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

LITTLE ROCK SCHOOL DISTRICT	PLAINTIFF
v.	
PULASKI COUNTY SPECIAL SCHOOOL DISTRICT, ET AL.	DEFENDANT
MRS. LORENE JOSHUA, ET AL.	INTERVENORS
KATHERINE WRIGHT KNIGHT, ET AL.	INTERVENORS

BRIEF IN SUPPORT OF OPPOSITION BY JOSHUA INTERVENORS TO MOTION FOR ORDER

The Arkansas Department of Education (ADE), the Arkansas State Board of Education and the State of Arkansas are the moving parties seeking the advisory opinion from the court regarding the conflicts of interest which those entities have either created or allowed.[1] In reality, the State's Motion implies that its takeover need not be submitted to the court for approval. Joshua opposes the takeover and requests an evidentiary hearing regarding the propriety of the State's action.

In their collective brief, the State defendants present evidence and explanation in justification of their decision to remove the individual members of the defendant Pulaski County Special School District No. 1 Board of Directors and Superintendent Dr. Charles Hopson. The representative party is the Commissioner of Education, Dr. Tom Kimbrell. The evidence upon which his request is made is reflected in Exhibit A, "a partial transcript" of a May 16, 2011 State

[1]. See Joshua Exhibit 1.

Board of Education meeting. Joshua discerns the facts presented by that transcript to be as follows:

1. On March 30, 2011, the ADE administratively notified the PCSSD that it was identified as being in fiscal distress.

2. On May 11, 2011, the Arkansas State Board of Education heard PCSSD's appeal from the administrative decision and on that date "denied PCSSD's appeal and classified the district as in fiscal distress."

As additional reasons, the State's Motion indicates the following alleged facts:

1. On June 10, 2011, the Arkansas Legislative Joint Auditing committee identified concerns regarding financial management of the district.

2. The PCSSD Board of Directors is experiencing a number of problems which erode their fiscal needs of the district and the public's confidence in decision making ability.

3. The ADE determined that the situation in PCSSD's administration cannot be allowed to continue.

4. The takeover is made for the purpose of restoring the public's confidence in the district.

5. The Commissioner appointed former PCSSD Superintendent Bobby Lester to manage the district.

6. The State's takeover requires that PCSSD litigation be directed by the State even though it presents a conflict of interest with respect to the current litigation before this court and the 8th Circuit Court of Appeals.

The conclusory reasons cited by the State, taken either alone or together, do not justify this court's approval of the State's extreme action in dismissing named parties from this

litigation. Those named parties may only be removed by substitution or dismissal by this court. Each of them has responsibilities under Plan 2000. Moreover, the State has no specific responsibility under Plan 2000.

In support of court intervention regarding State takeover, the State cites *Brown v Board of Education, 349 U.S. 294,300 (1955)* for the undisputed proposition:

> "in fashioning and effectuating school desegregation decrees federal courts are guided by equitable principles … characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs."

Brown supports the Joshua position. The equities do not favor the State in this case.

This court will be well advised to follow *Brown's* admonition regarding practical flexibility by restoring the PCSSD Board and Superintendent Dr. Charles Hopson as parties while it considers pending motions and briefs. It is a principle of equity that federal court decrees trump state action such as that asserted by Dr. Kimbrell. *See Cooper v. Aaron, 358 U.S. 1* (1958). In this case, Joshua submits that there is no compelling reason for one of the discriminators, the State of Arkansas, to change the alignment of parties and take over the responsibilities of some of the parties without court approval. Such a path only further confuses the situation.

I.
The State takeover of the PCSSD and the removal of Dr. Charles Hopson as Superintendent violate the 1989 Settlement Agreement.

The 1989 Settlement Agreement provides that PCSSD is a "sovereign desegregating school [school] operating pursuant to court orders and agreements and that this agreement is both necessary and desirable to facilitate their desegregation activities…" *See Section J, Recognition of Autonomy*.

There is precedent for determining the identities of the parties in this case. In 2003, under state law, the State Board of Education voted to allow the citizens of Jacksonville, Arkansas, to decide in an election whether the Jacksonville section of the PCSSD should be detached. Joshua opposed the detachment. After a hearing, the court disallowed the detachment. *See Docket No. 3792 and Joshua Exhibit 2, Tr. dated 8/18/2003*. The Court told the State Board that "they cannot use state statutes as a shield to avoid complying with all Court orders and contractual agreements that govern and control the desegregation obligations of the parties in this case." *Joshua Exhibit 2, Tr. 8//18/2003, p. 59*. In addition, the Court stated, "it's the effect and impact rather than the intent which is the critical inquiry under the circumstances." *Joshua Exhibit 2, Tr. 8/18/2003, p. 59*. Ruling from the bench, the Court held that the proposed separate Jacksonville district was in violation of the 1989 Settlement agreement and Eighth Circuit precedent in *LRSD v.* PCSSD, 805 F.2d 815 (8th Cir. 1986) and *LRSD v. PCSSD*, 778 F.2d 404 (8th Cir. 1985). The court disallowed the detachment and directed the State Board to rescind its vote authorizing the local election. *See Dkt. No. 3792* and *Tr. 8/18/2003, p. 65-66*.

Joshua attaches as *Exhibit 3* portions of the LRSD brief in support of its Motion to Enforce the Settlement Agreement in order to show that similar issues involving the State's unilateral action in seeking to modify the settlement agreement have been rejected by this court.

