arkansas squarely placed the efficacy of continued payments to the districts at issue. If there was doubt about the matter, LRSD raised the issue itself. On January

11, 2010, the LRSD filed a Motion in Limine asking Judge Miller to exclude "[e]vidence pertaining to interdistrict issues, including evidence pertaining to termination or modification of the 1989 Settlement Agreement." Ex. Q, DE# 4287 LRSD Motion in Limine; Ex. R, DE# 4288 LRSD Brief in Support of Motion in Limine; Ex. T, DE# 4310 LRSD Motion in Limine; Ex. U, DE# 4311, Brief in Support of Motion in Limine. The State opposed this motion and explained that unitary status of the two remaining school districts was inextricably intertwined with the end of the overall case and that keeping the funding flowing was a significant motivation for the LRSD to extend the litigation and the payments as long as possible. Ex. S, DE# 4299, State's Response to LRSD Motion in Limine. The Court denied LRSD's Motion in Limine signaling that issues "including evidence pertaining to the termination or modification of the 1989 Settlement Agreement" were a part of the unitary status hearings. Ex. V, DE# 4325 Order Denying MIL. The Court also denied a Motion in Limine filed by PCSSD (Ex. W, DE# 4309 PCSSD Motion in Limine) to exclude the participation of the LRSD in the unitary status hearing. Ex. X, DE# 4327 Order Denying PCSSD Motion in Limine.

The cutoff of the extra desegregation distributions by the State to the three Pulaski County school districts was squarely before the District Court, and the Court made clear that all issues were to be heard. LRSD's current contention that it had no idea that any change in funding might be ordered is without a basis in the record. Indeed, at the status hearing held on September 30, 2009, LRSD raised the very same arguments that it now advances in support of its motion for a stay pending appeal: that even if the districts were declared unitary – i.e. that the effects of illegal segregation were fully remedied to the extent practicable – the State should be ordered to make supplemental desegregation distributions indefinitely. In its recent order the Court did not

adopt the theory of perpetual payments advance by LRSD, but it is simply incorrect for LRSD's counsel to assert that the issue was never raised.

Following many weeks of hearings on the unitary status of PCSSD and NLRSD, in which all of the parties and the State participated, and after the Court's scrutiny of the massive record compiled in this case, the Court was left with the definite and firm conviction that continuing to give additional money to the districts had actually become a hindrance to desegregation in Pulaski County. The Court was correct in the course it took in attempting to reverse the perverse incentives the supplemental monies have created. The Order should not be stayed and the case should proceed to its conclusion.

I. INTRODUCTION

The Little Rock School District ("LRSD") filed this case on November 30, 1982,[1] alleging that the other two districts ("PCSSD" and "NLRSD") and the State had taken actions which were having a negative impact on the balance of white and African-American students in LRSD. *LRSD v. PCSSD*, 584 F.Supp. 328 (E.D. Ark. 1984); *LRSD v. PCSSD*, 778 F.2d 404 (8th Cir. 1985). In 1984, Judge Henry Woods concluded that the proportion of African-American students in the LRSD was increasing because of actions taken by the then-Defendants. *LRSD 1985*, 778 F.2d at 438 The remedies ordered by the Eighth Circuit (encouraging majority to minority student transfers, providing magnet schools, etc.) were principally designed to bring about race-neutral assignment of students to schools. On November 19, 1984, Judge Woods entered an order, at LRSD's request, stating the Court's "basis for retaining the state defendants in this case for remedial purposes." *LRSD* v. *PCSSD*, 597 F.Supp. 1220, 1227-1228 (E.D. Ark.

[1] This complaint was a continuation of the prior LRSD desegregation case that began on February 8, 1956. *Aaron v. Cooper*, 143 F.Supp. 855 (D. Ark. 1956); *See LRSD 2002*, 237 F.Supp.2d 988, 996-997 fn. 15, 18. In fact, the filing of this case overlapped by some three months with prior desegregation obligations imposed on the LRSD in the prior case. *Clark v. Board of Education of the Little Rock School District*, 705 F.2d 265 (8th Cir.1983).

1984). Judge Woods explained that the principal reason the State was being retained was for funding purposes. *Id.* The Eighth Circuit ruled on appeal that interdistrict remedies were appropriate to address past interdistrict violations that tended to segregate students by race. *Little Rock School District v. Pulaski County Special School Dist.*, 778 F.2d 404 (8th Cir. 1985).

In 1989, the parties entered a settlement agreement to address the Eighth Circuit's order with the purpose of "achieving unitary school systems in these three districts which are free from the vestiges of racial discrimination." 1989 Settlement Agreement p. 1. The 1989 Settlement Agreement required dismissal of the State as a party and provided for the release of all claims against the State which any of the parties then had "or may hereafter have arising out of or in any way related to any acts or omission of any and every kind . . . which in any way relate to racial discrimination or segregation in public education in the three school districts in Pulaski County, Arkansas." 1989 Settlement Agreement p. 18-19, Attachment A. LRSD was declared fully unitary by Judge Wilson on February 23, 2007. *LRSD v. PCSSD, et al.*, 2007 WL 624054, (E.D. Ark. Feb. 23, 2007) Docket # 4103. On April 2, 2009, the Eighth Circuit affirmed Judge Wilson's decision declaring LRSD unitary. *LRSD v. NLRSD*, 561 F.3d 746 (8th Cir. 2009). On May 19, 2011, the District Court issued its Findings of Fact and Conclusions of Law, concluding that all three districts are now unitary as to student assignments.[2] D.E. # 4507. This finding was a judicial recognition that the districts no longer illegally assign students to schools based on race, which was the legal wrong that the desegregation remedies funded by the State (magnet and M-M transfers) were principally instituted to address. The District Court also found that the distribution of supplemental funds by the State, made pursuant to the 1989 Settlement

[2] The only student assignments issue that remains is reporting by the PCSSD on one-race classrooms. With regard to assignment of students to schools and assignments that require interdistrict transfers, however, the PCSSD has been found to be unitary.

Agreement and subsequent orders of the Court, had become counterproductive: this extra funding encouraged the school districts to remain in litigation for as long as possible so as to continue receiving millions of additional dollars from the State beyond the funding provided to all other school districts. *Id.* at 107-08. Accordingly, the District Court terminated any requirement that the State make distributions under the 1989 Settlement Agreement, except for money specifically allocated to the M-to-M transfer program, which will be reviewed at a later date. *Id*. at 108.

LRSD has petitioned the Court for a stay pending appeal of the District Court Order. D.E. 4512, 4513; D.E. 4517. The District Court denied LRSD's Motion for a Stay on June 9, 2011. The same day, LRSD filed the current Motion for Stay with this Court. LRSD's motion challenges Judge Miller's decision to terminate desegregation payments. It does not challenge his determination that all parties have achieved unitary status as to student assignments.

