No. 11-2130

In the

United States Court of Appeals

for the

Eighth Circuit

Little Rock School District,

Plaintiff-Appellant,

vs.

State of Arkansas, *et al.*,

Defendants-Appellees

APPELLANT'S REPLY BRIEF
IN SUPPORT OF MOTION FOR STAY AND OTHER RELIEF

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I. Likelihood of Success on the Merits.

A. The State's Status Report Did Not Place Modification of the Interdistrict Remedy "At Issue".

The State of Arkansas claims that its September 15, 2009 Status Report (Docket No. 4261) "put at issue the question of the efficacy of continued desegregation payments" and put LRSD on notice "that termination of the desegregation funding had been requested in this case . . . ." **State Response, p. 11-12.** The State is mistaken. Fed. R. Civ. P. 7(b)(1) states, "A request for a court order must be made by motion." The State concedes that no party had filed a *motion* seeking modification or termination of the interdistrict remedy. Thus, there is no dispute that the district court acted *sua sponte* – on its own motion.

B. Modification of a Consent Decree Requires a Hearing to Resolve Disputed Facts.

Even if the State had filed a motion requesting modification of the consent decree, that motion could not be decided without a hearing to resolve disputed facts. The State concedes that the district court modified the consent decree. **State Response, p. 21** ("[M]odification of the consent decree was also proper because . . . ."). The law is clear that modification of a consent decree requires a hearing. *Heath v. DeCourcy*, 992 F.2d 630, 634 (6th Cir. 1993) ("Modification of a consent decree requires a complete hearing and findings of fact demonstrating that new and

unforeseen conditions have created a hardship thereby making impossible compliance with the decree.") (internal quotation and citations omitted)).[1]

The State argues that NLRSD's and PCSSD's unitary status hearings included the issue of modification of the consent decree. **State Response, p. 2.** The facts do not support this argument.[2] First, NLRSD and PCSSD moved for unitary status based on compliance with their intradistrict desegregation plans and made no request for modification of the Magnet Stipulation, M-to-M Stipulation or other components of the 1989 Settlement Agreement. ***See*** **Docket Nos. 4141, 4159 and 4217**. Second, the district court clearly limited the issues at the unitary status hearings to the districts' compliance with their intradistrict desegregation plans when it entered the detailed scheduling order outlining the order of proof. **Docket No. 4312** (quoted in full in LRSD's Motion for Stay, p. 6). Third, the district court's order begins by explaining that the "hearings" were on NLRSD and PCSSD's motions for unitary status and then sets forth the court's opinion as to

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[1] This Court relied on an earlier decision in the *Heath* case in advising the district court of the proper standard for modification of the districts' intradistrict desegregation plans. *Appeal of Little Rock Sch. Dist.*, 949 F.2d 253, 258 (8th Cir. 1991).

[2] The fact that 24 exhibits are attached to the State's Response, none of which were exhibits in the district court proceedings, also belies the notion that these issues were litigated below, including the issue of the need for a phase-out of funding. *Compare Jenkins v. State of Mo.*, 122 F.3d 588, 601-02 (8th Cir. 1997) (discussing testimony and other evidence supporting a phase-out of desegregation funding over three years).

each area of the districts' intradistrict desegregation plans. **Docket No. 4507, pp. 1-2**. Fourth, the State points to no evidence in the record which supports, or even touches upon, modification of the consent decree. Finally, the district court does not even mention the standard for modification of a consent decree and fails to make findings of fact required by that standard. **See Docket No. 4507, pp. 107-09**.

The State cites the district court's decision denying LRSD's motion in limine regarding interdistrict issues as "signaling that issues including evidence pertaining to termination or modification of the 1989 Settlement Agreement were part of the unitary status hearings." **State Response, p. 2**. In fact, the district court simply ruled that it could not "determine whether this evidence has probative value until it is offered in the context of the hearing." **Docket No. 4325**. During the unitary status hearings, no evidence was introduced pertaining to termination or modification of the consent decree, and thus, the district court was never asked to rule on its admissibility.

The State argues that modification of the consent decree was proper because the district court found that the State funding of the magnet schools "had become a disincentive for further desegregation efforts." **State Response, p. 21**. LRSD strongly disputes this finding, and neither the State nor the district court has identified any evidence from the unitary status hearings to support it. **See Docket No. 4507, pp. 107-09**. Indeed, there is none. The district court's opinion does not

even include the words "magnet school," even though the district court ordered an end to magnet school funding.