The situation here is analogous. The removal of the Board and Superintendent pursuant to state law requires federal court approval. Importantly, the State did not seek permission to take over the PCSSD. Mr. Sam Jones would make the same argument were he not conflicted and otherwise precluded from doing so. The state does not cite any authority where it may act independently of this court's approval to remove a party from this case. Nor has the State moved to substitute itself for the PCSSD. The State has thus disrespected the court and the parties. The

court had parties that it could hold responsible for implementation of its orders. The court now has to enter a *sua sponte* substitution of parties in order for its obligations to be enforced. Surely, the state can cite some authority for the radical action that it has taken other than that state law permits it. As stated earlier, state law permitted a [local vote] on a separate Jacksonville district; however, the court declined to allow such process without its approval and without a substantial evidentiary basis.

II.
The State's action may constitute a new violation and impose additional burdens of implementation upon the State of Arkansas.

The brief of the State does not make the case for ADE takeover and removal of the Superintendent. The brief says that there are several fiscal conditions which implicate the current Superintendent which have not been corrected. Joshua would show at an evidentiary hearing that the Superintendent held that responsibility for less than a year. Joshua would also show that PCSSD was no different from LRSD, NLRSD or many other districts which have experienced fiscal deficiencies but were not placed on fiscal distress; the Superintendent violated no directive from the ADE nor did the Board; the fiscal distress status imposed by the State Board of Education was just entered on May 16, 2011; and the Superintendent and PCSSD Board had less than one month to effectively address the asserted fiscal distress. Were Joshua, or PCSSD if it had a lawyer, able to present evidence it would be established that no takeover by the State ever came so quickly and with so little proof of failure of compliance over so short of a period of time. This would establish that the State is being punitive and retaliatory to PCSSD and Dr. Hopson. *See Settlement Agreement dated September 28, 1989, Section L, p. 10.* Joshua would also be able to show that Dr. Hopson had no opportunity to address any deficiency which directly implicated him and that the guilt of Dr. Hopson is that he is an African American with a

firmly stated commitment to follow the court approved plan of desegregation and otherwise remedy inequities and inequalities addressed by Judge Miller.

Moreover, were Joshua able to present evidence, Joshua would demonstrate that the Board divisions are normal and expected where race and union issues are present and often collide. The Joshua evidence would be that at least two white Board members, recently elected with union support, sought to diminish, counter and negate the efforts by the Superintendent to ensure that teachers were properly sensitized, challenged and motivated to teach, discipline and otherwise equally treat lower achieving, mostly African American school children in quality facilities comparable to those in the well to do areas of the PCSSD. This evidence constitutes the State siding with the public opponents to desegregation and Plan 2000, who are the PCCSD Board and the legislative and executive branches of state government.

III.
The rationale of the State is that it was compelled to act because of public opposition to the operation of the PCSSD and Superintendent.

By saying that the "ADE must act to restore the public's confidence in the third largest school district in the State," the State is yielding to and embracing the public viewpoints of the Board's two white minority members and the Joint Legislative Audit committee members who were vocal regarding what they heard or read about Dr. Hopson's initiatives and about differences among PCSSD school board members. This state of public debate is no different from the position the State actors took in 1958 when Governor Faubus closed the schools of Little Rock in order to allow a cooling off period of two and one-half years. What Dr. Kimbrell determined was that a cooling off period of two years and a new superintendent would relieve the situation. He acted under A.C.A. § 6-20-1908. He used state law in an attempt to trump federal law. He also removed an African American superintendent committed to this court's

order and replaced him with a white superintendent found lacking by both Judge Miller and Judge Susan Webber Wright. Dr. Kimbrell's action amounts to seeking a postponement of desegregation and prioritizing fiscal management ahead of desegregation plan implementation. For two years issues regarding fiscal distress will supersede the requirements of the federal court decree if this court allows the State's rationale to prevail. In *Cooper v. Aaron*, where Little Rock sought a two year postponement of desegregation, the Supreme Court stated as follows:

> "their position in essence was that because of extreme public hostility…engendered largely by the official attitudes and actions of the Governor and the Legislature, the maintenance of a sound educational program at Central High School, with the Negro students in attendance would be impossible." *358 U.S. 13*.
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> "the constitutional rights of respondents are not to be sacrificed to the ….disorder which … followed upon the actions of the Governor and Legislature. *358 U.S. 15*.
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> *******
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> "the constitutional rights of children not to be discriminated against on the grounds of race or color …can neither be nullified openly or directly by state legislators or state executive or judicial officers nor nullified indirectly by them through evasive schemes for segregation whether attempted ingeniously or ingenuously." *358 U.S. 16*
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The law is clear. Public opposition to desegregation as reflected by legislators' comments, two school board members' arguments against desegregation equity, and statements reflecting joy at the discontinuation of funding for programs intended to benefit African American children's education, is the same as opponents of desegregation standing in the school house door to prevent nine African American children from enrolling in Central High school. If there is any court case that is still good law from the Brown era, it is the Little Rock case itself which stands for the proposition that public opposition, whether by the Governor, legislators, the

State Board of Education, private citizens or a combination of them acting in concert may not be used as a reason or excuse, to delay or deny enjoyment of constitutional rights of minority citizens. In many respects, the situation is déjà vu.

CONCLUSION

Joshua respectfully submits that the request by the State of Arkansas to approve its takeover of PCSSD and to establish a protocol for litigation should be denied. If the State wishes to proceed on its announced course, it should first petition the Court for approval just as any other party would do on any important issue arising out of the Settlement Agreement. At that point, the issues may then be addressed factually and by argument and a record can be developed for purposes of appeal. There is no other way to address this matter than by denying the State's motion pending further appropriate and respectable pleadings and proceedings.

Respectfully submitted,

/s/ John W. Walker

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CERTIFICATE OF SERVICE

I do hereby state a copy of the foregoing Opposition has been filed utilizing the CM/ECF system wherein a copy will be automatically served on all counsel of the record on this 29th day of June, 2011.