The school district's Motion for Stay Pending Appeal should be denied on any one of several independent grounds. First, LRSD cannot demonstrate a likelihood of success on the merits. Indeed, LRSD has already lost on the merits. The principal basis for the Court's decision to end supplemental State funding, i.e. that continued funding in effect rewards non-compliance by the districts is barely challenged by LRSD. The Supreme Court, the Eighth Circuit, and other federal courts have made clear that any court-ordered desegregation remedy, such as the State's supplemental distributions to fund desegregation efforts here, cannot legally be continued longer than necessary to remedy the identified Constitutional violations. *Board of Education of Oklahoma City Public Schools v. Dowell,* 498 U.S. 237, 248, 111 S.Ct. 630, 637 (1991); *see also Milliken v. Bradley*, 433 U.S. 267, 97 S.Ct. 2749 (1977) (*Milliken II*).

In its May 19, 2011, ruling, the District Court recognized that circumstances had changed significantly, requiring alteration of the previous court-ordered desegregation remedies in this case. All three districts have now been declared unitary as to assignments of students to schools. The basis for the State's current supplemental payments to the districts was as a remedy for alleged constitutional violations in student to school assignments. Rather than being necessary to remedy segregation, the court-ordered supplemental desegregation distributions had become an impediment, encouraging the districts to remain in litigation as long as possible in order to continue receiving the funds. Under such circumstances, the United States Supreme Court's decisions in *Dowell* and *Milliken* not only authorized the Court to alter the consent decree, but required it to do so. The supplemental desegregation disbursements could not be left in place as a remedy if the constitutional violation for which that remedy had been ordered was gone. Moreover, as the Court found, the supplemental distributions of funds to remedy interdistrict student assignments were not necessary for PCSSD or NLRSD to achieve unitary status in the areas in which the districts remain under court-supervision. Finally, the distributions of supplemental funds had to end because they had become counterproductive to the goal of providing desegregated education in the Pulaski County school districts and returning those districts to local control. There is ample federal precedent to support the Court's decision to modify the consent decree and release the State from its obligation to provide desegregation disbursements based upon the changed circumstances of the findings of unitary status and that the disbursements had become an impediment to desegregation.

Second, the Court's ruling does not create a substantial risk of irreparable harm to LRSD or its students. The harm alleged by LRSD's counsel in its Memorandum Brief is exaggerated. The LRSD is one of the most well funded districts in the State. Even without the "desegregation

funding" it receives, the district has the largest total revenue ($349 million in 09-10) of all districts in the State, and, per student, the LRSD's revenue puts it in the top ten of the States' nearly 240 school districts. The district's allegations of potential harms – mass teacher layoffs, closing of schools, displacement of students, fear and confusion among parents, and drastic cuts to necessary academic programs – need not result from the loss of the supplemental desegregation monies, and in fact will only result if LRSD chooses a course of action that causes such disruptions. If LRSD structures its budget in a way detrimental to the district's fiscal health and educational adequacy, the State will be prepared to assist the district in addressing its fiscal and academic adequacy for its students. See Ark. Code Ann. § 6-20-1901, et seq. An educationally prudent and fiscally responsible approach is without a doubt available to the LRSD. Any "irreparable harm" to LRSD or its students that results from the Court's May 19, 2011 ruling will be directly attributable to the district's own budgeting decisions and is preventable with sensible financial management.

Third, issuance of a stay will substantially injure other parties interested in this litigation. The Court has found, after viewing the testimony and demeanor of the witnesses in addition to reviewing thousands of pages of documents in the record, that court-ordered desegregation payments to the three districts actually discourage the districts from meeting their remaining obligations under the 1989 Settlement Agreement and provide an incentive for inaction. D.E. 4507 at 107-08. A stay would not be in the best interests of the students of PCSSD and NLRSD, both of which have continuing desegregation obligations, because delaying the Court's order would perpetuate this broken system. Moreover, a stay would irreparably injure the State of Arkansas as a whole. It would require the State to expend millions of taxpayer dollars in

furtherance of this counterproductive arrangement when the segregation those funds were intended to remedy has been eliminated to the extent practicable.

Finally, public policy does not favor a stay of the Court's order pending appeal. A stay pending appeal is disfavored where it could inhibit or delay desegregation efforts. *See Harvest v. Board of Public Instruction of Manatee County, Fla.*, 312 F.Supp. 269 (D. Fla. 1970). Where a district court determines that certain actions are necessary and appropriate in order to promote desegregated education, appellate courts will not lightly delay the implementation of those orders. The District Court determined based on the witnesses, testimony, and evidence presented in the multi-week hearings that immediate termination of all State desegregation funding, except for that allocated to M-to-M transfers, was necessary to promote further desegregation of PCSSD and NLRSD. The Court's May 19, 2011, order reflects a clear finding that State desegregation funding was "one of the problems" inhibiting desegregation and created "an absurd outcome in which the districts are rewarded with extra money from the state if they fail to comply with their desegregation plans and they face having their funds cut by the state if they act in good faith and comply." D.E. 4507 at 107-08. Based on that finding, the Court ordered that the State need not continue supplemental desegregation distributions to the districts other than to fund M-to-M student transfers. The Court ordered the districts to show cause why M-to-M payments should not be terminated as well. *Id*. at 108. Where, as here, a federal court orders specific action to be taken in order to remedy unconstitutional segregation in education, public policy strongly favors full and swift compliance.

Additionally, public policy favors a clear course of action for the three districts and the State. Both the State and the three districts have already begun implementing the Court's ruling. Complete and immediate implementation of the Court's ruling allows LRSD to move forward as

a fully unitary school district, unfettered by the burden of court-ordered desegregation obligations, and free to educate its students on the same funding formula utilized by all other school districts in the State. It requires the districts to conservatively budget and plan for the coming school year. Denial of LRSD's Amended Motion for Stay Pending Appeal prevents the districts from gambling their 2011-2012 budgets on the misplaced belief that the Court's ruling will be overturned and the desegregation funds will continue indefinitely. In light of the applicable standard of review and high burden that LRSD faces in its appeal, it is in the best interests of all involved to require the districts to immediately prepare to operate their schools without the supplemental funding rather than budget for continued payments and claim surprise and hardship when they do not prevail on appeal.

For all of these reasons, which are more fully articulated below, the best course of action is for all parties involved in this litigation to continue full and immediate implementation of the Court's May 19, 2011 ruling. Therefore, LRSD's Motion for Stay Pending Appeal should be denied.

II. STANDARD: STAYS PENDING APPEAL ARE DISFAVORED WHEN SUCH ACTION WOULD INHIBIT OR DELAY DESEGREGATION EFFORTS

LRSD correctly sets out the four factors that generally govern whether a stay pending appeal is appropriate. Those factors, as most recently articulated by this Court in *Brady v. National Football League*, ___ F.3d ___, 2011 WL 1843832 (8th Cir. 2011), are: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceedings; and (4) where public policy interest lies." *Brady*, 2011 WL 1843832, *3 (citing *Hilton v. Braunskill*, 481 U.S. 770, 776, 107 S.Ct. 2113, 95 L.Ed.2d 724 (1987).

