No. 11-00671

IN THE
SUPREME COURT OF ARKANSAS

DEER/MT. JUDEA SCHOOL DISTRICT — APPELLANT

v. NO. 11-00671

MIKE BEEBE, GOVERNOR, *et al.* — APPELLEES

ON APPEAL FROM THE CIRCUIT COURT
OF PULASKI COUNTY

THE HONORABLE CHRIS PIAZZA, CIRCUIT JUDGE

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A. Pleadings.

I.

INFORMATIONAL STATEMENT

I. ANY RELATED OR PRIOR APPEAL: None

II. BASIS OF SUPREME COURT JURISDICTION:

(__) Check here if no basis for Supreme Court Jurisdiction is being asserted, or check below all applicable grounds on which Supreme Court Jurisdiction is asserted.

(1) X Construction of Constitution of Arkansas
(2) ___ Death penalty, life imprisonment
(3) ___ Extraordinary writs
(4) ___ Elections and election procedures
(5) ___ Discipline of attorneys
(6) ___ Discipline and disability of judges
(7) ___ Previous appeal in Supreme Court
(8) ___ Appeal to Supreme Court by law

III. NATURE OF APPEAL

(1) ___ Administrative or regulatory action
(2) ___ Rule 37
(3) ___ Rule on Clerk
(4) ___ Interlocutory appeal
(5) ___ Usury
(6) ___ Products liability
(7) ___ Oil, gas, or mineral rights

(8) ___ Torts
(9) ___ Construction of deed or will
(10) ___ Contract
(11) ___ Criminal

Deer/Mt. Judea School District ("Deer/Mt. Judea") alleged that the State failed to conduct adequacy studies in compliance with Ark. Code Ann. § 10-3-2102 (commonly referred to as "Act 57") in 2008 and 2010 and to make necessary adjustments to maintain an education system in compliance with the Arkansas Constitution article 14, section 1 and articles 2, 3 and 18. Deer/Mt. Judea asserted causes of action pursuant to Arkansas Constitution article 16, section 13 (public funds illegal exaction); the Arkansas Declaratory Judgment Act, Ark. Code Ann. §§ 16-111-101 to -111; and, the Arkansas Civil Rights Act of 1993, Ark. Code Ann. §§ 16-123-101 to -108. The Circuit Court (the Honorable Chris Piazza presiding) dismissed Deer/Mt. Judea's complaint finding it was barred by the doctrine of *res judicata* based on this Court's decision in *Lake View Sch. Dist. No. 25 v. Huckabee*, 370 Ark. 139, 257 S.W.3d 879 (2007). Deer/Mt. Judea appeals.

IV. IS THE ONLY ISSUE ON APPEAL WHETHER THE EVIDENCE IS SUFFICIENT TO SUPPORT THE JUDGMENT?
No.

V. EXTRAORDINARY ISSUES?

(x) appeal presents issue of first impression,
(__) appeal involves issue upon which there is a perceived inconsistency in the decisions of the Court of Appeals or Supreme Court,
(__) appeal involves federal constitutional interpretation,
(x) appeal is of substantial public interest,
(x) appeal involves significant issue needing clarification or development of the law, or overruling of precedent,
(__) appeal involves significant issue concerning construction of statute, ordinance, rule, or regulation.

VI. CONFIDENTIAL INFORMATION

(1) Does this appeal involve confidential information as defined by Section III (A)(11) and VII (A) of Administrative Order 19?

__ Yes x No

(2) If the answer is "yes", then does this brief comply with Rule 4-1(d)?

__ Yes __ No

II.

JURISDICTIONAL STATEMENT

1. Deer/Mt. Judea School District ("Deer/Mt. Judea") alleged that the State failed to conduct adequacy studies in compliance with Ark. Code Ann. § 10-3-2102 (commonly referred to as "Act 57") in 2008 and 2010 and to make necessary adjustments to maintain an education system in compliance with the Arkansas Constitution article 14, section 1 and articles 2, 3 and 18. The Circuit Court (the Honorable Chris Piazza presiding) dismissed Deer/Mt. Judea's complaint finding it was barred by the doctrine of *res judicata* based on this Court's decision in *Lake View Sch. Dist. No. 25 v. Huckabee*, 370 Ark. 139, 257 S.W.3d 879 (2007). Does the claim preclusion aspect of res judicata bar Deer/Mt. Judea's Complaint based on this Court's decision in *Lake View Sch. Dist. No. 25 v. Huckabee*, 370 Ark. 139, 257 S.W.3d 879 (2007)?

2. I express a belief, based on a reasoned and studied professional judgment, that this appeal raises the following questions of

legal significance for jurisdictional purposes:

- The case presents an issue of first impression: No Arkansas appellate court has considered the extent to which this Court's decision in *Lake View Sch. Dist. No. 25 v. Huckabee*, 370 Ark. 139, 257 S.W.3d 879 (2007) precludes subsequent claims that the education system violates the Arkansas Constitution article 14, section 1 and article 2, sections 2, 3 and 18.
- The appeal is of substantial public interest: Intelligence and virtue being the safeguards of liberty and the bulwark of free and good government, the people of Arkansas have a substantial interest in securing the advantages and opportunities of education. *See* Ark. Const. art. 14, § 1.
- The appeal involves significant issue needing clarification or development of the law, or overruling of precedent: The claim preclusive effect of *Lake View Sch. Dist. No. 25 v. Huckabee*, 370 Ark. 139, 257 S.W.3d 879 (2007) needs clarification.

For these reasons, the Supreme court should hear and decide this

case.

By Clay Fendley
Clay Fendley
Attorney for Appellant
Deer/Mt. Judea School District

III.

POINT ON APPEAL AND PRINCIPAL AUTHORITIES

Does the claim preclusion aspect of *res judicata* bar Deer/Mt. Judea's Complaint based on this Court's decision in *Lake View Sch. Dist. No. 25 v. Huckabee*, 370 Ark. 139, 257 S.W.3d 879 (2007)?

Baptist Health v. Murphy, 2010 Ark. 358.

Lake View Sch. Dist. No. 25 v. Huckabee, 370 Ark. 139, 257 S.W.3d 879 (2007).

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A. Cases

B. Statutes and Rules

C. Books and Treatises

None.

D. Miscellaneous

None.

V.

ABSTRACT

A. Hearing on Motion to Dismiss

1. Argument by Counsel for Beebe, *et al.*

Scott Richardson with the Attorney General's office. **R 754**.

The exhibits attached to our motion to dismiss are public records that the Court can take judicial notice of without converting the motion to dismiss into a motion for summary judgment. We would like to keep this a motion to dismiss. **R 762**.

There's lots of revenue going into the Deer/Mt. Judea School District to support education there. **R 770**.

The Complaint kind of goes all over, and it complains about a lot of different aspects of the State's educational system. I think very telling in the Complaint is several places where it says that the problem is that the State hasn't forced school districts to do what's supposed to be done. That's interesting in light of a 2007 Lake View opinion which concluded

with the statement that the State's funding system is now constitutional, and the obligation of providing adequacy passes to the school districts. **R 772**.

So, I find it curious that they, in their Complaint, blame themselves for several of the problems in the District. And, blames the State for not doing things the way that they believe that they should be done. For example, with professional development, they cite the Picus model and what Picus recommended, all that before the 2007 opinion in *Lake View* with no real changes since *Lake View* in how we fund professional development. In 2007 the Supreme Court said that's constitutional. So, we maintain the constitutional system there. And, you don't have any allegations in the Complaint of anything that's really changed in professional development. **R 773**.

But, that said, districts have flexibility in how they do professional development for the very reason that what they might need in Deer/Mt. Judea will very likely be different than what's needed down in Lake

Village or down in Texarkana or up in Jonesboro, or over in Fayetteville, or down here in Little Rock. **R 773**.

Much of the State's foundation funding system and even the professional development is aimed to give districts the flexibility to try and address the needs that they have. **R 773**. The Arkansas Department of Education has lots of supports for the districts; there's a whole division over it. **R 774**.

There is a live separation of powers issue in that the Supreme Court always made clear that it wasn't the judiciary's function to direct the details of the education funding system or to direct the details of the management of education in the state. The question out of *Lake View* is whether there's a rational basis for what's being done? **R 774**.

Lake View instructs us that's primarily answered by the Act 57 reports and the legislature's work to study how revenue is flowing to the districts and to study how the revenue that's going out meets the expenses and the needs of the districts. **R 775**.

Deer/Mt. Judea makes the interesting claim that these reports were not done in the past two biennium. They've been done in every biennium since 2004. The reports were adopted by the General Assembly, adopted by Committees of the General Assembly. They're public documents. Now, I'll grant, the ones before were longer, they had more detail, but I think that's because we were under *Lake View* and what the Supreme Court had said was an unconstitutional funding system. So, there's a lot more work to be done. **R 775**. We now have a constitutional education funding system. So, we want to preserve that; we don't want to fix things that aren't broken. **R 776**.

The consolidation of school districts with less than 350 students has been ruled constitutional in federal court and state court. It was part of the system approved in *Lake View*. **R 779**.

This Court determined that the we had a constitutional system in 2007 and nothing's really changed since then. **R 780**.

2. Argument by Counsel for Deer/Mt. Judea

Clay Fendley representing the Deer/Mt. Judea School District. **R 780**.

In ruling on a motion to dismiss, the facts in our Complaint are assumed to be true and are viewed in a light most favorable to sustaining our Complaint. And, it is improper to look to things outside the Complaint. **R 780**.

A complaint should be dismissed only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. So, the question is whether any relief could be granted based on the facts alleged in the Complaint. We believe there certainly is. **R 781**.

The current education system is unconstitutional in a number of respects. **R 785**. The State is knowingly under-funding transportation. This requires school districts like Deer/Mt. Judea to use funds intended for other components of an adequate education to pay transportation

costs. **R 786**.

There's a complete disconnect between the State's funding model and what's actually happening in school districts. For example, the funding system purports to provide funding for one-on-one tutoring, group tutoring, extended day and summer programs, but school districts are not doing that. **R 787**.

School districts are responsible for providing an education to their students consistent with the constitution. If they're not doing that, it is the State's responsibility to hold them accountable. That's where the State has failed. It has not held anybody accountable for not providing struggling students the extra assistance they need. **R 788**.

It is true that the funding matrix was developed before the Supreme Court issued its *Lake View* mandate in 2007. But, the Supreme Court stated that it presumed that elected officials would do what they said they were going to do. **R 789.** The Court also made clear that the State's duty to maintain a constitutional system required constant

vigilance, constant study, review and adjustment. What the State has done since then is produce adequacy reports that don't comply with Act 57. Those reports have identified problems. They've studied and reviewed, but there's been no adjustment. For example, the funding system purports to provide funds for a professional development system with six structural features of effective professional development. The adequacy reports state that schools districts do not have in place an effective professional development system. The State must respond to these problems and adjust. **R 790**.

Another example is transportation funding. The adequacy reports state that the method of funding transportation needs to changed so that school districts receive their actual transportation cost. The State has repeatedly ignored this and continues to fund transportation based on a fixed per pupil amount. **R 790**.

The same is true with extra help for struggling students. The adequacy reports state that school districts are not using this funding as

intended. **R 790**. The State has done nothing to require school districts to do this. The result is there has been no improvement in the educational outcomes in this state. **R 791**.

There are 465,000 kids in the Arkansas education system. Only 76 percent will graduate. So, the system is failing 100,000 kids that won't even graduate. **R 791**.

Of the kids who do graduate and want to go to college, only 50 percent of them will make a 19 on the ACT. The remainder will have to take remedial courses. The evidence is that if a student has to take a remedial course the likelihood of that student graduating is less than five percent. These kids are not being prepared for live in a global economy - part of what the State says it intends to do. **R 791**.

The State knows the system is not adequate and yet has failed to take action. There's a large discrepancy between the scores on the national exam, the National Assessment of Educational Progress ("NAEP") and the State Benchmark Exam. We allege that the State is

gaming the system. They are teaching the test, and this improves the students' scores on the tests being taught, the Benchmark Exam, but, it does not translate into increased achievement on the national test or in life in general. The real shame is we have a large number of students being told by the State that they are proficient when they are not. These are kids who are graduating high school having done everything asked of them, and they can't get a 19 on the ACT to get into college. That is not an adequate education system. **R 792**.

The selective application of the cost of living adjustment ("COLA") required by *Lake View* shows that the State knows that it is not funding education based on need. It is funding education just like it had before *Lake View* based on the amount available - a slice of the State budget pie. **R 792**.

The State has ignored their own reports about what is needed. It has identified problems – professional development and extra help for struggling students are the big ones – but there's no action taken to

address these problems. **R 793**.

The 2008 and 2010 Adequacy Reports note that no program evaluations are being done. So, what's happening is rather than teacher tutoring, extended day and summer programs, school districts are doing other things with that money, and nobody is evaluating it to determine whether it's effective. Act 57 specifically says all programs implemented must be evaluated. They're not being evaluated. They've got two adequacy reports that tell them, "You're not evaluating programs." We have no idea whether these programs are effective or not because they're not being evaluated. It would be one thing if school districts made the decision to do something else, and it was equally effective, and the State was assessing that. But, the State's not assessing what the school districts are doing. It's sending the money out and saying, "local control, you guys do whatever you want with it." **R 794**.

Act 57 also specifically requires proposed implementation schedules, timelines, specific steps, agencies and persons responsible,

resources needed, and draft bills proposing all necessary and recommended legislative changes. **R 794**. The 2008 and 2010 Adequacy Reports do not include that. The 2006 Adequacy Report did. Since the *Lake View* mandate issued in 2007, the State has not done that in direct violation of Act 57. **R 795**.

We included the Fourche Valley example in our Complaint to show that the State knows that isolated funding is inadequate. The school district told the State Board that it could not continue to operate the school on the funding provided. The State Board authorized closure without considering the issue of excessive transportation time. **R 796**.

There's no dispute that there's some amount of transportation time that is too much. The State could not build a school in Little Rock and say, "If you want an adequate education, come on down." That would clearly be inadequate. The State's refusal to define excessive transportation time combined with a system that under-funds transportation pressures school districts to increase transportation time

on kids. Excessive transportation time alone may deny students a substantially equal opportunity for an adequate education. **R 797**.

The intrastate teacher salary disparity is great and getting larger. It's currently around $28,000 per year. **R 797**. Deer/Mt. Judea has to pay the state minimum teacher salary whereas more affluent school districts, growing school districts that do better under the State's funding system have an average teacher's salary is $28,000.00 above that. The incentives that the State has put in to try and encourage teachers are $1,000.00 or $3,000.00 -- not even close to being sufficient to make a difference. And, the impact is clear. **R 798**.

Deer/Mt. Judea has a very difficult time finding qualified teachers in all subject areas to meet the standards of accreditation required by the State. The Court issued its mandate in *Lake View* presuming that the State had addressed the problem. But, the Adequacy Reports came back and told the State this isn't working. **R 798**. In the 2009 session, they increased the stipend from $3,000.00 to $4,000.00. When you have a

$28,000.00 disparity in teachers' salaries, that's not going to do it. **R 799**.

The final issue we raise is teacher retirement and health insurance. Those are items where the State has previously been told in federal court that when you take a cost incurred per teacher and pay it on a formula per student, that is not a rational way to pay that cost. And, that's what they are continuing to do for all of the other school districts in the State. In Pulaski County, the federal court ordered them to pay the full teacher retirement health insurance cost of the districts. But, that's not what's happening in the rest of the State. **R 799**.

Deer/Mt. Judea has a low student population but still has to meet all the standards of accreditation. This means it has a higher teacher to pupil ratio than most school districts in the State meaning their teacher retirement cost and health insurance cost per student are much higher, and the State should be paying all of that cost. **R 799**.

If this system was constitutional in 2007, and they haven't made

any changes, why isn't it still constitutional? The reason is the obligation of the State to study, review, adjust -- they have to change. The State can't just get by forever saying it was constitutional in 2007. In issuing the *Lake View* mandate in 2007, the Supreme Court stated that compliance with Act 57 is the linchpin of continued constitutionality for the school system. They have not complied with Act 57. **R 800**.

The amount of isolated funding received by Deer/Mt. Judea has absolutely no rational basis. They don't even purport to say what the rational basis is. They just say, "They're getting more money." In order for the system to be constitutional, it must be based on the needs of school districts. Isolated funding is just a slice of the budget pie. We've got a slice of the pie we're going to give to isolated school districts. That's what they get. It's not based on need. The adequacy reports and Picus Report recommended that they change the system for funding isolated schools. The haven't done it.

3. Argument by Counsel for Beebe, *et al.*

We cited the *Friends of Lake View* case where the Court of Appeals for the Eighth Circuit looked at the public record to decide that case on the merits. **R 805**. The Complaint clearly can't contradict what's in the public record. The Act 57 reports are public records. Deer/Mt. Judea cites them in its Complaint, but it doesn't want the Court to see them. **R 806**.

Rational basis review is any rational basis. It doesn't have to be the reason that they were adopted. Law could be adopted for completely unconstitutional reasons, by if there's a rational basis for it, even a lawyer can come up with, then it survives constitutional scrutiny. We have a constitutional system. The laws and actions of the State are presumed to be constitutional, and the Plaintiff must allege enough to overcome that presumption of constitutionality. The Complaint reads as if that doesn't exist, and *Lake View* 2007 never happened. **R 808**.

Arkansas code annotated 6-20-2305(b)(4) sets out what national school lunch act funding can be used for. In there is before school

academic programs and after school academic programs including transportation to and from the programs, pre-K programs, tutors, teachers, aids, counselors, social workers, parent education, summer programs, early intervention programs. **R 809.**

The funding is there for the programs. If the programs aren't working, that's for the district to look at, that's for the district to decide how best to utilize that money to fund its individual needs. That's why we have local control in the system because the individual needs in the Deer/Mt. Judea School District will be different from those in Hoxie or Lake Village. So, local control is important for them to be able to use the funding to address their local needs. **R 809**.

Mr. Fendley made the statement that the Legislature did nothing to address adequacy. Well, if you look at 6-20-2305, you'll see the increase in foundation funding from the '08-'09 to the '09-'10 school year, it goes from $5,905.00 up to $6,123.00. That's a $818.00 per student increase which equals the total amount for 456,000 students of $53,808,000.

That's not small change. That's real money -- especially in the State in Arkansas where half of every dollar that we all pay in taxes goes to fund elementary and secondary education. Seventy-five cents out of every dollar funds all education from pre-K to higher ed. So, a two percent increase in educational funding is a significant amount of money. **R 810**.

There's flexibility in the matrix. That is we don't mandate the specific items in the matrix. And, that was part of the system that was established in 2003 that the Supreme Court approved in 2004, and again in 2007. That flexibility allows the district to use the funds as needed to address their individual needs. **R 811**.

If you look at the *Lake View* opinion on health insurance, they clearly did not think that health insurance funding was directly tied to adequacy. They said the increase that was given by the General Assembly was a good thing, but it didn't help their adequacy arguments. **R 812**.

4. Statement by the Circuit Court

In *Lake View* there's a quote that says:

> First, it is not this Court's role under our system of government as created by the Arkansas Constitution and under the fundamental principles of separation of powers, as set out in Article 4, Section 2 of that document, to legislate, to implement Legislation or serve as a watchdog agency when there is no matter to be presently decided. This Court has made it perfectly clear in *Wells v. Purcell* that the Judicial Branch cannot arrogate itself to control of the Legislative Branch. Our role is to hear appeals, decide cases where we have original jurisdiction. . . . **[R 820]**
>
> . . . Various parties and the dissent call upon this Court to continue to monitor the General Assembly. But for how long? Until the adjournment *sine die* of the 2005 General Session? Until all legislative programs discuss this opinion been fully funded? Until all facilities and equipment and curricula deemed essential for the adequate education have been made substantially equal. What has been set in motion by the General Assembly and Executive Department will take years and perhaps even a decade to fully implement. Again, it is not this Court's constitutional role to monitor the General Assembly on an ongoing basis or over an extended period of time until the educational programs have all been completely implemented or until the dictates of *Lake View III* have been totally realized. **[R 821]**

[*Abstractor's Note: The Circuit Court read from Lake View Sch. Dist.*

No. 25 v. Huckabee, 358 Ark. 137, 159-161, 189 S.W.3d 1, 16-17 (2004)]

When I read that and all of this material, it put this in perspective for me.

I really think that this case was decided by *Lake View*, and that this is barred by *res judicata*. **R 822**.

I'm not going to address any of the other issues. I think that's probably the issue that needs to be decided before we go on. And, maybe we'll get it back someday. **R 823**.

VI.

STATEMENT OF THE CASE

A. Introduction

Deer/Mt. Judea School District ("Deer/Mt. Judea") operates two K-12 school campuses (Deer and Mt. Judea) serving approximately 360 students in mountainous and sparsely populated Newton County. **Add 3**. Deer/Mt. Judea filed this suit on its own behalf and on behalf of its students and taxpayers to enjoin State actions that violate state law and the Arkansas Constitution article 14, section 1, and article 2, sections 2, 3 and 18. **Add 3-4**.

In its Complaint, Deer/Mt. Judea alleged that the State failed to conduct adequacy studies in compliance with Ark. Code Ann. § 10-3-2102 ("Act 57") in 2008 and 2010 and to make necessary adjustments to maintain an education system in compliance with the Arkansas Constitution article 14, section 1 and articles 2, 3 and 18. **Add 43-109**. Deer/Mt. Judea named as defendants members of the executive and

legislative branches of government empowered to create and fund the State's education system. **Add 9-11**. The Circuit Court (the Honorable Chris Piazza presiding) dismissed Deer/Mt. Judea's complaint finding it was barred by the claim preclusion aspect of *res judicata* based on this Court's decision in *Lake View Sch. Dist. No. 25 v. Huckabee*, 370 Ark. 139, 257 S.W.3d 879 (2007)("*Lake View 2007*").

B. Education Funding Generally

The State's system for funding education is based on the model developed by Lawrence O. Picus & Associates ("Picus") in 2003 and was first implemented in the 2004-05 school year. Under the Picus model, the State determines the components of an adequate education, determines the per student cost of each component for a prototypical school of 500 students, and then provides school districts a per student amount designed to cover the cost of all components of an adequate education. Arkansas calls the total per student amount paid to school districts "foundation funding." *See* Ark. Code Ann. § 6-20-2301 to-

2307. Each school district receives the foundation funding amount multiplied by the number of students it serves, known as average daily membership ("ADM"). Foundation funding was set at $5,789 per student for 2008-09 and $5,905 for 2009-10. **Add 15**.

Each biennium, Arkansas code annotated sections 10-3-2101 to-2104 (hereinafter "Act 57") requires the House Education Committee and the Senate Education Committee (hereinafter "Joint Committee") to reevaluate the components of an adequate education and to prepare an adequacy report with recommendations for changes in the education system. The Bureau of Legislative Research ("BLR") prepares the adequacy report for the Joint Committee. Based on the adequacy report, the Joint Committee recommends a foundation funding amount using a matrix. The matrix is made up of the individual components of an adequate education. For example, for the 2008-09 school year, the foundation funding amount of $5,789.00 per student was made up of the following components of an adequate education:

School Level Salaries and Benefits	$4,013.90
School Level Resources	524.60
Operations and Maintenance	581.00
Central Office	383.50
Transportation	286.00
TOTAL	$5,789.00

Add 15-16.

In addition to foundation funding, all school districts receive additional funding, known as "categorical funding." There are four types of categorical funding. First, school districts receive National School Lunch ("NSL") funds based on the percentage and number of students who qualify for free or reduced price meals under the National School Lunch Act. Second, school districts receive funding based on the number of English-language learners ("ELL"). Third, school districts receive funding for students who are placed in an alternative learning environment ("ALE"). Professional development funding is the fourth type of categorical funding. **Add 16-17**.

Local property taxes collected by school districts are required by amendment 74 of the Arkansas Constitution to be remitted to the State

for distribution according to law. The law requires foundation funding to be distributed so that all school districts have at least the foundation funding amount per student after taking into account property tax revenue generated by 25 mills. Ark. Code Ann. § 6-20-2305(a)(1)(A). Amendment 74 allows school districts to use revenue generated in excess of the 25 mills for "enhanced curricula, facilities, and equipment which are superior to what is deemed adequate by the State." *Lake View Sch. Dist. No. 25 v. Huckabee*, 358 Ark. 137, 155, 189 S.W.3d 1, 13 (2004). **Add 17**.