/s/ John W. Walker

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June 27, 2011

Mr. Scott Richardson
Assistant Attorney General
Office of the Attorney General
323 Center Street, Suite 200
Little Rock, Arkansas 72201

Dear Scott:

This letter is to request that your client, the Arkansas Department of Education (ADE), rescind its takeover Order of the Pulaski County Special School District. The takeover is not before any court at this time and if it is left in place, it will further confuse an already confused circumstance. It also raises material issues of conflict of interest which cannot be addressed except through further litigation in the case now on appeal. Let me enumerate several of the conflict issues.

One issue of conflict relates to the Department's being a defendant in an action brought by Little Rock and Joshua. Another is the agreement to support Plan 2000 which was developed between Joshua and PCSSD while Bobby Lester was superintendent, with State concurrence.[1] A third issue relates to ADE's siding with Board members who were negative, according to their public statements, to implementation of Plan 2000. One of them was quoted as saying that Superintendent Hopson appeared too intense upon addressing racial issues; and another of whom resigned because the Board did not appear to be serious about implementation of Plan 2000.

The fourth conflict appears that, as things are, the district and Dr. Hopson will be found guilty by default of the allegations of Dr. June Elliott who has sued those entities in circuit court. Dr. Hopson is at least entitled to a defense as is the district, otherwise the district's economic circumstances will be further harmed by a costly default judgment to the material injury to the students of the district. The evidence submitted before Judge Miller demonstrated that Dr. Elliott knew little about Plan 2000 and had little involvement in its implementation. Is Dr. Hopson entitled to his own defense independent of what Dr. Kimbrell may think about Dr. Elliott's lawsuit? Does Dr. Kimbrell have an interest in validating her lawsuit so as to confirm his own judgment

[1]. The District Court's findings of bad faith compliance began with Mr. Bobby Lester's administration.

regarding Dr. Hopson? While the insurance company may provide a defense, who does the insurance company represent? Dr. Hopson or Dr. Kimbrell, or the ADE? If the insurance company represents Dr. Kimbrell rather than Dr. Hopson, must Dr. Hopson cooperate with the carrier or may he have to pay a judgment under circumstances which ADE controls?

A fifth conflict issue involves the question for which party does Sam Jones now work, ADE, Dr. Tom Kimbrell, PCSSD or himself? Does Mr. Jones have personal standing, meaning personal harm which will allow him to take an action against ADE or Dr. Tom Kimbrell or anyone for that matter? On one hand, he is suing the State and on the other hand he is representing the same state agency. The appeal of the funding cutoff is in effect an action against the State. What kind of sense does that make?, especially where he has represented the district in ongoing litigation for more than 20 years against the ADE. There is, as you know, the claim that ADE actions have contributed to the district's financial circumstances. Is Mr. Jones free, with Dr. Kimbrell as the person to decide whether he can sue Dr. Kimbrell as a necessary party?

Finally, the ADE actions invite more litigation. It leaves thousand of written contract in limbo. It also does not allow the parties to reach any voluntary resolution of the issues on which the Court has ruled against PCSSD. Because of these considerations and others, I respectfully request that your client reconsider its takeover action and restore Dr. Hopson and the Board to the positions that they previously held.

Respectfully submitted,

John W. Walker

JWW:js
Cc: Mr. Sam Jones
Mr. Steve Jones
Mr. Chris Heller
Ms. Margie Powell, ODM
Mr. Austin Porter
Mr. Robert Pressman

premise that a remedy could only be extended to the boundaries of the county. And that was a misleading one. It was not one that had any factual correctness, because the Pulaski County School District extends beyond Pulaski County. It extends into Lonoke County. Now, white flight was the genesis of the lawsuit. And it's no different now than it was then. So what Mr. Bond seeks to prevent is what we all would like to prevent. I do not know that this case provides the forum for allowing it to happen.

With respect to the argument by Mr. Gauger, that a provision upon which he relies was authored by Mr. Jones by the Pulaski County School District and that construction should be against the drafter, there's nothing to demonstrate that Mr. Jones was the drafter of that particular provision. There's nothing to say that he was or I was or anybody else. That's a conclusion being offered. And we ask the Court to disregard that comment. Thank you.

THE COURT: We are going to be in recess until 1 o'clock, at which time I'll announce my decision. We are in recess.

(Recess from 11:25 a.m. until 1:00 p.m.)

THE COURT: I would have liked to have had more time so that I could enter a written opinion in this case, but I consider time to be of the essence, because I want the parties or party that feels aggrieved after my ruling to have an

EXHIBIT tabbies Joshua Ex 2

opportunity to try to get an expedited appeal before the Eighth Circuit in a case that's so important to so many people, and particularly so important to school children. I am comforted by the fact that we have a Circuit Court of Appeals if a party wants to go that route. I am sure in delivering this oral ruling there will be solecisms of plenty so that members of the print media who care to write about this can put "sic" after several things I say.

One of my alleged friends I heard by the grapevine recently said since I've been a judge I was one of those fellows that was often in error but never in doubt. That is one thing I categorically deny. I often agonize a great deal over decisions, particularly when it is very important to so many people, crucially important to people. I will say, this is not one of those cases insofar as determining what the result ought to be. After reading all of the papers -- and I spent most of the weekend studying this case and the decided cases and the papers that have been filed by the lawyers -- I am confident that I have come to the right decision, and oral argument affirmed that.

I must say, frankly, as far as the action of the state board, I'm puzzled. I think I feel somewhat like the piano player in the bordello. "I don't know what's going on upstairs."

In any event, I understand under the clear language of

Section II(J) under the 1989 settlement agreement, the state explicitly recognized that the Pulaski County Special District is an, quote, independent, sovereign desegregated school district, end of quote, which would be operating under a continuing interdistrict remedy for the foreseeable future.