While these *Dataphase* factors, *Dataphase Systems, Inc. v. CL Systems, Inc.*, 640 F.2d 109, 113 (8th Cir. 1981), state the basic elements that any applicant for a stay pending appeal must establish, there is an additional consideration in the special context of desegregation litigation. A stay pending appeal is disfavored where it could inhibit or delay desegregation efforts. *See Harvest v. Board of Public Instruction of Manatee County, Fla.*, 312 F.Supp. 269 (D. Fla. 1970). In *Harvest*, the court relied upon decisions of the Fourth Circuit and the United States Supreme Court for the principle that, in cases involving the constitutional rights of school children to attend integrated schools, the courts should be reluctant to stay mandatory injunctions intended to further desegregation. *Id*. (Citing *Goins v. County School Board of Grayson County*, 282 F.2d 343 (4th Cir. 1960); *Lucy v. Adams*, 350 U.S. 1, 76 S.Ct. 33, 100 L.Ed. 3 (1955); *Tillman v. Bd. of Pub. Instr. of Volusia County*, No. 24501 Civ. J., M.D. Fla. (Order denying motion to stay pending appeal entered on February 2, 1970); *Swann v. Charlotte-Mecklenburg Board of Education*, 311 F.Supp. 265, W.D.N.C. (Order of February 5, 1970)). As the *Harvest* court noted, the Fifth Circuit made its attitude toward stays in school segregation cases clear in *Singleton v. Jackson Municipal Separate School Dist.*, 419 F.2d 1211 (December 1, 1969): "The shift is from a status of litigation to one of unitary operation pending litigation." The policy behind this rule is sound. Where a district court determines that certain actions are necessary and appropriate in order to promote desegregated education, appellate courts will not lightly delay the implementation of those orders.

The principle articulated in the cases cited above applies with full force here. The District Court determined, after hearing extensive testimony, observing the demeanor of the school district witnesses, and reviewing vast amounts of evidence presented during two months of hearings, that immediate cessation of State desegregation funding, except for that allocated to M-

to-M transfers, was necessary to further the desegregation efforts of PCSSD and NLRSD. The Court's May 19, 2011, order reflects a clear finding that State funding significantly encouraged failure to achieve complete desegregation and created "an absurd outcome in which the districts are rewarded with extra money from the state if they fail to comply with their desegregation plans and they face having their funds cut by the state if they act in good faith and comply." D.E. 4507 at 107-08. LRSD does not seriously dispute this observation. Based on that finding, the Court ordered the State to stop all desegregation payments other than M-to-M payments, and ordered the districts to show cause why M-to-M payments should not be terminated as well. *Id.* at 108. The requested stay of this order should be analyzed under the same standard that has historically applied to other rulings mandating desegregation. Specifically, this Court should apply the four *Dataphase* factors while always bearing in mind the overarching policy disfavoring delays in desegregation.

III. ARGUMENT

a. LRSD is Unlikely to Succeed in its Argument for Reversal of the District Court's Decision

i. The Issue of Whether State Desegregation Disbursements Should Continue was Before the Court and Has been Considered by the School District for Years

LRSD cannot demonstrate that it is likely to succeed on the merits of its claim that the District Court's order terminating State desegregation distributions should be overturned. LRSD's procedural claim, that it had insufficient notice and opportunity to present evidence regarding the funding issue, fails on multiple grounds. First, the State put at issue the question of the efficacy of continued desegregation payments and whether they should continue in its September 15, 2009, filing responding to the Court's questions about how it should proceed with the case. DE # 4261. Moreover, LRSD and PCSSD specifically asked Judge Miller to exclude

these issues from the unitary status hearings and he refused to do so. Thus, even if LRSD had completely ignored the likelihood that the supplemental desegregation funding would end given that LRSD was declared unitary in 2007, the record shows that LRSD was on notice at least by September 2009 that termination of the desegregation funding had been requested in this case and that Judge Miller intended to consider all issues pertaining to the litigation.

Second, the State's obligation to provide desegregation money under the consent decree embodied a court-ordered remedy designed to correct past segregation, and as such, could continue only so long as necessary to achieve that goal. Judge Miller's May 19, 2011, ruling, concluding that all three Pulaski County school districts are now unitary as to interdistrict student assignments, means that State desegregation disbursements are no longer necessary to remedy the past segregation that formed the principal basis for the claims in this case: assignment of students to schools. The District Court also concluded that such disbursements would actually inhibit further desegregation efforts. Under controlling federal case law, modification of the consent decree was an automatic and necessary response to the change in circumstances and did not require advanced notice to any party or the presentation of additional evidence.

As the United States Supreme Court has made clear, desegregation decrees were never intended to continue forever. *Board of Education of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237, 248, 111 S.Ct. 630, 637 (1991). They are only "a temporary measure to remedy past discrimination." *Id.* "The legal justification for displacement of local authority by an injunctive decree in a school desegregation case is a violation of the Constitution by the local authorities." *Id.* A desegregation decree can and should continue no longer than necessary to remedy the identified Constitutional violation "to the extent practicable." *Id. see also Milliken v. Bradley*, 433 U.S. 267, 97 S.Ct. 2749 (1977) (*Milliken II*). Once the Constitutional violation is

remedied, control of children's education *must* be returned to the local school officials and the State. *Id.* "By withdrawing control over areas where judicial supervision is no longer needed, a district court can concentrate both its own resources and those of the school district on the areas where the effects of *de jure* discrimination have not been eliminated and further action is necessary in order to provide real and tangible relief to minority students." *LRSD v. PCSSD, et al.*, 237 F.Supp.2d 988, 1028 (E.D. Ark. 2002)[3] *quoting Freeman*, 503 U.S. at 493, 112 S.Ct. 1430. Partial withdrawal of supervision over a plan fulfills the Court's duty to return the areas of a school system that are operating in compliance with federal law back to the control of the patrons and taxpayers supporting the schools. *Freeman*, 503 U.S. at 490 ("Returning schools to the control of local authorities at the earliest practicable date is essential to restore their true accountability in our governmental system.").

In the context of institutional reform litigation against a State, a consent decree and its enforcement 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 exercise caution to ensure 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). Modification of a consent decree by a district court is reviewed for abuse of discretion. *McDonald v. Armontrout*, 908 F.2d 388 (8th Cir. 1990).

[3] Because of the number of opinions in this case this brief will refer to the opinions by year of decision. For example, Judge Wilson's comprehensive opinion from 2002 finding the LRSD unitary will be referred to as *LRSD 2002*, 237 F.Supp.2d 988.