This Court required the parties to create magnet schools and approved the parties' agreement to establish the six interdistrict magnet schools which exist today. *LRSD v. PCSSD*, 921 F.2d 1371, 1389 (8th Cir. 1990) ("In compliance with the direction in our 1985 *en banc* opinion, 778 F.2d at 436, the parties stipulated to the creation of six interdistrict magnet schools."). LRSD's magnet schools have worked and are working to provide students an opportunity to exit their racially-identifiable neighborhood schools and receive a quality education in a truly desegregated environment. *See Liddell v. State of Mo.*, 731 F.2d 1294, 1310 (8th Cir. 1984) ("Before reviewing the State's specific arguments, we observe that the utility and propriety of magnets as a desegregation remedy is beyond dispute.").

The district court appears to have adopted the State's unsupported allegation from the State's September 15, 2009 status report that State desegregation funding has "become a significant impediment to termination of Court oversight." **See Docket No. 4261, pp. 3-5**.[3] Unsupported allegations cannot be the basis for modifying a consent decree. *Heath*, 992 F.2d at 635 (reversing the district court's

[3] Notably, the State's Status Report (Docket No. 4261) which is quoted on p. 1 of the State Response, did not request an immediate termination of funding but instead requested "firm cutoff dates for the State funding as a consequence of any failure to by a district promptly to attain unitary status."

decision to modify a consent decree where "the district court relied on unverified statements in the record . . . unauthenticated materials and oral argument . . . and failed to conduct a 'complete hearing' by not allowing any evidence or expert testimony . . . ."). Before modifying the Magnet Stipulation and the M-to-M Stipulation, the district court must conduct an evidentiary hearing and make findings on the factors identified by the Supreme Court in *Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367 (1992). *See id.* This case involves the constitutional rights of citizens "so the courts must be ever vigilant to preclude a termination or modification of proceedings until everyone affected has an opportunity to be heard." *Id.*

Setting aside the lack of evidence supporting the district court's modification of the Magnet Stipulation, the district court's finding that State funding of magnet schools created a disincentive for the districts to comply with their intradistrict desegregation plans is inconsistent with the facts. First, LRSD has already been declared completely unitary, and the district court found NLRSD complied with its intradistrict desegregation plan and is unitary in all but one area (staff recruitment). **See Docket No. 4507, p. 109**. No evidence was presented at the unitary status hearings indicating that any of the districts failed to comply with the Magnet Stipulation.

Second, the district court's disincentive theory could be viable only if the districts' agree with the State's position that magnet funding automatically ends when all three districts are unitary. LRSD has consistently maintained that magnet funding, as well other funding received through the 1989 Settlement Agreement, should continue until the State pleads and proves that current residential segregation in Pulaski County is not proximately related to the State and defendant districts unconstitutional efforts to perpetuate residential segregation. ***See* Docket No. 4260, p. 6; Docket No. 4274, Tr. 7-8.** *See Freeman v. Pitts*, 503 U.S.467, 494 (1992); *Jenkins v. Missouri*, 216 F.3d 720, 725 (8th Cir. 2000)("[O]nce there has been a finding that a defendant established an unlawful dual system in the past, there is a presumption that current disparities . . . are the result of the defendant's unconstitutional conduct.").

LRSD, therefore, has no financial motivation to oppose unitary status for PCSSD and NLRSD and, contrary to the State's argument, did not oppose the PCSSD or NLRSD motions for unitary status. Only when all parties were asked by the district court whether PCSSD and NLRSD were unitary did LRSD express it's "concerns" that PCSSD "may not" have sufficiently complied with its desegregation plan to have earned unitary status. LRSD's "concerns" were echoed in the district court opinion of May 19, 2011.

The State argues that the parties entered the 1989 Settlement Agreement "with purpose of 'achieving unitary school systems in these three districts…'". **State Response p. 4.** The language the State quotes actually refers to the districts' desegregation plans, not the Settlement Agreement. **See 1989 Settlement Agreement, p. 1.** The purpose of the 1989 Settlement Agreement was to avoid "[c]ontinued litigation regarding funding and other issues" that may hamper or delay implementation of the desegregation plans. Consistent with this purpose, the Settlement Agreement deals almost exclusively with funding issues, and the desegregation plans are mentioned only incidentally. **See 1989 Settlement Agreement**.

