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

LITTLE ROCK SCHOOL DISTRICT	PLAINTIFF
v. Case No. 4:82cv00866 BSM	
PULASKI COUNTY SPECIAL SCHOOL DISTRICT NO. 1, NORTH LITTLE ROCK SCHOOL DISTRICT, ET AL	DEFENDANTS
MRS. LORENE JOSHUA, ET AL	INTERVENORS
KATHERINE KNIGHT, ET AL	INTERVENORS

RESPONSE TO ORDER TO SHOW CAUSE
WHY THE STATE OF ARKANSAS SHOULD NOT BE ORDERED
TO STOP FUNDING M-TO-M TRANSFERS

The Little Rock School District ("LRSD") for its Response to Order to Show Cause Why the State of Arkansas Should Not Be Ordered to Stop Funding M-to-M Transfers states:

1. The M-to-M transfer program, which encourages white PCSSD students to attend LRSD schools and black LRSD students to attend PCSSD schools, has 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 of Arkansas should be required to fund M-to-M transfers so long as they are necessary to lessen the educational impact of residential segregation caused by the State. *See 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" residential segregation in Little Rock).

BACKGROUND

2. The Eighth Circuit ordered the creation of the M-to-M transfer program as a part of its order affirming the State's liability for state-imposed residential segregation. In *Little Rock*

Sch. Dist. v. Pulaski County Special Sch. Dist., 778 F.2d 404 (8th Cir. 1985), the Eighth Circuit held that the remedy for the State and defendant districts constitutional violations must include an M-to-M transfer program. 778 F.2d at 436 ("Voluntary intra- or interdistrict majority-to-minority transfers shall be encouraged, with the State of Arkansas being required to fund the cost of transporting students opting for interdistrict transfers and to pay benefits to the sending and receiving schools for interdistrict transfers . . . ."). In accordance with the Eighth Circuit's order, the parties submitted the M-to-M Stipulation to the district court on or about August 26, 1986. "Beginning in the 1987-88 school year and continuing thereafter," the M-to-M Stipulation requires LRSD, PCSSD and NLRSD to "permit and encourage voluntary majority-to-minority interdistrict transfers." M-to-M Stipulation, ¶ 1. The M-to-M Stipulation requires the State of Arkansas to "pay the full cost of transporting students opting for interdistrict transfers." M-to-M Stipulation, ¶ 12. The State of Arkansas also pays a financial incentive to the sending district and the cost of educating the M-to-M students to the receiving district. M-to-M Stipulation, ¶ 13; 1989 Settlement Agreement, § II, ¶ E(2).

3. The State has paid the full cost of transporting magnet and M-to-M students by reimbursing the districts for the actual cost of this transportation. The actual cost of LRSD's magnet and M-to-M transportation is approximately $4 million per year. LRSD receives approximately $3.5 million per year for educating M-to-M students and about $1 million per year in incentive payments for recruiting and encouraging M-to-M transfers, an obligation unique to the Pulaski County districts and not otherwise funded by the State. Docket No. 4524-1, Bailey Aff., ¶ 2.

4. This Court recognized the important contribution that the M-to-M transfer program continues to make in increasing racial and socioeconomic diversity of Pulaski County

schools. In discussing PCSSD's construction of Chenal Elementary and Maumelle High School, the Court noted that both schools "rely on majority to minority transfers from the Little Rock School District to keep them racially balanced." Docket No. 4507, p. 75. The Court further recognized that this was due to continuing residential segregation. The Court stated, "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." Docket No. 4507, p. 76. *See* Docket No. 4507, p. 77 ("Children who live in predominately black zones of the district attend older and smaller schools that are less instructionally functional and are less aesthetically attractive."). Thus, the continuing necessity of the M-to-M transfer program does not appear to be the issue. The districts are required to continue to operate the M-to-M transfer program even without State funding provided pursuant to the M-to-M Stipulation and the 1989 Settlement Agreement. *See LRSD v. PCSSD*, 921 F.2d 1371, 1390 (8th Cir. 1990) (The districts' desegregation obligations "remain binding" "[w]hether the State makes the payments required by the Settlement Agreement or not. . . ".) Rather, the issue is whether the cost of the M-to-M transfer program should be borne by the State or the districts.

ARGUMENT

5. The cost of the M-to-M transfer program should be borne by the State because the State agreed to make the payments indefinitely as a remedy for its constitutional violations. Shifting responsibility for these costs to LRSD, the plaintiff in the interdistrict case, for the defendants' failure to comply with their intradistrict desegregation plans is unprecedented, unjustified and unfair to the victims of past discrimination that this case was intended to benefit.

6. The State agreed to make payments for M-to-M transfers "beginning in the 1987-88 school year *and continuing thereafter* . . . ." M-to-M Stipulation, ¶ 1 (emphasis supplied). The State understood when it agreed to make these payments that the consent decree would be in place "for a long time." *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.*, 921 F.2d 1371, 1384 (8th Cir. 1990). While the term of the consent decree is indefinite, LRSD has never claimed that the interdistrict remedy should remain in place forever. The consent decree may be modified or terminated upon proper notice and a hearing and if the facts satisfy the appropriate legal standard. *See Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.*, 921 F.2d 1371, 1384 (8th Cir. 1990)(identifying the standard for modification of a consent decree); *Cody v. Hillard*, 139 F.3d 1197, 1199 (8th Cir. 1998)(identifying factors to be considered by a district court in deciding whether to terminate a consent decree). The State agreed to make these payments indefinitely as part of a binding contract that must be respected by this Court. *LRSD v. PCSSD*, 921 F.2d at 1387 ("Consent decrees partake of the nature of contracts, as well as judicial action, and parties seeking to change them bear an extremely heavy burden.").