As a party to the '89 settlement agreement, the state knows that, in order for the Pulaski County School District to achieve unitary status, it must satisfy a host of desegregation obligations related to, A, the assignment of students and teachers; B, the racial makeup of students and teachers at the schools throughout the Pulaski County Special School District; C, the transfer of students among the Pulaski County School District, the Little Rock School District, and the North Little Rock School District under majority to minority transfer provisions and the magnet school and the incentive school transfer provisions; D, the transportation of students; E, complex school funding obligations tied to the number of students transferring among the district; and, F, a host of other desegregation obligations.

The state also knows that the purpose for the language in Section II(J) of the 1989 settlement agreement, which guaranteed the independence and sovereignty of the Pulaski County Special School District, was to protect the geographic identity and integrity of the Pulaski County Special School District so that it would have a base of students, schools, and

tax revenues sufficient to allow it to discharge its future desegregation obligations under the 1989 settlement agreement and the later desegregation plans and consent decrees under which it has operated.

On June the 4th of this year, the attorney general issued an Advisory Opinion to the director of the Arkansas Department of Education in which he explicitly cautioned the director that if the Board of Education approved the proposed election to create a detached school district in northeast Pulaski County, it might directly -- might directly violate the '89 settlement agreement and the Pulaski County School District's desegregation plan which has been approved by the Court. The language of this warning, which the State Board of Education received before it approved the election, bears repeating, at least a portion of it does.

And I quote: As a general matter, the settlement agreement and the Pulaski County Special School District's existing desegregation plan were written in the context of the Pulaski County Special School District having control over the schools in the proposed detachment area, having the benefit of the local revenue derived from taxes on property within the proposed detachment area, and having available the students residing in the proposed detachment area who might, through M-M transfers or other reassignment, be available to lessen racial disparities in individual schools in the Pulaski County Special

School District, the Little Rock School District, and the North Little Rock School District. In light of this, any detachment of a significant amount of territory from the Pulaski County School District could almost certainly be expected to have an impact on the Pulaski County Special School District's ability to comply with its desegregation plan and have an impact on the operation of the settlement agreement, including the agreement's provisions concerning the M-M students and the magnet schools in the Little Rock School District."

Furthermore, later in the same opinion, the attorney general states that the language in Section II(J) of the settlement agreement suggests that either: Quote, A, the parties simply did not anticipate that a successor district might be created from territory that was formerly within the Pulaski County Special School District, or, B, the parties specifically intended that there would not be any such successor district created under any circumstances, end of quote.

Thus, the attorney general's June 4, 2003, Advisory Opinion, and to some extent the one issued, the supplement issued in July, makes it abundantly clear that attempting to carve out and create a new school district from the Pulaski County Special School District is in direct violation of the language in Section II(J) of the 1989 settlement agreement, which guarantees the sovereignty and independence of the

Pulaski County Special School District, until at least such time as it has fully discharged all of its desegregation obligations and obtained unitary status.

It is clear beyond peradventure that Section II(J) of the 1989 settlement agreement imposes a contractual obligation on the state not to take any action that might adversely affect the sovereignty and integrity of the Pulaski County Special School District.

The State Board of Education's decision to approve an election to create a new school district to be carved out of the existing Pulaski County Special School District directly threatens the sovereignty and independence of the Pulaski County School District and its ability to comply with desegregation obligations.

In point of fact, the attorney general's June 4 Advisory Opinion clearly and specifically warns the Department of Education of the adverse consequences that creating such a new school district would have on the Pulaski County Special School District.

I quote again from that June 4 Advisory Opinion. "Any detachment of a significant amount of territory from the PCSSD could almost certainly be expected to have an impact on the PCSSD's ability to comply with its desegregation plan and have an impact on the operation of the settlement agreement, including the agreement's provisions concerning M-M students

and the magnet schools in the Little Rock School District, end of quote.

While the author of this Advisory Opinion chose to leave an obvious point unstated, the impact he was referring to on the Pulaski County Special School District and its ability to comply with its desegregation obligation was unquestionably going to be a negative impact.

Thus, in my opinion, the State Board of Education's vote to allow an election to create a new school district in northeast Pulaski County unquestionably violated the state's obligation under Section II(j) of the 1989 settlement agreement to preserve the independence and sovereignty of the Pulaski County Special School District until such time as it had fulfilled all of its desegregation obligations and achieved unitary status.

I find also that this vote violated several orders of the Eighth Circuit and this Court. In 1986, in *Little Rock School District v. Pulaski County School District*, the Eighth Circuit directly addressed the procedure that should be followed in order to change the geographic boundaries among the three Pulaski County school districts. Importantly, those boundaries, which were originally established by the Eighth Circuit in *Little Rock School District v. Pulaski County School District*, 778 F.2d 404 (Eighth Circuit 1985), 778 F.2d 404, have remained essentially unchanged for almost 20 years.

Now, I like the Mark Twain quote given to us by Mr. Bond. Also, it made me hark back to a quote by Dr. Martin Luther King, when people were cautioning him at one point to cool off. He said he had found that when you cool off too long, you often wind up in the deep freeze. Nonetheless, here we are with 20 years, operating essentially under these three same districts.

Now, in the 1986 decision, the Eighth Circuit rejected an attempt by the Little Rock School District to allow its geographic boundaries to automatically expand, at the expense of the Pulaski County Special School District, whenever the City of Little Rock annexed new territory from the county. In other words, it was Judge Woods, as I recall. He approved a plan that would allow when the city annexed property from the Pulaski County Special School District area that automatically the school district would change. The Eighth Circuit disapproved that.

