

David Newbern
10 Ozark Point
Little Rock, Arkansas 72205

June 19, 2011

Hon. Dustin McDaniel
Attorney General of the State of Arkansas
323 Center Street, Suite 200
Little Rock, Arkansas 72201

Dear Attorney General McDaniel,

This letter responds to your request for assistance with respect to determining how the State of Arkansas and you, as the state's lawyer, should handle certain ethical and practical litigation issues that could arise if the Pulaski County Special School District (PCSSD) is taken over by the Arkansas Department of Education (DOE) pursuant to Ark. Code Ann. § 6-20-1909 in an action resulting from PCSSD having been found to be in fiscal distress. Factual statements below have their origins in discussions with, and documents provided to me by, Assistant Attorneys General Scott Richardson and Ali Brady.

The litigation in question is *Little Rock School District, et al. v. Pulaski Special School District, et al.*, the "desegregation case," in which the United States District Court for the Eastern District of Arkansas, Western Division, (USDC) in an opinion delivered on May 19, 2011, released the state from that court's requirement that the state pay annually large sums of money to three metropolitan Arkansas school districts, Little Rock School District, North Little Rock School District, and PCSSD, to be used for desegregation purposes. The USDC did not release the school districts from the entire financial obligation, but it is enough to say here that, pursuant to the release order, PCSSD will lose anticipated desegregation funds in excess of \$10,000,000 for the coming school year, assuming that it could have anticipated desegregation funding in an amount similar to that which it received in the immediate past school year.

[Exhibit A](#)

PCSSD, as an independent statutory entity, *see* Ark. Code Ann. § 6-13-102, has litigated as such and has appealed from the order to the United States Court of Appeals for the Eighth Circuit and moved the USDC to stay its order pending the result of the appeal. The motion to stay was not granted, and PCSSD has filed a notice of appeal in that respect as well. PCSSD has joined a motion to stay filed with the court of appeals by the Little Rock School District. That motion is pending. The Little Rock and North Little Rock districts have filed similar appeals. The state, and you as its lawyer, support the USDC order releasing the state from the obligation to pay. If the state, through the DOE, assumes control of it, PCSSD most certainly will lose its independence from DOE but will become, temporarily at least, a “ward” and part of DOE with which it has a direct conflict in the federal litigation.

At first blush, one could say that if PCSSD comes under state control, and the state’s position agrees with the USDC order releasing the state’s obligation to pay the desegregation funds, the state could withdraw the PCSSD appeals and thus end the matter. That, of course, would have no effect on the Little Rock and North Little Rock districts’ appeals and leads to fairness speculation in the event the release order is overturned as to them but not to PCSSD. It also ignores the possibility, however unlikely, that the superintendent and individual board members who would be displaced might challenge the PCSSD takeover by the state and obtain a reversal of it.

My recommendation is that, in the event of state action to relieve the PCSSD Superintendent and Board of Directors, notice of that action be provided the USDC and added to the record before the Court of Appeals as soon as possible. The motion should request an order to the effect that, in view of the contingencies addressed above, appeals filed by PCSSD will be allowed to go forward and that counsel who have served PCSSD to date will be allowed to continue to participate in the appellate process to its conclusion and be compensated by DOE in accordance with whatever contract or other arrangement they had with PCSSD prior to the dismissals. Obviously, you could under no circumstances be counsel for both the state and PCSSD. Ark. R. Prof. Cond. 1.7. The federal courts could, of course, entertain any issues about fairness of attorney fees for representation by PCSSD lawyers.

Unfortunately, the situation that may develop does not lend itself to a "perfect" solution. Following my recommendation leaves current PCSSD counsel representing a "virtual" client, as the persons who hired them would be without further authority to direct counsel's actions, and it puts DOE in the position of having to pay lawyers over whom it has no control. I view it, however, as a solution that, if approved by the federal court(s), could achieve the fairness to the PCSSD students, employees, and former officials that I know you intend, and it will be consistent with the high ethical standards that your office seeks to maintain as Arkansas's lawyer and counsel in the ongoing desegregation litigation.

Thank you for giving me this opportunity to be of service to your office.

Sincerely,

A handwritten signature in cursive script, appearing to read "David Newbern".

David Newbern

[Exhibit A](#)