UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

LITTLE ROCK SCHOOL DISTRICT **PLAINTIFF**

v. **No. 4:82-cv-866 BSM**

PULASKI COUNTY SPECIAL SCHOOL DISTRICT NO. 1, et al. **DEFENDANTS**

MRS. LORENE JOSHUA, et al. **INTERVENORS**

KATHERINE KNIGHT, et al. **INTERVENORS**

RESPONSE TO COURT'S REQUEST FOR BRIEFS ON THE COURT'S POSSIBLE RECUSAL

The Arkansas Department of Education (ADE), by and through its attorneys, Attorney General Dustin McDaniel and Assistant Attorney General Scott P. Richardson, state for their Response to the Court's Request for Briefs on the Court's Possible Recusal:

In the last twenty-five years, a party's (the Joshua Intervenors twice, LRSD once) request for the presiding district court Judge in this case to recuse has been addressed in three Eighth Circuit opinions. *LRSD v. PCSSD*, 833 F.2d 112 (8th Cir. 1987); *LRSD v. PCSSD*, 839 F.2d 1296 (8th Cir. 1988); *LRSD v. Armstrong*, 359 F.3d 957 (8th Cir. 2004). Each time the request has been denied and that decision was upheld each time at the Eighth Circuit. Each the issue arose after the party requesting recusal had received a decision that it did not agree with. First came LRSD's suggestion, by way of Writ of Mandamus, that Judge Henry Woods should have recused because a) a lawyer with whom Judge Woods had previously practiced law had appeared in a prior related case (*Clark v. Board of Educ. Of the LRSD*, No. LR-C-64-155) on behalf of an *amicus curiae* and b) because certain procedural rulings by Judge Woods called into question Judge Woods's impartiality. Both suggestions for recusal were denied by both Judge Woods and the Eighth Circuit which declined to remove Judge Woods from the case.

In *LRSD v. PCSSD*, 839 F.2d 1296, 1301-03 (8th Cir. 1988), LRSD and the Joshua Intervenors again argued that Judge Woods should have recused for essentially the same reasons put forward and rejected the previous year. The Eighth Circuit held, again, that recusal was not required because Judge Woods, upon learning of the prior representation, had severed the prior case to avoid the appearance of impropriety. *Id.* Even so, the Eighth Circuit stated that the question of whether the two cases constituted the same "matter in controversy" was "a question of judgment and degree. We cannot say that the trial judge's former law partner's submission of an *amicus* brief in a case involving, to a large extent, different issues and different remedies two decades ago requires recusal under § 455(b)(2), nor do we believe that Congress intended such a result." *Id.* at 1302. The LRSD and Joshua Intervenors also suggested that Judge Woods should have recused under 28 U.S.C. § 455(a). The Court disagreed and held that Judge Woods, though he had made some errors in judgment, could impartially preside over "this grueling litigation." *Id.* at 1302-03.

The third request for recusal involved Judge Billy Roy Wilson. *LRSD v. Armstrong*, 359 F.3d 957 (8th Cir. 2004). After Judge Wilson granted partial unitary status to LRSD the Joshua Intervenors requested that Judge Wilson recuse from the case because he had previously represented Judge Woods in the case when the writ of mandamus had been filed alleging that Judge Woods should recuse from the case. *Armstrong*, 359 F.3d at 959-961. Judge Wilson denied the motion reasoning that he had not served as a lawyer in the "matter in controversy" under 28 U.S.C. § 455(b)(2) because the recusal issue was separate from the main issues in the case. *Id.* at 959-960. The Eighth Circuit agreed and affirmed his decision not to recuse.

The Attorney General's office is not aware of any case law addressing the particular situation that the Court presents; and the statute does not appear to directly address the situation

either. The subsection to which the Court referred, 28 U.S.C. § 455(b)(3), appears to be directed more at the situation where a judge may have served in a role as an advocate in prior government service. To this extent, 455(b)(3) is analogous to Rule 1.11(a)(2) of the Model Rules of Professional Conduct. Because the Court did not "personally and substantially" participate in the consideration of the issues on appeal during the Court's clerkship with Judge Richard Arnold, Rule 1.11 does not seem to apply to disqualify the Court. Given the facts and circumstances surrounding this situation, section 455(b)(3) does not appear to be implicated. *See Moran v. Clarke*, 296 F.3d 638 (8th Cir. 2002).

The State has a greater concern in this case: the slow pace this case has taken over the last four years. After LRSD was declared fully unitary, the Joshua Intervenors initiated an appeal on April 9, 2007. Several months after this appeal was filed, the North Little Rock School District (NLRSD) and Pulaski County Special School District (PCSSD), at the urging of the State, filed petitions to be declared unitary for the first time in many years. DE # 4141 (NLRSD), 4159 (PCSSD). Unfortunately, the district court declined to rule on or schedule hearings on these petitions while the appeal of LRSD's unitary status was pending. This introduced a two year delay in resolving the case during which the taxpayers of Arkansas had to disburse roughly $125 million under the 1989 Settlement Agreement. After LRSD's full unitary status was affirmed on April 2, 2009, it took almost a year for hearings on the unitary status petitions to be held and another year for the district court to issue its eventual ruling on May 19, 2011. During this additional two years the taxpayers of the State of Arkansas disbursed another roughly $140 million under the 1989 Settlement Agreement. The projected disbursements for the 2011-12 School Year under the 1989 Settlement Agreement have been projected to be approximately $72 million. To date, this case has cost the State over $1.05 billion. That number grows at a pace of

approximately $6,000,000 each month. Accordingly, the State is primarily concerned with advancing this litigation as expeditiously as possible. The State is confident that the Court will give this case the full consideration it is due.

Respectfully submitted,

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Attorney General

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ATTORNEYS FOR STATE OF ARKANSAS AND
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CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which shall send notification of such filing to the following:

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I, Scott P. Richardson, Assistant Attorney General, do hereby certify that I have served the foregoing and a copy of the Notice of Electronic Filing by depositing a copy in the United States Mail, postage prepaid, on June 12, 2011, to the following non-CM/ECF participants:

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/s/ Scott P. Richardson
SCOTT P. RICHARDSON