While the Eighth Circuit recognized that the district court retained the discretion to change the geographic boundaries of those three school districts in the future, it set out an exacting standard for the district court to follow in making any future changes in the boundaries of the three districts: First, any change in the boundaries would have to have substantially the same impact on the student populations of each district; and, second, the change in the boundaries would have to, quote, better meet the educational needs of the

students of the districts involved, end of quote.

Now, the statutory scheme crafted by the general assembly, the Arkansas General Assembly, in the detachment statute, 6-13-1501, et seq., attempts to relegate the district court to a limited role in any detachment process.

Under those statutes, the Court would only become involved after the new district was created, and its role would be limited to providing a safety net to ensure the new district would not adversely affect the desegregation obligations of the other districts in the county.

With all due respect to the general assembly -- and I say that. I do have great respect for the general assembly as an elected representative of the people. The clear mandate of the Eighth Circuit, mandates of the Eighth Circuit, do not permit the relegation of the district court to a backstopping or a safety net role.

The Eighth Circuit has carefully and explicitly described the Court's role in deciding if any change should be made to the boundaries of the three Pulaski County school districts. As a threshold matter, any party -- and that includes the state -- that contemplates changing the boundaries of any of the three school districts must, in my opinion, first come to the Court with a detailed feasibility study and specific data sufficient to allow this Court to conduct an evidentiary hearing to determine if, one, the boundary changes will

substantially impact the student populations of each district; and, two, the changes in the boundaries will, and I quote again, better meet the educational needs of the students of the districts involved."

It is, of course, elementary law that the Supremacy Clause of the United States Constitution, under it the Arkansas legislature cannot properly enact legislation that in any way appreciably limits the role of the Court in this desegregation case or that attempts to reduce the constitutional authority of the Court to that of a safety net for state sponsored school detachment schemes -- I use "schemes" not in the pejorative sense. "Plans," I should have said maybe -- that, as I have said before, appear to be constitutionally infirm on a number of different grounds.

Because the Board of Education under the Arkansas Department of Education failed to obtain the Court's prior approval of the proposed new school district in northeast Pulaski County before they voted to allow an election to take place to create the detached district, possibly created, I conclude that the state violated its obligations under the '89 settlement agreement and the obligations under the Eighth Circuit's decision in the 1986 case that I have cited earlier.

On January 28 of 2003 and on March 25th of this year, I entered orders affecting school enrollment at Sylvan Hills Middle School, Clinton Interdistrict School, the new middle

school in Maumelle, Harris Elementary School, and Cato Elementary School.

Obviously, the proposal to create a new school district in northeast Pulaski County will have an undeniable, in my opinion, profound effect on the ability of the Pulaski County Special School District to comply with those two orders, not to mention the many other desegregation obligations outlined in Plan 2000.

I find it quite troubling that the Arkansas Department of Education and the State Board of Education would take even the first step necessary to create a new detached school district, from territory now included in the Pulaski County Special School District, without at least notifying the Court that it had received a request to form such a new district, and then seeking guidance from the Court regarding whether approving an election to create a new district might violate the 1989 settlement agreement, orders of this Court, and orders of the Eighth Circuit.

The Arkansas Department of Education and the State Board of Education must both understand that they cannot use state statutes as a shield to avoid complying with all Court orders and contractual agreements that govern and control the desegregation obligations of the parties in this case.

Now, I have looked at many cases in the last several days involving the attempts to create what the courts have called

splinter districts within districts that have been set up under federal court supervision in desegregation cases. I have been unable to find a single case that approves such a splinter district. And it puzzles me that those cases weren't -- maybe they were discussed. But the State Board of Education, if they were, those cases were discussed with them, went ahead anyhow. I find that very puzzling.

The state has already paid millions of dollars in attorneys' fees to the lawyers involved in the case. Likewise, each of the three school districts have paid millions of dollars in attorneys' fees. Each dollar, each dollar of school funding that goes to pay attorneys is one less dollar available to educate the children of Pulaski County.

It is hard for me to fathom why the State Board of Education would set into motion an election to create a splinter school district in Pulaski County after it had been advised by the attorney general of the danger of pursuing that course of action and knowing, or I assume knowing, that the federal courts throughout the country that have considered this precise issue have universally prohibited the formation of such splinter groups.

I don't consider the two letters from the attorney general, particularly the June letter, as simply a shot across the bow. I think those letters were shots across the bow, the fantail, the midships, port and aft, port and starboard.

At this critical stage of this desegregation litigation, all the efforts of all of the parties need to be directed at ensuring the three Pulaski County school districts meet all of their remaining desegregation obligations necessary to achieve unitary status.

Now, I assume most people here know that I entered a 170-something page order last year in which I found that the Little Rock School District had moved a long way towards unitary status. Of course, that issue is before the Eighth Circuit. But it is my opinion, based on what I found, that the school districts -- and I was considering specifically then from what I could see of the others -- that every one was on the main lane towards unitary status, where I or any federal Court that follows me can step out of the picture. And I believe this would be a major step backwards if I permitted this election.

Now, what's the remedy? I conclude that the State Board of Education's decision to approve an election to form a new school district in northeast Pulaski County violates, as I said earlier, both the terms of the '83 settlement agreement and the 1986 Eighth Circuit decision. I believe that those require any proposed change in the geographic boundaries of the three schools in Pulaski County to first have approval of the Court.

Therefore, I order the State Board of Education to rescind its decision approving an election to create a splinter school

district in northeast Pulaski County.

If the State Board of Education intends to pursue this matter further, it must first file with the Court a detailed feasibility study with other supporting documents sufficient to meet the test laid down by the Eighth Circuit in *Little Rock School District v. Pulaski County Special School District*, 805 F.2d 815. That's Eighth Circuit, 1986.

The Pulaski County Special School District and other parties will then be allowed the opportunity to submit evidence in opposition to the state's request to change the geographic boundaries of the Pulaski County Special School District or of any other party to change them. And I would then conduct an evidentiary hearing on that issue.