7. It is fair that the State fund the M-to-M transfer program because that remedy is designed to address the State's constitutional violations. The State violated the Constitution in two ways. First, the State failed in "its affirmative duty to assist the local districts in their desegregation efforts." *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.*, 597 F.Supp. 1220, 1228 (E.D. Ark. 1984). Second, the State was found liable for residential segregation in Pulaski County. *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.*, 778 F.2d 404, 423 (1985).

8. In arguing against a stay, the State responded 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.*" Docket No. 4525, p. 14 (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. In 1984, the district court (the Honorable Henry Woods presiding) found that the State participated 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 the Eighth Circuit 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.

LRSD v. PCSSD, 778 F.2d at 423. The Eighth Circuit 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, the Eighth Circuit affirmed "imposition of remedial liability upon the State of Arkansas" for state-

imposed residential segregation. *Id.* at 426. Finally, the Eighth Circuit distinguished cases relied upon by the State because they did not involve "state-imposed residential segregation." *Id.* at 428-29.

9. The 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**.[1] Unsupported allegations cannot be the basis for modifying a consent decree. *Heath*, 992 F.2d at 635 (reversing the district court's 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 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.*

10. The show cause order followed the Court's discussion of "an absurd outcome in which the districts are rewarded with extra money from the state if they fail to comply with their desegregation plans . . .." Docket No. 4507, p. 108. The Court concluded, "If a district actually complies with its desegregation obligations and is found unitary, it faces the likelihood that the state will ask the court to discontinue the state's obligation to pay for the various programs that are funded with desegregation funds." *Id.* This court's finding that State funding of magnet

[1] Notably, the State's Status Report (Docket No. 4261) 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."

schools and M-to-M transfers 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 or M-to-M Stipulations.

11. 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 and M-to-M 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's 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.").

12. LRSD, therefore, has no financial motivation to oppose unitary status for PCSSD and NLRSD and did not oppose the PCSSD or NLRSD motions for unitary status. Only when all parties were asked by the 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 Court's opinion of May 19, 2011.

13. The Court's disincentive theory is also 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 the 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.* Thus, the continuing need for the M-to-M program has nothing to do with whether the districts have remedied their intradistrict constitutional violations; rather, the continuing need for the M-to-M program derives from the lingering effects of state-imposed residential segregation in Pulaski County. Even after all three districts have done everything they can do to remedy their intradistrict constitutional violations, the lingering consequences of state-imposed residential segregation justify the continued interdistrict movement of students through voluntary M-to-M transfers. *See Id.* at 510-511 ("The violations by the state and by the housing authority are long in the past. But to the extent that their consequences linger, continued equitable relief may be appropriate.").

14. In addition to its general duty to help the districts desegregate, the State made a firm commitment in the 1989 Settlement Agreement to monitor implementation of programs designed to remediate the achievement disparity. 1989 Settlement Agreement, § III.A. Rather than assisting PCSSD to ensure compliance, the State in at least two instances abetted PCSSD in its noncompliance. First, the Court found PCSSD failed to comply with Plan 2000's requirements related to facilities. In fact, the State approved and funded, at least in part, PCSSD's construction of state-of-the-art schools in white, affluent communities while ignoring expert recommendations for improvements and new construction in black, poor communities. Docket No. 4507, pp. 74-78. Second, the Court found that PCSSD failed to implement the "Ross Plan" to improve African-American achievement. PCCSD relied on its ACSIPs required by the ADE to satisfy this obligation. Even though the ACSIPs were all approved by ADE, the Research Group found they "did not contain the focus on black students mandated by the Ross Plan." Docket No. 4507, p. 95. The State should not be rewarded for its failures.

15. The Court's determination to punish the districts will ultimately punish the victims of past discrimination. If the State is relieved of its funding obligations, the districts will be forced to assume the cost of transporting M-to-M transfer students. Every dollar spent on transportation is a dollar not available for classroom instruction and remediation. The State already underfunds the transportation component of regular State education funding so the districts will have no option but to use funding intended for the classroom. Every school district in the state receives the same per student amount for transportation regardless of the districts actual transportation cost. *See* Docket No. 4442, ¶¶ 178 to 187. LRSD spends around $4.2 million a year more on regular student transportation that it receives in regular State funding. Docket No. 4442, ¶ 187. If the State is relieved of its obligation to fund magnet and M-to-M

transportation, LRSD have to use an additional $4 million intended for the classroom to transport magnet and M-to-M students. *See* Docket No. 4524-1, Bailey Aff., ¶ 2. The loss of M-to-M funding would compound the problems already created by the Court's decision regarding funding of magnet schools and teacher retirement and health insurance. While LRSD intends to do everything it can to minimize the impact on students, there will certainly be a significant negative impact on students, and in particular, the victims of past discrimination.

16. LRSD successfully sued the State and others in order to remedy interdistrict constitutional violations which hurt LRSD students. It would be fundamentally wrong to require LRSD and those students, as victims of the constitutional violations, to bear the burden of remedying them.

WHEREFORE, for the reasons set forth above, LRSD prays that the Court *not* relieve the State of its agreed commitment to fund the M-to-M transfer programs as set forth in the M-to-M Stipulation and the 1989 Settlement Agreement.

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