In addition to foundation funding and categorical funding, the State also provides school districts with funding for special needs, such as growing or declining enrollment and geographic isolation. **Add 17**.

VII.

ARGUMENT

Does the claim preclusion aspect of *res judicata* bar Deer/Mt. Judea's Complaint based on this Court's decision in *Lake View Sch. Dist. No. 25 v. Huckabee*, 370 Ark. 139, 257 S.W.3d 879 (2007)?

A. Standard of Review

This Court reviews *de novo* an order granting a motion to dismiss based on the claim preclusion aspect of res judicata. *Henry v. Continental Cas. Co.*, 2011 Ark. 224, at 5; *Baptist Health v. Murphy*, 2010 Ark. 358, at 7. In so doing, the Court treats the facts alleged in the complaint as true and views them in the light most favorable to the plaintiff. All reasonable inferences must be resolved in favor of the complaint, and the pleadings are to be liberally construed. *Baptist Health*, *supra.* The Court does not look beyond the complaint in testing the sufficiency of the complaint. *Thomas v. Pierce*, 87 Ark. App. 26, 28, 184 S.W.3d 489, 490 (2004).

While the State attached a number of exhibits to its motion to

dismiss, the State made clear at oral argument that it did not want to convert its motion to one for summary judgment. **Abs 1**. The Circuit Court's order does not reference the exhibits indicating that they were not considered. **Add 188**. *Compare Koch v. Adams*, 2010 Ark. 131, at 4-5 ("The judge's order of dismissal reads that his findings were '[b]ased upon the pleadings, arguments of counsel, and *other matters and things* before the court.')(emphasis in original). The Circuit Court's statement of its intent to grant the motion at the conclusion of oral argument further indicates that the Circuit Court did not consider the State's exhibits. **Abs 18-19**. Since they were not considered by the Circuit Court, the State's motion to dismiss exhibits have not been included in Deer/Mt. Judea's Addendum.

B. The Claim Preclusion Aspect of *Res Judicata*

The claim-preclusion aspect of *res judicata* bars re-litigation of a subsequent suit when: (1) the first suit resulted in a final judgment on the merits; (2) the first suit was based on proper jurisdiction; (3) the first suit

was fully contested in good faith; (4) both suits involve the same claim or cause of action; and (5) both suits involve the same parties or their privies. *Baptist Health*, 2010 Ark. 358, at 7-8. *Res judicata* bars not only the re-litigation of claims that were actually litigated in the first suit, but also those that could have been litigated. *Baptist Health*, 2010 Ark. 358, at 8.

The claim preclusion aspect of res judicata does not apply in the present case because Deer/Mt. Judea's Complaint does not involve the same claim or cause of action as the *Lake View* litigation. The *Lake View* litigation concluded when the Court issued its mandate on May 31, 2007. *Lake View 2007*, 370 Ark. 139, 257 S.W.3d 879. Deer/Mt. Judea Complaint is based entirely on events occurring after May 31, 2007. *See* Section E*, infra*. Because the events giving rise to Deer/Mt. Judea's Complaint had not yet occurred, they could not possibly have been litigated as a part of *Lake View*.

There are two types of "events" giving rise to Deer/Mt. Judea's

Complaint. First, there is the State's failure to comply with Act 57 in preparing the 2008 and 2010 adequacy reports. *See* Section E.1*., infra.* Second, there is the State's failure to make necessary adjustments based on the findings and recommendations of the 2008 and 2010 adequacy reports. *See, e.g.,* Section E.2-4*., infra*. Neither type of claim could possibly have been litigated in 2007.

The State argued below that the mere fact that the State prepared and adopted documents called adequacy reports renders it immune from liability. It made no adjustments, the State argued, because "we don't want to fix things that aren't broken." **Abs 4; R 776.** The State's argument fails because the State's own adequacy reports show that the work of providing every child in Arkansas a substantially equal opportunity for an adequate education is far from complete and further adjustments are necessary to maintain constitutional compliance.

C. Post-*Lake View* Educational Outcomes

First implemented in the 2004-05 school year, the Picus model was

designed to double student achievement in the "medium term" with a long term goal of 90 percent of students achieving proficiency. **Add 32**. Because the State has failed to fully fund and implement the Picus model, student achievement has not improved and remains dismal. Arkansas' educational outcomes show a continuing need for significant changes in the way Arkansas educates its children. **Add 32**.

Every two years a sample of Arkansas 4th and 8th graders participate in the National Assessment of Educational Progress ("NAEP"), also known as "The Nations Report Card." From 2003 to 2009, Arkansas reading scores showed no improvement while scores have improved nationally; math scores have improved, but Arkansas students failed to make-up any ground when compared to the nation as a whole. **Add 32**. Based on the 2009 NAEP, only 29 percent of 4th graders and 27 percent of 8th graders are proficient or above in reading, and only 36 percent of 4th graders and 27 percent of 8th graders are proficient or above in math. Arkansas ranked 41st in 4th and 8th grade

reading and 8th grade math among the 52 jurisdictions tested; Arkansas ranked 36th in 4th grade math. **Add 32-33**.

In 2009, NAEP for the first time released state-level data in reading and math for 12th graders, and again, Arkansas students performed poorly. Only 30 percent of Arkansas 12th graders scored proficient or above in reading, and only 15 percent scored proficient in math (zero percent were "advanced" in math). **Add 33**.

Arkansas students do much better on the state developed and administered test known as the Benchmark Exam. While only 29 percent of 4th graders were proficient or above in reading on the 2009 NAEP, the State reported that 70 percent of 4th graders were proficient or above in reading based on the Benchmark Exam – a 41 percent discrepancy. Moreover, while NAEP 4th grade reading scores were essentially unchanged from 2003 to 2009, Benchmark Exam scores improved from 51 percent to 70 percent scoring proficient or above. **Add 33**.

The discrepancy in the performance of Arkansas children on the NAEP compared to the Benchmark Exam calls into question the validity and reliability of the Benchmark Exam. It suggests that improved achievement claimed by the State based on the Benchmark Exam may be illusory. State officials may be "gaming the system" so they can take credit for improving test scores. According to one expert, the most common way states game the system is excessive test preparation – "teaching the test." **Add 33-34**. This improves test scores on the test taught but does not translate to other tests, such as NAEP, or performance in real life. **Add 34**. Another way some states have produced illusory improvement is by "lowering the bar" and making it easier for students to score proficient or above on state exams. New York recently admitted to this, raised standards and saw improvements on state tests disappear. **Add 34**.

Like Arkansas' NAEP scores, other measures of the education system show a continuing need for significant changes in the way

Arkansas educates its children. According to the 2010 Adequacy Report:

- Average composite ACT scores were the essentially the same in 2010 as they were in 2005 and remain below the national average;
- SAT reading scores were essentially the same from 2005 to 2009, while math scores have leveled off after a small improvement in 2006;
- The high school graduation rate has remained unchanged at 76 percent since 2003, with the exception of an unexplained spike in 2006;
- The college remediation rate (40 percent at colleges; almost 80 percent at universities) has remained unchanged since 2005;
- The racial achievement gap remains large – 26 points; and,

- Arkansas received a grade of "D" for student achievement in the Education Week's Quality Counts 2010 rankings. **Add 34-35.**

A review of the Quality Counts 2010 Arkansas report shows that the state's "D" in student achievement was an average of the following: Status: "F", Change: "C", Equity: "C-". In other words, the 2010 status of student achievement in Arkansas is "failing." **Add 35**.

It is true that Arkansas ranked 10th overall in the Quality Counts 2010 report. This was due to Arkansas scoring in the top 10 in Standards, Assessments and Accountability (7th), the Teaching Profession (2nd), and Transitions and Alignment (6th). Unfortunately for Arkansas children, positive steps taken in these areas have not resulted in improved achievement and are unlikely to do so. As stated above, the current status of Arkansas K-12 achievement is failing, and Arkansas ranks 46th in "Chance for Success." **Add 35**.

Arkansans continue to suffer the consequences of an inadequate education system. According to the U.S. Census Bureau's 2010 Statistical Abstract: State Rankings, only Mississippi has more people living below poverty than Arkansas. Arkansas ranks 49th in persons 25 and older with at least a bachelor's degree and 46th in per capita income. **Add 35**.

Twenty-seven percent of Arkansas children live in poverty – the second highest rate in the nation behind Mississippi. The 2010 Kids Count report prepared by the Annie E. Casey Foundation ranked Arkansas 48th overall in providing for the health and education of its children – ahead of Mississippi and Louisiana. **Add 36**.

There is a strong link between poverty and educational attainment. The poverty rate for people over age 25 with less than a high school degree is nearly 30 percent, compared to a poverty rate of only 4 percent for those with a college degree or higher. A person's level of education

attainment clearly matters in his or her ability to find and maintain employment in jobs paying wages above the poverty line. **Add 36**.

D. Constitutional Compliance is an Ongoing Task Requiring Constant Study, Review and Adjustment

This Court knew that when issued its mandate in 2007 that the work of creating an equitable and adequate education system was incomplete. It relied heavily on the Masters finding that "the General Assembly [complied with Act 57] and understands now that the job for an adequate education system is 'continuous' and that there has to be 'continued vigilance' for constitutionality to be maintained." *Lake View 2007*, 370 Ark. at 145, 257 S.W.3d at 883. The Court concluded:

> We hold that the General Assembly has now taken the required and necessary legislative steps to assure that the school children of this state are provided an adequate education and a substantially equal educational opportunity. A critical component of this undertaking has been the comprehensive system for accounting and accountability, which has been put in place to provide state oversight of school-district expenditures. ***What is especially meaningful to this court is the Masters' finding that the General Assembly has expressly shown that constitutional compliance in the field of education is an ongoing task***

> ***requiring constant study, review, and adjustment.*** In this court's view, Act 57 of the Second Extraordinary Session of 2003, requiring annual adequacy review by legislative committees, and Act 108 of the Second Extraordinary Session of 2003, establishing education as the State's first funding priority, are the cornerstones for assuring future compliance.

Lake View 2007, 370 Ark. at 145-46, 257 S.W.3d at 883 (emphasis supplied).

Even though the 2008 and 2010 adequacy reports failed to comply with Act 57, the reports do contain a significant amount of important data on critical issues identified by Picus. That data demonstrated the need for further "adjustments" in the areas of extra-help for struggling students, **Add 50-59**; professional development for teachers, **Add 59-68**; funding for small, remote schools, **Add 68-81**; transportation funding and excessive transportation time, **Add 82-95**; the intrastate teacher salary disparity, **Add 95-105**; teacher retirement and health insurance funding, **Add 105-07**; and facilities, **Add 107-09**. In each of these areas, the "event" giving rise to Deer/Mt. Judea's Complaint is the State's

failure to adjust following the 2008 and 2010 adequacy reports. Due to space limitations, the discussion below will be limited to the State's failure to comply with Act 57 and the State's failure to make adjustments in the areas of extra-help for struggling students, professional development for teachers and transportation funding.

E. The Events Giving Rise to Deer/Mt. Judea's Complaint

1. Failure to Comply with Act 57

Deer/Mt. Judea alleged that the 2008 and 2010 adequacy reports failed to comply with two key requirements of Act 57. **Add 43-49**. First, Act 57 requires that each recommendation be accompanied by proposed implementation schedules with timelines, specific steps, agencies and persons responsible and resources needed. Ark. Code Ann. § 10-3-2104(b). **Add 43**. The 2008 and 2010 adequacy reports failed to comply with this requirement. **Add 45-46**. As a result, the State imposed a number of unfunded mandates on school districts. **Add 46**.

Second, Act 57 requires the Joint Committee to "[e]valuate the

effectiveness of any program implemented by a school, a school district, an education service cooperative, the Department of Education, or the State Board of Education and recommend necessary changes." Ark. Code Ann. § 10-3-2102(a)(4). **Add 44**. The 2008 and 2010 adequacy reports failed to comply with this requirement. **Add 44**.

Even so, the 2008 and 2010 adequacy reports recognized that program evaluations are "essential." **Add 44**. The 2008 Adequacy Report stated, "It is essential to determine which of multiple interventions used by schools (such as one-to-one tutoring versus a professional development program) are providing results and which need to be dropped or modified." **Add 44**. The report further acknowledged that the present practice of conducting "scholastic audits" provides "no data on the effectiveness of interventions." **Add 44**. The report concluded that without program evaluations "it is not possible to determine which strategies work and which do not." **Add 44-45**. Despite acknowledging the failure to evaluate programs as required by

Act 57, the Joint Committee ignored the problem and made no recommendations related to program evaluation. **Add 45**.

The 2010 Adequacy Report again noted that no program evaluations were being done. **Add 46**. It stated:

> [The Arkansas Department of Education ("ADE")] acknowledged that currently there are no systemic efforts in place to assess the effectiveness of scholastic audits in schools or school districts. ADE does not have the fiscal and human resources to successfully evaluate the effectiveness of all programs and interventions, but the department said it will continue to publish status and gain results in the annual performance reports, so that school performance can be evaluated.

Add 46-47. In other words, programs are not being evaluated as required by Act 57, and ADE has no plans to do so. Again, the Joint Committee ignored the problem and made no recommendations related to program evaluation. **Add 47**.

Obviously, the General Assembly's failure to comply with Act 57 in preparing the 2008 and 2010 adequacy reports could not have been

litigated as a part of *Lake View*. Both reports were completed after the *Lake View* litigation ended on May 31, 2007. **Add 48**.

The Court has made clear that compliance with Act 57 is essential to maintaining a constitutional education system. *Lake View 2007*, 370 Ark. at 146, 257 S.W.3d at 883. The Court recalled its mandate in 2005 based, in part, on the General Assembly's failure to comply with Act 57. It stated that compliance with Act 57 is the "linchpin for achieving adequacy in public education . . . ." *Lake View Sch. Dist. No. 25 v. Huckabee*, 364 Ark. 398, 411, 220 S.W.3d 645, 654 (2005)("*Lake View 2005*"). The Court explained:

> Without a continual assessment of what constitutes an adequate education, without accounting and accountability by the school districts, without an examination of school district expenditures by the House and Senate Interim Committees, and without reports to the Speaker of the House and the President of the Senate by September 1 before each regular session, the General Assembly is "flying blind" with respect to determining what is an adequate foundation-funding level.

Lake View 2005, 364 Ark. at 412, 220 S.W.3d at 654-55.

The Joint Committee's failure to comply with Act 57 means the General Assembly was "flying blind" in 2009 and 2011when determining what was an adequate foundation funding level. *Id*. The failure to identify "resources needed" to implement legislative enactments resulted in unfunded mandates on school districts. **Add 46**. The failure to evaluate programs made it impossible for the State to "determine which strategies work and which do not" so that school districts could be held accountable. **Add 45-46**. These failures mean "the General Assembly could not make an informed decision" as to an adequate foundation funding level. *Id*.

The State's conscious decision *not* to evaluate programs represents the State's latest effort to defer to "local control" of school district expenditures and a new constitutional violation. *See Lake View Sch. Dist. No. 25 v. Huckabee*, 351 Ark. 31, 79, 91 S.W.3d 472, 500 (2003)("*Lake View 2003*")("Deference to local control is not an option

for the State when inequality prevails, and deference [to local control] has not been an option since the *DuPree* decision.").

2. Extra Help for Struggling Students

Arkansas cannot improve achievement overall without an effective strategy for helping struggling students. Picus first outlined its model for doubling student achievement in a report dated September 1, 2003 and entitled, "An Evidence-Based Approach to School Finance Adequacy in Arkansas." ("2003 Picus Report"). Picus advised the State that "[e]very school should have a **powerful and effective strategy for struggling students**, i.e., students who must work harder and need more time to achieve proficiency levels." (emphasis in original). "The most powerful and effective strategy is individual one-to-one tutoring provided by licensed teachers," Picus reported, citing educational research. Picus recommended funding for fully licensed teacher-tutors with the number of teacher-tutors determined by the number of NSL

students at a school. Picus recommended one teacher-tutor for every 100 NSL students at a school. **Add 50-51**.

After the Arkansas Supreme Court recalled its Lake View mandate in 2005, the State retained Picus to "recalibrate" the school-funding system. On August 30, 2006, Picus submitted to the Joint Committee a report entitled, "Recalibrating the Arkansas School Funding Structure," ("2006 Picus Recalibration Report"). **Add 51**. As in 2003, the 2006 Picus Recalibration Report recommended one-on-one teacher-tutoring for struggling students.

The Picus model intended that NSL funds be used for teacher-tutors. To prevent school districts from using NSL funds for other purposes, Picus recommended that:

> [T]he state program regulations and state law (Act 2283) for NSL funds be rewritten to allow districts to *use the funds only for tutors*, because tutoring is the most effective extra help strategy. Current law and regulations allow districts to essentially use NSL funds for any programmatic intervention; we recommend that the state be more restrictive.

Add 54-55 (emphasis in original). Deferring to local control, the State rejected this recommendation and has never required school districts to use NSL funds for teacher-tutors. **Add 55**.

The 2008 and 2010 adequacy reports revealed that school districts are not using NSL funds for one-on-one teacher-tutoring. The 2008 Adequacy Report indicated that school districts used only 3.1 percent of their NSL funds for tutoring. **Add 55**. The 2010 Adequacy Report noted that NLS funds were intended to provide additional learning time "through tutoring, extended day, and summer programs." **Add 56**. However, a survey of school districts showed that "[m]ost districts allocate NSLA funding to both district-wide programs and individual schools. The majority of districts said they target NSLA funding to certain grade levels for additional support and provide different NSLA programs to different schools to target specific academic needs." **Add 56**.

Therefore, Picus identified a proven model for helping struggling students and allocated NSL funds so that school districts could implement that model. School districts have rejected the Picus model and are implementing other programs to help struggling students, but because the State is not evaluating those programs, it cannot hold school districts accountable if the programs fail. This is exactly what Act 57 was intended to prevent. The State is again deferring to local school districts and abdicating its ultimate responsibility to provide every child in this state a substantially equal opportunity to an adequate education. *Lake View 2003*, 351 Ark. at 78-79, 91 S.W.3d at 500 ("It is the State's responsibility to provide an equal education to its school children and, as we said in *Dupree*, '[i]f local government fails, the state government must compel it to act.'").

3. Professional Development for Teachers

The State is to be commended for raising teacher salaries, but paying the same teachers more money to do the same thing has not

improved student achievement. Improving teacher quality is a necessary prerequisite to improving student achievement in Arkansas. The 2003 Picus Report explained:

> Indeed, improving teacher effectiveness through high quality professional development is arguably as important as all of the other resource strategies identified; better instruction is the key aspect of the education system that will improve student learning (Rowan, Correnti & Miller, 2002; Sanders & Horn, 1994; Sanders & Rivers, 1996; Webster, Mendro, Orsak & Weerasinghe, 1998).
>
> Moreover, all the resources recommended in this report need to be transformed into high quality instruction in order to transform them into increases in student learning (Cohen, Raudenbusch & Ball, 2002). And effective professional development is the primary way those resources get transformed into effective and productive instructional practices.

Add 59-60. Citing education research, Picus identified six structural features of an effective professional development system:

> 1) The **form** of the activity – that is, whether the activity is organized as a study group, teacher network, mentoring collaborative, committee or curriculum development group. The above research suggests that effective professional development should be school-based, job-embedded and focused on the curriculum taught rather than a one-day workshop.

2) The **duration** of the activity, including the total number of contact hours that participants are expected to spend in the activity, as well as the span of time over which the activity takes place. The above research has shown the importance of continuous, ongoing, long-term professional development that totals a substantial number of hours each year, at least 100 hours and closer to 200 hours.

3) The degree to which the activity emphasizes the **collective participation** of teachers from the same school, department, or grade level. The above research suggests that effective professional development should be organized around groups of teachers from a school that over time includes the entire faculty (e.g., Garet, Birman, Porter, Desimone & Herman, 1999).

4) The degree to which the activity has a **content focus** – that is, the degree to which the activity is focused on improving and deepening teachers' content knowledge as well as how students learn that content. The above research concludes that teachers need to know well the content they teach, need to know common student miscues or problems students typically have learning that content, and effective instructional strategies linking the two (Bransford, Brown & Cocking, 1999; Kennedy, 1998).

5) The extent to which the activity offers opportunities for **active learning**, such as opportunities for teachers to become engaged in the meaningful analysis of teaching and learning; for example, by scoring student work or developing and "perfecting" a standards-based curriculum unit. The above research has shown that professional development is most effective when it includes opportunities for teachers to work directly on incorporating the

> new techniques into their instructional practice (e.g., Joyce & Showers, 2002).
>
> 6) The degree to which the activity promotes **coherence** in teachers' professional development, by aligning professional development to other key parts of the education system such as student content and performance standards, teacher evaluation, school and district goals, and the development of a professional community. The above research supports tying professional development to a comprehensive, inter-related change process focused on improving student learning.

Add 60-61 (emphasis in original).

The 2008 and 2010 Adequacy Reports documented the lack of an effective professional development system. **Add 62-68**. For example, a survey of teachers who quit the teaching profession revealed that 15 percent reported "irrelevant professional development" as their reason for leaving. **Add 63**. Teachers continue to waste time in irrelevant workshops just to get the required 60 hours annually – much less than the 100 to 200 hours recommended by Picus. **Add 66**.

The professional development system in Arkansas lacks the structural features of an effective professional development as described

by Picus. It is not collaborative, not content-focused, does not involve active learning and is not aligned with "other key parts of the education system such as student content and performance standards, teacher evaluation, school and district goals, and the development of a professional community." **Add 66**. Even so, the 2008 and 2010 adequacy reports made no recommendations for improving professional development. **Add 66**.

4. Transportation Funding and Excessive Transportation Time

Student transportation is a necessary component of an adequate education system, **Add 85**, but the State's current system of funding student transportation has no rational basis. The foundation funding matrix includes a per student amount for student transportation -- $286.00 per student in 2008-09. This means all school districts receive the same amount of transportation funding per student, irrespective of their actual transportation costs. Both the 2008 and 2010 adequacy report documented school districts' widely varying transportation costs.

Add 84-85. The 2010 report noted, "The difference in matrix expenditures for transportation now ranges from a low of $74.78 (one outlier district excluded) to a high of $842.12 per pupil." **Add 85**.

The $286.00 per student in transportation funding included in foundation funding was school districts' average 2007-08 actual transportation cost increased for inflation. **Add 83**. The use of a fixed per student amount was intended to be temporary while the State developed a standards-based transportation funding formula that would approximate school districts' actual transportation cost. **Add 83-84**. The 2010 Adequacy Report indicated that BLR had developed a standards-based transportation funding formula based on route miles, but the General Assembly rejected BLR's formula and continues to fund transportation based on a fixed, per student amount. **Add 86**. For 2010-11, the transportation funding included in the foundation funding matrix ($297.50 per student) will not even cover an average district's transportation cost ($385.00 per student according to BLR). **Add 87**.

Even if the General Assembly adopted BLR's standards-based funding formula, a rational system of transportation funding must also include a definition of excessive transportation time, or stated another way, the maximum amount of time a child may spend on a bus. In rural areas, the number of buses and bus drivers needed depends on the number of bus routes, and the number of bus routes depends on how long children may be on a bus. All other things being equal, if a school district needs five routes to get all students to school within 90 minutes one-way, it would need 10 routes to get all students to school within 45 minutes one-way. Therefore, to determine the amount of transportation funding school districts need, the State must establish a maximum transportation time. **Add 87**.

The State has recognized the problem of excessive transportation time, but it has lacked the political will to address the problem. Act 1452 of 2005, directed ADE to "conduct a study of isolated schools to determine the most efficient method of providing opportunities for an

adequate and substantially equal education for students without excessive transportation time." *See* Act 1452 of 2005, § 2, then codified as Ark. Code Ann. § 6-20-605. Despite this express directive, ADE refused to define excessive transportation time. **Add 88**. In 2007, the General Assembly repealed Ark. Code Ann. § 6-20-605, (Act 1573 of 2007, § 60), but adopted Act 1604 of 2007 requiring BLR and the Division of Public School Academic Facilities and Transportation to:

> [C]onduct a study of the transportation of public school students by public school districts in the state with an emphasis on public school districts resulting from consolidation or annexation, isolated school districts, and public school districts with declining enrollment to assess whether the time and cost of public school district transportation for students enrolled in those public school districts can or should be minimized. Ark. Code Ann. § 6-19-123(a) (Repl. 2009). BLR was to report its findings by October 1, 2008.