Now, obviously, all of this will take a great deal of time and will be very expensive for the parties. Before the state elects to pursue this option, I strongly urge it to become familiar with the case law from all the other districts, which to date no court has ever approved the creation of a splinter district from within the territory of an existing district that is being operated under court supervision and attempting to satisfy a desegregation plan.

Because I have determined that the state has breached its contractual obligations under the '89 settlement agreement, I'm going to allow counsel for the Pulaski County School District to file a motion to recover its attorneys' fees. If I have the

authority to grant those attorneys' fees against the state, I will grant them.

In expressing my concern with the action by the state board, I'm not assuming that they are bad people or acted with bad purpose. To the contrary, I assume they are good people. But I can only conclude that their reasoning processes were in vapor lock when they voted to allow this election. And I would hope in the future that they would take a more careful look at it. I will say this. If there's any other similar type issue comes up, and assuming that I'm upheld by the Eighth Circuit, if this goes to the Eighth Circuit, I would more than likely seriously consider measures more stern than attorney's fees in a similar situation.

Finally, I want to refer to the 1994 Alabama district court case, which I believe to be on point. With this case -- that's *Lee v. Chambers County Board of Education*, *Lee v. Chambers County Board of Education*, 849 F.Supp. 1474. I believe that's a '94 case. That case, in my opinion, is well written. In that case the citizens of Valley City, Alabama, wanted to detach from the county school district, which was operating under a desegregation plan under federal court supervision.

The citizens of Valley had the perception that the county school board had not conducted business as though it was accountable to the citizens of Valley and had ignored their

requests to improve some of their schools, basically the same concerns that the citizens of Jacksonville have expressed here.

The court in Alabama pointed out it was not the intent of the proponent, not what they intended to do. There was considerable testimony in that case as to whether or not there was any racial motivation or any racial intent. The court pointed out it was not the intent of the proponents for the splinter district in their move to separate. He didn't reach that issue, the judge in Alabama didn't, because he pointed out -- this has been true in all the cases -- it's the effect and impact rather than the intent which is the critical inquiry under these circumstances. The same, of course, is true here.

The Alabama case also quotes from *Stout v. Jefferson County Board of Education*, which is a 1971 Fifth Circuit case, 448 F.2d 403. And I quote: Where the formulation of splinter school districts, albeit validly created under state law, have the effect of thwarting the implementation of a unitary school system, the district court may not recognize their creation."

And I'm going to conclude by quoting again from the decision in Alabama. I think Judge Albritton's decision is extremely well reasoned and written. And I will in advance say amen to the part that I am fixing to read from the latter part of his opinion.

"It has never been the aim of the federal courts to assume permanent control over public schools, and federal courts

entered this area only to remedy the constitutional violations of a racially segregated school system. Once that is done, the courts will get out. The Supreme Court made this original goal clear once again in the case of *Freeman v. Pitts*." It quotes from *Freeman v. Pitts* as follows: "We have said that the court's end purpose" -- this is the Supreme Court of the United States now. "We have said the court's end purpose must be to remedy the violation and in addition to restore state and local authorities to the control of a school system that is operating in compliance with the Constitution," citing *Board of Education of Oklahoma City against Dowell*. "We emphasized that federal judicial supervision of a local school system was intended as a temporary aid. Although this temporary measure has lasted decades, the ultimate objective has not changed: To return school districts to the control of the local authorities."

I will enter probably a one-sentence written order this afternoon simply adopting what I have said here so the parties may take that and do what they deem appropriate. Is there anything I haven't ruled on that's before the Court? Yes.

MR. SAM JONES: If I could, Your Honor, to avoid any question among the local officials, suggest a modest addendum to the ruling the Court announced earlier. That would be not only should the state board rescind its order authorizing the election, that it should then immediately communicate that

recision to the affected county clerks and election commissions. My understanding is absentee ballots go out Friday.

THE COURT: I so order. Anything else? All right. We are in recess. Thank y'all very much for your time.

(Proceedings concluded at 1:30 p.m.)

CERTIFICATE

I, Elaine Hinson, Official Court Reporter, do hereby certify that the foregoing is a true and correct transcript of the proceedings in the above-entitled case.

Elaine Hinson Date: August 21, 2003.

Elaine Hinson, RMR, CRR, CCR
United States Court Reporter

Elaine Hinson, RMR, CRR, CCR
United States Court Reporter

In addition to any payment described elsewhere in this agreement, the State will continue to pay . . . the State's share of any and all programs for which the Districts now receive State funding. The funds paid by the State under this agreement are not intended to supplant any existing or future funding which is ordinarily the responsibility of the State of Arkansas. **(Ex. 3, § II, ¶ E.)**

The settlement payments described in this agreement are exclusive of any funds for compensatory education, early childhood development or other programs that may otherwise be due to LRSD (or any successor district or districts to which students residing in the territory now within LRSD may be assigned or for the benefit of the students if the State or other entity becomes responsible for their education), PCSSD or NLRSD under present and future school assistance programs established or administered by the State. The State will not exclude the Districts from any compensatory education, early childhood development, or other funding programs or discriminate against them in the development of such programs or distribution of funds under any funding programs. **(Ex. 3, § II, ¶ F.)**

* * *

The State shall take no action (including the enactment of legislation) for the purpose of retaliating against the Districts (including retaliatory failure to increase State aid and retaliatory reduction in State aid) because of this Litigation or this Settlement. ***The State will enact no legislation which has a substantial adverse impact on the ability of the Districts to desegregate.*** **(Ex. 3, § II., ¶ L.)**(emphasis supplied).

