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

| | |
|---|---|
| **LITTLE ROCK SCHOOL DISTRICT** | **PLAINTIFF** |
| **V.** | **NO. 4:82CV00866BSM/HDY** |
| **PULASKI COUNTY SPECIAL SCHOOL DISTRICT NO. 1, ET AL.** | **DEFENDANTS** |
| **MRS. LORENE JOSHUA, ET AL.** | **INTERVENORS** |
| **KATHERINE KNIGHT, ET AL.** | **INTERVENORS** |

# PCSSD BRIEF ON THE ISSUE OF MAJORITY TO MINORITY FUNDING

## SUMMARY OF THE PCSSD ARGUMENT

- The abrupt termination of the majority-to-minority funding will work a hardship upon and is unfair to the class of African American children for whom this case was brought.
- Majority to Minority funding should be continued for reasons of fundamental fairness at least until such time as an equitable and rational phase-out of the M-to-M program takes place.
- ACA 6-20-416 provides a rational vehicle for resolution of this issue.
- The 1989 Settlement Agreement was written by the parties and not by the courts.
- After the District Court disapproved the 1989 Settlement Agreement, the Court of Appeals approved it and ordered it be implemented as written by the parties.
- This written Agreement has no end date, and is unique among desegregation cases.

- At the time of this Court's Order 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.

## INTRODUCTION

## THE 1989 SETTLEMENT AGREEMENT AND THE M TO M PROGRAM.

This brief responds to this Court's Order to "show cause" why the Court should not terminate majority-to-minority funding. The first section of this brief deals with the equities surrounding funding the M-to-M program. The second part of the brief traces the history, terms and conditions and uniqueness of the 1989 Settlement Agreement. All the parties, which then included the State defendants, agreed to incorporate the stipulation that created the Majority – Minority program as originally ordered the United States Court of Appeals for the Eighth Circuit, as a component part of their Settlement Agreement.

## THE RECRUITMENT OF M-TO-M STUDENTS INVOLVES MULTIPLE PROMISES BY THE STATE AND THE SCHOOL DISTRICTS

Paragraph three of the M-to-M stipulation requires that applications for new students be filed before May 1 of the preceding school year.) Stipulation . page 2, paragraph 3.)

Paragraph six, which begins at page 3 states in pertinent part:

> The commitment to accept a student shall be for the duration of the student's voluntary participation. Once the student exercises his or her right to participate, the student will continue in the initially selected school for at least one full school year or until the student graduates or affirmatively withdraws from participation…Students will not have to transfer each year or exercise a transfer choice to remain in the host district. Students shall be encouraged to continue to participate at their initial school of choice. It is expected that the student will follow the pattern of assigned schools for the resident students in the school in which the transfer student first enrolled.

In short, students are recruited to these school districts under the promise that they can remain in their initially selected school, which in the case of elementary schools would be up to six years (K-5) and that they may elect to continue in the host district until they graduate from high school.

The current mix of students no doubt spans every category from newly enrolled kindergarten students to students about to enter their senior year in high school having gone through as much as 12 years of schooling in the host district. It would simply be unfair to these students, most of whom probably had widely varying reasons for making these choices in the first place, to return to a district from which they affirmatively elected to transfer. For instance, as can be verified by the ODM reports, Pulaski County hosts over 941 M to M African American students from the Little Rock School District and North Little Rock School District. Those students have elected to continue their education in the PCSSD and that educational process should not be interrupted or abruptly terminated. (See Declaration of Dr. Brenda Bowles attached; see also Declaration of Anita Farver regarding financial impact)

**EXTRACURRICULAR AND AFTER-SCHOOL ACTIVITY**

As paragraph 11 of the M-to-M stipulation provides, transfer students are encouraged to participate in all school programs including academic, athletic and extracurricular and their participation has been facilitated by extracurricular buses and after-school transportation which has been available to all such transfer students and paid for by the state as described in paragraph 12 of the stipulation. Accordingly, not only do these transfer students voluntarily enroll to get educated in the host district, they also are privileged and encouraged to participate in the full spectrum of co-curricular and after-school programs including athletics. Again, it would be

fundamentally unfair to these students to terminate these programs in the middle of June when school starts in two months.