Add 89. In October of 2008, BLR presented to the Joint Committee a standards-based formula based on route miles, but it was not adopted by the General Assembly. **Add 90**.

While Act 1604 of 2007 directed BLR to study how transportation time "can or should be minimized," Act 1604 of 2007, § 60, BLR did not address the question. In Arkansas, excessive transportation time may be defined as the amount of transportation time that will deny a student a substantially equal opportunity for an adequate education. Both common sense and scientific research tell us that excessively long bus rides have a negative impact on student achievement. The only scientific study of issue found that 4th and 8th graders suffered a two percent decrease in achievement for every one hour spent on a bus. **Add 90**. It is not uncommon for children living in rural Arkansas to spend three hours a day on a bus. **Add 90**. That translates into a six percent reduction in achievement.

In 2006 Picus was commissioned to conduct a study of student transportation, but the study was never completed. A "working draft" noted that experts recommended no more than 30 minutes on a bus one-way. **Add 91**. In the Pulaski County interdistrict desegregation case,

the State agreed to and the Court of Appeals for the Eighth Circuit approved a 45 minute one-way transportation time limit. *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.*, 921 F.2d 1371, 1377-78 (8th Cir. 1990). **Add 91**. Given this 22 year-old agreement, the State should be estopped from arguing that longer transportation times are not excessive. The State has no rational basis for imposing longer transportation times on rural children and equity requires that the State establish a 45 minute one-way transportation time limit for all school children in Arkansas.

CONCLUSION

For the reasons set forth above, the Circuit Court's order should be reversed and the case should be remanded for a full trial on the merits of Deer/Mt. Judea's Complaint.

Respectfully submitted,

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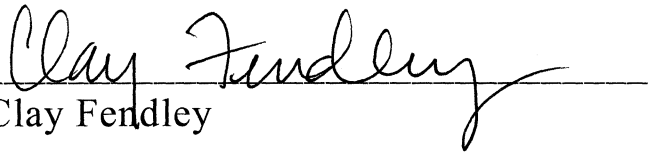
By: 
Clay Fendley

VIII.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing brief has been sent via U.S. Mail, Postage Prepaid, on this 12th day of August, 2011 to the persons identified below:

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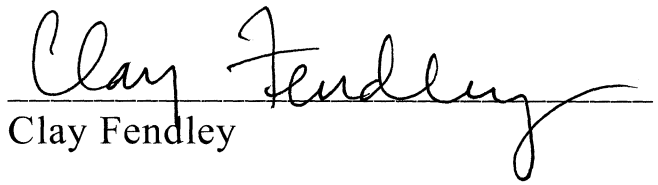

Clay Fendley

XI.

ADDENDUM

A. Pleadings.

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
2ND DIVISION

DEER/MT. JUDEA SCHOOL DISTRICT PLAINTIFF

v. 60 CV 2010 6936 NO.

FILED 12/03/10 09:27:59 FG
Pat O'Brien Pulaski Circuit Clerk
FG

MIKE BEEBE, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF ARKANSAS DEFENDANT

MARK DARR, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS LIEUTENANT GOVERNOR OF THE STATE OF ARKANSAS DEFENDANT

DR. TOM W. KIMBRELL, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF EDUCATION FOR THE STATE OF ARKANSAS DEFENDANT

DR. NACCAMAN WILLIAMS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE STATE BOARD OF EDUCATION DEFENDANT

DR. BEN MAYS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE STATE BOARD OF EDUCATION DEFENDANT

SHERRY BURROW, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS A MEMBER OF THE STATE BOARD OF EDUCATION DEFENDANT

JIM COOPER, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS

A MEMBER OF THE STATE BOARD OF EDUCATION — DEFENDANT

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RICHARD WEISS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE DEPARTMENT OF FINANCE AND ADMINISTRATION — DEFENDANT

MAC DODSON, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE ARKANSAS DEVELOPMENT FINANCE AUTHORITY — DEFENDANT

ROBERT MOORE, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SPEAKER

OF THE HOUSE OF REPRESENTATIVES DEFENDANT

PAUL BOOKOUT, INDIVIDUALLY AND
IN HIS OFFICIAL CAPACITY AS PRESIDENT
PRO TEMPORE OF THE SENATE DEFENDANT

COMPLAINT

Plaintiff Deer/Mt. Judea School District for its Complaint states:

Plaintiff

1. Plaintiff Deer/Mt. Judea School District ("Deer/Mt. Judea") is a body corporate that may sue in its own name. Ark. Code Ann. § 6-13-102(a). It operates two K-12 schools (Deer and Mt. Judea) serving approximately 360 students. The Deer and Mt. Judea schools are remote and necessary. They are located in mountainous and sparsely populated Newton County, Arkansas. They are necessary because, if the Deer and Mt. Judea schools are closed, their students will be denied a substantially equal opportunity for an adequate education due to excessive transportation time. The State of Arkansas must keep the Deer and Mt. Judea campuses open to comply with the Constitution of Arkansas, Article 14, § 1, and Article 2, §§ 2, 3 and 18, and provide all Arkansas school children a substantially equal opportunity for an adequate education.

2. Deer/Mt. Judea brings this suit on its own behalf and on behalf of its students and taxpayers to enjoin State actions that violate state law and the Constitution of Arkansas, Article 14, § 1, and Article 2, §§ 2, 3 and 18, and that

will inevitably result in the closure of the Deer and Mt. Judea schools. The State has violated state law and the Constitution of Arkansas by failing to provide small, remote schools adequate funding and by closing small, remote schools without considering whether their students will be denied a substantially equal opportunity for an adequate education due to excessive transportation time.

3. The State has violated state law by failing to comply with Act 57 of the Second Extraordinary Session of 2003. The Arkansas Supreme Court has stated that "the linchpin for achieving adequacy in public education is the General Assembly's compliance with Act 57 of the Second Extraordinary Session of 2003." *Lake View v. Huckabee*, 364 Ark. 398, 411-12, 220 S.W.3d 645, 654-55 (2005). Act 57 requires the State to evaluate "whether a substantially equal opportunity for an adequate education is being afforded to Arkansas students." *Lake View v. Huckabee*, 370 Ark. 139, 145, 257 S.W.3d 879, 883 (2007). The State has not complied with Act 57 since the Arkansas Supreme Court issued its *Lake View* mandate in 2007. *Id.* 370 Ark. at 146, 257 S.W.3d at 883. The State knows that small, remote schools are underfunded, but rather than providing them the additional funding they need, the State has aggressively sought to close them without considering whether their students will be denied a substantially equal opportunity for an adequate education due to excessive transportation time.

4. In issuing its mandate in *Lake View*, the Arkansas Supreme Court stated that complying with Act 57 and "establishing education as the State's first funding priority[] are the cornerstones for assuring future compliance." *Id.* 370 Ark. at 146, 257 S.W.3d at 883. Establishing education as the state's first funding priority means that the state cannot fund education as some percentage of the state's overall budget. Education funding must be based on what is needed to provide all Arkansas children a substantially equal opportunity for an adequate education. *Lake View V*, 364 Ark. at 413, 220 S.W.3d at 655-56. Since the Arkansas Supreme Court issued its *Lake View* mandate, the State has funded education "based upon what funds were available - not by what was needed." *Lake View V*, 364 Ark. at 413, 220 S.W.3d at 655-56. The Act 57 adequacy review process has resulted in reports clearly identifying problems of constitutional significance, but the State has ignored the problems. Rather than a meaningful review of Arkansas' education system, the Act 57 adequacy review process has devolved into little more than an effort to justify the smallest possible cost-of-living adjustment ("COLA") to the existing school-funding formula.

5. While the State has been "flying blind" in funding education, Arkansas children continue to fail. Arkansas received a grade of "F" for current student achievement in *Education Week's Quality Counts 2010*. In 2009, ***less than one-third*** of Arkansas 4th and 8th graders scored proficient or above in reading and

math on National Assessment of Educational Progress ("NAEP), also known as "The Nations Report Card." Arkansas 12th graders did even worse with only ***15 percent*** proficient or above in math and ***30 percent*** proficient or above in reading. As this would suggest, Arkansas has seen no increase in scores on college entrance exams, and, almost ***80 percent*** of students enrolling in Arkansas public universities are required to take one or more remedial courses.

6. The education system in Arkansas is underfunded, inequitable and inadequate. If nothing changes, Deer/Mt. Judea will be closed even though it is necessary for the State to provide all Arkansas school children an equitable and adequate education. Accordingly, Deer/Mt. Judea seeks declaratory and prospective injunctive relief directing the State to comply with the Constitution of Arkansas and Act 57; directing the State to fund and implement an education system reasonably designed to provide all Arkansas school children a substantially equal opportunity for an adequate education; and to enjoin the State from closing small, remote schools until these constitutional violations have been remedied.

Standing

7. Deer/Mt. Judea has standing pursuant to Article 16, § 13 of the Constitution of Arkansas to prevent the expenditure of State tax dollars appropriated pursuant to an unconstitutional funding system. This is a public-funds illegal exaction case. Deer/Mt. Judea contends that public funds generated

from tax dollars are being misapplied or illegally spent. Citizens have standing to bring public-funds cases because they have a vested interest in ensuring that the tax money they have contributed to the state treasury is lawfully spent. An illegal-exaction suit under Article 16, §13 is, by its nature, a class action as a matter of law.

8. Article 16, Section 13 of the Constitution of Arkansas provides:

> Any citizen of any county, city or town may institute suit in behalf of himself and all others interested, to protect the inhabitants thereof against the enforcement of any illegal exactions whatever.

9. Deer/Mt. Judea as a body corporate is a "citizen" as used in Article 16, § 13 of the Constitution of Arkansas. *See McCarroll v. Gregory-Robinson-Speas, Inc.*, 198 Ark. 235, 129 S.W.2d 254 (1939).

10. Deer/Mt. Judea is "interested" as used in Article 16, § 13 of the Constitution of Arkansas. As an Arkansas school district, Deer/Mt. Judea is charged with providing its students a substantially equal opportunity for an adequate education as required by the Constitution of Arkansas, Article 14, § 1, and Article 2, §§ 2, 3 and 18. Deer/Mt. Judea also levies an ad valorem property tax and is required by Amendment 74 of the Constitution of Arkansas to remit a portion of its ad valorem property tax revenue to the State Treasurer for distribution by the State to school districts as provided by law.

11. Deer/Mt. Judea also has standing to bring this suit pursuant to the Arkansas Declaratory Judgment Act, Ark. Code Ann. §§ 16-111-101 to 111. There exists a justiciable controversy between Deer/Mt. Judea and the State as to whether the current education system complies with the Constitution of Arkansas, Article 14, § 1, and Article 2, §§ 2, 3 and 18. The interests of Deer/Mt. Judea and the State are adverse. Deer/Mt. Judea has a legally protectable interest in ensuring that the Arkansas education system complies with the constitution. The issue of whether the current education system complies with the constitution is ripe for judicial resolution.

12. Finally, Deer/Mt. Judea also has standing to bring this suit pursuant to the Arkansas Civil Rights Act of 1993, Ark. Code Ann. §§ 16-123-101 to 108. The Arkansas Civil Rights Act provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of this state or any of its political subdivisions subjects, or caused to be subjected, any person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Arkansas Constitution shall be liable to the party injured in an action in circuit court for legal and equitable relief or other proper redress.

Ark. Code Ann. § 16-123-105(a). Deer/Mt. Judea is a "person" for purposes of the Arkansas Civil Rights Act. *See McCarroll v. Gregory-Robinson-Speas, Inc.*, 198 Ark. 235, 129 S.W.2d 254 (1939). The individual defendants, acting under color of law, are depriving Deer/Mt. Judea students of a substantially equal opportunity

for an adequate education as required by the Constitution of Arkansas, Article 14, § 1, and Article 2, §§ 2, 3 and 18.

Defendants

13. Defendants are State officials with responsibility for creating and implementing a constitutional education system. The General Assembly passes bills that become law upon signature of the Governor and that create and fund the State's education system. The Commissioner of Education, the State Board of Education and the Commission for Public School Academic Facilities and Transportation exercise authority over the education system delegated to them by law. These State officials have violated Arkansas law and created and implemented an unconstitutional education system. This Court must exercise authority over each and all of them to ensure the State's compliance with the constitution. *See Lake View Sch. Dist. v. Huckabee*, 351 Ark. 31, 54, 91 S.W.3d 472, 484 (2002)("This court's refusal to review school funding under our state constitution would be a complete abrogation of our judicial responsibility and would work a severe disservice to the people of this state. We refuse to close our eyes or turn a deaf ear to claims of a dereliction of duty in the field of education. As Justice Hugo Black once sagely advised: '[T]he judiciary was made independent because it has ... the primary responsibility and duty of giving force and effect to constitutional liberties and limitations upon the executive and

legislative branches." Hugo L. Black, *The Bill of Rights,* 35 N.Y.U. L. Rev. 865, 870 (1960).'").

14. Defendant Mike Beebe is the Governor of the State of Arkansas.

15. Defendant Mark Darr is the Lieutenant Governor and serves as President of the Senate and may vote therein in case of a tie vote. The powers of Governor devolve to the Lieutenant Governor when the Governor is absent from the state or otherwise unable to discharge the powers and duties of Governor.

16. Defendant Dr. Tom W. Kimbrell is the Commissioner of Education for the State of Arkansas and the person responsible for the disbursement of tax dollars appropriated under the current school-funding system. He is also a member of the Commission for Arkansas Public School Academic Facilities and Transportation.

17. The State Board of Education ("State Board") is an entity created by statute and empowered with the general supervision of public schools in Arkansas. *See* Ark. Code Ann. § 6-11-105(a). Dr. Naccaman Williams is the Chairman of the State Board. Sherry Burrow, Jim Cooper, Brenda Gullett, Samuel Ledbetter, Alice Williams Mahony, Dr. Ben Mays, Toyce Newton and Vicki Saviers are current members of the State Board.

18. The Commission for Arkansas Public School Academic Facilities and Transportation ("Commission") is an entity created by statute and responsible for

promulgating rules and regulations for school transportation that promote and provide a safe, efficient, and economical system of pupil transportation. Ark. Code Ann. § 6-19-101 (Supp. 2010). The Commission has three members: the Director of the Department of Finance and Administration, the Commissioner of Education and the President of the Arkansas Development Finance Authority. Ark. Code Ann. § 6-21-114 (Supp. 2010). Defendant Richard Weiss is the Director of the Department of Finance and Administration. Defendant Mac Dodson is the President of the Arkansas Development Finance Authority.

19. Defendant Robert Moore is the Speaker of the House of Representatives for the 88th General Assembly.

20. Defendant Paul Bookout is the President Pro Tempore of the Senate for the 88th General Assembly.

21. The Attorney General for the State of Arkansas is also entitled to be heard in this matter and will be duly served. *See* Ark. Code Ann. § 16-111-106(b).

Jurisdiction and Venue

22. This Court has jurisdiction pursuant to the Constitution of Arkansas, Amendment 80, § 6; Ark Code Ann. §§ 16-13-201(a); the Arkansas Civil Rights Act of 1993, Ark. Code Ann. §16-123-105(a); and the Arkansas Declaratory Judgment Act, Ark. Code Ann. § 16-111-103(a).

23. Pulaski County is the proper venue for this action. *See* Ark. Code Ann. §§ 16-60-102(2) and 103(4).

Sovereign Immunity

24. The Constitution of Arkansas, Article 5, § 20, provides, "The State of Arkansas shall never be made defendant in any of her courts." When a state official is sued in his or her official capacity, it is a suit against the State.

25. The Constitution of Arkansas, Article 16, § 13, overrides Article 5, § 20 and allows illegal exaction suits against state officials. *Streight v. Ragland,* 280 Ark. 206, 209-10 n. 7, 655 S.W.2d 459, 461 n. 7 (1983). Accordingly, Deer/Mt. Judea's public funds illegal exaction suit is brought against the defendant state officials in their official capacities.

26. The Arkansas Supreme Court has also recognized exceptions to sovereign immunity granted by Article 5, § 20. In *Arkansas Tech University v. Link*, 341 Ark. 495, 503, 17 S.W.3d 809, 814 (2000), the Arkansas Supreme Court stated:

> One of those exceptions is that equity has jurisdiction to enjoin or restrain State officials or agencies from acts which are *ultra vires,* in bad faith, or arbitrary and capricious. [citations omitted].

A suit against a state official to prevent him or her from acting *ultra vires* is treated as a suit against the state official personally and not as a suit against the State. *Grine v. Bd. of Trustees*, 338 Ark. 791, 797, 2 S.W.3d 54, 58 (1999). Deer/Mt.

Judea brings this suit to prevent the defendant state officials from acting *ultra vires* by creating and implementing an education system in violation of Act 57 and the Constitution of Arkansas, Article 14, § 1, and Article 2, §§ 2, 3 and 18. Because such a suit is treated as one against the state official personally, the defendant state officials are also sued in their individual capacities.

Qualified Immunity

27. State officials have qualified immunity from suits *for damages* under Ark. Code Ann. § 19-10-305(a) which provides:

> Officers and employees of the State of Arkansas are immune from liability and suit, except to the extent that they may be covered by liability insurance, for damages for acts or omissions, other than malicious acts or omissions, occurring within the course and scope of their employment.

This statute does not apply to this case because Deer/Mt. Judea does not seek damages. Deer/Mt. Judea seeks only declaratory and prospective injunctive relief.

28. The defendant state officials are not entitled to common law qualified immunity as a defense to Deer/Mt. Judea's claim under the Arkansas Civil Rights Act, Ark. Code Ann. § 16-123-105(a). Deer/Mt. Judea's students have a clearly established constitutional right to an equitable and adequate education system. *DuPree v. Alma Sch. Dist. No. 30*, 279 Ark. 340, 651 S.W.2d 90 (1983). As discussed in more detail below, the current education system bears no rational relationship to the educational needs of Deer/Mt. Judea's students, and therefore,

fails to provide all Arkansas school children an equitable and adequate education. No reasonable state official could conclude that the current education system complies with the Constitution of Arkansas, Article 2, §§ 2, 3 and 8 and Article 14, § 1.

Constitutional Provisions at Issue

29. The Constitution of Arkansas, Article 2, §§ 2, 3 and 18:

§ 2. Freedom and Independence.

All men are created equally free and independent, and have certain inherent and inalienable rights, amongst which are those of enjoying and defending life and liberty; of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness. To secure these rights governments are instituted among men, deriving their just powers from the consent of the governed.

§ 3. Equality Before the Law.

The equality of all persons before the law is recognized, and shall ever remain inviolate; nor shall any citizen be deprived of any right, privilege or immunity, nor exempted from any burden or duty, on account of race, color or previous condition.

§ 18. Privileges and Immunities – Equality.

The General Assembly shall not grant to any citizen or class of citizens privileges or immunities which upon the same terms shall not equally belong to all citizens.

x. The Constitution of Arkansas, Article 14, § 1:

§ 1. Free School System.

Intelligence and virtue being the safeguards of liberty and the bulwark of a free and good government, the State shall ever maintain

a general, suitable and efficient system of free public schools and shall adopt all suitable means to secure to the people of Arkansas the advantages and opportunities of education. The specific intention of this amendment is to authorize that in addition to existing constitutional and statutory provisions the General Assembly and/or public school districts may spend public funds for the education of persons over twenty-one (21) years of age and under six (6) years of age, as may be provided by law, and no other interpretation shall be given to it.

School-Funding Generally

30. The State's system for funding education is based on the model developed by Lawrence O. Picus & Associates ("Picus") in 2003 and was first implemented in the 2004-05 school year. Under the Picus model, the State determines the components of an adequate education, determines the per student cost of each component for a prototypical school of 500 students, and then provides school districts a per student amount designed to cover the cost of all components of an adequate education. Arkansas calls the total per student amount paid to school districts "foundation funding." *See* Ark. Code Ann. § 6-20-2301, *et seq.* Each school district receives the foundation funding amount multiplied by the number of students it serves, known as average daily membership ("ADM"). Foundation funding was set at $5,789 per student for 2008-09 and $5,905 for 2009-10.

31. Each biennium, Act 57 requires the House Education Committee and the Senate Education Committee (hereinafter referred to as the "Joint Committee")

to reevaluate the components of an adequate education and to prepare an adequacy report with recommendations for changes in the school-funding system. *See* Ark. Code Ann. § 10-3-2101 to 2104. The Bureau of Legislative Research ("BLR") prepares the adequacy report for the Joint Committee. Based on the adequacy report, the Joint Committee recommends a foundation funding amount using a matrix. The matrix is made up of the individual components of an adequate education. For example, for the 2008-09 school year, the foundation funding amount of $5,789.00 per student was made up of the following components of an adequate education:

Matrix Calculation (per student amounts)	2008-2009
School Level Salaries and Benefits	$4,013.90
School Level Resources	524.60
Operations and Maintenance	581.00
Central Office	383.50
Transportation	286.00
TOTAL	$5,789.00

32. In addition to foundation funding, all school districts receive additional funding, known as "categorical funding." There are four types of

categorical funding. First, school districts receive National School Lunch ("NSL") funds based on the percentage and number of students who qualify for free or reduced price meals under the National School Lunch Act ("NSLA"). Second, school districts receive funding based on the number of English-language learners ("ELL"). Third, school districts receive funding for students who are placed in an alternative learning environment ("ALE"). Professional development funding is the fourth type of categorical funding.

33. Local property taxes collected by school districts are required by Amendment 74 to the Constitution of Arkansas to be remitted to the State for distribution according to law. The law requires foundation funding to be distributed so that all school districts have at least the foundation funding amount per student after taking into account property tax revenue generated by 25 mills. Ark. Code Ann. § 6-20-2305(a)(1)(A). Amendment 74 allows school districts to use revenue generated in excess of the 25 mills for "enhanced curricula, facilities, and equipment which are superior to what is deemed adequate by the State." *Lake View IV,* 358 Ark. at 155, 189 S.W.3d at 13.

34. In addition to foundation funding and categorical funding, the State also provides school districts with funding for special needs, such as growing or declining enrollment and geographic isolation.

Arkansas School-Funding Decisions

35. *DuPree v. Alma School District No. 30.* In *DuPree v. Alma Sch. Dist. No. 30*, 279 Ark. 340, 651 S.W.2d 90 (1983), eleven school districts challenged the school-funding system based on the equality provisions (Article 2, §§ 2, 3 and 18) and the education article (Article 14, § 1) of the Arkansas Constitution. The school districts contended that the school-funding system resulted in a "great disparity" in funds available to school districts and that the funding received by school districts was "unrelated to the educational needs of any given district." *DuPree,* 279 Ark. at 342, 651 S.W.2d at 91. The trial court ruled in favor of the school districts, and the Arkansas Supreme Court affirmed. *DuPree,* 279 Ark. at 343, 651 S.W.2d at 91.

36. In affirming, the Arkansas Supreme Court noted that it was "undisputed" that "there are sharp disparities among school districts in the expenditures per pupil and the educational opportunities available as reflected by staff, class size, curriculum, remedial services, facilities, materials and equipment." *DuPree,* 279 Ark. at 344, 651 S.W.2d at 92. The question was whether these disparities violated the equality provisions (Article 2, §§ 2, 3 and 18) and the education article (Article 14, § 1) of the Arkansas Constitution. The Arkansas Supreme Court held they did and explained:

> We can find no legitimate state purpose to support the system. It bears no rational relationship to the educational needs of the individual

districts, rather it is determined primarily by the tax base of each district. ***The trial court found the educational opportunity of the children in this state should not be controlled by the fortuitous circumstance of residence, and we concur in that view.*** Such a system only promotes greater opportunities for the advantaged while diminishing the opportunities for the disadvantaged.

DuPree, 279 Ark. at 345, 651 S.W.2d at 93 (emphasis supplied). Thus, a school-funding system that "bears no rational relationship to the educational needs of the individual districts" violates the Arkansas Constitution's mandates of equality and of a general, suitable and efficient school system. *Id.*

37. The Arkansas Supreme Court rejected the State's argument that "local control" justified the disparities in funding and educational opportunity. The Court identified two fallacies in this argument:

> First, to alter the state financing system to provide greater equalization among districts does not in any way dictate that local control must be reduced. Second, as pointed out in *Serrano, supra,* 135 Cal.Rptr. at 364, 557 P.2d at 948, "The notion of local control was a 'cruel illusion' for the poor districts due to limitations placed upon them by the system itself.... Far from being necessary to promote local fiscal choice, the present system actually deprives the less wealthy districts of the option." Consequently, even without deciding whether the right to a public education is fundamental, we can find no constitutional basis for the present system, as it has no rational bearing on the educational needs of the districts.