Finally, the district court's disincentive theory is at odds with the legal distinction between an intradistrict remedy and an interdistrict remedy. *See Milliken v. Bradley*, 419 U.S. 717, 744-45 (1974) (An interdistrict remedy requires proof that "racially discriminatory acts of the state or local school districts, or a single school district have been a substantial cause of interdistrict segregation."). Where the interdistrict remedy is based on state-imposed residential segregation, the interdistrict remedy does not end upon a school district remedying its intradistrict constitutional violations and attaining unitary status. *See United States v. Bd. of School Comm'rs of the City of Indianapolis*, 128 F.3d 507 (7th Cir. 1997). *See also Berry v. Sch. Dist. of the City of Benton Harbor*, 195 F.Supp.2d 971

(W.D. Mich. 2002). In Indianapolis, the district court held that the school district attaining unitary status was "irrelevant" to the continued validity of the interdistrict remedy. *Bd. of Sch. Comm'rs of the City of Indianapolis*, 128 F.3d at 510 ("The postponed hearing on 'unitary status' is, in the district judge's view, irrelevant to the continued validity of the interdistrict busing order."). The Seventh Circuit agreed and said any argument to the contrary "would border on the frivolous" because of "the fundamental difference between interdistrict and intradistrict remedies in school desegregation cases." *Id.* The district court's failure to respect the difference between the interdistrict remedy (magnet schools and the M-to-M transfer program) and the intradistrict remedies (the districts' desegregation plans) increases the likelihood that LRSD will succeed on the merits.

C. Magnet Schools and the M-to-M Transfer Program Remain Necessary to Remedy State-Imposed Residential Segregation.

The State argues without citation that the magnet schools and majority to minority transfers ordered by this Court "were principally designed to bring about race-neutral assignment of students to schools." **State Response, p. 3:** The State then asserts, again without citation, 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-to-M transfers) were principally instituted to address." **State Response, p. 4.** The State's argument misrepresents the history of this case. This Court did not impose interdistrict

remedies such as magnet schools and majority to minority transfers because the districts had previously assigned students based on race. This Court imposed those remedies to address the constitutional violations by the State and others which led to the concentration of black students in LRSD. *See LRSD v. PCSSD*, 585 F.Supp. 328, 339-51 (E.D. Ark. 1984) (fact findings regarding efforts to establish and maintain residential segregation); *LRSD v. PCSSD*, 778 F.2d 404, 423 (8th Cir. 1985) (discussing the "causal role of the State of Arkansas and PCSSD in creating and perpetuating" segregated housing in Little Rock). The interdistrict remedies were therefore necessary to bring about the "desegregative effect" of "reducing the number of black students in LRSD and the number of white students in PCSSD." *LRSD v. PCSSD*, 921 F.2d 1371, 1379-80 (8th Cir. 1990).

The State responds to LRSD's claim that the interdistrict remedy remains necessary to address residential segregation by asserting, "Such a claim was not part of the parties' Settlement Agreement ***nor any court order in this long-running case.***" **State Response, p. 15** (emphasis supplied). This assertion is clearly erroneous. LRSD did not bring this case for the purpose of obtaining unitary status. LRSD could have obtained unitary status by eliminating the vestiges of its past discrimination "to the extent practicable," *Bd. of Educ. v. Dowell*, 498 U.S. 237 (1991), but although LRSD would have been unitary, it would have been a one-race, all-black school district. *See Clark v. Bd. of Educ. of*

Little Rock Sch. Dist., 705 F.2d 265, 271 (8th Cir. 1983). Instead, LRSD filed this case "to ensure a complete and constitutional remedy that will eradicate the vestiges of Arkansas' prescribed racially dual structure of public education and a century and a half of racial discrimination in Pulaski County." **Docket No. 1, Complaint, ¶ 15.** A key component of "Arkansas' prescribed racially dual structure of public education" was residential segregation. In 1984, the district court (the Honorable Henry Woods presiding) found that the State, acting though its agents and in concert with the defendants, engaged in numerous schemes that were "major contributing factors to the residential segregation in Pulaski County which exists today." *See Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.*, 584 F.Supp. 328, 353 (E.D. Ark. 1984). Judge Woods concluded that the State's "goal of preserving residential segregation has been successful." *LRSD v. PCSSD*, 584 F. Supp. at 353.