In this case, the District Court's ruling held that all three school districts are now unitary as to interdistrict student assignments and that continuing the State's desegregation disbursements would serve as a road-block to desegregation in other areas. D.E. 4507 at 1, 107-08. The Court's finding of unitary status in student assignments to schools means that as a legal matter the parties have successfully eliminated to the extent practicable the vestiges of the original "interdistrict violations" cited by the Eighth Circuit. *LRSD v. PCSSD*, 778 F.2d 404, 433 (8th Cir. 1985). While PCSSD remains under Court supervision as to one portion of its intradistrict student assignment obligation (its obligation to file reports regarding any one-race classrooms), that does not affect the issues raised in LRSD's motion. PCSSD's reporting obligation does not affect the interdistrict student transfers that gave rise to this case.

It is undisputed that the State's involvement in this case – like the accompanying obligation to provide desegregation disbursements under the consent decree – was tied to the claim regarding interdistrict assignment of students to schools. At the September 30, 2009, status hearing the District Court asked LRSD's counsel, Chris Heller, why and how LRSD was still inserting itself into the litigation when LRSD had been declared entirely unitary in 2007. Counsel replied that "the question still remains about the interdistrict violations, which were the basis of Little Rock's lawsuit in 1982." *See Transcript of Motions Hearing, September 30, 2009, attached hereto as Exhibit A*, at 6. Mr. Heller argued to the District Court that to end the State's obligations Judge Miller would have to find that the three Pulaski County school districts have "remedied, to the extent practicable, the violations which resulted from the interdistrict violations." *Id*. at 7. Throughout the hearing, Mr. Heller focused upon the State's alleged liability for "interdistrict violations" clearly arguing that, in order to end the State's supplemental distributions to the districts that help pay for the interdistrict remedy, the District Court would

have to find that the interdistrict violations had been cured to the extent practicable. That is exactly what has happened. In his ruling, Judge Miller found all three districts unitary as to the one interdistrict issue in this case: assignment of students to schools. D.E. 4507 at 44-49, 53-59.

In its request for a stay, LRSD has now shifted from the argument made to the District Court to focus on a different one, i.e. its contention that the District Court should have heard arguments and accepted evidence not only on interdistrict violations in the assignment of students to schools but also on whether the State should be held responsible on an ongoing basis for residential housing segregation. D.E. 4513 at 8. Such a claim was not part of the parties' Settlement Agreement or any court order in this long-running case.[4] Instead, this new claim is merely part of the effort by LRSD to keep supplemental state funds flowing even though there are no longer any interdistrict violations left to remedy. Under the 1989 Settlement Agreement the District Court and Eighth Circuit approved means by which the districts, with State funding, were to remedy interdistrict student assignment violations by financing specific interdistrict school programs. It is undisputed that, for over twenty years, the State did provide those desegregation disbursements required by the Settlement Agreement. On May 19, 2011, the Court found PCSSD unitary as to student assignments, marking the first time all three districts have been unitary as to the sole interdistrict issue in this lawsuit: assignment of students to schools.

The State has met the obligations of the 1989 Settlement Agreement and provided the necessary assistance for the districts to attain the intended interdistrict result. The jurisdiction of federal courts is limited to that provided by the Constitution or by statute. *Kokonnen v. Guardian*

[4] LRSD has especially keyed on a claim of residential segregation in these last days of this case. There is only minimal reference to any sort of housing action in the 89 Settlement Agreement. Section VII.D. That section has not been even mentioned in the over 20 years since the Settlement Agreement was signed. What is clear is that when LRSD agreed to the 89 Settlement Agreement it waived any claims that could have been made relating to any discrimination claims affecting schools up to then; including any issues related to alleged residential segregation. LRSD has invited the district court for some time now to rewind this litigation to revisit this residential segregation issue that it released in the 89 Settlement Agreement. Clearly, Judge Miller has found that this argument does not support continued desegregation disbursements by the State.

Life Ins. Co., 511 U.S. 375, 114 S.Ct. 1673 (1994). The party seeking to invoke or maintain the remedial authority of a federal court bears the burden of demonstrating that the Court retains jurisdiction. *Id.* Modification of a consent decree is appropriate when a significant change in circumstances warranting revision of the decree occurs and the modification is suitably tailored to the change in circumstances. *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 383, 112 S.Ct. 748, 760 (1992). District courts must exercise flexibility when presented with a request to modify a consent decree. *Id.*

In a desegregation case, a federal court's remedial authority ends when the Constitutional violations found to exist in the school district have been remedied. *Dowell*, 498 U.S. 237, s*ee also Kindred v. Duckworth*, 9 F.3d 638, 644 (7th Cir.1993) ("[D]ecrees imposing obligations upon state institutions normally should be enforceable no longer than the need for them."); *Cody v. Hillard*, 139 F.3d 1197 (8th Cir. 1998). Notably, LRSD has not challenged the Court's finding of unitary status as to all districts' assignment of students to schools. Therefore, immediate termination of the State's participation in a completed court-ordered remedy was proper because that remedy was no longer necessary to cure the specific Constitutional violation for which it was put in place. The parties were not entitled to any formal written notice or separate hearings on continuing State desegregation disbursements because State funding was part of the remedy for the past constitutional violations being addressed in the unitary status hearings rather than a stand-alone issue. The court-ordered desegregation distributions were permitted under federal law only so far as necessary to remedy the original constitutional violation, and therefore the question of their continued existence hinged solely upon a finding of unitary status as to interdistrict student assignments. Once all three districts were found unitary as to assignments of students to schools, all vestiges of the State's original constitutional violation had been cured to

the greatest extent practicable, and the State's continued obligation to provide desegregation distributions would have violated *Board of Education of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237, 248, 111 S.Ct. 630, 637 (1991). The parties, all represented by counsel, have knowledge of the controlling federal case law limiting any court-ordered desegregation remedy to only that which continues to be necessary. Therefore, the parties, which all participated in the months of hearings regarding unitary status, cannot now claim surprise that the outcome of those hearings, a finding of interdistrict unitary status, would dictate an immediate change in the court-ordered remedies in this case.

The current argument by LRSD's counsel that he was completely unaware that State desegregation distributions might end as a result of a unitary status finding is contrary to both LRSD's own statements and contrary to the conduct of the District. The Little Rock School Board has stated on several occasions during the four years since LRSD was declared fully unitary that it was aware the funds would soon end. For example, shortly following LRSD's attainment of unitary status in 2007, attorneys Chris Heller and John Walker briefed the Little Rock School Board on the issue of continued State desegregation disbursements. *See Minutes, LRSD Special Board Meeting, January 17, 2007, attached hereto as Exhibit B.* At this meeting,

> Mr. Heller reminded the board that it is the responsibility of the court to return local school operations to the local community once the requirements of the court order have been met . . . and continuation of the magnet programs will be up to the local school districts whether federal court supervision continues or not. In addition, state funding for magnet programs is an issue that will continue to be before the state legislature. Mr. Walker disagreed with this response and suggested the State of Arkansas will discontinue funding the magnet programs once the districts are found to be unitary."