DuPree, 279 Ark. at 346, 651 S.W.2d at 93. The Court made clear that "[u]ltimately, the responsibility for maintaining a general, suitable and efficient school system falls upon the state." *DuPree,* 279 Ark. at 349, 651 S.W.2d at 95. "If [a school district] fails, the state government must compel it to act, and if [a

school district] cannot carry the burden, the state must itself meet its continuing obligation." *Id.* (*quoting Robinson v. Cahill*, 303 A.2d 274, 295 (N.J. 1973)).

38. Lake View I. On September 19, 1994, the Lake View School District ("Lake View") filed an amended complaint against the State alleging that the school-funding system violated the equality provisions (Article 2, §§ 2, 3 and 18) and the education article (Article 14, § 1) of the Arkansas Constitution. *Lake View v. Tucker*, 323 Ark. 693, 694, 917 S.W.3d 530, 531 (1996) ("*Lake View I*"). By order entered November 9, 1994 ("1994 Order"), the trial court ruled that the school-funding system violated the equality provisions (Article 2, §§ 2, 3 and 18) of the Arkansas Constitution, "as it has no rational bearing on the educational needs of the district," and that the system also violated the education article (Article 14, § 1) of the Arkansas Constitution by "failing to provide a general, suitable, and efficient system of free public education." *Lake View I*, 323 Ark. at 532, 917 S.W.3d at 695. The trial court stayed the effect of the 1994 Order to allow the General Assembly time to enact and implement appropriate legislation in accordance with its opinion. The Arkansas Supreme Court rejected an appeal of the 1994 Order concluding it was not a final, appealable order because of the stay. *Lake View I*, 323 Ark. at 533, 917 S.W.2d at 697.

39. Lake View II. The General Assembly responded to the 1994 Order by enacting Acts 916, 917 and 1194 of 1995 ("1995 legislative acts"), which

effectively repealed the school-funding system that was the subject of the 1994 Order. *Lake View v. Huckabee*, 340 Ark. 481, 485-86, 10 S.W.3d 892, 894-95 (2000) ("*Lake View II*"). In 1996, Lake View filed an amended complaint again seeking a declaration that the 1995 legislative acts violated the equality provisions (Article 2, §§ 2, 3 and 18) and the education article (Article 14, § 1) of the Arkansas Constitution. *Lake View II*, 340 Ark. at 486, 10 S.W.3d at 895. In April of 1997, Acts 1307 and 1361 of 1997 ("1997 legislative acts") became law and amended or repealed the school-funding system established by the 1995 legislative acts. *Lake View II*, 340 Ark. at 487-88, 10 S.W.3d at 896. On May 29, 1997, Lake View filed an amended complaint challenging the constitutionality of both the 1995 and 1997 legislative acts. *Lake View II*, 340 Ark. at 488, 10 S.W.3d at 896. On August 17, 1998, the trial court issued a final order dismissing Lake View's amended complaint for failure to state a claim because the 1995 and 1997 legislative acts were presumed constitutional and no facts were alleged supporting a lack of rational basis for those acts. *Lake View II*, 340 Ark. at 492, 10 S.W.3d at 899. Lake View appealed. On appeal, Lake View argued that the trial court erred in dismissing its amended complaint without a trial on the merits on the constitutionality of State initiatives since 1994. The Arkansas Supreme Court agreed and remanded the case for trial. *Lake View II*, 340 Ark. at 495, 10 S.W.3d at 900.

40. *Lake View III*. A trial on the constitutionality of State initiatives since 1994 was conducted over 19 days in September and October of 2000. On May 25, 2001, the trial court entered a final order ("2001 Order") concluding that the school-funding system remained unconstitutional under the equality provisions (Article 2, §§ 2, 3 and 18) and the education article (Article 14, § 1) of the Arkansas Constitution. *Lake View v. Huckabee*, 351 Ark. 31, 45, 91 S.W.3d 472, 479 (2002)("*Lake View III*"). Both Lake View and the State appealed. *Id.*

41. The Arkansas Supreme Court began by noting that "[t]he 2001 school-funding formula is essentially the same as what was in place in 1994." *Id.* After explaining in detail the school-funding system, the Arkansas Supreme Court considered the trial court's declaration that the school-funding system was not "adequate" in violation of the education article, Article 14, § 1. Interpreting the education article, the Court stated, "There is no question in this court's mind that the requirement of a general, suitable, and efficient education system of free public schools places on the State an absolute duty to provide the school children of Arkansas with an adequate education." *Lake View III*, 351 Ark. at 66-67, 91 S.W.3d at 492.

42. The State argued that the 2001 Order should be reversed because it is impossible to define an adequate education. The Arkansas Supreme Court described the State's argument as follows:

The keystone of the State's adequacy argument is that an adequate education in Arkansas is impossible to define. We observe that on this point, the Department of Education and the General Assembly may be at odds. In her 1994 order, Judge Imber stated that there had been no studies on the per-student cost to provide "a general, suitable and efficient" educational opportunity to Arkansas schoolchildren. In 1995, the Arkansas General Assembly seized upon that theme and called for an adequacy study:

> (c) The State Board of Education shall devise a process for involving teachers, school administrators, school boards, and parents in the definition of an "adequate" education for Arkansas students.
>
> (d) The State Board shall seek public guidance in defining an adequate education and shall submit proposed legislation defining adequacy to the Joint Interim Committee on Education prior to December 31, 1996.
>
> Act 917 of 1995, § 6(c-d).

Despite this directive from the General Assembly, nothing has been done by the Department of Education, and seven years have passed. Judge Kilgore echoed this in his 2001 order:

> Pursuant to Act 917 of 1995, and in order that an amount of funding for an education system based on need and not on the amount available but on the amount necessary to provide an adequate educational system, the court concludes an adequacy study is necessary and must be conducted forthwith.

Stated simply, the fact that the Department of Education has refused to prepare an adequacy study is extremely troublesome and frustrating to this court, as it must be to the General Assembly.

* * *

> In short, the General Assembly is well on the way to defining adequacy while the Department of Education, from all indications, has been recalcitrant.

Lake View III, 351 Ark. at 56-57, 91 S.W.3d at 486-87.

43. In finding the school-funding system inadequate, the Arkansas Supreme Court identified four deficiencies:

> [T]his court is troubled by four things: (1) the Department of Education has not conducted an adequacy study; (2) despite this court's holding in *DuPree v. Alma Sch. Dist. No. 30, supra*, that equal opportunity is the touchstone for a constitutional system and not merely equalized revenues, the State has only sought to make revenues equal; (3) despite Judge Imber's 1994 order to the same effect, neither the Executive branch nor the General Assembly have taken action to correct the imbalance in ultimate expenditures; and (4) the State, in the budgeting process, continues to treat education without the priority and the preference that the constitution demands. Rather, the State has continued to fund the schools in the same manner, although admittedly taking more steps to equalize revenues.

Lake View III, 351 Ark. at 71, 91 S.W.3d at 495. For these reasons, the Court concluded that "the State has not fulfilled its constitutional duty to provide the children of this state with a general, suitable, and efficient school-funding system." *Lake View III*, 351 Ark. at 72, 91 S.W.3d at 495. Accordingly, the Court affirmed the trial court's finding "that the current school-funding system violates the Education Article of the Arkansas Constitution." *Id.*

44. The Arkansas Supreme Court next considered the trial court's finding that the school-funding system was inequitable in violation of Article 2, §§ 2, 3 and 18 of the Arkansas Constitution. The State argued that equality required the

State to equalize per-student revenue available to school districts. The Court rejected this argument citing its decision in *DuPree*. "It is clear to this court that in *DuPree*, we concentrated on expenditures made per pupil and whether that resulted in equal educational opportunity as the touchstone for constitutionality, not on whether the revenues doled out by the State to the school districts are equal." *Lake View III*, 351 Ark. at 74, 91 S.W.3d at 497. As in *DuPree*, the Court found no rational basis for a school-funding system that "in no way corrects the inherent disparities" in per-student expenditures among school districts. *Id.*

45. The State offered two justifications for disparities in per-student expenditures: local control and the need to fund other state programs. *Lake View III*, 351 Ark. at 78, 91 S.W.3d at 499. As to local control, the Arkansas Supreme Court stated, "We rejected the argument of local control in *DuPree* in no uncertain terms." *Id.* "Deference to local control is not an option for the State when inequality prevails, and deference [to local control] has not been an option since the *DuPree* decision." *Lake View III*, 351 Ark. at 79, 91 S.W.3d at 500. As to the need to fund other state programs, the Court stated, "[T]he State's claim that the General Assembly must fund a variety of state programs in addition to education and that this is reason enough for an inferior education system hardly qualifies as a legitimate reason." *Lake View III*, 351 Ark. at 78, 91 S.W.3d at 499-500. Accordingly, the Court affirmed the trial court's finding that the school-funding

system violated the equality provisions of the Arkansas Constitution. *Lake View III*, 351 Ark. at 79, 91 S.W.3d at 500.

46. Frustrated by the State's failure to understand its holding in *DuPree*, the Arkansas Supreme Court provided the State clear guidance as to what the constitution required:

> It is the State's responsibility, first and foremost, to develop forthwith what constitutes an adequate education in Arkansas. It is, next, the State's responsibility to assess, evaluate, and monitor, not only the lower elementary grades for English and math proficiency, but the entire spectrum of public education across the state to determine whether equal educational opportunity for an adequate education is being substantially afforded to Arkansas' school children. It is, finally, the State's responsibility to know how state revenues are being spent and whether true equality in opportunity is being achieved. Equality of educational opportunity must include as basic components substantially equal curricula, substantially equal facilities, and substantially equal equipment for obtaining an adequate education. The key to all this, to repeat, is to determine what comprises an adequate education in Arkansas. The State has failed in each of these responsibilities.

Lake View III, 351 Ark. at 79, 91 S.W.3d at 500. The Court stayed issuance of its mandate until January 1, 2004 to give the State "time to correct this constitutional disability in public school funding and time to chart a new course for public education in this state." *Lake View III*, 351 Ark. at 97, 91 S.W.3d at 511.

47. Lake View IV. The State failed to comply with the Arkansas Supreme Court's mandate in *Lake View III*. On January 22, 2004, the Arkansas Supreme Court recalled its mandate to consider "what remedy or writ is necessary to assure

compliance." *Lake View v. Huckabee*, 355 Ark. 617, 142 S.W.3d 643 (2004). The Court appointed Masters to examine and evaluate legislative and executive action taken since November 21, 2002. *Lake View v. Huckabee*, 356 Ark. 1, 2-3 144 S.W.3d 741, 742 (2004). On April 2, 2004, the Masters filed their report with the Court. On June 18, 2004, the Court issued a supplemental opinion. *Lake View v. Huckabee*, 358 Ark. 137, 189 S.W.3d 1 (2004)("*Lake View IV*").

48. In its supplemental opinion, the Arkansas Supreme Court praised the work of the General Assembly, in particular legislative action taken in the Second Extraordinary Session of 2003 -- *after the Court recalled its mandate* -- and described the legislative accomplishments as "truly impressive." *Lake View IV*, 358 Ark. at 158, 189 S.W.3d at 15. The Court rejected the argument that "if this court does not serve as a 'watchdog' agency to assure full compliance with *Lake View III*, the General Assembly will not complete or fully implement what it has already begun." *Lake View IV*, 358 Ark. at 159, 189 S.W.3d at 16. The Court stated, "Admittedly, some measures, and specifically funding measures and those related to facilities and equipment, have not been brought to fruition. But we presume they will be, as we presume that government officials will do what they say they will do." *Lake View IV*, 358 Ark. at 160, 189 S.W.3d at 16. Accordingly, the Court released jurisdiction and issued its mandate.

49. On April 14, 2005, various parties filed motions alleging that the State had failed to do what it said it would do and asking the Arkansas Supreme Court to recall its mandate. The Court scheduled oral arguments on the motions for May 19, 2005. *Lake View v. Huckabee*, 362 Ark. 251, 252-53, 208 S.W.3d 93, 94 (2005). The movants alleged "that the General Assembly reneged on its legislative commitments and failed to comply with the landmark legislation passed during the Second Extraordinary Session of 2004." *Lake View v. Huckabee*, 362 Ark. 520, 522, 210 S.W.3d 28, 29 (2005). On June 9, 2005, the Court recalled its mandate and reappointed the Masters. The Masters were directed to file a report on or before September 1, 2005. *Lake View v. Huckabee*, 362 Ark. at 522-23, 210 S.W.3d at 29.

50. *Lake View V*. After receiving the Masters' report, the Arkansas Supreme Court again found the school-funding system unconstitutional. *Lake View v. Huckabee*, 364 Ark. 398, 415, 220 S.W.3d 645, 657 (2005) ("*Lake View V*"). The Court identified a number of deficiencies. These included the no COLA for foundation or categorical funding, new legislation creating "unfunded mandates," and inadequate facilities funding. *Id.* 364 Ark. at 413-14, 220 S.W.3d at 655-56. Most important, the Court held "that the General Assembly failed to comply with Act 57 and Act 108 in the 2005 regular session and, by doing so, retreated from its prior actions to comply with this Court's mandate in [*Lake View*

III]." *Lake View V*, 364 Ark. at 411-12, 220 S.W.3d at 654-55. The Court explained that Act 57 imposes a duty on the General Assembly to assess, evaluate and monitor the entire spectrum of public education across the state and to evaluate the amount of state funds needed based on the cost of providing all children a substantially equal opportunity for an adequate education. *Lake View V*, 364 Ark. at 412, 220 S.W.3d at 655 n.4. The Court noted:

> [T]he [General Assembly] interim committees made no request to the Department of Education for any information before the 2005 regular session, or even during that session. Thus, vital and pertinent information relating to existing school district revenues, expenditures, and needs was not reviewed. Without that information, the General Assembly could not make an informed funding decision for school years 2005-2006 and 2006-2007. We have no doubt that the decision to freeze the previous year's [foundation-funding amount] of $5,400 for purposes of 2005-2006 is a direct result of this lack of information.

Lake View V, 364 Ark. at 412, 220 S.W.3d at 655. The Court explained:

> [T]he linchpin for achieving adequacy in public education is the General Assembly's compliance with Act 57 of the Second Extraordinary Session of 2003. Without a continual assessment of what constitutes an adequate education, without accounting and accountability by the school districts, without an examination of school district expenditures by the House and Senate Interim Committees, and without reports to the Speaker of the House and the President of the Senate by September 1 before each regular session, the General Assembly is "flying blind" with respect to determining what is an adequate foundation-funding level.

Lake View V, 364 Ark. at 411-12, 220 S.W.3d at 654-55.

51. Act 108 of the Second Extraordinary Session of 2003 created the Educational Adequacy Fund to ensure a fully-funded system of public education.

The Arkansas Supreme Court held the General Assembly violated Act 108 because "[e]ducation needs were not funded first." *Lake View V*, 364 Ark. at 413, 220 S.W.3d at 655. Rather, the General Assembly established the amount of school-funding "based upon what funds were available - not by what was needed." *Lake View V*, 364 Ark. at 413, 220 S.W.3d at 655-56.

52. Based on the General Assembly's failure to comply with Act 57 and Act 108, among other deficiencies, the Arkansas Supreme Court held that "the public school-funding system continues to be inadequate" and that "our public schools are operating under a constitutional infirmity which must be corrected immediately." *Lake View V*, 364 Ark. at 415, 220 S.W.3d at 657. As in *Lake View III*, the Court held that the General Assembly and Department of Education should have time to cure the deficiencies. Accordingly, the Court stayed issuance of its mandate until December 1, 2006. *Lake View V*, 364 Ark. at 416, 220 S.W.3d at 657.

53. On November 30, 2006, the Arkansas Supreme Court deferred issuance of its mandate an additional 180 days and reappointed the Masters to evaluate the State's compliance with *Lake View III*. *Lake View v. Huckabee*, 368 Ark. 231, 234, 243 S.W.3d 919, 920-21 (2006). The State was directed to furnish the Court with any information related to constitutional compliance within 30 days. *Id.*

54. *Lake View VI*. The Masters filed an interim report on March 16, 2007 and a final report on April 26, 2007. On May 31, 2007, the Arkansas Supreme Court adopted the Masters' reports in a unanimous opinion. *Lake View v. Huckabee*, 370 Ark. 139, 145, 257 S.W.3d 879, 883 (2007) ("*Lake View VI*"). The Court's opinion detailed steps taken by the State to address each deficiency identified in *Lake View V*. More importantly, the Court emphasized the State's commitment to "continual assessment and evaluation" and adopted the Masters' finding that the State "understands now that the job for an adequate education system is 'continuous' and that there has to be 'continued vigilance' for constitutionality to be maintained." *Lake View VI*, 370 Ark. at 145, 257 S.W.3d at 883. The Court concluded:

> We hold that the General Assembly has now taken the required and necessary legislative steps to assure that the school children of this state are provided an adequate education and a substantially equal educational opportunity. A critical component of this undertaking has been the comprehensive system for accounting and accountability, which has been put in place to provide state oversight of school-district expenditures. What is especially meaningful to this court is the Masters' finding that the General Assembly has expressly shown that constitutional compliance in the field of education is an ongoing task requiring constant study, review, and adjustment. In this court's view, Act 57 of the Second Extraordinary Session of 2003, requiring annual adequacy review by legislative committees, and Act 108 of the Second Extraordinary Session of 2003, establishing education as the State's first funding priority, are the cornerstones for assuring future compliance.

> Because we conclude that our system of public-school financing is now in constitutional compliance, we direct the clerk of this court to issue the mandate in this case forthwith.

Lake View VI, 370 Ark. at 145-46, 257 S.W.3d at 883.

Post-*Lake View* Educational Outcomes

55. First implemented in the 2004-05 school year, the Picus model was designed to double student achievement in the "medium term" with a long term goal of 90 percent of students achieving proficiency. (2006 Recalibration Report, p. 4) Because the State has failed to fully fund and implement the Picus model, student achievement has not improved and remains dismal. Arkansas' educational outcomes show a continuing need for significant changes in the way Arkansas educates its children.

56. Every two years a sample of Arkansas 4th and 8th graders participate in the National Assessment of Educational Progress ("NAEP"), also known as "The Nations Report Card." From 2003 to 2009, Arkansas reading scores showed no improvement while scores have improved nationally; math scores have improved, but Arkansas students failed to make-up any ground when compared to the nation as a whole. (2010 Adequacy Report, p. 8). Based on the 2009 NAEP, only 29 percent of 4th graders and 27 percent of 8th graders are proficient or above in reading, and only 36 percent of 4th graders and 27 percent of 8th graders are proficient or above in math. Arkansas ranked 41st in 4th and 8th grade reading and

8th grade math among the 52 jurisdictions tested; Arkansas ranked 36th in 4th grade math. (NAEP Statistics).

57. In 2009, NAEP for the first time released state-level data in reading and math for 12th graders, and again, Arkansas students performed poorly. Only 30 percent of Arkansas 12th graders scored proficient or above in reading, and only 15 percent scored proficient in math (zero percent were "advanced" in math). (NAEP Statistics).

58. Arkansas students do much better on the state developed and administered test known as the Benchmark Exam. While only 29 percent of 4th graders were proficient or above in reading on the 2009 NAEP, the State reported that 70 percent of 4th graders were proficient or above in reading based on the Benchmark Exam – ***a 41 percent discrepancy.*** Moreover, while NAEP 4th grade reading scores were essentially unchanged from 2003 to 2009, Benchmark Exam scores improved from 51 percent to 70 percent scoring proficient or above. (NAEP Statistics; Benchmarks 2005-2010).

59. The discrepancy in the performance of Arkansas children on the NAEP compared to the Benchmark Exam calls into question the validity and reliability of the Benchmark Exam. It suggests that improved achievement claimed by the State based on the Benchmark Exam may be illusory. State officials may be "gaming the system" so they can take credit for improving test

scores. According to one expert, the most common way states game the system is excessive test preparation – "teaching the test." (Ravitch, p. 159). This improves test scores on the test taught but does not translate to other tests, such as NAEP, or performance in real life. (Ravitch, p. 160). Another way some states have produced illusory improvement is by "lowering the bar" and making it easier for students to score proficient or above on state exams. New York recently admitted to this, raised standards and saw improvements on state tests disappear.

60. Like Arkansas' NAEP scores, other measures of the education system show a continuing need for significant changes in the way Arkansas educates its children. According to the Joint Committee's 2010 Adequacy Report:

a. Average composite ACT scores were the essentially the same in 2010 as they were in 2005 and remain below the national average (p. 10);

b. SAT reading scores were essentially the same from 2005 to 2009, while math scores have leveled off after a small improvement in 2006 (p. 10);

c. The high school graduation rate has remained unchanged at 76 percent since 2003, with the exception of an unexplained spike in 2006, (p. 11);

d. The college remediation rate (40 percent at colleges; almost 80 percent at universities) has remained unchanged since 2005 (p. 11);

e. The racial achievement gap remains large – 26 points (p. 12); and,

f. Arkansas received a grade of "D" for student achievement in the *Education Week's Quality Counts 2010* rankings (p. 12). A review of the *Quality Counts 2010* Arkansas report shows that the state's "D" in student achievement was an average of the following: Status: "F", Change: "C", Equity: "C-". In other words, the 2010 status of student achievement in Arkansas is "failing."

61. It is true that Arkansas ranked 10th overall in the *Quality Counts 2010* report. This was due to Arkansas scoring in the top 10 in Standards, Assessments and Accountability (7th), the Teaching Profession (2nd), and Transitions and Alignment (6th). Unfortunately for Arkansas children, positive steps taken in these areas have not resulted in improved achievement and are unlikely to do so. As stated above, the current status of Arkansas K-12 achievement is failing, and Arkansas ranks 46th in "Chance for Success."

62. Arkansans continue to suffer the consequences of an inadequate education system. According to the U.S. Census Bureau's *2010 Statistical Abstract: State Rankings*, only Mississippi has more people living below poverty than Arkansas. Arkansas ranks 49th in persons 25 and older with at least a bachelor's degree and 46th in per capita income.

63. Twenty-seven percent of Arkansas children live in poverty – the second highest rate in the nation behind Mississippi. (Poverty Taskforce, p. 13). The *2010 Kids Count* report prepared by the Annie E. Casey Foundation ranked Arkansas 48th overall in providing for the health and education of its children – ahead of Mississippi and Louisiana.

64. There is a strong link between poverty and educational attainment. The poverty rate for people over age 25 with less than a high school degree is nearly 30 percent, compared to a poverty rate of only 4 percent for those with a college degree or higher. A person's level of education attainment clearly matters in his or her ability to find and maintain employment in jobs paying wages above the poverty line. (Poverty Taskforce, p. 18).

Act 57

65. The Arkansas Supreme Court made clear in *Lake View V* that compliance with Act 57 is essential to maintaining an adequate education system. It stated:

> [T]he linchpin for achieving adequacy in public education is the General Assembly's compliance with Act 57 of the Second Extraordinary Session of 2003. Without a continual assessment of what constitutes an adequate education, without accounting and accountability by the school districts, without an examination of school district expenditures by the House and Senate Interim Committees, and without reports to the Speaker of the House and the President of the Senate by September 1 before each regular session, the General Assembly is "flying blind" with respect to determining what is an adequate foundation-funding level.

Lake View V, 364 Ark. at 411-12, 220 S.W.3d at 654-55. Act 57 requires the Joint Committee to prepare an adequacy report by September 1 preceding each regular legislative session. Act 57, as amended, has been codified as Ark. Code Ann. §§ 10-3-2101 to 2104. Relevant provisions are set forth below.

66. Ark. Code Ann. § 10-3-2101. Purpose and Findings.

> (a) The General Assembly recognizes that it is the responsibility of the State of Arkansas to:
>
> > (1) Develop what constitutes an adequate education in Arkansas pursuant to the mandate of the Supreme Court and to conduct an adequacy study, which has been completed; and
> >
> > (2) Know how revenues of the State of Arkansas are being spent and whether true equality in educational opportunity is being achieved.
>
> (b) The General Assembly also recognizes that no one (1) study can fully define what is an adequate, efficient, and equitable education.
>
> (c) The General Assembly further recognizes that while the adequacy study performed in 2003 is an integral component toward satisfying the requirements imposed by the Supreme Court, the General Assembly has a continuing duty to assess what constitutes an adequate education in the State of Arkansas.
>
> (d) Therefore, because the State of Arkansas has an absolute duty to provide the school children of the State of Arkansas with an adequate education, the General Assembly finds that ensuring that an adequate and equitable system of public education is available in the

State of Arkansas shall be the ongoing priority for the State of Arkansas.