The State appealed Judge Woods' findings, and this Court affirmed stating:

> The district court made detailed and extensive findings regarding the existence of segregated housing in the Little Rock metropolitan area and regarding the causal role of the State of Arkansas and PCSSD in creating and perpetuating this condition. After reviewing these findings for clear error, we find none, and conclude that the record amply supports the district court's determination.

Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist., 778 F.2d 404, 423 (8th Cir. 1985). This Court also considered the issue of whether it was proper for the

district court to order an interdistrict remedy based, in part, on residential segregation. After reviewing precedent from the Supreme Court and two courts of appeal, this Court affirmed "imposition of remedial liability upon the State of Arkansas" for state-imposed residential segregation. *Id.* at 426. Finally, this Court distinguished cases relied upon by the State because they did not involve "state-imposed residential segregation." *Id.* at 428-29.

The State argues that LRSD told the district court at the September 30, 2009 status conference that the "districts" had to remedy their "interdistrict violations" before the State's funding obligations could end, but that LRSD has now "shifted" from this argument to a "new claim" that the State is responsible for "residential housing segregation." **State Response, pp. 14-15.** The record does not support any of this. The transcript of the September 30, 2009 status conference (Ex. A to the State's Response) shows that LRSD's lawyer gave the following response when asked by the district court whether, if NLRSD and PCSSD were found to be unitary, there would have to be another hearing to deal with "the interdistrict problem":

> That's exactly right, Your Honor, because at some point in this case, we're going to be talking about the remedy, the interdistrict remedy, and how long that should be in effect and whether it's still serving a useful purpose. And in order to address that question, I think the Court needs to take evidence about whether or not the residential segregation, for example, that exists in Pulaski County that the State was found to be at least partly

> responsible for – whether or not that still exists, or whether it's been remedied. And the presumption is, once you're found to be a constitutional violator, that the continuing existence of that condition of segregation is traceable to the constitutional violation.

Transcript of September 30, 2009 Status Conference, pp. 7-8. LRSD's lawyer went on to discuss the proof which would be required of the State to meet it's burden concerning residential segregation:

> And the State could come in and present evidence to you that any segregation which exists today is purely the result of private choices and not traceable to the constitutional violations that Judge Woods found in 1984 that the State had engaged in. They can attempt to make that case. They'll have the burden of proof, and you can decide whether or not the remedy, the interdistrict remedy, is still serving a useful purpose.

***Id.* at 8.** These transcript excerpts clearly show that LRSD's arguments about residential segregation are not new and that there has been no "shift" in LRSD's position on this issue.

LRSD has remedied its intradistrict constitutional violations and is now operating a unitary school system. Even so, the interdistrict remedy remains necessary to address ongoing residential segregation. The district court acknowledged in its order that neighborhoods in Pulaski County remain racially identifiable. **Docket No. 4507, p. 76** ("Given that these two schools are located in very affluent, predominately white communities, and that their black student population is artificially inflated by M-to-M transfers, the disparately high amount

of money spent on the facilities begins to erode one's confidence that the district has tried to fairly allocate its limited resources."), **and p. 77** ("Children who live in predominately black zones of the district attend older and smaller schools that are lest instructionally functional and are less aesthetically attractive."). Until the State pleads and proves that the consent decree is no longer needed to remedy residential segregation in Pulaski County, the State remains liable for funding the remedy as it agreed to do in the 1989 Settlement Agreement. *See Freeman*, 503 U.S at 494; *Jenkins v. Missouri*, 216 F.3d at 725.

D. The Term of the 1989 Settlement Agreement is Indefinite, Not Perpetual.

LRSD has never claimed that the interdistrict remedy should remain in place forever, as argued by the State. In *Cody v. Hillard*, 139 F.3d 1197 (8th Cir. 1998), the Court explained that termination of a consent decree should be based on consideration of the following factors:

> (1) any specific terms providing for continued supervision and jurisdiction over the consent decree; (2) the consent decree's underlying goals; (3) whether there has been compliance with prior court orders; (4) whether defendants made a good faith effort to comply; (5) the length of time the consent decree has been in effect; and (6) the continuing efficacy of the consent decree's enforcement.