Id. at 2. The meeting minutes for the Little Rock School Board's April 24, 2008, meeting again reflect the Board's understanding and expectation that a finding of unitary status legally necessitated a change in the court-ordered desegregation disbursements. *See, Minutes, LRSD*

Regular Board Meeting, April 24, 2008, attached hereto as Exhibit C. At that April 2008 meeting, the board members and attorney Chris Heller discussed options for funding the magnet programs without State desegregation disbursements, the possibility of settlement with the State, and continued litigation. Notably, attorney Heller advised the Board that they could attempt to reach a settlement with the Arkansas Department of Education under which there would be no immediate change to desegregation disbursements, "until the Pulaski County District is found to be unitary with their student assignments," indicating a clear understanding that a finding of unitary status as to all district's student assignments would necessitate termination of State involvement in this case. *Id.* at 5.

At the July 24, 2008, meeting, the LRSD Board again engaged in serious discussions with Mr. Heller regarding the termination of desegregation disbursements and the possibility of settlement with the State. *See Minutes, LRSD Regular Board Meeting, July 24, 2008, attached hereto as Exhibit D*. On December 18, 2008, the Board again grappled with the fact that State desegregation disbursements would soon end. *See Minutes, LRSD Regular Board Meeting, December 18, 2008, attached hereto as Exhibit E.* Board Member Baker Kurrus argued against continued litigation against the State on the issue of desegregation disbursements; "[h]e noted that the LRSD is a wealthy school district with a high millage rate and a firm tax base, especially when compared to other districts across the state . . . He repeated comments from a previous meeting - - that the LRSD should strive to become more competitive and more efficient in operations." *Id*. at 8. "The reality is we spend too much money on administration, but we aren't putting it to good use," Kurrus said. *Id*. On June 25, 2009, Board member Baker Kurrus recommended spending stimulus funds on "bricks and mortar" instead of on continued high personnel costs. *See Minutes, LRSD Regular Board Meeting, June 25, 2009, attached hereto as*

Exhibit F. On October 22, 2009, Mr. Heller presented the Board with spreadsheets "which provided an estimate of district funding if magnet and M-to-M programs were eliminated in the future." *See Minutes, LRSD Regular Board Meeting, October 22, 2009, attached hereto as Exhibit G.* Finally, before the District Court's May 19, 2011, ruling was issued, Dr. Morris Holmes, LRSD's Superintendent, proposed budgets for the 2011-12 school year to enable LRSD to meet its education obligations within its financial means based on the assumption that some or all of its special desegregation disbursements would soon end. Thus, LRSD was clearly aware that termination of the State desegregation disbursements was likely once all districts were declared unitary in student assignments. LRSD simply cannot prevail on any argument that it had no warning that termination of the State's desegregation disbursements was a possible result of the Court's findings.

Likewise, LRSD cannot successfully contend that the Judge Miller's order must be overturned because the district lacked an opportunity to make its case why the State should be required to continue to pay money to LRSD. Those very arguments were in fact made by the attorney for LRSD at the September 30, 2009, status hearing in the present case. Exhibit A at 5-9. The transcript reflects that Mr. Heller articulated without limitation LRSD's position regarding its view of the State's obligations under the 1989 Settlement Agreement, its argument that the State could not be released prior to a finding of unitary status as to the interdistrict violation, and its belief that continued State desegregation disbursements should be required even after a finding of unitary status. *Id.* While LRSD may regret that the District Court did not agree with the analysis laid out by Mr. Heller at the status hearing, it cannot argue that LRSD was prevented from making its case and presenting these theories to Judge Miller. Had the Court agreed with LRSD that the desegregation disbursements should continue beyond a finding of unitary status, it

may well have ordered hearings on that issue. However, controlling case law and the specific circumstances of this case both dictated that federal jurisdiction over the State's involvement in this litigation should immediately end, negating the need for further proceedings on the desirability of continued funding.

Finally, LRSD argues that Judge Miller's order should be set aside because it was issued prior to a ruling on a pending LRSD Motion. The motion to which LRSD refers relates to a new and independent allegation against the State regarding its laws and policies on charter schools. That motion had no bearing on the Judge Miller's determination that the districts' student assignments were unitary. Courts are free to manage their docket as they see fit, and there is no procedural bar that would prevent the District Court from fully addressing and disposing of the question of unitary status and accordant State obligations before taking up the unrelated matter of charter schools. While LRSD's charter school motion is meritless, it is still pending before the District Court and there is no indication that LRSD will not receive full and fair consideration from Judge Miller on that issue at the appropriate time.

ii. Release of the Desegregation Funding Not Only Supports the Goal of Desegregating the Districts But Also Is Required Once the Districts were Found Unitary as to Assignment of Students to Schools

LRSD's substantive argument that the Court below erred in cutting off State desegregation distributions is also unlikely to succeed on the merits. The district argues that the State may not be released from its obligation to provide desegregation funding, even after a finding of unitary status, because it claims that the State's obligation continues in perpetuity. This claim fails for at least three reasons: (1) it flies in the face of well-established desegregation case law, (2) LRSD's new contentions regarding charter schools are without merit, and (3) LRSD's theory would mean that the 1989 Settlement Agreement is void as a perpetual contract. Regarding the first point, LRSD cannot prevail on its claim that State desegregation

disbursements should continue beyond a finding of interdistrict unitary status, which is the issue for which the state was originally required to fund a remedy. As noted above, a Court's remedial authority lasts only as long as the existence of the violation it is intended to address.

Moreover, modification of the consent decree was also proper because the Court specifically found that the State desegregation disbursements had become a disincentive for further desegregation efforts. D.E. 4507 at 107-08. Because PCSSD and NLRSD have continuing desegregation obligations in order to become fully unitary, it was appropriate for the Court to modify the consent decree and eliminate the disbursements, which discouraged the districts from reaching the goal of full desegregation.

As to the second point, LRSD claims that its pending motion regarding charter schools provides a basis for the State to provide desegregation disbursements in perpetuity. Those claims are without legal basis. The State's Response to LRSD's motion is incorporated herein by reference as if set out word for word. The District Court was free to address the issues before it and their impact on the continued progress of the case and to reserve the issues raised in LRSD's new motion for a later time.

Moreover, if LRSD continues to insist that the 1989 Settlement Agreement is to be governed by the law of contracts rather than the established case law regarding consent decrees in desegregation cases, the result would be a null and void contract. LRSD claims that the State's obligation to provide nearly $70 million per year in desegregation disbursements continues perpetually, regardless of unitary status. Under this theory, the State would be required to continue to provide its consideration (desegregation disbursements) forever, and the other parties would have no deadline upon which they were required to meet their contract obligations

(successful attainment of complete unitary status), and in fact would not be required to meet them at all.

Perpetual contracts are strongly disfavored. A contract will not be construed to extend forever "unless the language is so plain as to admit of no doubt of the purpose to provide for perpetual renewal." *Baker Car and Truck Rental, Inc. v. City of Little Rock*, 325 Ark. 357, 361-62, 925 S.W.2d 780, 782-83 (1996). And, governmental entities in Arkansas are prohibited from entering perpetual contracts, *Lamar Bath House Co. v. City of Hot Springs*, 229 Ark. 214, 315 S.W.2d 884 (1958), to ensure the people's continued right to decide the use of the resources they have provided through taxes.