C. The State's Past Violations.

18. The Court has found that the State violated the M-to-M Stipulation, Magnet Stipulation and the 1989 Settlement Agreement on numerous occasions. These Court decisions provide a framework for considering whether the State Board has violated the M-to-M Stipulation, the Magnet Stipulation and the 1989 Settlement Agreement by unconditionally approving open-enrollment charter schools in Pulaski County.

ODM Funding.

19. In 1991, the State unilaterally decided that it had no obligation to fund the Office of Desegregation Monitoring ("ODM") based on a strict reading of the 1989 Settlement

Agreement and orders of the Court and Eighth Circuit. The Court rejected the State's strict interpretation in favor of an interpretation consistent with the purpose of the agreement. The Court stated:

> The ADE correctly points out that there was no language expressly directing the state to continue its funding in the Court's October 30, 1990 order approving the interim budget. However, ***implicit in this order*** was the requirement that all parties should continue funding according to their previous obligations; otherwise, without funding, the authorization of an interim budget would have been an exercise in futility. . . . .[T]he Court's January 18, 1991 order "converted" the Office of Metropolitan Supervisor into the Office of Desegregation Monitoring, retaining the same staff and budget for an interim period. . . . Thus, while its name has been changed and the scope of its function narrowed to monitoring the parties' compliance with the settlement plans, the office still exists to assist the Court, as well as the parties, in achieving the mutual goal of constitutionally desegregated public school systems. . . . ***To construe this provision otherwise would exalt form over substance and permit the State to escape an obligation from which it was nowhere expressly released by the Eighth Circuit.***

Docket No. 1442, p. 3-4.

Workers Compensation.

20. In 1993, the State shifted responsibility for workers' compensation from the State to school districts. LRSD claimed that workers' compensation was a program under Section II, Paragraph E of the 1989 Settlement Agreement and that the shift of responsibility for workers' compensation to the District had an adverse financial impact. The Court agreed with LRSD and explained:

> When the parties were negotiating the Settlement Agreement, the Districts and Intervenors were concerned that the State would attempt to recoup the monies being used to fund the Settlement Agreement by reducing funds that were otherwise available to the Districts. Also, ***the parties knew that their ability to carry out their obligations under the Settlement Agreement was directly tied to their belief that the settlement funds, when added to the funds received in the ordinary course of business, would be sufficient to fund their desegregation obligations.*** The State's decision not to fund workers' compensation claims is an

example of an unexpected obligation that the Districts were seeking to avoid in the Settlement Agreement.

Docket No. 2337, p. 5. The Court concluded:

> [T]he State must fund the same proportion of the cost of each of the three Pulaski County school districts' workers' compensation insurance as it pays for all the other school districts in the state beginning with the 1994-95 school year. By requiring the State to assist the Pulaski County school districts to the same degree that it is assisting others, the Districts will not be "singled out" for less favorable treatment than the other districts.

Docket No. 2337, p. 7. The Court's decision was affirmed by the Eighth Circuit. *LRSD v. PCSSD*, 83 F.3d 1013 (8th Cir. 1996).

Loss Funding.

21. Also in 1993, the State amended the funding for districts with declining enrollment known as loss funding. LRSD and PCSSD alleged that the manner in which the State treated M-to-M transfer students in calculating "loss funding" violated the 1989 Settlement Agreement. **Docket No. 2337, p. 7.** The Court agreed stating:

> [T]he State is deliberately discriminating against the Districts with respect to the provision of loss funding for a decline in enrollment related to the loss of M-to-M students. Whether a district loses a student through ordinary transfer or an M-to-M transfer, the effect on that district's enrollment is the same. No matter how the loss occurs, the disruption to a school district from a net declining enrollment is the same. However, the ADE has decided not to credit the Districts for the loss of students due to M-to-M transfers. Thus, the ADE has determined to discriminate against the three Pulaski County districts with respect to M-to-M students.

Docket No. 2337, p. 9. The Court further explained:

> The state's application of loss funding and growth funding encourages the PCSSD to lose students to neighboring predominantly white districts, not to the LRSD. ***This is contrary to the Eighth Circuit's intent to encourage voluntary majority-to-minority transfers between the Districts and to require the state to pay for***

> ***such transfers.***[3] It is clear that the decision of the ADE is not consistent with the actual language of the stipulation. ***A party may not unilaterally change the implementation or language of an agreement or order without the prior approval of the Court and/or the consent of the parties.*** If the ADE believed that the literal application of the language of the stipulation and the Settlement Agreement was inconsistent with the original intent of the parties and would work an injustice with respect to loss funding, the ***ADE should have approached the parties and petitioned the Court for a modification.***

Docket No. 2337, p. 9-10 (emphasis supplied). The Court concluded:

> The state of Arkansas needs to focus on its obligation in the settlement to give the Pulaski County school districts ***special*** consideration to enable these districts to meet their numerous and burdensome obligations under the settlement. The Court reminds the state of the Eighth Circuit's specific findings about the state's complicated and lengthy history of promotion of unconstitutional racial segregation which has led to this interminable litigation. ***The swiftest and surest way out of the federal court is to abide by the terms and spirit of this settlement Agreement, and this includes following proper procedures for modification of the settlement.***

Docket No. 2337, p. 15-16 ("special" emphasis in original, other emphasis supplied). The Court's decision was affirmed by the Eighth Circuit. *LRSD v. PCSSD*, 83 F.3d 1013 (8th Cir. 1996).

Teacher Retirement and Health Insurance.