67. Ark. Code Ann. § 10-3-2102. Duties.

(a) During each interim, the House Committee on Education and the Senate Committee on Education shall meet separately or jointly, as needed, to:

(1) Assess, evaluate, and monitor the entire spectrum of public education across the State of Arkansas to determine whether equal educational opportunity for an adequate education is being substantially afforded to the school children of the State of Arkansas and recommend any necessary changes;

(2) Review and continue to evaluate what constitutes an adequate education in the State of Arkansas and recommend any necessary changes;

(3) Review and continue to evaluate the method of providing equality of educational opportunity of the State of Arkansas and recommend any necessary changes;

(4) Evaluate the effectiveness of any program implemented by a school, a school district, an education service cooperative, the Department of Education, or the State Board of Education and recommend necessary changes;

(5) Review the average teacher salary in the State of Arkansas in comparison to average teacher salaries in surrounding states and member states of the Southern Regional Education Board and make recommendations for any necessary changes to teacher salaries in the State of Arkansas established by law;

(6) Review and continue to evaluate the costs of an adequate education for all students in the State of Arkansas, taking into account cost of living variances,

diseconomies of scale, transportation variability, demographics, school districts with a disproportionate number of students who are economically disadvantaged or have educational disabilities, and other factors as deemed relevant, and recommend any necessary changes;

(7) Review and continue to evaluate the amount of per-student expenditure necessary to provide an equal educational opportunity and the amount of state funds to be provided to school districts, based upon the cost of an adequate education and monitor the expenditures and distribution of state funds and recommend any necessary changes;

(8) Review and monitor the amount of funding provided by the State of Arkansas for an education system based on need and the amount necessary to provide an adequate educational system, not on the amount of funding available, and make recommendations for funding for each biennium.

(b) As a guidepost in conducting deliberations and reviews, the committees shall use the opinion of the Supreme Court in the matter of Lake View Sch. Dist. No. 25 v. Huckabee, 351 Ark. 31, 91 S.W.3d 472 (2002), and other legal precedent.

(c) The Department of Education, the Department of Career Education, and the Department of Higher Education shall provide the committees with assistance and information as requested by the committees.

(d) The Attorney General is requested to provide assistance to the committees as needed.

(e) Contingent upon the availability of funding, the House Committee on Education, the Senate Committee on Education, or both, may enter into an agreement with outside consultants or other experts as may be necessary to conduct the adequacy review as required under this section.

(f) The study for subdivisions (a)(1)-(4) of this section shall be accomplished by:

(1) Reviewing a report prepared by the Division of Legislative Audit compiling all funding received by public schools for each program;

(2) Reviewing the curriculum frameworks developed by the Department of Education;

(3) Reviewing the Arkansas Comprehensive Testing, Assessment, and Accountability Program, § 6-15-401 et seq.;

(4) Reviewing fiscal, academic, and facilities distress programs;

(5) Reviewing the state's standing under the No Child Left Behind Act of 2001, 20 U.S.C. § 6301 et seq.;

(6) Reviewing the Arkansas Comprehensive School Improvement Plan process; and

(7) Reviewing the specific programs identified for further study by the House Committee on Education and the Senate Committee on Education.

(g)(1) The study for subdivision (a)(5) of this section shall be accomplished by comparing the average teacher salary in Arkansas with surrounding states and Southern Regional Education Board member states, including without limitation:

(A) Comparing teacher salaries as adjusted by a cost of living index or a comparative wage index;

(B) Reviewing the minimum teacher compensation salary schedule; and

(C) Reviewing any related topics identified for further study by the House Committee on

Education and the Senate Committee on Education.

(2) Depending on the availability of National Education Association data on teacher salaries in other states, the teacher salary comparison may be prepared as a supplement to the report after September 1.

(h) The study for subdivision (a)(6) of this section shall be accomplished by reviewing:

(1) Expenditures from:

(A) Isolated school funding;

(B) National school lunch student funding;

(C) Declining enrollment funding;

(D) Student growth funding;

(E) Special education funding;

(2) Disparities in teacher salaries; and

(3) Any related topics identified for further study by the House Committee on Education and the Senate Committee on Education.

(i) The study for subdivision (a)(7) of this section shall be accomplished by:

(1) Completing an expenditure analysis and resource allocation review each biennium; and

(2) Reviewing any related topics identified for further study by the House Committee on Education and the Senate Committee on Education.

(j) The study for subdivision (a)(8) of this section shall be accomplished by:

(1) Using evidence-based research as the basis for recalibrating as necessary the state's system of funding public education;

(2) Adjusting for the inflation or deflation of any appropriate component of the system of funding public education every two (2) years; and

(3) Reviewing any related topics identified for further study by the House Committee on Education and the Senate Committee on Education.

68. Ark. Code Ann. § 10-3-2104. Report.

(a) The House Committee on Education and the Senate Committee on Education shall file separately or jointly, or both, reports of their findings and recommendations with the President Pro Tempore of the Senate and the Speaker of the House of Representatives no later than September 1 of each year prior to the convening of a regular session.

(b) For each recommendation the report shall include proposed implementation schedules with timelines, specific steps, agencies and persons responsible, resources needed, and drafts of bills proposing all necessary and recommended legislative changes.

(c) The report shall be supplemented as needed to accomplish the purposes of this continuing evaluation.

(d)(1) Before a fiscal session under Arkansas Constitution, Article 5, § 5, the House Committee on Education and the Senate Committee on Education shall meet, jointly or separately as needed, to review the funding recommendations contained in the most recent report filed under this section.

(2) The House Committee on Education and the Senate Committee on Education, meeting jointly or separately as

needed, also shall review any other matters identified by the House Committee on Education or the Senate Committee on Education that may affect the state's obligation to provide a substantially equal opportunity for an adequate education for all public school students.

(3) By September 1 of the calendar year before the beginning of a fiscal session, if the House Committee on Education and the Senate Committee on Education find that the recommendations in the most recent adequacy evaluation report filed under this section should be amended, the House Committee on Education and the Senate Committee on Education, jointly or separately, or both, shall advise in writing the President Pro Tempore of the Senate and the Speaker of the House of Representatives of their findings and amendments to the adequacy evaluation report.

Failure to Comply with Act 57

69. The 2006 Adequacy Report was the last adequacy report that even arguably complied with Act 57. That report ran 165 pages and included over 70 recommendations covering "the entire spectrum of public education." *See* Ark. Code Ann. § 10-3-2102(a)(1). For each recommendation, the report included proposed implementation schedules with timelines, specific steps, agencies and persons responsible and resources needed. *See* Ark. Code Ann. § 10-3-2104(b).

70. In contrast, the 2008 Adequacy Report was 59 pages and included only 11 recommendations. In sum, the Joint Committee recommended continuing with the status quo with a small COLA for certain funding categories. The Joint Committee also recommended an increase in transportation funding (discussed in

more detail below). (2008 Adequacy Report, pp. 53-57). The selective application of COLAs suggests that the State established the amount of school-funding "based upon what funds were available - not by what was needed." *Lake View V*, 364 Ark. at 413, 220 S.W.3d at 655-56.

71. A key component of Act 57 is the requirement for program evaluations. Ark. Code Ann. § 10-3-2102(a)(4) requires the Joint Committee to "[e]valuate the effectiveness of any program implemented by a school, a school district, an education service cooperative, the Department of Education, or the State Board of Education and recommend necessary changes." The Joint Committee has never evaluated programs as required by Act 57, Ark. Code Ann. § 10-3-2102(a)(4).

72. The 2008 Adequacy Report recognized that program evaluations were "essential" given the State's deference to local control in selecting interventions to help struggling students. The report stated, "It is essential to determine which of multiple interventions used by schools (such as one-to-one tutoring versus a professional development program) are providing results and which need to be dropped or modified." (2008 Adequacy Report, p. 19). The 2008 Adequacy Report acknowledged that the present practice of conducting "scholastic audits" provides "no data on the effectiveness of interventions." (2008 Adequacy Report, p. 19). The report concluded that without program evaluations "it is not possible to

determine which strategies work and which do not." (2008 Adequacy Report, p. 19). Despite Act 57 requiring program evaluations and the 2008 Adequacy Report acknowledging they were not being done, the Joint Committee ignored the problem and made no recommendations related to program evaluations.

73. The 2008 Adequacy Report recommendations were followed by a section entitled, "Additional Considerations." This section concludes with the following paragraph:

> Arkansas Code Ann. § 10-3-2104 requires that "For each recommendation, the report shall include proposed implementation schedules with timelines, specific steps, agencies and persons responsible, resources needed, and drafts of bills proposing all necessary and recommended legislative changes." Action on these recommendations, including legislation and final determinations of funding levels will be considered by the 87th General Assembly (2009 Regular Session).

(2008 Adequacy Report, p. 58). As the final sentence suggests, the 2008 Adequacy Report did not include "proposed implementation schedules with timelines, specific steps, agencies and persons responsible, resources needed, and drafts of bills proposing all necessary and recommended legislative changes," as required by Act 57, Ark. Code Ann. § 10-3-2104(b).

74. Act 57 requires the Joint Committee to prepare draft bills and to identify resources school districts will need to do what a bill requires so that foundation funding can be adjusted accordingly. *See* Ark. Code Ann. § 10-3-2104(b). Otherwise, new requirements imposed on school districts are "unfunded

mandates," and school districts will be required to use foundation funding intended for other purposes to cover the cost of new requirements. *See Lake View V,* 364 Ark. at 413, 220 S.W.3d at 655-56 ("[I]nflation and unfunded mandates listed in the Masters' Report were not specifically addressed by the General Assembly. It seems patently clear to this court that new funds may be necessary to meet some, if not all, of these unfunded mandates.").

75. The 87th General Assembly (2009) imposed a number of unfunded mandates on school districts in violation of Act 57. For example, Act 1373 of 2009 imposed burdensome reporting requirements related to school improvement plans; Act 1473 required school districts to develop a school bus safety plan; Act 496 required schools to purchase automated external defibrillators to provide a cardiopulmonary resuscitation program for employees; Act 314 required school districts to provide assistance to military families moving in or out of the district; and, Act 397 required school districts to provide instruction to parents on how to become more involved in their child's education.

76. The 2010 Adequacy Report failed to comply with Act 57 in the same ways as the 2008 Adequacy Report. The report again noted that no program evaluations were being done. It stated:

> [The Arkansas Department of Education ("ADE")] acknowledged that currently there are no systemic efforts in place to assess the effectiveness of scholastic audits in schools or school districts. ADE does not have the fiscal and human resources to successfully evaluate

> the effectiveness of all programs and interventions, but the department said it will continue to publish status and gain results in the annual performance reports, so that school performance can be evaluated.

(2010 Adequacy Report, p. 20). In other words, programs are not being evaluated as required by Act 57, and ADE has no plans to do so. Again, the Joint Committee ignored the problem and made no recommendations related to program evaluation.

77. The 2010 Adequacy Report ultimately made three recommendations. First, it repeated the recommendation from 2008 for an increase in transportation funding (discussed in more detail below). Second, it recommended a COLA of between 2.0 and 2.4 percent for foundation and categorical funding. This represented a compromise between the Joint Committee and the Governor's office. The Joint Committee approved a 2.5 percent COLA on August 25, 2010, but reversed its vote on August 31, 2010, because some committee members were "uncomfortable with the amount of the increase during the current tough economic times." (ADG 10/31/2010). Governor Mike Beebe pressured the Joint Committee to remove the recommended 2.5 percent COLA because of concerns about its impact on the overall State budget. According to Beebe's spokesman, Beebe and members of his staff approached lawmakers and "asked for more time to look through and examine the impact of the numbers on the education budget and the budget in general." (ADG, 10/31/2010).

78. On October 25, 2010, the Joint Committee convened to adopt a COLA as required by Act 57. *See* Ark. Code Ann. § 10-3-2102(j)(2). Senate Education Committee Chairman Jimmy Jeffress moved for a COLA of between 2.0 and 2.4 percent. Richard Weiss, representing the Governor, argued for a lower COLA and showed contempt for the requirement that education be the State's first funding priority. "What I think is really wise is to look at the whole state budget and make an apportionment based on what we have known out there, what we have used in the past," Weiss told the Joint Committee. (ADG 8/26/2010). House Education Committee Chairman Bill Abernathy defended the need for the COLA and stated that a 2.0 percent COLA would not even cover school districts' expected increase in teacher salaries. The Joint Committee voted to approve the motion and to recommend a COLA of between 2.0 and 2.4 percent.

79. The 2010 Adequacy Report's final recommendation was to change the due date of the adequacy report from September 1 to November 1. In fact, the Joint Committee has consistently failed to meet the September 1 deadline and has submitted "revised" reports after September 1. The 2006 Adequacy Report was "final" on January 22, 2007. The 2008 Adequacy Report was revised and submitted on December 30, 2008. The 2010 Adequacy Report cited herein is a "draft" distributed at the August 30, 2010 meeting of the Joint Committee.

80. As in 2008, the 2010 Adequacy Report did not include "proposed implementation schedules with timelines, specific step, agencies and persons responsible, resources needed, and drafts of bills proposing all necessary and recommended legislative changes," as required by Act 57, Ark. Code Ann. § 10-3-2104(b). The failure to comply with Act 57 means that new requirements imposed on school districts by the 88th General Assembly (2011) will be unfunded mandates.

81. The State's failure to comply with Act 57 and evaluate programs means the State has been "flying blind" since 2007. The State has abdicated its responsibility to provide oversight of school district expenditures. *See Lake View VI*, 370 Ark. at 145-46, 257 S.W.3d at 883 ("A critical component of [assuring that the school children of Arkansas are provided a substantially equal opportunity for an adequate education] has been the comprehensive system for accounting and accountability, which has been put in place to provide state oversight of school-district expenditures."). School districts have been either unable or unwilling to implement key elements of the Picus model, and the State has failed or refused to hold school districts accountable – instead, deferring to "local control." This calls into question the entire school-funding system which is based on the assumption that school districts are implementing the Picus model.

82. Two key elements of the Picus model merit special attention: extra-help for struggling students and professional development for teachers. School districts have been either unable or unwilling to provide struggling students the extra-help they need – individual and small group tutoring, extended day and summer school – as recommended by Picus. While the State has raised the state's average teacher salary, there has been no concomitant improvement in teaching because the State failed to implement a comprehensive, integrated and rigorous system of professional development, as recommended by Picus. These two critical elements of the Picus model are discussed in more detail below.

Extra-Help for Struggling Students

83. Picus first outlined its model for doubling student achievement in a report dated September 1, 2003 and entitled, "An Evidence-Based Approach to School Finance Adequacy in Arkansas." ("2003 Picus Report"). Picus advised the State that "[e]very school should have a **powerful and effective strategy for struggling students**, *i.e.*, students who must work harder and need more time to achieve proficiency levels." (emphasis in original). "The most powerful and effective strategy is individual one-to-one tutoring provided by licensed teachers," Picus reported, citing educational research. Picus recommended funding for fully licensed teacher-tutors with the number of teacher-tutors determined by the

number of NSL students at a school. Picus recommended one teacher-tutor for every 100 NSL students at a school. (2003 Picus Report, p. 25 n.11).

84. After the Arkansas Supreme Court recalled its *Lake View* mandate in 2005, the State retained Picus to "recalibrate" the school-funding system. On August 30, 2006, Picus submitted to the Joint Committee a report entitled, "Recalibrating the Arkansas School Funding Structure," ("2006 Picus Recalibration Report"). The report began with six general recommendations. It stated that Arkansas needs to:

> Recalibrate goals for student learning. In order to have Arkansas' students prepared for college, work in the emerging global economy and citizenship, the medium term goal is to double student academic achievement, as measured by the rigorous National Assessment of Educational Progress (NAEP) and the state's testing system. The long term goal is to have at least 90 percent of students – including low income, students of color, ELL and students with disabilities – achieve to proficiency standards.
>
> Re-engineer schools to have them deploy more powerful instructional strategies and use resources more productively. Schools need to change the curriculum they use, how they are organized and how they use resources – along the lines outlined in the next sections of this report. One core idea is that all students should take a college preparatory curriculum of 4 years of English, 4 years of history and at least 3 years of mathematics and science.
>
> Redesign teacher development so that all teachers acquire the instructional expertise to educate all students to proficiency and the ability to think, understand, problem solve and communicate. This means using the extensive professional development resources that are included in the funding model in the most effective ways.

> Reinforce achievement for struggling students by providing a series of extended learning opportunities, such as some combination 1-1, 1-3 and small group tutoring, extended-day and summer school programs, so all students have an opportunity to achieve to high standards. The objective is to hold performance standards high and vary instructional time so all students can achieve to rigorous standards. In this process, schools also will close the achievement gap.
>
> Retool schools' technology so they can tap the educating potential of the Internet.
>
> Restructure teacher compensation so the state begins to move away from paying teachers on the basis of just years of experience and education units, and towards a system that pays teachers individually for what they know and can do (a knowledge and skills-based pay system), and collectively a bonus for improving student learning.

Picus followed these general recommendations with three examples of jurisdictions that adopted these strategies and doubled student performance. (2006 Picus Recalibration Report, pp. 4-12). The State has failed to fully fund and implement any of these recommendations.

85. As in 2003, the 2006 Picus Recalibration Report recommended one-on-one teacher-tutoring for struggling students. Picus explained:

> The theory of action for why individual one-to-one tutoring, as well as other very small student groupings, boosts student learning follows. First, tutoring intervenes immediately when a student is trying to learn. Second, tutoring is explicitly tied to the specific learning problem. Third, when provided by a trained professional, tutoring provides the precise and appropriate substantive help the student needs to overcome the learning challenge. Fourth, tutoring should thus remedy short-term learning problems, and in many cases may not be needed on a continuing basis. In short, though potentially expensive, the ability of tutoring to intervene quickly, precisely and effectively to undo an individual's specific learning challenge gives it the ability to

have large effects, particularly when the specific learning challenge or challenges are key concepts related to a student's learning the grade-level expectations for a specific content area.

The impact of tutoring programs depends on how they are structured. The alignment between what tutors do and the regular instructional program is important (Mantzicopoulos, Morrison, Stone, & Setrakian, 1992; Wheldall et al., 1995). Who conducts the tutoring matters, as does the intensity of the tutoring (Shanahan, 1998). Poorly organized programs in which students lose instructional time moving between classrooms can limit tutoring effects (Cunningham & Allington, 1994). Researchers (Cohen, Kulik, & Kulik, 1982; Farkas, 1998; Mathes & Fuchs, 1994; Shanahan, 1998; Shanahan & Barr, 1995; Wasik & Slavin, 1993) have found greater effects when the tutoring includes the following mechanisms:

- Professional teachers as tutors
- Tutoring initially provided to students on a one-to-one basis
- Tutors trained in specific tutoring strategies
- Tutoring tightly aligned to the regular curriculum and to the specific learning challenges, with appropriate content specific scaffolding and modeling
- Sufficient time provided for the tutoring
- Highly structured programming, both substantively and organizationally.

(2006 Picus Recalibration Report, pp. 47-48).

86. Picus also made a power point presentation to the Joint Committee on June 15, 2006 entitled, "Level and Use of Resources in Arkansas: Are Use Patterns Consistent with Doubling Student Performance?" ("2006 Picus Resource Use Report."). After reviewing data on how school districts were using additional resources, Picus stated:

> Were the additional resources used in the main in the regular classroom to bolster instruction for the core classes of math, science, reading/English, history, language? NOT REALLY
>
> The bulk of the new resources were for programs and services OUTSIDE of the REGULAR CLASSROOM
>
> Dollars targeted to specific students – low income, handicapped, ELL, deseg – were used for targeted programs but often these programs were ineffective

(2006 Picus Resource Use Report, p. 32). School districts were not using the additional resources as intended because the State deferred to the judgment of local educators. Picus stated:

> The 2004 Arkansas School Finance Adequacy reform increased school resources based on the Arkansas version of the Evidence-Based model.
>
> The legislature did not require districts to use the resources according to the model; it deferred to the judgment of local educators.
>
> Did local school systems use the resources for the evidence-based, high impact strategies in the evidence-based model? Not Really

(2006 Picus Resource Use Report, p. 68). In short, the State deferred to local control and allowed school districts to ignore the Picus model. School districts were either unable or unwilling to implement the Picus model.

87. The Picus model allocated NSL funds for teacher-tutors. To prevent school districts from using NSL funds for other purposes, Picus recommended that:

> [T]he state program regulations and state law (Act 2283) for NSL funds be rewritten to allow districts to *use the funds only for tutors*, because tutoring is the most effective extra help strategy. Current law

> and regulations allow districts to essentially use NSL funds for any programmatic intervention; we recommend that the state be more restrictive. The state even could consider creating a "teacher tutor" category for a special certification to insure that such individuals have the requisite knowledge and skills to implement tutoring programs effectively.

(2006 Recalibration Report, p. 50 (emphasis in original)). The State rejected this recommendation[1] and has never required school districts to use NSL funds for teacher-tutors. To the contrary, the State responded with Act 1590 of 2007 and allowed school districts to continue to use NSL funds for teacher salaries – further exacerbating the intrastate teacher salary disparity (discussed in more detail below). The 2008 Adequacy Report indicated that school districts used only 3.1 percent of their NSL funds for tutoring. (2008 Adequacy Report, p. 46-47).

88. While Picus recommended one-on-one teacher-tutoring, Picus noted that schools that successfully doubled student achievement provided extra-help to struggling students using some combination of tutoring, extended day and summer school. (2006 Picus Recalibration, p. 12). The 2008 Adequacy Report found that school districts were spending only 2.5 percent of NSL funds on extended day programs and only 1.85 percent on summer programs. It also reported that Governor Beebe had created a Task Force on Best Practices for After-School and Summer Programs. The report concluded, "The Task Force will continue

[1] The school districts that moved for recall of the Court's *Lake View* mandate in 2005 did not raise this issue so it was not considered by Arkansas Supreme Court in *Lake View VI*.

researching and discussing policy recommendations." (2008 Adequacy Report, p. 11).

89. Ignoring evidence that school districts were not using NSL funds as intended, the 2008 Adequacy Report made only one recommendation related to NSL funding: a COLA of 1.6 to 2.8 percent. The 87th General Assembly (2009) rejected this recommendation and left NSL funding unchanged at the same level originally established for 2004-05.

90. The 2010 Adequacy Report again found that school districts were not using NSL funds as intended. The report noted, "Much of the research on improving student achievement points to the necessity of providing additional learning time. The Arkansas General Assembly created NLSA funding in part to provide those types of opportunities through tutoring, extended day, and summer programs." (2010 Adequacy Report, p. 51). However, a survey of school districts showed that "[m]ost districts allocate NSLA funding to both district-wide programs and individual schools. The majority of districts said they target NSLA funding to certain grade levels for additional support and provide different NSLA programs to different schools to target specific academic needs." (2010 Adequacy Report, p. 51). The 2010 Adequacy Report contained no reference to the Governor's Task Force on Best Practices for After-School and Summer Programs, and it included no recommendations for addressing school districts' continuing

failure to use NSL funds for additional learning time through tutoring, extended day and summer school programs.

91. Arkansas Advocates for Children and Families recently released a report examining how school districts were using NSL funds. Like the adequacy reports, it found that school districts were not spending NSL funds as intended. The report's summary states:

> At the end of the 2008-2009 academic year, Arkansas schools were sitting on more than $25 million they were supposed to spend that year helping poor students catch up to their peers. They didn't spend it on after-school and preschool programs or other techniques proven by research to help raise the academic achievement of impoverished children. Instead, school administrators let it stockpile and then rolled it over to the next year—just like many have done every year since the state money started being distributed in 2004 to districts with high populations of poor children.
>
> More than a fifth of all Arkansas school districts in 2009 carried over more than 20 percent of the money they received through the National School Lunch Act (NSLA) funding program. Much of the money sent to schools to help those specific children went unspent.
>
> Only 31 of the 257 districts and charter schools spent all their NSLA money in the year it was intended. That's 12 percent of schools.
>
> However, money that was spent often didn't pay for the most effective programs that help children succeed in school, move on to college and lift themselves out of poverty. Research by Arkansas Advocates for Children and Families shows that certain approaches are the best way to close the academic achievement gap between minority and poor students and their peers. They are:
>
> - High-quality before- and after-school and summer programs.
> - High-quality early childhood education.
> - School initiatives that promote student health.