Finally, LRSD has misrepresented the 1989 Settlement Agreement to suggest that the Agreement continues beyond unitary status. The relevant section of the Agreement, in full, is as follows:

> The State conditions this settlement upon its dismissal from this Litigation with prejudice in accordance with the terms of Attachment A. The settlement is also conditioned upon the full execution of and compliance with the terms of the release of all claims against the State affixed hereto as Attachment A. The settlement of the State's liability, while contingent on the district court's approval, is not contingent upon court approval of any District's plan or a finding of unitary status for any District. Further, the settlement is contingent upon a determination by the district court that the settlement is binding on the classes of all current, past and future LRSD, PCSSD, and NLRSD black students, their parents and next friends. . . .

1989 Settlement Agreement IV. A. p. 18-19. This paragraph required that the State would be released from further liability regardless of whether a district had been declared unitary. Contrary to LRSD's contention, this paragraph had nothing whatsoever to do with how long the funding obligations set out in other parts of the Agreement would last. The argument that this paragraph makes the other terms of the agreement perpetual is, at best, absurd.

In fact, other sections of the settlement agreement make clear that the State's distribution of supplemental desegregation funds has lasted well beyond what anyone expected at the time the 1989 Settlement Agreement was drafted. The sections reciting the settlements with the individual school districts provided payment schedules for "compensatory education programs and other desegregation expenses." Section VI (LRSD), VII (PCSSD), and VIII (NLRSD). The last scheduled payment (to LRSD) ended January 1, 1999. None of the payments in the agreement was scheduled to last beyond 2000. Under these circumstances, it was well within the District Court's authority immediately to terminate the State's obligation for supplemental desegregation disbursements. While LRSD now argues that that a wind-down of funds is required by precedent, there is ample federal case law to support the Court's immediate termination of desegregation disbursements. In *Price v. Austin Independent School Dist.*, 945 F.2d 1307 (5th Cir. 1991), the Fifth Circuit stated that "a unitariness finding 'is critical because once it is made a federal court loses its power to remedy the lingering vestiges of past discrimination absent a showing that either the school authorities or the state had deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools.'" 945 F.2d at 1314-15. There are multiple examples of cases in which a court has declared a district or districts unitary and, in the same order, has dissolved outstanding orders and injunctions and has terminated court supervision. *See Robinson v. Shelby County Bd. of Educ.*, 566 F.3d 642 (6th Cir. 2009); *N.A.A.C.P., Jacksonville Branch v. Duval City*, 273 F.3d 960 (11th Cir. 2001); *Lee v. Houston County Bd. of Educ.*, __ F. Supp. 2d. ___, 2008 WL 166954 (M.D. Ala. 2008); *Lee v. Pike County Bd. of Educ.*, ___ F.Supp.2d___, 2007 WL 128788 (M.D. Ala. 2007); *Goodwine v. Taft,* ___ F.Supp.2d ___, 2002 WL 1284228 (S.D. Ohio 2002) ("When a school district has achieved unitary status, the Court must dissolve the desegregation decree,

terminate its supervision of the school district and dismiss the action"); *Harris v. Crenshaw County Bd. of Educ.*, ___ F.Supp.2d ___, 2006 WL 2590592 (M.D. Ala. 2006). These cases summarily dissolved all the outstanding orders and injunctions and dismiss all parties without mentioning a wind-down of any kind. *See also Manning v. School Bd. Of Hillsborough County*, 244 F.3d 927 (11th Cir. 2001).

In *Lee v. Talladega County Board of Education*, 963 F.2d 1426 (11th Cir. 1992), the United States Court of Appeals for the Eleventh Circuit held that injunctive orders in a school desegregation case were dissolved by operation of law once a district court declared that the school system had attained unitary status. 963 F.2d at 1429; *Hall v. Alabama Ass'n of School Boards*, 326 F.3d 1157, 1172 (11th Cir. 2003) ("[S]tate actors subject to terminal school desegregation orders have affirmative duties to demonstrate to the court that they have taken all necessary steps to eradicate vestiges of segregation . . . however, such duties cease upon a court's declaration of unitary status for the relevant school system."). Therefore, there is ample federal authority to support the State's immediate release from its obligations under the consent decree upon a finding of unitary status as to interdistrict student assignments. *United States v. Swift & Co.*, 286 U.S. 106, 114-115 (1932) ("A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need. . . . In either event, a court does not abdicate its power to revoke or modify its mandate, if satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong."); *McDonald v. Armontrout*, 908 F.2d 388 (8th Cir. 1990) ("The district court retains authority over a consent decree, including the power to modify the decree in light of changed circumstances, and is subject to only a limited check by the reviewing court.").

Accordingly, LRSD's contention that a stay is warranted because LRSD is likely to succeed in keeping this litigation going is misconceived. The petition for a stay pending appeal should be denied.

b. LRSD's Arguments about Risk of Harm are Exaggerated

LRSD has also failed to demonstrate a significant risk of irreparable harm if its Motion for Stay is denied. LRSD has been entirely unitary since 2007. In the past four years, LRSD has publicly acknowledged that State desegregation disbursements would cease in the near future and that it needed to plan, and has planned, for the end of those disbursements. See Exhibits B-G. Dr. Morris Holmes, LRSD's current Superintendent said well before the District Court's May 19, 2011 ruling that he and other LRSD officials have been preparing budgets for the coming school year to enable LRSD to meet its education obligations within its financial means based on the assumption that some or all of its special desegregation disbursements would soon end. Former Little Rock School Board Member Baker Kurrus, who recently ended his tenure after twelve years on the Board, has also publicly stated that LRSD has ample financial resources to provide quality education for all of its students without the special desegregation disbursements. Kurrus stated that the loss of funding will no longer allow LRSD to tolerate waste, which he sees as a positive impact of the District Court's ruling. For LRSD's lawyers now to blame the trial court for "disruption" or "irreparable harm" is disingenuous and it contradicts the public statements of the School District's elected and appointed officials. There is absolutely no need, nor any likelihood, that any Little Rock school will be forced to close, that mass layoffs of teachers will occur, or that the plans of students and their parents for the next school year will be disrupted in a significant way. Those things will only happen if LRSD itself chooses such a course of action and not as a result of the Court's decision.