139 F.3d at 1199 (*quoting McDonald v. Carnahan*, 109 F.3d 1319, 1321 (8th Cir. 1997)). The district court heard no evidence and made no findings as to any of these factors. Because factual disputes exist with regard to, for example, the

State's good faith compliance and the continuing efficacy of a decree, the district court must conduct an evidentiary hearing before terminating the consent decree. *Id.* at 1200.

E. LRSD's Pending Motion to Enforce 1989 Settlement Agreement.

The State's claims that LRSD's pending Motion to Enforce 1989 Settlement Agreement **(Docket No. 4440 and 4442)** "relates to a new and independent allegation against the State regarding its laws and policies on charter schools" that the district court can hear at a later date. While LRSD's motion does address charter schools, it also alleges other violations of the Magnet Stipulation, M-to-M Stipulation and 1989 Settlement Agreement, including provisions related to remediation of the racial achievement disparity. **See Docket No. 4442, ¶¶ 158-187**. Because these issues concern the State's compliance with the decree, which is a necessary element for termination of the decree, *see Cody*, *supra*, LRSD's motion must be resolved before the State can be released from the obligations it voluntarily undertook.

II. Public Interest.

The State correctly notes that public policy favors "full and swift compliance" with desegregation remedies and "a clear course of action for the three districts and the State." **State Response, p. 33**. Both of these public policy considerations favor entry of a stay. An immediate loss of State funding will make

it difficult, if not impossible, for the districts to fully comply with their obligations under the Magnet Stipulation and M-to-M Stipulation, and for NLRSD and PCSSD to fully comply with their remaining intradistrict obligations. Entry of a stay would also allow the district court to develop a clear course of action for resolving issues related to modification and termination of the consent decree, and if the decree is to be terminated, an orderly phase out of magnet and M-to-M funding. The public interest is not served by modifying or terminating a consent decree in a manner that creates chaos for the parties and diminishes respect for the federal judiciary. *See Freeman*, 503 U.S. at 489-90 ("Just as a court has the obligation at the outset of a desegregation decree to structure a plan so that all available resources of the court are directed to comprehensive supervision of its decree, so too must a court provide an orderly means for withdrawing from control when it is shown that the school district has attained the requisite degree of compliance. A transition phase in which control is relinquished in a gradual way is an appropriate means to this end.").

The State cites a number of cases for the proposition that a desegregation decree may be immediately terminated upon a finding of unitary status (**State Response pp. 23-24**), but these cases are inapposite because none are interdistrict cases involving state-imposed residential segregation where the state agreed to provide the districts additional funding to cover the cost of implementing the

interdistrict remedy. Although the State cites *Harris v. Crenshaw County Bd. Of Educ* as a case which "dissolved all outstanding injunctions and orders and dismiss[ed] all parties without mentioning a wind-down of any kind," the *Harris* court actually held that "the state defendants are not dismissed, and the orders dealing with state-wide 'special education' and 'facilities' issues are not dissolved." 2006 U.S. Dist. LEXIS 64671 at p.*21.

The State argues that "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…", but this is not true. This Court has made it clear that desegregation commitments such as magnet schools are "unconditional obligations" which must be met "[w]hether the State makes the payments required by the Settlement Agreement or not." *LRSD v. PCSSD*, 921 F.2d at 1390.

Conclusion

Throughout its Response, the State refers to the magnet funding it agreed to provide, and to the teacher retirement and health insurance payments it was ordered to make to remedy one of its violations of the Settlement Agreement, as "supplemental" payments. The payments are actually a critical part of a remedy which was agreed upon by all parties and approved and enforced by this Court. The State's arguments in favor of immediate termination of its funding obligations

are simply the latest in a long line of arguments, rejected by this Court, which are designed to minimize the State's financial liability. The State's repeated efforts in this regard have been the source of all the litigation about which the State complains. See Docket No. 1442 (ODM funding); *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.*, 83 F.3d 1013 (8th Cir. 1996) (workers' compensation funding); *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.*, 83 F.3d 1013 (8th Cir. 1996) (loss funding); *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.*, 148 F.3d 956 (8th Cir. 1998) (teacher retirement and health insurance funding); *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.*, 378 F.3d 774 (8th Cir. 2004) (Jacksonville splinter district). The stay requested by LRSD, PCSSD and NLRSD should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on June 20, 2011, I have electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which shall send notification of such filing to the parties of record.

/s/ Christopher Heller