> Just 12 percent of the $157.8 million sent to Arkansas schools in 2008/2009 school year to help poor students was spent on these proven programs. That means thousands of children whose poverty status drew extra money to their district didn't benefit from it in the most effective way possible.
>
> Arkansas leaders should stop school districts from carrying over large amounts of unspent poverty money. That money needs to help our children today.

(Paychecks and Politics, Issue 50: December 2010, p. 1).

92. If school districts could or would provide extended day and summer programs, recent research indicates most students would voluntarily participate. Act 722 of 2009 created the Arkansas Legislative Taskforce on Reducing Poverty and Promoting Economic Opportunity ("Poverty Taskforce"). The Poverty Taskforce issued its report on November 29, 2010. The Poverty Taskforce reported:

> Recent surveys conducted in Arkansas by the Wallace Foundation and JC Penny Afterschool Fund provides a good estimate of the supply and demand for afterschool and summer programs. The survey found that only 12 percent (59,837) of Arkansas' K-12 youth participate in afterschool programs. It also found that 44 percent (187,722) of all Arkansas children not in after-school would be likely to participate if an after-school program were available in the community, regardless of their current care arrangement. Another survey determined that only 17 percent of children (82,701) in Arkansas participate in a summer learning program. Yet 58 percent of parents (with 233,509 children) are interested in enrolling their children in such programs. This indicates that there are not enough of these programs.

(Poverty Taskforce, p. 19). The Poverty Taskforce identifies NSL funding as a "possible funding source for extended learning programs," without acknowledging

that Picus recommended that school districts be required to use NSL funding for these types of programs. (Poverty Taskforce, p. 19).

93. The Picus model provides school districts NSL funding for teacher-tutors, extended day and summer programs, but school districts are using the funding, if at all, for less-effective programs. The State cannot continue to fund school districts based on the Picus model knowing that school districts are not implementing that model. The State must either require school districts to implement the Picus model (and provide them the funding necessary to do so) or adopt a new funding system that will provide all children, including the 27 percent of kids living in poverty, a substantially equal opportunity for an adequate education.

Professional Development

94. Improving teacher quality is a necessary prerequisite to improving student achievement in Arkansas. The 2003 Picus Report explained:

> ***Indeed, improving teacher effectiveness through high quality professional development is arguably as important as all of the other resource strategies identified; better instruction is the key aspect of the education system that will improve student learning*** (Rowan, Correnti & Miller, 2002; Sanders & Horn, 1994; Sanders & Rivers, 1996; Webster, Mendro, Orsak & Weerasinghe, 1998).
>
> Moreover, all the resources recommended in this report need to be transformed into high quality instruction in order to transform them into increases in student learning (Cohen, Raudenbusch & Ball, 2002). And effective professional development is the primary way those

resources get transformed into effective and productive instructional practices.

(2003 Picus Report, p. 33 (emphasis supplied)). Citing education research, Picus identified six structural features of an effective professional development system:

> 1) The **form** of the activity – that is, whether the activity is organized as a study group, teacher network, mentoring collaborative, committee or curriculum development group. The above research suggests that effective professional development should be school-based, job-embedded and focused on the curriculum taught rather than a one-day workshop.
>
> 2) The **duration** of the activity, including the total number of contact hours that participants are expected to spend in the activity, as well as the span of time over which the activity takes place. The above research has shown the importance of continuous, ongoing, long-term professional development that totals a substantial number of hours each year, at least 100 hours and closer to 200 hours.
>
> 3) The degree to which the activity emphasizes the **collective participation** of teachers from the same school, department, or grade level. The above research suggests that effective professional development should be organized around groups of teachers from a school that over time includes the entire faculty (e.g., Garet, Birman, Porter, Desimone & Herman, 1999).
>
> 4) The degree to which the activity has a **content focus** – that is, the degree to which the activity is focused on improving and deepening teachers' content knowledge as well as how students learn that content. The above research concludes that teachers need to know well the content they teach, need to know common student miscues or problems students typically have learning that content, and effective instructional strategies linking the two (Bransford, Brown & Cocking, 1999; Kennedy, 1998).
>
> 5) The extent to which the activity offers opportunities for **active learning**, such as opportunities for teachers to become engaged in the meaningful analysis of teaching and learning; for example, by scoring

student work or developing and "perfecting" a standards-based curriculum unit. The above research has shown that professional development is most effective when it includes opportunities for teachers to work directly on incorporating the new techniques into their instructional practice (e.g., Joyce & Showers, 2002).

6) The degree to which the activity promotes **coherence** in teachers' professional development, by aligning professional development to other key parts of the education system such as student content and performance standards, teacher evaluation, school and district goals, and the development of a professional community. The above research supports tying professional development to a comprehensive, inter-related change process focused on improving student learning.

(2003 Picus Report, pp. 34-35 (emphasis in original)). Picus made the following recommendations:

a. **Some time during the summer for intensive training institutes.** This can most easily be accomplished by insuring that approximately 10 days of the teacher's normal work year will be dedicated to professional development. Due to the fact that the current Arkansas teacher year is 185 days, and includes 5 days for professional development, this recommendation requires an increase of 5 days to the contract, to produce the minimum number of 10 days.

b. **On-site coaching for all teachers** to help them incorporate the practices into their instructional repertoire. The instructional facilitators described above would provide this function.

c. **Collaborative work with teachers in their school during planning and preparation periods** to improve the curriculum and instructional program, thus reinforcing the strategic and instrumental need for planning and preparation time during the regular school day. This will require smart scheduling of teachers during the regular school day and week.

d. **Funds for training** during the summer and for some ongoing training during the school year, the cost of which is about $25,000 for a school unit of 500 students, or $50/pupil.

95. The State adopted two of Picus' recommendations. It added five extra days to teachers' contracts and provided school districts $50 per pupil to pay for professional development – although it placed no limitation on how school districts spend this money. The State rejected Picus' recommendation of "least 100 hours and closer to 200 hours" of annual professional development that research showed was necessary, instead requiring only 60 hours. It also rejected Picus' recommendation for on-site coaches for all teachers, collaborative work with teachers and the other structural features of an effective professional development system.

96. In the 2006 Picus Recalibration Report, Picus repeated its review of education research into effective professional development and repeated the recommendations from its 2003 report that were not implemented. The 2006 Adequacy Report ignored these recommendations and made no substantive recommendations related to professional development.

97. The 2008 Adequacy Report's section on professional development was brief. It noted that school surveys "elicited a variety of responses. The majority of school officials interviewed ranked [professional development] as satisfactory or above. Seven schools ranked [professional development] they

received as below satisfactory, and three schools did not respond at all." (2008 Adequacy Report, p. 47).

98. Other sections of the 2008 Adequacy Report, however, noted the need for more and better professional development. The section on the racial achievement gap noted that schools that have been successful in closing the gap had "certain traits, such as extended learning time, rigorous professional development and strong school leadership." (2008 Adequacy Report, p. 10). The section on student mobility cited research indicating that "[t]eachers should receive professional development on facilitating the integration of new students. . . ." (2008 Adequacy Report, p. 12). In the section on formative assessments (tests given during the school year that help teachers tailor lessons to student learning needs), the report stated that "sustained investment in professional development," among other things, was necessary for formative assessments to improve student achievement. (2008 Adequacy Report, p. 14). The section on teacher attrition reported a survey of teachers who quit the teaching profession revealed that 15 percent reported "irrelevant professional development" and 3 percent reported "lack of professional development" as their reason for leaving. (2008 Adequacy Report, p. 23). Finally, the section on leadership identified 20 strategies for improving educational leadership including, "16. Develop a comprehensive

professional development plan for the state that will include mentoring and coaching." (2008 Adequacy Report, p. 29).

99. Despite the reported need for more and better professional development, the 2008 Adequacy Report made only one recommendation related to professional development: a COLA of 1.6 to 2.8 percent. The 87th General Assembly (2009) rejected this recommendation and left professional development funding at $50 per pupil – the same amount originally recommended by Picus for the 2004-05 school year.

100. The 2010 Adequacy Report included a more substantive discussion of professional development. It began by acknowledging the importance of effective professional development: "Professional development (PD) for educators is a critical factor in the effort to improve student performance and ensure highly qualified teachers in the classroom." (2010 Adequacy Report, p. 56). It noted that funding for professional development had not changed since the 2004-05 school year – $50.00 per student. It then went on to describe how school districts are providing professional development to their teachers:

> Responses from the BLR's district survey indicate that a high percentage of districts' PD is provided by educational cooperatives (coops) and the districts themselves. Contractual PD is infrequently used by school districts in Arkansas.
>
> In a BLR survey of teachers, respondents said that grade-specific and subject-specific PD was most effective in improving instruction aimed at increasing student achievement. Respondents also noted that

districts choosing PD based on individual teachers' needs is important as well.

Research shows that equally important is the instilling of knowledge and skill acquisition through follow-up modeling, observational feedback, and job-embedded mentoring by presenters or coaches (Blank & de las Alas, 2008; Council of Chief State School Officers, 2009; Fogarty & Pete, 2009; Yoon et al., 2007). Teachers need time and coaching to apply strategies taught in PD exercises to fully acquire operational skills and knowledge.

All BLR surveys and interviews, including some in-depth case studies by the BLR, indicate that technology training for teachers is a top priority for PD. When principals were asked to indicate the top five most effective PD for teachers, technology training was the most frequent response. According to on-site interviews and case studies, most districts have purchased valuable technology (e.g., Smart Boards) with stimulus funds, but many teachers need to learn how to use it. Too many teachers, for example, are using SMART Boards as "white boards." Many principals and teachers indicated that they also need technology instructors in their district. ADE reports that most of the technology PD is done by educational cooperatives. Among their top survey responses for most effective PD, principals also listed training in the interpretation and use of test data for instruction.

Teachers and principals also were asked which PD experiences in the past year would they rate as unproductive in terms of professional enhancement. Universally required workshops and conferences that do not meet teachers' needs or interests were rated as unproductive by teachers and many principals. Respondents also reported that one-time workshops or conferences, with no follow-up opportunities to practice skills taught, have little practical utility. Requiring teachers to attend workshops devoted to content they do not teach also was a common complaint among teachers on the BLR survey and in on-site interviews.

(2010 Adequacy Report, pp. 56-57). These responses make clear that Arkansas lacks an effective professional development system. Principals' assessments of the

need for professional development demonstrate a lack of planning and coordination. Teachers continue to waste time in irrelevant workshops just to get the required 60 hours annually.

101. The professional development system in Arkansas lacks the structural features of an effective professional development as described by Picus. It is not collaborative, not content-focused, does not involve active learning and is not aligned with "other key parts of the education system such as student content and performance standards, teacher evaluation, school and district goals, and the development of a professional community." (2003 Picus Report, pp. 34-35) Even so, the 2010 Adequacy Report made no recommendations for improving professional development.

Arkansas Advanced Initiative in Math and Science

102. A recent report by the Arkansas Advanced Initiative in Math and Science ("AAIMS") provides new evidence that additional learning time and high-quality professional development work to improve student achievement. AAIMS is a non-profit corporation funded by private-sector grants that works with Arkansas schools to maximize the number of high school students passing Advanced Placement ("AP") exams. AAIMS began working with nine schools in 2008 and has expanded the number of schools served each year and now serves a total of 31 schools. A key component of the AAIMS's model is effective

professional development that includes 60 hours of training, access to subject matter experts, lead teachers and vertical team meetings. Another key component is extended learning time for students in the form of tutoring and Saturday study sessions.

103. On October 11, 2010, AAIMS reported to the State Board that the nine schools that began implementing the AAIMS program in 2008 had a 68.9 percent increase in students passing the AP exams (scoring a 3 or better), while other Arkansas schools saw a 10.5 percent increase and the nation as a whole saw a 13.5 percent increase. AAIMS explained:

> The 24 AAIMS schools comprised only 8% of Arkansas's public high schools reporting qualifying AP math, science, and English scores; yet they accounted for 73% of the state's increase for students and 61% of the state's increase for minority students taking an AP math, science, and English exam, and 61% of the state's increase in qualifying scores for 2009-10.
>
> Because of the AAIMS schools, the state of Arkansas ranks #1 in the United states in 1 year % increases for qualifying scores on AP math and science exams from 2009 to 2010 for all students!

(AAIMS Report, October 11, 2010).

104. The success of AAIMS shows that high-quality professional development and additional learning time work to improve student achievement. Rather than requiring implementation these highly-effective and proven strategies, the State deferred to local control and allowed school districts to select their own programs and interventions. The State then failed to evaluate the programs and

interventions implemented by school districts so it cannot be determined what, if anything, is working. Arkansas' NAEP scores, graduation rate and college remediation rate provide compelling evidence that, overall, they are not working to improve student achievement.

105. Like most other school districts, Deer/Mt. Judea' s existing funding will not cover the cost of high-quality professional development, teacher-tutors for struggling students or transportation for extended day and summer school programs. This is true despite the fact that Deer/Mt. Judea receives additional funding beyond what most other school districts receive. The State has recognized that geographically remote schools with small enrollments are more expensive to operate and need additional funding, but the amount of additional funding provided these schools has been arbitrarily based on the amount of funding available rather than the amount needed.

Special Funding for Small, Remote Schools

106. The "Isolated Funding" program was created by Act 1318 of 1997. It divided isolated *districts* into two categories based on student density and provided additional funding based on a formula that considered a district's enrollment and property tax revenue. To receive funding under Act 1318, a school district was required to have less than 350 students. During the Second Extraordinary Session of 2003, Act 60 required the consolidation of school districts with fewer than 350

students. To ensure that remote schools in consolidated districts continued to receive isolated funding, Act 60 and Act 65 of the Second Extraordinary Session of 2003 created a definition for isolated *schools* and provided continued isolated funding for the consolidated districts.

107. Deer/Mt. Judea was formed by consolidating the Deer School District with the Mt. Judea School District. Both the Deer K-12 campus and the Mt. Judea K-12 campus are isolated schools as defined by Ark. Code Ann. § 6-20-603. Section 6-20-603 lists 56 isolated schools and specifies the per student funding amount provided to the school districts containing them. Deer receives $853.00 per student in Isolated Funding; Mt. Judea receives $622.00.

108. Act 1452 of 2005, Ark. Code Ann. § 6-20-604, created the "Special Needs Isolated Funding" program to provide additional funding to small, remote schools. To be eligible for Special Needs Isolated Funding, a school district must qualify for Isolated Funding. In addition, the local school board by majority vote must "determine[] that the isolated school is so isolated that to combine its operation in one (1) school district campus would be impractical or unwise." Ark. Code Ann. § 6-20-604(b)(2). Districts that qualify for Special Needs Isolated Funding receive an additional 20 percent, 15 percent, 10 percent, or 5 percent of the foundation funding received. The percentage received depends on a district's ADM, student density, and the grade levels served in isolated schools. In 2008-09,

18 districts, including Deer/Mt. Judea, received Special Needs Isolated Funding. Deer/Mt. Judea, the most remote district in Arkansas, was the only district to receive an additional 20 percent of foundation funding in Special Needs Isolated Funding.

109. In Act 1452 of 2005, the General Assembly recognized that "school districts that contain isolated schools need additional funding to provide an adequate education for students attending schools in those school districts." Ark. Code Ann. § 6-20-604. The General Assembly has expressly identified two reasons why small, remote schools need additional funding. First, in Act 1452 of 2005, the General Assembly declared, "The new requirements under the Standards for Accreditation of Arkansas Public Schools adopted by the State Board of Education have disproportionately increased the cost of operations for school districts that contain isolated schools." *See* Act 1452 of 2005, § 1. Second, small, remote schools have higher transportation costs than other schools. In 2009, the General Assembly declared:

> It is found and determined by the General Assembly of the State of Arkansas that school districts that enroll students in an isolated school or from a closed isolated school need funding for the transportation of those students to and from the isolated area; that some school districts may lose isolated school funding when an isolated school is closed but continue to have the additional transportation costs; that the loss of the funding may place a hardship on the school district involved; and that this act is immediately necessary because school districts affected by this act and the Department of Education need to resolve the funding

> issues under this act before the beginning of the 2009-2010 school year.

Act 811 of 2009, § 4. Thus, the State has acknowledged that small, remote schools need additional funding to meet State standards and to provide transportation to their students.

110. The funding amounts in Ark. Code Ann. § 6-20-603 and 604 are not rationally related to the needs of small, remote schools. The Joint Committee knows this and has recommended that the system of funding small, remote schools be changed. In 2006, BLR conducted a study of small, remote districts. BLR first presented criteria used by other states to identify and fund small, remote schools. (2006 BLR Special Needs Study, pp. 8-10). BLR then discussed the difficulty small, remote schools have in meeting the requirements of No Child Left Behind ("NCLB"). BLR reported:

> A requirement of the NCLB Act (2001) that presents a particular challenge to small rural and isolated schools is the provision that children in Title 1 schools be instructed by "highly qualified" teachers. The "Highly Qualified Teacher" provisions of the NCLB Act (2001) loom large for rural school districts because teachers are difficult to recruit and retain, and teachers often have to teach in more than one subject and grade level due to small faculties (Richard, 2003).

(2006 BLR Special Needs Study, p. 10). The report also noted that small, remote schools were at risk for sanctions under NCLB for not making adequate yearly progress ("AYP") because of sampling error. "In lay terms, this means a lot is riding on a single student's performance, and there are many possibilities of not

achieving AYP." (2006 BLR Special Needs Study, pp. 8-10). That study concluded:

> Law governing the closing of isolated schools in the state may need to be reevaluated. Law providing the requirements for funding isolated schools may need to be reconsidered. Currently, isolated schools funded prior to 2004-05 are being funded at levels prescribed by law and the original qualifications for that funding are no longer considered for that group of schools. The requirements for special needs isolated funding partially include some of the requirements from the original isolated school funding. The designation of "isolated" for purposes of additional funding could be reviewed and a more stream-lined determination of that designation could be developed.

(2006 BLR Special Needs Study, p. 24; 2006 Adequacy Report, p. 91).

111. The 2006 Adequacy Report noted BLR's Special Needs Study and recommended "that the state continue to fund isolated schools and special needs isolated funding, and that the funding mechanisms under Arkansas Code Annotated §§ 6-20-603 and 6-20-604 be rewritten." (2006 Adequacy Report, p. 137). The General Assembly rejected this recommendation. The 2008 and 2010 adequacy reports included no discussion of small, remote schools, and the basic funding mechanisms for Isolated Funding and Special Needs Isolated Funding remain unchanged.

112. While the State has not amended § 6-20-603 or 604 as recommended by BLR and the Joint Committee, the State did amend § 6-20-604 during the 2010 Fiscal Session. Act 293 of 2010 included a section that will allow the Melbourne

School District, and only the Melbourne School District, to continue to receive funding under § 6-20-604 despite having closed an isolated school. Section 32 of Act 293 amended § 6-20-604(e) as follows (new language is underlined):

> (e)(1) ~~A~~ Except as provided in subdivision (e)(2) of this section, a school district meeting the requirements of subsection (b) of this section shall receive an amount equal to ten percent (10%) of the foundation funding received by the school district under § 6-20-2305(a)(2) based on the three-quarter average daily membership of the isolated school area under § 6-20-2305(a)(2) if the school district has school facilities open for kindergarten through grade twelve (K-12) in one (1) or more isolated schools meeting the requirements of subsection (b) of this section.
>
> (2) A school district shall receive an amount equal to ten percent (10%) of the foundation funding received by the school district under § 6-20-2305(a)(2) based on the three-quarter average daily membership of the isolated school area under § 6-20-2305(a)(2) if:
>
> (A) The school district has school facilities serving students in any grade in kindergarten through grade twelve (K-12) in one (1) or more isolated schools meeting the requirements of subsection (b) of this section; and
>
> (B) The school district closed an isolated facility serving students in grades seven (7) through twelve (12) between January 1, 2008, and July 1, 2008.

113. The Melbourne School District is the only school district that will receive Special Needs Isolated Funding under Section 32 of Act 293 because of the time period specified in § 6-20-604(e)(2)(B). There are Arkansas school districts that satisfy the criterion contained in § 6-20-604(e)(2)(A) but do not satisfy the criterion contained in § 6-20-604(e)(2)(B). There is no rational or legitimate

reason to provide additional funding to the Melbourne School District based on the fact that it closed an isolated school *between January 1, 2008 and July 1, 2008.*

114. The time period criterion set forth in § 6-20-604(e)(2)(B) bears no rational relationship to a school district's need for special needs isolated funding. The time period during which an isolated school was closed has no impact on the cost of transporting students living in an isolated school area. The 87th General Assembly failed to provide a rational or legitimate reason to provide Special Needs Isolated Funding to the Melbourne School District but not other similarly situated school districts. School districts that closed isolated schools before, January 1, 2008, and after July 1, 2008, are similarly situated in all material respects to the Melbourne School District.

115. The Melbourne School District's receipt of funding pursuant to Section 32 of Act 293 reduces the amount of funding that Deer/Mt. Judea receives pursuant to § 6-20-604.

116. Amendment 14 to the Constitution of Arkansas provides, "The General Assembly shall not pass any local or special act." In *Wilson v. Weiss*, 368 Ark. 300, 245 S.W.3d 144 (2006) ("*Wilson I*"), the Arkansas Supreme Court summarized its Amendment 14 jurisprudence:

> We have "differentiated that 'special' legislation arbitrarily separates some person, place, or thing, while 'local' legislation arbitrarily applies to one geographic division of the state to the exclusion of the rest of the state." *McCutchen v. Huckabee,* 328 Ark. 202, 208, 943

S.W.2d 225, 227 (citing *Fayetteville Sch. Dist. No. 1 v. Arkansas State Bd. of Educ.*, 313 Ark. 1, 852 S.W.2d 122 (1993)). With regard to a challenge under Amendment 14, this court has also said:

> [T]his court has repeatedly held that merely because a statute ultimately affects less than all of the state's territory does not necessarily render it local or special legislation. *Fayetteville, supra; City of Little Rock v. Waters,* 303 Ark. 363, 797 S.W.2d 426 (1990).

Instead, we have consistently held that an act of the General Assembly that applies to only a portion of this state is constitutional if the reason for limiting the act to one area is rationally related to the purposes of that act. *Fayetteville, supra; Owen* [*v. Dalton*], *supra* [296 Ark. 351,757 S.W.2d 921 (1988)]; *Board of Trustees v. City of Little Rock,* 295 Ark. 585, 750 S.W.2d 950 (1988); *Streight v. Ragland,* 280 Ark. 206, 655 S.W.2d 459 (1983). Of particular interest, is *Phillips v. Giddings,* 278 Ark. 368, 646 S.W.2d 1(1983), where we clarified that ***although there may be a legitimate purpose for passing the act, it is the classification, or the decision to apply that act to only one area of the state, that must be rational.*** *McCutchen,* 328 Ark. at 208-09, 943 S.W.2d at 227-28.

Wilson I, 368 Ark. at 307-08, 245 S.W.2d at 150 (emphasis supplied).

117. Section 32 to Act 293 is local or special legislation in violation of Amendment 14. There is no rational and legitimate reason for Section 32 of Act 293 to provide Special Needs Isolated Funding to the Melbourne School District and not other similarly situated school districts that have closed isolated schools. *Wilson I,* 368 Ark. at 308, 245 S.W.2d at 151.

118. The State knows that Isolated Funding and Special Needs Isolated Funding do not provide small, remote schools the funding they need to provide their students a substantially equal opportunity for an adequate education. Most

recently, the Two Rivers School District sought to close the small, remote Fourche Valley K-12 campus because State funding was inadequate. The State Board approved the closures without determining whether excessive transportation time would deny Fourche Valley students a substantially equal opportunity for an adequate education. If nothing changes, the Deer and Mt. Judea K-12 campuses will suffer the same fate as Fourche Valley.

The Fourche Valley Closure

119. In May of 2004, the State Board created the Two Rivers School District ("Two Rivers") by the administrative consolidation of the Plainview-Rover School District, the Fourche Valley School District and the Ola School District. The Fourche Valley School District was an isolated school district as defined by Ark. Code Ann. § 6-20-601(a) (Repl. 2009). Upon consolidation, Fourche Valley Elementary School (grades K-6) and Fourche Valley High School (grades 7-12) became isolated schools as defined by Ark. Code Ann. § 6-20-602(a) (Repl. 2009). Following consolidation, the State Board created a new school board composed of members elected from seven single-member zones. The territory of the former Fourche Valley district was included in a single zone.