Moreover, in 2010 consultants hired by the LRSD completed the creation of a strategic plan with "eye-popping" goals designed to "dramatically improve student performance." *See LRSD Strategic Plan, attached hereto as H.* The consultants specifically considered whether the district could attain the goals set out in the plan utilizing the regular (non-desegregation) funding received by the school district. The conclusion was that the "district has adequate fiscal resources to meet [its] goals." Ex. H at 15. The consultants discussed the amount of funding provided by the "state school finance formula" i.e. foundation and categorical funding, additional local operating property taxes levied in the district, and "targeted Federal resources for special education and Title I." *Id.* The consultants concluded that the state education funding model and the district's local millages provided enough funding that "the district has more employees overall than are funded through the state's adequacy model thus providing it more than ample people resources to implement all the strategies identified in this document [the Strategic Plan.]" *Id*. at p. 17. The Strategic Plan also suggested trimming programs and other cuts at the district. Thus, according to the LRSD's own experts, it has sufficient funding without the desegregation payments to not only maintain educational standards but also to improve the achievement of its students.

Therefore, a stay pending appeal is unnecessary; with proper management of its resources LRSD can continue to educate all of its students without resorting to the drastic measures threatened in its Motion for Stay. Pursuant to the District Court's order, approximately $21 million dollars in M-to-M funding will continue to the three districts, including LRSD. Therefore, the change in desegregation disbursements to LRSD is not the full $38 million per year as alleged because M-to M funding remains in effect. Of the $38 million that LRSD received in desegregation disbursements in financial year ("FY") 09-10, less than half of that

payment was for the Stipulation Magnet Schools ($15,382,372). *See Payment History by District by Purpose, attached hereto as Exhibit I; and Exhibit O Summary of State Cost.* Also, the State pays Foundation Funding for each of the students at the stipulation magnet schools and that payment that will continue. Most of the rest of the $38 million disbursed to LRSD was pursuant to the Court's order on teacher retirement and health insurance ($13,076,843). *Id.* In addition, the LRSD's operating budget for the 2010-2011 school year projects that LRSD will end this year with an operating fund balance of $21,147,944. *See LRSD 2010-2011 Budget, a relevant excerpt of which is attached as Exhibit J.* LRSD has reported to ADE as of April 30, 2011, that it has an operating fund balance of $21,765,638.[5] *See Affidavit of William J. Goff, attached hereto as Exhibit K.* Over $19 million of that $21 million are unrestricted funds that can be used for any purpose. These surplus funds that Little Rock keeps in its accounts would cover almost a full year of the desegregation disbursements it was previously receiving from the State.

Even without the desegregation disbursements, LRSD receives more than enough money to provide for its educational and operational needs. During 2009-2010, the most current school year for which complete data is available, LRSD took in $213,775,740.02 in total unrestricted revenue from state and local sources. Exhibit K. That number does not include state categorical funds (which include supplemental NSLA funds for students in poverty, Alternative Learning Environment ("ALE") funds, English Language Learners ("ELL") funds, and professional development funds), federal grant revenue, bond or loan proceeds, desegregation disbursements from the State, or any other state revenue restricted for a specific purpose. *Id*. Based upon its reported number of 22,750 students, LRSD received $9,396.52 per student in unrestricted

[5] LRSD also retained a "Building Fund Balance" of $16,821,625 at the end of FY 09-10. If needed, the LRSD Board can draw on these funds by Board vote to help adjust for the reduction of its overall budget from $348 million to over $310 million.

revenue from state and local sources. *Id*. The statewide average per student in unrestricted revenue from state and local sources was $7,489.44. *Id*. Other districts are capable of operating their schools, including magnet schools, on less money than what LRSD regularly takes in. *Id.* LRSD, with $2,000 more per student revenue than many school districts across the State, has ample resources to maintain educational adequacy.

Also, each year the State compiles the Annual Statistical Report ("ASR") from information provided by the school districts. *See 2009-10 ASR, 2008-09 ASR, 2007-08 ASR, attached hereto as Exhibits L, M, N, respectively*. LRSD's ASR shows that in the 2009-10 school year the district received over $199 million in unrestricted revenue from State and local sources (not including the district's $14.6 million debt service payment or its desegregation disbursements). Ex. N. It spent $112.5 million on "Regular Instruction" or classroom instruction; leaving $86.5 million in unrestricted revenue (or $236,886,619 in total revenue) for other expenses. *Id.* Stated another way, LRSD, in FY 09-10, spent on classroom instruction only 53% of its total unrestricted revenue and 32% of its total revenue. The decision as to whether to lay-off teachers or close the stipulation magnet schools (which operated in the district long before the 89 Settlement Agreement) will depend solely upon the budgeting priorities set by LRSD itself. There is room in the LRSD's budget to avoid any severe budgetary consequences. It is, therefore, disingenuous for LRSD to claim that Judge Miller's order creates a fiscal emergency which threatens the education of students when LRSD has been developing budget proposals to deal with the end of desegregation disbursements; when LRSD routinely carries fund balances of well over $20 million; and when LRSD has significant funding from local, state, and federal sources apart from the desegregation disbursements. Finally, even if LRSD proves unable to adjust to changes in its budget, the State stands ready to assist the school district. In the past few

years the State attempted to partner with the districts in the ending of the desegregation disbursements, but LRSD refused that effort and chose to litigate against the State instead. LRSD references the law that allowed the executive branch to enter these negotiations with the school districts. Ark. Code Ann. § 6-20-416. What LRSD does not tell this Court is that the school district declined the wind-down mentioned in 6-20-416 and chose to litigate instead. LRSD knew the potential consequences of this decision and chose to pursue this course in the face of the risks inherent in litigation.

Be that as it may, the State, through its fiscal distress law, provides a safety net for districts that are unable to adequately manage their finances. Ark. Code Ann. § 16-20-1901, et seq. In fact, NLRSD and PCSSD have recently been identified as districts in fiscal distress because of problems with how they manage the ample financial resources they are provided. The State is assisting them in addressing the financial management issues that gave rise to the fiscal distress classification. Should the "catastrophe" that LRSD's counsel argues to the Court come to fruition, the State will be ready to take action. *Lake View School District No. 25 v. Huckabee*, 351 Ark. 31, 79, 91 S.W.3d 472, 500 (2002) ("No longer can the State operate on a "hands off" basis regarding how state money is spent in local school districts and what the effect of that spending is. Nor can the State continue to leave adequacy and equality considerations regarding school expenditures solely to local decision-making.") For these reasons, LRSD's claim that an emergency stay is necessary in order to keep school doors open is simply not supported by the facts.

i. PCSSD, the Second Largest School District in the State, Also Has Ample Financial Resources

Attached as Exhibits L, M, and N, are ASR pages reflecting the budgets and expenses of all three Pulaski County school districts for the past three school years. PCSSD is the second

largest school district in the State, and has the second largest school district budget in the State. In FY 09-10, PCSSD received about $20.5 million in desegregation disbursements from the State. Of that amount, $10,478,331 was M to M incentive funding that remains in place; leaving $10,021,159 affected by the District Court's order. Ex. I. In FY 09-10, PCSSD had total unrestricted revenue (which does not include the desegregation disbursements) of $141,318,111 for 16,916 students, or $8,354.11 per student ($864.67 per student above the State average). Ex. N, p. 12. Total revenue for PCSSD in FY 09-10 was $204,227,247 or $12,073 per student. *Id.* PCSSD spent in FY 09-10 $66,878,313 on Regular Instruction (i.e. classroom instruction) or 47% of its total unrestricted revenue and 33% of its total revenue. *Id.* At the end of FY 09-10, PCSSD had a legal balance of $9,516,868 with $72 million in its building fund balance. With PCSSD's identification as in fiscal distress, the State has taken an active part in the fiscal management of the district.