**M-TO-M FUNDING IS DIFFERENT THAN THE OTHER TYPES OF FUNDING**

The sending district does receive an incentive payment as described in paragraph 13c. However, the host district simply receives reimbursement for the actual cost of educating the child from the state as well as reimbursement for transporting these children. The host district does not receive any extra payment for hosting students, and all three districts host transfer students. Accordingly, the sums received by these districts for hosting transfer students are more nearly like regular state aid than the other categories of funding this court has determined to end.

**ONE POSSIBLE SCENARIO FOR EQUITABLY PHASING OUT THE M-TO-M PROGRAM**

As previously noted, the recruitment deadline for new M-to-M students for next school year was May 1, 2011. The Court and the parties could consider a phase-out under which no new M-to-M applications would be considered on a going forward basis. Stated another way, beginning now no new M-to-M applications would be processed for the 2012-2013 school year. This would likely have an immediate impact on the number of students who elect to remain in the program. In fairness, those who are already enrolled or who will be new enrollees this coming school year should be allowed to complete whatever grade level was originally promised to them. The state should continue to pay based on actual number of students (just as it does now) and it is likely that a fairly rapid phase-out would result.

While transportation would likely become even more inefficient than it currently is, the state could exercise its option, which it has always had, to transport these students in a state-operated system. See Stipulation at paragraph 12, page 5.

**THE SETTLEMENT AGREEMENT WAS WRITTEN EXCLUSIVELY BY THE PARTIES.**

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 the Court of Appeals 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, this 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; issues regarding Settlement Agreement "first notice" to State)

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.

**THE SETTLEMENT AGREEMENT IN THIS CASE IS UNIQUE AMONG DESEGREGATION CASES IN THE COUNTRY**

Not only is it important to remember the history of the 1989 Settlement Agreement, it is also critical to 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 the Court of Appeals. 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 agreed to settle the case. They submitted to the District Court comprehensive agreements covering both interdistrict and intradistrict desegregation measures – agreements referred to by the parties as the "settlement plans." They also submitted a separate but related document, called the "settlement agreement," settling the financial 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 settlement agreement 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 unnecessary and unwarranted.
>
> 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]

Judge Arnold then patiently explained that 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 financial agreement, to be disapproved. *Id. a*t 1393
> …
> 6. On remand, the District Court is directed to approve the parties' settlement agreement as written by them.
>
> [Emphasis supplied] *Id.* at 1394.

**WHAT STANDARDS SHOULD THE COURT APPLY?**

It is respectfully submitted that some standard more strict than Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1992) should attend an effort by the District Court, or anyone else, to change, terminate or otherwise impact the vitality of the written settlement agreement including the M to M program which settled the financial obligations of the State.

Thus, under the circumstances attending this Court's evaluation of M to M funding, what should the process be? 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 to include the M to M funding. The statute's definition of "post unitary" is flexible enough to encompass current conditions. 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 Court to direct the parties to agree upon a reasoned and rational phase-out of these funds as well as the programs, including the M-to-M transfers, and their transportation, which generate the funds at issue.

## CONCLUSION

This Court should continue M to M funding and strongly consider directing the parties to pursue the path outlined in ACA 6-20-416 as amended.

Respectfully submitted,

MITCHELL, WILLIAMS, SELIG,
GATES & WOODYARD, P.L.L.C.
425 West Capitol Avenue, Suite 1800
Little Rock, Arkansas 72201
Telephone: (501) 688-8800
Facsimile: (501) 688-8807
E-mail: sjones@mwlaw.com

*/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 20, 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**
  clayfendley@comcast.net
- **Christopher J. Heller**
  heller@fec.net
- **Stephen W. Jones**
  sjones@jlj.com
- **Office of Desegregation Monitor**
  paramer@odmemail.com
- **Scott P. Richardson**
  scott.richardson@arkansasag.gov,agcivil@arkansasag.gov
- **John W. Walker**
  johnwalkeratty@aol.com,lorap72297@aol.com,jspringer@gabrielmail.com

*/s/ M. Samuel Jones, III*

I hereby certify that on June 20, 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
C255 Richard Sheppard Arnold U. S. Courthouse
500 West Capitol Avenue
Little Rock, Arkansas 72201

*/s/ M. Samuel Jones, III*

M. Samuel Jones III (76060)
Attorneys for Defendant PCSSD
MITCHELL, WILLIAMS, SELIG, GATES & WOODYARD, P.L.L.C.
425 West Capitol Avenue, Suite 1800
Little Rock, Arkansas 72201
Telephone: (501) 688-8800
Facsimile: (501) 688-8807
sjones@mwlaw.com

**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