120. At the time of consolidation, Ark. Code Ann. § 6-20-602(b) stated that isolated schools "shall remain open." *See* Act 60 of 2003 (2nd Ex. Sess.), § 5. In 2005, the General Assembly amended Ark. Code Ann. § 6-20-602(b) and created a

process for closing isolated schools. *See* Act 1397 of 2005, § 2. It requires either a unanimous vote of the local school board, or if the vote is not unanimous, approval by the State Board. The State Board may approve the closing of an isolated school where it finds that closure "is in the best interest of the students in the school district as a whole." Ark. Code Ann. § 6-20-602(b)(2)(C)(ii).

121. Two Rivers' Superintendent, Sherry Holliman, recommended closing the Fourche Valley schools because the schools were running a deficit and leading Two Rivers toward "fiscal distress." School districts identified as in fiscal distress are subject to state takeover including removal of the superintendent and dissolution of the board of directors. *See* Ark. Code Ann. §§ 6-20-1901-- 6-20-1906. On March 2, 2009, Two Rivers' Board of Directors voted 6 to 1 to close the Fourche Valley schools with the Fourche Valley representative dissenting. Because the vote was not unanimous, Ark. Code Ann. § 6-20-602(b) required Two Rivers to petition the State Board for approval to close the schools.

122. The State Board conducted a hearing on Two Rivers' petition to close the Fourche Valley schools on April 13, 2009. Before the State Board, Two Rivers presented proof that inadequate state funding made it impossible for Two Rivers to continue operating the Fourche Valley schools in compliance with state standards. The Fourche Valley schools' operating deficit was causing Two Rivers to have a "declining balance" that would eventually result in Two Rivers being identified as

in fiscal distress. Holliman told the State Board that closing the Fourche Valley schools was a last resort. She testified:

> Addressing the Fourche Valley campus is the only way we feel that we -- at this point we've made all of the cuts in the district that we can, with the exception of addressing the Fourche Valley campus. We think this is a way for us to become more efficient with what we can do. We hate to have to petition for this closure . . . [T]his is not what we would like to see happen [f]or the patrons of the Fourche Valley District, but we feel that there's no choice left to us. With too many students related to the staff, [being] required to meet state standards, the facility deficiencies that we have district-wide, and trying to make school improvements, we feel we need to move forward with this.

(State Board Transcript, April 13, 2009).

123. Parents of Fourche Valley students argued that the Fourche Valley schools were necessary for the State to provide Fourche Valley students a substantially equal opportunity for an adequate education because of the negative impact of excessive transportation time. Two Rivers acknowledged that closing the Fourche Valley schools would require three of the four Fourche Valley bus routes to travel an additional 15.8 miles one-way each day – effectively adding around 40 minutes per day to the routes. In addition, these three bus routes would be consolidated into two longer routes to save additional money. Holliman stated that the longer of these two routes would travel 63.9 miles and last 80 minutes one-way. The Fourche Valley bus route closest to Plainview would be consolidated with an existing Plainview route. According to Holliman, that route would be 71.6 miles. Holliman estimated that this route would be between 80 and 90 minutes

one-way. A Fourche Valley patron and Fourche Valley's representative on the Two Rivers' Board of Directors testified that the one-way transportation time would likely be closer to 120 minutes – four hours of total transportation time each day.

124. The State Board voted 5 to 2 to approve closing the Fourche Valley schools. The State Board, acting on the advice of counsel, refused to determine whether the Fourche Valley schools were necessary because of the negative impact of excessive transportation time. After Fourche Valley patrons presented their case to the State Board, legal counsel for the State Board told them ***not*** to consider the Fourche Valley patrons' constitutional argument. He said, "In my opinion, as your Counsel, that goes . . . beyond your responsibilities as set forth in 6-20-620." (Record, Tr. 94:25-95:1-3). Similarly, legal counsel for Two Rivers stated, "To the extent that Mr. Finley (sic) raised constitutional issues regarding school funding and those type things, I submit to you, and the District submits to you, that those are not issues that this Board should be concerned with." (Record, Tr. 97:1-5)

125. The State Board erroneously interpreted Ark. Code Ann. § 6-20-602(b) to preclude consideration of whether an isolated school is necessary because of the negative impact of excessive transportation time. As noted above, the State Board may approve the closing of an isolated school where it finds that closure "is in the best interest of the students in the school district as a whole." See

Ark. Code Ann. § 6-20-602(b)(2)(C)(ii). A basic principal of statutory construction is that "[i]f it is possible to construe an act so that it will pass the test of constitutionality, the courts not only may, but should and will, do so." *Love v. Hill,* 297 Ark. 96, 99, 759 S.W.2d 550, 551 (1988) (citing *Davis v. Schimmel,* 252 Ark. 1201, 482 S.W.2d 785 (1972)). Thus, the "best interest of the students" standard in Ark. Code Ann. § 6-20-602(b)(2)(C)(ii) may, and should be, construed in a constitutional manner. For the "best interest of the students" standard to be constitutional, it cannot be construed to allow an isolated school to be closed if the school is necessary for the State of Arkansas to provide the isolated school students a substantially equal opportunity for an adequate education because of the negative impact of excessive transportation time.

126. Carol Walker and other Fourche Valley parents ("Walker") appealed the State Board's decision to Circuit Court pursuant to the Administrative Procedure Act ("APA"), Ark. Code Ann. § 25-15-212 (Repl. 2004). The Circuit Court affirmed the decision of the State Board. Walker appealed. The Supreme Court affirmed refusing to address the constitutional issues raised by Walker.[2] The Arkansas Supreme Court made clear it was not deciding whether the State's school-funding system was constitutional. It stated:

[2] Walker did not challenge the constitutionality of § 6-20-602(b)(2)(C)(ii) on its face or as applied by the State Board.

> The State was not a defendant in this case, and it is the [State] Board's action that is the sole action subject to review under the APA. While the Board is an agency of the State, it is not the State itself, and because this is an appeal under the APA, ***whether or not the State itself is in violation of its constitutional duty to provide an adequate education is simply not before us.***

Walker v. State Board, 2010 Ark. 277 at 19 (emphasis supplied). Nevertheless, the Arkansas Supreme Court hinted that 90 minute one-way bus rides were constitutionally suspect. It stated, "It is evident to this court that the General Assembly is aware of the issues involving public-school transportation, and we have every confidence that its resolution of any matters involving education, such as transportation concerns, will be direct and substantial." *Walker*, 2010 Ark. 277 at 20, n.7.

127. The Fourche Valley case makes clear that the current school-funding system is inadequate for small, remote schools and demonstrates the State's inhumane desire to close these schools. The Picus model, based on prototypical schools of 500 students, does not come close to meeting the needs of small, remote schools with less than 200 students K-12. The Picus model, as implemented by the State, fails to meet the needs of small, remote schools to transport students, attract and retain highly-qualified teachers, pay teacher retirement and health insurance benefits and build and maintain facilities. Each of these deficiencies is discussed in more detail below.

Student Transportation

128. Student transportation is a necessary component of an adequate education system. The State's current system of funding student transportation has no rational basis. As discussed above, the foundation funding matrix includes a per student amount for student transportation -- $286.00 per student in 2008-09. This means all school districts receive the same amount of transportation funding per student, irrespective of their actual transportation costs. As a result, some school districts receive more transportation funding than they need, and school districts like Deer/Mt. Judea receive less than they need and must use foundation funding intended for other components of an adequate education to pay transportation costs and/or subject its students to excessive transportation time. Excessive transportation time has a negative impact on student achievement and places students at increased risk of serious injury or death from traffic crashes. To comply with the constitution, the State must adopt a standards- and research-based system of funding transportation that includes a maximum one-way transportation time.

129. In 2006, Picus recommended that transportation funding be removed from foundation funding and that a new transportation funding system be developed. The 2006 Picus Recalibration Report stated:

> In addition, as discussed at the January meeting, we will recommend a different approach to transportation funding. We anticipate proposing

> a method of funding transportation costs that will vary by district depending on district characteristics (i.e. population density, road condition, distances and number of students transported, etc.). Because data on pupil transportation are limited, this document utilizes actual transportation expenditures of Arkansas school districts to estimate a state-wide per pupil figure. Again, seeking guidance from the Oversight Committee we will find a way to allocate transportation funds that more accurately reflects the realities of individual school districts.

(2006 Picus Recalibration Report, p. 61). Until a new system of funding transportation was developed, Picus estimated districts' 2007-08 transportation cost by increasing their past actual cost for inflation. Picus explained:

> As noted above, we recommend that the transportation figure be removed from the new "per pupil" [foundation funding] amount and provided to districts as a separate grant, providing each district with the amount actually spent per pupil on transportation in 2004-05 inflated up to an appropriate figure for 2007-08 until the state creates a more standards- and research-based transportation funding formula.

(2006 Picus Recalibration Report, p. 79). Picus never made a specific recommendation for funding transportation because the State halted Picus' study of transportation before it was completed. Upon information and belief, the State halted the Picus study of transportation because of concerns about the cost -- both the cost of the study and the cost of the transportation funding formula likely to be recommended.

130. The 2006 Adequacy Report included the following discussion of transportation:

> The 2006 Picus Report states that transportation costs average $286 per average daily membership, but the variance is wide; it ranges from $63 per average daily membership to $658. The [D]ivision [of Public School Academic Facilities and Transportation] submitted written testimony that it was reviewing options for support of local transportation needs. One of the options under consideration is the introduction of a series of statewide contracts for fuel. This concept would assist school districts by stabilizing the fluctuating costs of fuel. The division has not made a final determination about this possibility because it is still collecting data necessary to determine the scope, cost and feasibility of such a program.

The report's only recommendation was further study of ways to reduce transportation costs. (2006 Adequacy Report, p. 159). Because no "standards- and research-based transportation funding formula" was ever developed, the statewide average per pupil transportation cost of $286.00 was included in the foundation funding matrix for 2007-08 and 2008-09.

131. The 2008 Adequacy Report had no discussion of transportation issues, but it did include the following recommendation with supporting rationale:

> **Recommendation:** The issue of whether to change the amount of funding in the matrix for public school transportation is referred to the Education Committees for consideration. The Education Committees recommend that the amount of $24,584,000 in General Revenue Funding be provided each year of the upcoming biennium to the Public School Fund to be utilized for Enhanced Transportation Funding. This enhanced Transportation Funding is in addition to the $286 per ADM currently provided in the Funding Matrix and will be distributed to school districts in accordance with the distribution methodology developed by the BLR.
>
> **Rationale:** The current funding matrix provides $286 per student to fund K-12 student transportation, but evidence was presented that rising costs are causing many school districts to spend more than $286 per student. Richard Wilson, Assistant Director for Research Services of the BLR,

> told the Education Committees that the amount that districts spend on transportation appears to exceed the $286 provided in the matrix in some cases. However, the committee was not presented with complete data from the school districts to make a final recommendation. Therefore the committee recommended that the Education Committees continue to study the transportation issue.
>
> The Education Committees have determined that state-funded transportation for public education may be a necessary component to providing students with an equitable opportunity for an adequate education to the extent that a student would not otherwise be able to realize this opportunity but for such transportation being provided by the state. There is currently no data available to determine each district's essential route miles for students whose access to an equitable opportunity for an adequate education would be prevented by disability, poverty, distance, or geography. However, that determination is not required at the present time, as the committees' recommendation for the distribution methodology for the Enhanced Transportation Funding, which is in addition to the foundation funding matrix amount, utilizes a function of each district's historical route miles that is well above this minimum adequacy standard.

(2008 Adequacy Report, p. 56). The 87th General Assembly (2009) rejected this recommendation and continued to provide all school districts the same per student amount for transportation, irrespective of school districts' actual transportation costs, for the 2009-10 and 2010-11 school years.

132. The 2010 Adequacy Report included little discussion of transportation issues. It noted that school districts continued to spend widely varying amounts on transportation. "The difference in matrix expenditures for transportation now ranges from a low of $74.78 (one outlier district excluded) to a high of $842.12 per pupil." (2010 Adequacy Report, p. 43). It then repeated the recommendation from

the 2008 Adequacy Report that "enhanced transportation funding" be provided to school districts with high transportation costs. The report stated:

> For FY2012 and FY2013, keep the funding for the transportation line item at its current FY2011 funding level of $297.50, but create a separate funding line item to be known as Enhanced Transportation Funding. Distribute funding for this line item using a formula based on "essential linear route miles" (those directly related to transporting students to and from school for the purpose of providing them with the opportunity to receive an adequate education) to those school districts whose transportation costs are not covered by the amount of funding provided to them by the current transportation line item in the matrix. Establish the funding for the Enhanced Transportation Funding line item using the appropriate inflationary adjustment to the amount of funding currently allocated to the transportation line item in the funding matrix (2.5% of the matrix funding for transportation in FY2012 and 2.9% in FY2013).

(2010 Adequacy Report, p. 66).

133. Even if the 88th General Assembly (2011) provides school districts with "enhanced transportation funding," the system will continue to violate the constitution for at least three reasons. First, it is inefficient and inequitable to pay some districts more than their actual cost of transportation. In 2008-09, the Fort Smith School District, for example, received $3.9 million in transportation funding, but its actual transportation cost was only $2.4 million – a $1.5 million surplus.

134. Second, the transportation component of foundation funding has no rational basis. The $286.00 per student transportation funding amount included in the 2007-08 and 2008-09 matrices was the 2004-05 average cost inflated to 2007-

08. In 2008, BLR inflated 2006-07 actual transportation costs for 2009-10, and the average transportation cost was $385.00 per student. (2008 BLR Transportation Study Handout). Thus, for 2010-11, the transportation funding included in the foundation funding matrix ($297.50 per student) will not even cover an average district's transportation costs ($385.00 per student according to BLR).

135. Third, the 2010 Adequacy Report does not recommend that the Commission for Public School Academic Facilities and Transportation ("Commission") define excessive transportation time. A rational system of transportation funding must include a definition of excessive transportation time, or stated another way, the maximum amount of time a child may spend on a bus. In rural areas, the number of buses and bus drivers needed depends on the number of bus routes, and the number of bus routes depends on how long children may be on a bus. All other things being equal, if a school district needs five routes to get all students to school within 90 minutes one-way, it would need 10 routes to get all students to school within 45 minutes one-way. Therefore, to determine the amount of transportation funding school districts need, the State must establish a maximum transportation time.

136. The State has recognized the problem of excessive transportation time, but it has lacked the political will to address the problem. Act 1452 of 2005, directed ADE to "conduct a study of isolated schools to determine the most

efficient method of providing opportunities for an adequate and substantially equal education for students without excessive transportation time." *See* Act 1452 of 2005, § 2, then codified as Ark. Code Ann. § 6-20-605. Despite this express directive, ADE refused to define excessive transportation time. (2007 Transportation Memo, p. 10). In response to Act 1452, ADE submitted a memorandum explaining why it did not define excessive transportation time. While ADE acknowledged that the most commonly cited study by Lu and Tweeten found that excessive transportation time had a negative impact on student achievement, ADE discounted the study because it was done in 1973. ADE concluded, "There is no way for this Department to make a recommendation on the relationship between transportation and student achievement without the benefit of scientifically based studies. In addition to the above referenced problem, there are too many locally controlled decisions that influence school transportation issues." (2007 Transportation Memo, p. 9). Notably absent from ADE's memorandum was any discussion of ADE conducting "scientifically based studies" so an evidence-based recommendation could be made. ADE's attempt to defer to local control "has not been an option since the *DuPree* decision." *Lake View III*, 351 Ark. at 79, 91 S.W.3d at 500.

137. In 2007, the General Assembly repealed Ark. Code Ann. § 6-20-605, (Act 1573 of 2007, § 60), but adopted Act 1604 of 2007 requiring BLR and the Division of Public School Academic Facilities and Transportation to:

> [C]onduct a study of the transportation of public school students by public school districts in the state with an emphasis on public school districts resulting from consolidation or annexation, isolated school districts, and public school districts with declining enrollment to assess whether the time and cost of public school district transportation for students enrolled in those public school districts can or should be minimized.

Ark. Code Ann. § 6-19-123(a) (Repl. 2009). BLR was to report its findings by October 1, 2008.

138. In response to Act 1604, BLR made a power point presentation to the Joint Committee on October 14, 2008. Based on a sample of 30 school districts, BLR found 2006-07 per student transportation costs inflated to 2009-10 ranged from $103.00 to $982.00 and averaged $385.00 per student. (2008 BLR Transportation Study Handout). BLR reminded the Joint Committee that the $286.00 per student provided as a part of foundation funding in 2007-08 was based on the 2004-05 average transportation cost increased for inflation. (2008 BLR Transportation Study, p. 4). It further reminded the Joint Committee of the recommendations made in the 2006 Picus Recalibration Report that transportation funding be removed from foundation funding, that a standards- and research-based transportation funding formula be developed, and until then, school districts

receive their actual transportation costs increased for inflation. (2008 BLR Transportation Study, pp. 5-6). BLR then suggested a standards- and research-based transportation funding formula, but the Joint Committee failed to recommend its adoption, and it was not adopted by the General Assembly.

139. While Act 1604 of 2007 directed BLR to study how transportation time "can or should be minimized," Ark. Code Ann. § 6-19-123(a), BLR did not address the question. Even so, BLR's proposed transportation funding formula did include "the number of buses." As discussed above, the number of buses a school district needs depends on how long students may ride a bus, and school districts will lack any rational basis for deciding how long students may ride a bus until the Commission defines excessive transportation time.

140. In Arkansas, excessive transportation time may be defined as the amount of transportation time that will deny a student a substantially equal opportunity for an adequate education. Both common sense and scientific research tell us that excessively long bus rides have a negative impact on student achievement. The 1973 study by Lu and Tweeten found that 4th and 8th graders suffered a two percent decrease in achievement for every one hour spent on a bus. (Lu and Tweeten, p. 3). It is not uncommon for children living in rural Arkansas to spend three hours a day on a bus. (Walker v. State Board, SBE Arg p. 4) That translates into a six percent reduction in achievement based on the 1973 study by

Lu and Tweeten. The decrease in achievement may result from a multitude of factors including sleep deprivation, sporadic meal times and little time for homework or extra-curricular activities.

141. As noted above, in 2006 Picus was commissioned to conduct a study of student transportation. Though that study was never completed, the "working draft" noted that experts recommended no more than ***30 minutes*** on a bus one-way. (2006 Picus Transportation Study, p. 15). In the Pulaski County interdistrict desegregation case, the Court of Appeals for the Eighth Circuit approved a ***45 minute*** one-way transportation time limit. In an opinion by the late Judge Richard Arnold, the Eighth Circuit explained:

> We authorized the District to allow deviation beyond the prescribed percentage ranges in black enrollment if necessary to keep the one-way bussing times within the forty-five minute limit. [internal quotations and citation omitted]. We did so because we recognized the existence of practical limits to the remedial use of desegregating student assignments, particularly where the time or distance of travel risks damage to the health and education of school children. [internal quotations and citation omitted].

Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist., 921 F.2d 1371, 1377-78 (8th Cir. 1990). A maximum one-way transportation time was necessary in the interdistrict desegregation case, in part, because the State reimburses the Pulaski County districts for their actual cost of interdistrict transportation. The 45 minute maximum one-way transportation time prevents the State from attempting to

reduce the cost of interdistrict transportation by decreasing the number of bus routes and increasing transportation times.

142. Outside of Pulaski County, however, the State has aggressively sought to reduce transportation costs by underfunding transportation, forcing school districts to cut bus routes, and as a result, increasing transportation times such that they border on inhumane. Deer/Mt. Judea has been forced to cut bus routes resulting in 90 minute one-way transportation times for some children (including children with severe disabilities).[3] Deer/Mt. Judea cannot remain fiscally sound and reduce the transportation time of its students without additional funding from the State. In 2008-09, Deer/Mt. Judea spent $313,811 on student transportation, but only received $108,394 in transportation funding – a deficit of $205,417. Deer/Mt. Judea was required to use funding intended for other components of adequate education to cover this deficit.

143. The Deer and Mt. Judea schools are necessary to provide a substantially equal opportunity for an adequate education to their students because "the time or distance of travel risks damage to the health and education of school children." *Little Rock Sch. Dist.*, 921 F.2d at 1377-78. Deer/Mt. Judea covers 394 square miles and is the most sparsely populated school district in Arkansas. If

[3] Excessive transportation time has been found to result in a violation of the Individuals with Disabilities in Education Act ("IDEA"). *See, e.g., Bonadonna v. Cooperman*, 557 IDELR 178 (D. N.J. 1985).

Deer/Mt. Judea's schools were closed, it would at a minimum add 20 minutes one-way to bus rides that are already 90 minutes one-way, and the consolidated district would be the largest in Arkansas covering 1,058 square miles.

144. Closing the Deer and Mt. Judea schools would also impose an inhumane safety risk on students. Deer/Mt. Judea's students already face a significant risk of injury or death due to traffic crashes and that risk increases with the number of vehicle miles traveled. The Deer campus is located on top of a mountain at 2,339 feet above sea-level. The Mt. Judea campus is located in "Arkansas' Grand Canyon" at 928 feet above sea-level. Numerous signs warn that the two-lane highway is "very crooked and steep." Most of the roads traveled by Deer/Mt. Judea's buses are unpaved and poorly maintained, in addition to being "very crooked and steep."

145. National Highway Traffic Safety data shows that around 60 percent of traffic fatalities occur on rural roads. In 2007, the national fatality rate per 100 million vehicle miles traveled was 2.5 times higher in rural areas than in urban areas (2.21 and 0.88, respectively). (NTSA810996, pp. 1-2). Data from the Arkansas State Highway and Transportation Department shows that from 2004 through 2008 the five-year average fatality rate per 100 million vehicle miles traveled was almost three times higher in Newton County than Pulaski County (3.82 and 1.37, respectively). If only 2008 is considered, the fatality rate per 100

million vehicle miles traveled was almost 7.6 times higher in Newton County than Pulaski County (5.44 to .72, respectively). Because Deer/Mt. Judea's students spend about twice as much time on a bus as students in Pulaski County, the increased risk is doubled. The only way to mitigate this risk is to decrease the time and distance traveled by Deer/Mt. Judea students. This will require that the Deer and Mt. Judea campuses remain open, and the State provide Deer/Mt. Judea the funding necessary to run additional bus routes, thereby decreasing transportation time.

146. For the State to provide rural students a substantially equal opportunity for an adequate education, the maximum transportation time must be the same for all Arkansas school children. While it may cost the State more to transport rural students, the maximum amount of transportation time cannot depend on the cost. To do so would be funding education "based upon what funds were available - not by what was needed." *Lake View V*, 364 Ark. at 413, 220 S.W.3d at 655-56. The State agreed to a 45 minute one-way time limit for interdistrict transportation in Pulaski County as necessary for the health and education of children in Pulaski County. Given this 21 year-old agreement, the State should be estopped from arguing that longer transportation times are not excessive. The State has no rational basis for imposing longer transportation times

on rural children and equity requires that the Commission establish a 45 minute one-way transportation time limit for all school children in Arkansas.

Recruiting and Retaining Highly-Qualified Teachers

147. Deer/Mt. Judea struggles to recruit and retain highly-qualified teachers because of its geographic remoteness. Few highly-qualified teachers live in Newton County, and the current funding system does not provide Deer/Mt. Judea the funding necessary to attract teachers willing relocate to Newton County. In fact, Deer/Mt. Judea must pay its teachers the State minimum to avoid fiscal distress. When unable to attract certified teachers, Deer/Mt. Judea has filled gaps with non-traditional teachers, but after three years, these teachers become fully certified and leave Deer/Mt. Judea for higher pay. Deer/Mt. Judea's inability to recruit and retain highly-qualified teachers results in the State denying Deer/Mt. Judea's students a substantially equal opportunity to an adequate education.

148. The problem of intrastate competition for teachers is well-known, but as in other areas, the State rejected Picus' recommendation for addressing the problem. In 2003, the State contracted with Picus to study the teacher compensation system in Arkansas. That report concluded that Arkansas' current teacher compensation system "is lacking" in the following areas:

> 1. Teacher salary levels are below that of the contiguous states as well as the member states of the Southern Regional Education Board (SREB) – hampering Arkansas' ability to recruit and retain the levels

of skills required to deliver student achievement required by its adequacy goals.