In the District Court, PCSSD raised the issue of accepting the re-enrollment of 1,000 students if LRSD discontinued the stipulation magnet schools or the districts decided to discontinue the magnet transfers. According to the 2010-11 Enrollment report prepared by the Office of Desegregation Monitoring (ODM), PCSSD sent 765 students to the stipulation magnet schools in the 2010-11 school year. Ex. ___, 2010-11 Enrollment and Racial Composition of the Pulaski County Special School District, March 14, 2011 ("2011 Enrollment Report"), p. 54. The same report shows that PCSSD's elementary schools are operating at 62% of capacity and have room for some 5,870 additional students. *Id.* at 20. PCSSD secondary schools are operating at 64% capacity and have room for 4,484 additional students. *Id.* Considering the fact that the students PCSSD is concerned about will be spread across thirteen grades (K-12) and thirty-seven

schools, the district should be able to accommodate the students in the unlikely event that LRSD decides to close the stipulation magnet schools.[6]

ii. NLRSD has Ample Financial Resources as well.

NLRSD has approximately half the student body of PCSSD. In FY 09-10, the NLRSD received $9,517,912.09 in desegregation disbursements from the State. Ex. I. M to M funding comprises $5,988,915 of that amount; leaving $3,528,997 affected by the district court's decision. The NLRSD's total unrestricted revenue in FY 09-10 was $67,715,779 for 8,580 students, or $7,892 per student. Ex. N. The district's total revenue was $114,410,404, or $13,335. *Id.* NLRSD spent, in FY 09-10, $33,519,897 on regular instruction. *Id.* NLRSD's regular instruction was 49.5% of its total unrestricted revenue, and 29% of its total revenue. *Id.* The district finished FY 09-10 with a legal fund balance of $13,454,376.

ODM's 2011 Enrollment Report shows that 401 students transferred from NLRSD to the stipulation magnet schools. Ex. ___, p. 54. It also showed that NLRSD's elementary schools were operating at 86% capacity during the 2010-11 school year, and they had room for 763 students. *Id.* p. 49. NLRSD secondary schools operated at 80% of capacity with room for 1,174 students. *Id.* Each of these students bring with them foundation and categorical funding from the State. Thus, it appears that NLRSD should have sufficient capacity in its twenty K-12 schools to accept the stipulation magnet school students that reside in its district in the unlikely event that LRSD decides to close those schools.

[6] LRSD's leaders, in the days following the District Court's order releasing the State's desegregation payment obligations, have verbally committed to maintaining the stipulation magnet schools.

c. The Impact of Desegregated Education for Students in the Districts will be Positive

Issuance of a stay will substantially injure other parties interested in this litigation. Judge Miller issued his finding after months of hearings and consideration of all the evidence, ruling that court-ordered desegregation payments to the three districts discourage the districts from meeting their obligations under the 1989 Settlement Agreement and provide an incentive for inaction and, indeed, continued litigation. D.E. 4507 at 107-08. A stay would not be in the best interests of the students of PCSSD and NLRSD, both of which have continuing desegregation obligations, because delaying the Court's order would perpetuate this broken system. Nor would a stay be in the best interests of the LRSD's students whose administration appears to desire continued litigation and court-oversight to maintain a perpetual flow of State desegregation disbursements despite the attainment of unitary status. Moreover, a stay would irreparably injure the State of Arkansas as a whole. It would require the State to expend millions of non-refundable taxpayer dollars in furtherance of this counterproductive arrangement when those funds are no longer necessary to remedy segregation and could be put to better use addressing the needs of Arkansans across the State.

d. Public Policy Favors Decisive Action to Encourage Desegregation and the Return of State Institutions to Democratic Control

Finally, public policy does not favor a stay of the Court's order pending appeal. A stay pending appeal is disfavored where it could inhibit or delay desegregation efforts. *See Harvest v. Board of Public Instruction of Manatee County*, 312 F.Supp. 269 (D. Fla. 1970). Where a district court determines that certain actions are necessary and appropriate in order to promote desegregated education, appellate courts will not lightly delay the implementation of those orders. The Court determined that immediate termination of all State desegregation funding, except for that allocated to M-to-M transfers, was necessary to promote further desegregation of

PCSSD and NLRSD. The Court's May 19, 2011, order reflects a clear finding that State desegregation funding was "one of the problems" inhibiting desegregation and created "an absurd outcome in which the districts are rewarded with extra money from the state if they fail to comply with their desegregation plans and they face having their funds cut by the state if they act in good faith and comply." D.E. 4507 at 107-08. Based on that finding, the Court ordered the State to stop all desegregation payments other than M-to-M payments and ordered the districts to show cause why M-to-M payments should not be terminated as well. *Id*. at 108. Where, as here, a federal court orders specific action to be taken in order to remedy unconstitutional segregation in education, public policy strongly favors full and swift compliance.

Additionally, public policy favors a clear course of action for the three districts and the State. Both the State and the three districts have already begun implementing the District Court's ruling. Complete and immediate implementation of Judge Miller's ruling allows LRSD to move forward as a fully unitary school district, unfettered by the burden of court-ordered desegregation obligations, and free to educate its students on the same funding formula utilized by all other school districts in the State. Indeed, it places LRSD in a position of working with the State instead of litigating against the State. It requires the districts to conservatively budget and plan for the coming school year. Denial of LRSD's Amended Motion for Stay Pending Appeal prevents the districts from gambling their 2011-2012 budgets on the belief that the District Court's ruling will be overturned on appeal and the desegregation disbursements reinstated and the belief that this case can continue in litigation in perpetuity. In light of the applicable standard of review and high burden that LRSD faces in its appeal, it is in the best interests of all involved to require the districts to tighten their belts now and immediately prepare to operate their schools

without the supplemental funding rather than budget for continued payments and claim surprise and hardship when they do not prevail on appeal.

Public policy clearly favors desegregating the districts, ending the case, and, with it, ending federal control of state and local institutions. The District Court properly recognized the fact, obvious to everyone except the LRSD, that continued desegregation funding only encourages non-compliance and, indeed, continued litigation.

IV. CONCLUSION

For the reasons stated above, the State requests that the Court decline to enter a stay of Judge Miller's May 19, 2011, Order, deny the LRSD's Motion, and allow this case to end.

Respectfully submitted,

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BY: /s/ Scott P. Richardson

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ARKANSAS DEPARTMENT OF EDUCATION

CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2011, 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 17, 2011, to the following non-CM/ECF participants:

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/s/ Scott P. Richardson
SCOTT P. RICHARDSON