22. In 1995, the Arkansas General Assembly enacted a new school funding formula. Under the new funding formula, school districts no longer received money specifically earmarked for teacher retirement contributions or health insurance. Instead, the money in the past earmarked for teacher retirement and health insurance was distributed under the new

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[3] *See LRSD v. PCSSD*, 778 F.2d 404, 436 (8th Cir. 1985)("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 the interdistrict transfers similar to those required to be paid in *Liddell*. All three defendant school districts in Pulaski County shall be included in this program.")

funding formula on a per student basis. The districts argued that this violated the 1989 Settlement Agreement, Section II, Paragraph E, which required that the State continue to pay the "[t]he State's share of any and all programs for which the Districts now receive State funding." The State responded that the 1989 Settlement Agreement, Section II, Paragraph L, authorized "fair and rational adjustments to the funding formula which have general applicability but which reduce the proportion of State aid to any of the Districts" and that stated that such adjustments "shall not be considered to have an adverse impact on the desegregation of the Districts." The Court found that the changes in the funding formula were neither "fair and rational" nor "of general applicability." The new funding formula was not "fair and rational" because it failed to consider the number of employees in distributing aid for teacher retirement and health insurance. **Docket No. 2930, p. 11-12**. The new funding formula was not "of general applicability" and violated of the anti-retaliation provision of the 1989 Settlement Agreement because other school districts received a greater proportion of their teacher retirement and health insurance costs than did the three Pulaski County districts. **Docket No. 2930, p. 11-12**. The Court recognized that a violation of the anti-retaliation provision did not require an intent to retaliate. "This result is precisely what the anti-retaliation clause was meant to prevent. It funds the Pulaski County districts to a lesser degree than other districts in the state. It is of no moment that the State reached this result in a mathematically consistent manner." **Docket No. 2930, p. 4-5**, *quoting LRSD v. PCSSD*, 83 F.3d 1013, 1018 (8th Cir. 1996). The Court noted "the State has not petitioned the Court for any modifications in the Agreement and the Court is bound to enforce

the terms of the Agreement." **Docket No. 2930, p. 11.**[4] The Court's decision was affirmed by the Eighth Circuit. *LRSD v. PCSSD*, 148 F.3d 956 (8th Cir. 1998).

Jacksonville Splinter District.

23. In 2003, the State Board authorized an election to create a splinter district by detaching the Jacksonville area from the PCSSD. On the motion of PCSSD, the Court directed the State Board to rescind its order authorizing the election. The Court found that the proposed Jacksonville splinter district violated the 1989 Settlement Agreement and the Eighth Circuit's orders in *LRSD v. PCSSD,* 805 F.2d 815 (8th Cir. 1986) and *LRSD v. PCSSD*, 778 F.2d 404 (8th Cir. 1985). **Docket No. 3792 and Ex. 7, Tr. 8/18/2003**. In ruling from the bench, the Court quoted from an opinion letter written by the Attorney General[5] stating:

> As a general matter, the settlement agreement and the Pulaski County Special School District's existing desegregation plan were written in the context of the Pulaski County Special School District having control over the schools in the proposed detachment area, having the benefit of the local revenue derived from taxes on property within the proposed detachment area, ***and having available the students residing in the proposed detachment area who might, through M-to-M transfers and other reassignment, be available to lessen racial disparities in individual schools in the Pulaski County Special School District, the Little Rock School District, and North Little Rock School District.*** In light of this, any detachment of a significant amount of territory from the Pulaski County School District would ***almost certainly be expected to have an impact on the Pulaski County Special School District's ability to comply with its desegregation plan and have an impact on the operation of the settlement agreement, including the agreement's provisions concerning M-to-M students and the magnet schools in the Little Rock School District.***

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[4]The Court's decision on health insurance adopted the reasoning of its opinion on teacher retirement without further discussion. **Docket No. 2967**.

[5]The Arkansas Attorney General at the time was Governor Mike Beebe. The opinion letter was written by Senior Assistant Attorney General Timothy G. Gauger who is now legal counsel for Governor Beebe. The Attorney General opinion quoted by the Court is attached hereto as Exhibit 7A.

Ex. 7, Tr. 8/18/2003, pp. 52-53 (emphasis supplied). The Court concluded, "Obviously, the proposal to create a new school district in northeast Pulaski County will have an undeniable, in my opinion, profound effect on the ability of the Pulaski County Special School District to comply with those two orders, not to mention the many other desegregation obligations outlined in Plan 2000." **Ex. 7, Tr. 8/18/2003, p. 59**.

24. The Court described the process to be followed by any party that "contemplates changing the boundaries of any of the three school districts" in Pulaski County. **Ex. 7, Tr. 8/18/2003, p. 56**. The Court stated:

> First, come to the Court with a detailed feasibility study and specific data sufficient to allow this Court to conduct an evidentiary hearing to determine if, one, the boundary changes will substantially impact the student populations of each district; and two, the changes in the boundaries will, and I quote again, better meet the educational needs of the students of the districts involved.

Ex. 7, Tr. 8/18/2003, pp. 57-58.

25. The Court warned the State Board that "they cannot use state statutes as a shield to avoid complying with all Court orders and contractual agreements that govern and control the desegregation obligations of the parties in this case." **Ex. 7, Tr. 8/18/2008, p. 59**. Moreover, the Court made clear that "it's the effect and impact rather than the intent which is the critical inquiry under these circumstances." **Ex. 7, Tr. 8/18/2003, p. 59.**[6] The State did not appeal the Court's decision. *See LRSD v. PCSSD*, 378 F.3d 774 (8th Cir. 2004).

D. Impact of LRSD Being Unitary.

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[6]In addition to the violations enumerated herein, the State's failure to meet its monitoring obligations is well documented in the Office of Desegregation Monitoring's, "Report on ADE's Monitoring of the School Districts in Pulaski County," filed December 18, 1997 (Docket No. 3097). See Docket No. 2045 ("ADE never followed the provisions of the settlement agreement or monitoring plan in any substantial way and, therefore, is in violation of its obligations.").