2. The current single salary schedule prevalent throughout Arkansas' school districts fails to create the incentives and opportunities for Arkansas teachers to develop and apply the kinds of skills required to improve student learning.

3. There are no incentives in the current teacher compensation program to directly reward teachers for their efforts leading to improved student learning.

(2003 Teacher Compensation Study, p. 7). The Study recommended a statewide system of teacher compensation and made five specific recommendations:

1. Increase Arkansas' teacher salaries by 15% -- at a cost of $277 million.

2. Adopt a Knowledge and Skill Based Pay (KSBP) salary schedule to replace the single salary schedule currently in use.

3. Adopt a set of policies for teachers to progress through the new KSBP salary schedule.

4. Adopt the Committee's recommendations for piloting KSBP and making the transition from our current salary schedule to the KSBP salary schedule.

5. Adopt the Committee's recommendation for designing and implementing a new School Based Performance Award program.

(2003 Teacher Compensation Study, p. 8).

149. The statewide teacher compensation system recommended by Picus recognized that "[s]alary levels should also reflect the amenities and dis-amenities of the various districts in Arkansas, specifically those in rural areas." (2003

Teacher Compensation Study, p. 16). It included a "geographic shortage adder" that would allow the State "to adjust the [salary] schedule to compensate teachers to locate in hard to place areas (both urban and rural)." (2003 Teacher Compensation Study, p. 79). The report explained that the geographic shortage adder "contributes to creating a level playing field among Arkansas' school districts for attracting and retaining teachers." (2003 Teacher Compensation Study, p. 79).

150. The State has failed to implement a statewide teacher compensation system or otherwise create a "level playing field" among Arkansas school districts for attracting and retaining teachers. While the State increased funding for teacher salaries so as to make Arkansas overall competitive regionally, Deer/Mt. Judea cannot compete with other school districts in Arkansas or regionally because it cannot pay above the State minimum teacher salary.

151. The teacher salary diparity between Deer/Mt. Judea and large, low-cost districts is large and getting larger. The 2006 Adequacy Report found that the highest average teacher salary was $53,491 while the lowest was $30,092. Questions were raised about whether this disparity in teacher salaries violated the constitution, and the Arkansas Attorney General ("AG") was asked to render an opinion on the issue. The AG concluded that intrastate salary disparities were not *per se* unconstitutional. However, the AG advised the Joint Committee:

> Should the State discover that some districts are unable to attract and retain [teachers who provide the type of instruction the State defines as 'adequate'], it is for the General Assembly to determine, as a matter of policy, what steps can or should be taken to address the issue. Efforts to promote or require greater "equality" of teacher pay between districts may be but one of many ways in which to address such a problem, if it exists, but it is not the sole constitutionally acceptable way.

(AG Teacher Compensation Memo, p. 6). Accepting this as an accurate interpretation of the law, the State "discovered" that small, remote districts were having trouble attracting and retaining highly-qualified teachers no later than 2003. The 2003 Picus report on teacher compensation identified the problem and recommended a "geographic shortage adder" to address it. The State rejected this recommendation and inequality prevails.

152. The 2008 Adequacy Report documented the large intrastate disparity in teacher salaries. It found:

> In Arkansas, the lowest beginning salary in 2006-07 was $28,611, and the highest was $41,000, for a difference of $12,389. That disparity decreased from $12,581 in 2005-06. The lowest district average salary in 2006-07 was $34,080, and the highest was $59,026, for a difference of $24,946. That disparity increased from $22,469 in 2005-06.

(2008 Adequacy Report, p. 20). The report acknowledged that "[t]eacher turnover is a significant factor for Arkansas schools. In much of the state, the turnover rate is 24 percent or higher." (2008 Adequacy Report, p. 23).

153. The 2008 Adequacy Report reviewed State programs designed to level the playing field for highly-qualified teachers. First, Act 101 of the Second

Extraordinary Session of 2003 created the High-Priority District Teacher Incentive Program, codified as Ark. Code Ann. § 6-17-811. That program provided hiring and retention bonuses ($4,000 signing bonus, $3,000 for two years, $2,000 thereafter) for teachers entering small, high-poverty school districts. To qualify as a "high-priority district," 80 percent or more of a school district's students must be NSL students. Deer/Mt. Judea has never been able to qualify as a high-priority district because it has never had 80 percent or more NSL students. In 2008-09, 73.1 percent of Deer/Mt. Judea's students were NSL students. There is no rational basis for excluding Deer/Mt. Judea from the High-Priority District Teacher Incentive Program. Small, remote districts and high-poverty districts are similarly situated in their need for incentives to attract and retain highly-qualified teachers. (Odden and Picus, *School Finance: A Policy Perspective*, p. 405 (4th Ed. 2008)).

154. Even if Deer/Mt. Judea was eligible for this incentive program, the program has proved ineffective. While superintendents of high-priority districts testified in 2006 that the program "has enabled those schools to more effectively recruit and retain higher quality classroom teachers by providing the district with a method to provide competitive teacher salaries," (2006 Adequacy Report, p. 86), the 2008 Adequacy Report found that only 374 teachers had participated in the program causing over 40 percent of the money appropriated for the program to go

unspent. (2008 Adequacy Report, p. 24). The bonus amounts were clearly too small given the $25,000 disparity in average teacher salaries.

155. Second, Act 2196 of 2005 created the Teacher Opportunity Program ("TOP") which provides incentives for teachers to obtain additional college instruction and to obtain certification in additional subject areas. An incentive for teachers to obtain certification in additional subject areas is much needed. Small, remote schools require teachers to teach multiple subjects because of the small number of students needing particular classes. Unfortunately, the TOP incentive has also proved ineffective. In 2006-07, almost three-quarters of the TOP appropriation was not spent. (2008 Adequacy Report, p. 25). Moreover, the TOP program does not require that teachers teach in small, remote districts. Thus, the additional certification simply makes teachers more likely to be able to land a higher-paying teaching position in a large, low-cost district.

156. Third, Act 39 of the Second Extraordinary Session of 2003 created the Teacher Housing Development Program, Ark. Code Ann. § 6-26-101 to 305, to provide rental stipends and low interest loans for teachers to teach in "high-priority" school districts. To qualify as a high-priority district, 50 percent or more of the district's students must be performing below proficient on the Benchmark Exam. Ark. Code Ann. § 6-26-102(8). Deer/Mt. Judea has never qualified for this program because more than 50 percent of its students have scored proficient or

above on the Benchmark Exam. Even if Deer/Mt. Judea was eligible, this program has also proved ineffective. The 2008 Adequacy Report stated:

> In 2006-07, the program received $100,000 in state funding, but paid out nothing to teachers. The program's other expenditures totaled $125,897, including $25,897 in carry over funds from the previous year.
>
> The program was first funded in FY2005 with $300,000. An additional $100,000 was added annually for the following three years, for a total of $600,000 for the program. The first housing stipends were awarded in 2008. Through March 31, a total of $4,500 in rental stipends had been paid for nine teachers. Additional funding had been committed but not disbursed. Total program expenses as of March 31, 2008 were $283,550.

(2008 Adequacy Report, p. 25).

157. Therefore, the 2008 Adequacy Report put the Joint Committee on notice of the continuing problem of intrastate disparities in teacher salaries and that the programs adopted so far to address the problem have been ineffective. Nevertheless, the Joint Committee made no recommendations to the 87th General Assembly (2009) related to the intrastate disparity in teacher salaries.

158. Despite no recommendation from the Joint Committee, the 87th General Assembly (2009) recognized that the incentives in the High-Priority District Teacher Incentive Program were too small but only increased the incentives by $1,000. Even with this increase, the incentives (now $5,000 hiring, $4,000 for two years and $3,000 thereafter) remain too small to make the program effective given the $25,000 disparity in average teacher salaries. The program also

remains limited to small districts with 80 percent or more NSL students, and thus, excludes Deer/Mt. Judea.

159. The 87th General Assembly (2009) also repealed a minority teacher incentive program and replaced it with the State Teacher Education Program ("STEP"), codified as Ark. Code Ann. § 6-81-1601 to 1606. This program repays federal student loans in the amount of $3,000 for a maximum of three years for teachers in subject areas having a critical shortage of teachers or teachers located in a geographical shortage area. Ark. Code Ann. § 6-81-1606(a)(1)(B). Deer/Mt. Judea was not identified as being located in a geographical shortage area for 2009-10 but is for 2010-11.

160. STEP had little chance of success for at least three reasons. First, it only provides an incentive to teachers with student loans – a small sub-population of certified teachers. Second, the $3,000 incentive is far less than the $25,000 disparity in average teacher salaries so teachers remain more likely to pursue employment in large, low-cost districts. Finally, the incentive is for only three years after which the teacher may leave for higher pay in a large, low-cost district.

161. The 2010 Adequacy Report provides additional evidence that the State's efforts to level the playing field for teachers have failed. The disparity in starting and average teacher salaries among school districts continues to grow. The lowest beginning salary in 2008-09 was $29,244, and the highest was $42,230, for

a difference of $12,986. That disparity increased from $12,389 in 2006-07. The lowest average salary in 2008-09 was $34,437, and the highest was $60,663, a difference of $26,226. That disparity increased from $24,946 in 2006-07. (2010 Adequacy Report, p. 47).

162. While the average Arkansas teacher salary remains regionally competitive, even if less so, the problem is that most Arkansas school districts pay much less than the Arkansas average. The 2010 Adequacy Report recognized that Arkansas' regionally competitive average salary is the result of high salaries paid by large, low-cost districts. It stated, "Of the 244 districts surveyed, 180 (73.8%) had averages plus benefits below the average teacher salary and benefits in the matrix. Higher salaries in larger districts appear to be driving the statewide average salary higher. The 25 districts (10.2%) with the highest teacher salary averages employ over one-third (37%) of the FTE [Full Time Equivalent] teachers in the state." (2010 Adequacy Report, pp. 33-34).

163. Small, remote districts like Deer/Mt. Judea can only afford to pay its teachers the State minimum and remain unable to compete inside and outside Arkansas for highly-qualified teachers. The 2010 Adequacy Report noted that 29 school districts paid teachers the State minimum which has not increased since 2008-09. (2010 Adequacy Report, p. 46).

164. The 2010 Adequacy Report includes no discussion of STEP or other programs intended to address the intrastate teacher salary disparity, and it makes no recommendations to address the issue.

165. In *Lake View III*, the Arkansas Supreme Court recognized that the intrastate salary disparity was an issue of constitutional significance. *Lake View III*, 351 Ark. at 61, 91 S.W.3d at 489 ("Serious disparities also exist in teacher salaries among school districts within the State of Arkansas."). When it appointed the Masters in 2004, it ordered the Masters to evaluate, among other things, "the measures in place to assure that teacher salaries are sufficient to prevent the migration of teachers from poorer school districts to wealthier school districts or to neighboring states." *Lake View Sch. Dist. v. Huckabee*, 256 Ark. 1, 3, 144 S.W.3d 741, 742 (2004). In issuing its mandate in 2005, the Arkansas Supreme Court cited the High-Priority District Teacher Incentive Program, the Teacher Housing Development and the predecessor to STEP and concluded, "The General Assembly has addressed the issue in a meaningful way." *Lake View IV*, 358 Ark. at 158, 189 S.W.3d at 15. However, the Court also noted the Masters' conclusion that the effectiveness of these programs "will not be known for at least another year." *Id.* 358 Ark. at 149, 189 S.W.3d at 9. It is now known that these programs were ineffective. The disparity in starting and average teacher salaries continues to grow. Large, low-cost districts continue to raise salaries to compete with each

other, while small, remote districts just get by paying the State minimum. It is now clear that the only way to meaningfully address the intrastate salary disparity is a statewide teacher compensation system that includes a "geographical shortage adder" for small, remote districts as recommended by Picus in 2003.

Teacher Retirement and Health Insurance

166. In 1995, the State changed the way it paid teacher retirement and health insurance benefits. Rather than paying these costs directly, it shifted the responsibility to school districts so that more funding would be distributed through the school-funding formula and the system would appear more equitable. *See* Act 1194 and 917 of 1995. Those costs are now a component of foundation funding so that all school districts receive the same per student amount for these costs. However, small, remote schools like Deer and Mt. Judea have more certified and classified employees per student than the average school due to a combination of the State's accreditation standards and their small enrollment. This means that Deer/Mt. Judea's per student cost for teacher retirement and health insurance are significantly higher than the average school district, and it receives less per teacher to cover these costs.

167. There is no rational basis for the State including teacher retirement and health insurance in foundation funding. Teacher retirement and health insurance are costs incurred per teacher, but the State is funding them based on a

per student formula. In 1997, the federal court overseeing the Pulaski County interdistrict desegregation case held that funding these per teacher costs using a per student formula was not rational, and therefore, violated the parties' 1989 Settlement Agreement. Likewise, this Court should find that there is no rational basis for including teacher retirement and health insurance in foundation funding and direct the State to return to paying these costs directly on behalf of school districts.

168. The 1989 Settlement Agreement in Pulaski County interdistrict desegregation case obligates the State to continue to pay the three Pulaski County districts "[t]he State's share of any and all programs for which the Districts now receive State funding." (Settlement Agreement § II, ¶ E). The agreement goes on to state that "[f]air and rational adjustments to the funding formula which have general applicability but which reduce the proportion of State aid to any of the Districts shall not be considered to have an adverse impact on the desegregation of the Districts." (Settlement Agreement § II, ¶ L). The federal court concluded that the 1995 change was not "fair and rational" because it failed to consider the number of employees in distributing aid for teacher retirement and health insurance – costs incurred per employee. (LRSD v. PCSSD, **Docket No. 2930, p. 11-12**). The court's decision was affirmed by the Court of Appeals for the Eighth Circuit. *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.*, 148 F.3d 956 (8th Cir.

1998). The three Pulaski County districts continue to receive additional State funding for teacher retirement and health insurance based on this interpretation of the 1989 Settlement Agreement. If the State removed teacher retirement and health insurance from foundation funding and returned to paying those costs directly as it did before 1995, it could stop making these additional payments to the three Pulaski County districts ($21 million in 2008-09).

Facilities

169. The Commission administers the academic facilities programs by which the State provides financial assistance to public school districts for the construction of new academic facilities, and regulates the management of the repair, maintenance, and planning for academic facilities. The programs were established in large part in the 2005 Regular Session and the First Extraordinary Session of 2006. *See* Ark. Code Ann. § 6-20-2501 to 2515.

170. The Partnership Program is the State's main facilities funding program. That program operates pursuant to rules adopted by the Commission. Pursuant to these rules, school districts are assigned an "academic facilities wealth index." The wealth index is used to determine what percentage of the cost of a facilities project must be paid by the school district. The State partners with the school district to pay the remaining cost. In 2009, for example, based on Deer/Mt. Judea's wealth index, the district would be required to pay 39 percent of the cost of

a new facility, and the State would pick of the tab for the remaining 61percent. Deer/Mt. Judea cannot build much needed facilities, however, because it cannot raise local funds to pay the 39 percent of the cost required to participate in the Partnership Program.

171. When the Arkansas Supreme Court issued its mandate in 2007, it found that the State "addressed the need for state assistance with public school academic facilities in a substantial and commendable fashion." *Lake View VI,* 370 Ark. at 141, 257 S.W.3d at 880. One problem the State allegedly addressed was the inability of poor districts to raise local funds to pay the local school district's share of construction projects. *See Lake View V*, 364 Ark. at 414, 220 S.W.3d at 656 ("The Masters went further and underscored that the facilities needs of certain school districts may never be met due to the requirements of the academic facilities wealth index formula which may negate a local partnership."). In finding the system unconstitutional in 2005, the Arkansas Supreme Court cited the Masters conclusion "that a school district's financial responsibility was so great for it to enter into a partnership with the State for construction and repairs that many school districts will be unable to raise the required funds and thus will be forced to forego needed construction and repairs." *Lake View V*, 364 Ark. at 409, 220 S.W.3d at 653. In *Lake View VI*, the Court presumed that Act 727 of 2007, codified as Ark. Code Ann. § 6-20-2502(1)(B), would solve this problem and "provide[] some state

assistance to every school district based on the actual need for facilities in the individual school districts as well as the school district's ability to pay." *Lake View VI,* 370 Ark. at 143, 257 S.W.3d at 881. In fact, Deer/Mt. Judea has substantial construction and repair needs that it has been forced to forgo because the school district's financial responsibility remains too great, even after Act 727 of 2007. As a result, Deer/Mt. Judea's facilities are inequitable and inadequate.

Prayer for Relief

WHEREFORE, Deer/Mt. Judea prays for the following relief:

a. A declaration that the State's K-12 school-funding system is inequitable and inadequate in violation of the Constitution of Arkansas, Article 14, § 1 and Article 2, §§ 2, 3 and 18;

b. A declaration that the State's K-12 education system is inequitable and inadequate in violation of the Constitution of Arkansas, Article 14, § 1 and Article 2, §§ 2, 3 and 18;

c. A mandatory injunction directing the State to comply with the Constitution of Arkansas, Article 14, § 1 and Article 2, §§ 2, 3 and 18 and Act 57, and in particular:

(1) Directing the General Assembly, the State Board of Education and/or the Commissioner of Education to develop, fully fund and implement a

system for evaluating the effectiveness of programs, interventions and/or strategies for improving student achievement;

(2) Directing the General Assembly, the State Board of Education and/or the Commissioner of Education to develop, fully fund and implement a statewide system of professional development that includes the six structural features of effective professional development identified in the 2003 Picus Report;

(3) Directing the General Assembly to adopt a statewide system of teacher compensation that includes a geographical shortage adder to attract and retain teachers in small, remote schools;

(4) Directing the Commission for Public School Academic Facilities and Transportation to establish a maximum one-way transportation time of 45 minutes for students who require transportation provided by the State to have a substantially equal opportunity for an adequate education;

(5) Directing the General Assembly and/or the Commission for Public School Academic Facilities and Transportation to identify students who require transportation provided by the State to have a substantially equal opportunity for an adequate education;

(6) Directing the General Assembly to remove transportation funding from foundation funding and to adopt a standards- and research-based funding system for the transportation of students who require transportation

provided by the State to have a substantially equal opportunity for an adequate education;

(7) Directing the General Assembly to remove teacher retirement and health insurance funding from foundation funding and to pay the full amount of these costs directly on behalf of school districts; and,

(8) Directing the General Assembly and/or the Commission for Public School Academic Facilities and Transportation to adopt rules and regulations that will allow school districts unable to raise local funds to pay their partnership percentage to repair or replace inequitable and inadequate facilities and to construct new facilities necessary to provide students an equitable and adequate education;

d. An injunction prohibiting the State Board of Education from closing small, remote schools pursuant to Ark. Code Ann. § 6-20-602 and consolidating or annexing small, remote districts pursuant to Ark. Code Ann. §§ 6-13-1601 to 1612 until such time as the State has remedied the constitutional violations identified herein;

e. A declaration that Section 32 of Act 293 of 2010 is local or special legislation in violation of Amendment 14 of the Constitution of Arkansas;

f. An injunction prohibiting the Commissioner of Education from disbursing funds pursuant to Section 32 of Act 293 of 2010;

g. That Deer/Mt. Judea be awarded all other just and proper relief to which it may be entitled; and,

h. That Deer/Mt. Judea be reimbursed its costs and attorneys' fees expended herein to the extent permitted by Arkansas law.

Respectfully submitted,

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By: Clay Fendley
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IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
SECOND DIVISION

DEER/MT. JUDEA SCHOOL DISTRICT **PLAINTIFF**

v. **NO. 60CV-10-6936**

MIKE BEEBE, Individually And In His Official Capacity As Governor Of The State Of Arkansas;
MARK DARR, Individually And In His Official Capacity As Lieutenant Governor Of The State Of Arkansas;
DR. TOM W. KIMBRELL, Individually And In His Official Capacity As Commissioner Of Education For The State Of Arkansas;
DR. NACCAMAN WILLIAMS, Individually And In His Official Capacity As Chairman Of The State Hoard Of Education;
DR. BEN MAYS, Individually And In His Official Capacity As A Member Of The State Board Of Education;
SHERRY BURROW, Individually And In Her Official Capacity As A Member Of The State Board Of Education;
JIM COOPER. Individually And In His Official Capacity As A Member Of The State Board Of Education;
BRENDA GULLETT, Individually And In Her Official Capacity As A Member Of The State Board Of Education;
SAMUEL LEDBETTER, Individually And In His Official Capacity As A Member Of The State Board Of Education;
ALICE WILLIAMS MAHONEY, Individually And In Her Official Capacity As A Member Of The State Board Of Education;
TOYCE NEWTON, Individually And In Her Official Capacity As A Member Of The State Board Of Education;
VICKI SAVIRS, Individually And In Her Official Capacity As A Member Of The State Board Of Education;
RICHARD WEISS, Individually And In His Official Capacity As Director Of The Department Of Finance And Administration;

DEFENDANTS

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MAC DODSON, Individually And In His Official Capacity As President Of The Arkansas Development Finance Authority;
ROBERT MOORE, Individually And In His Official Capacity As Speaker Of The House Of Representatives;
PAUL BOOKOUT, Individually And In His Official Capacity As President Pro Tempore Of The Senate

MOTION TO DISMISS

Comes now Governor Mike Beebe, Commissioner of Education Tom W. Kimbrell, Dr. Naccaman Williams, Dr. Ben Mays, Sherry Burrow, Jim Cooper, Brenda Gullett, Samuel Ledbetter, Alice Williams Mahoney, Toyce Newton, Vickie Savirs, Richard Weiss, and Mac Dodson, in their official and individual capacities, by and through their attorneys, Arkansas Attorney General Dustin McDaniel and Assistant Attorney General Scott P. Richardson, and for their *Motion to Dismiss*, state:

1. The Deer/Mt. Judea School District has filed this lawsuit challenging the State's elementary and secondary education funding system.

2. For the reasons stated in the brief in support of this motion, Plaintiff's Complaint should be dismissed with prejudice.

Wherefore, Defendants request that Plaintiff's Complaint be dismissed with prejudice and that they be granted all other relief to which they are entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 18, 2011, I mailed a copy of the foregoing to the following by U.S. Mail and electronic mail:

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SCOTT P. RICHARDSON

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
SECOND DIVISION

DEER/MT. JUDEA SCHOOL DISTRICT **PLAINTIFF**

v. **NO. 60CV-10-6936**

MIKE BEEBE, Individually And In His Official Capacity As Governor Of The State Of Arkansas;
MARK DARR, Individually And In His Official Capacity As Lieutenant Governor Of The State Of Arkansas;
DR. TOM W. KIMBRELL, Individually And In His Official Capacity As Commissioner Of Education For The State Of Arkansas;
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MAC DODSON, Individually And In His Official Capacity As President Of The Arkansas Development Finance Authority;
ROBERT MOORE, Individually And In His Official Capacity As Speaker Of The House Of Representatives;
PAUL BOOKOUT, Individually And In His Official Capacity As President Pro Tempore Of The Senate

BRIEF IN SUPPORT OF MOTION TO DISMISS

Comes now Governor Mike Beebe, Commissioner of Education Tom W. Kimbrell, Dr. Naccaman Williams, Dr. Ben Mays, Sherry Burrow, Jim Cooper, Brenda Gullett, Samuel Ledbetter, Alice Williams Mahoney, Toyce Newton, Vicki Saviers, Richard Weiss, and Mac Dodson, in their official and individual capacities, by and through their attorneys, Arkansas Attorney General Dustin McDaniel and Assistant Attorney General Scott P. Richardson, and for their *Brief in Support of Motion to Dismiss*, state:

I. INTRODUCTION

The Deer/Mt. Judea School District was created in 2004 when two school districts with low enrollment consolidated in the initial wake of Act 60 of 2003 (2nd Ext. Sess.). The resulting district (Deer/Mt. Judea) maintains the two campuses that existed prior to administrative consolidation. In the 2009-2010 school year the Deer campus had enrolled about 221 K–12 students, and the Mt. Judea (pronounced "Judy") campus had enrolled about 153 K–12 students. In total, the Deer/Mt. Judea School District enrolled an Average Daily Membership (or ADM) of 374 students in the 2009-2010 school year. See Complaint ¶ 1.

This case is, essentially, Deer/Mt. Judea's attempt to secure more revenue for the district. What follows is a brief overview of the State's funding system for elementary and secondary education. School Districts in Arkansas receive funding from a variety of sources. The principal

sources of funding, however, are known as "foundation funding" and "categorical funding." Ark. Code Ann. § 6-20-2305(a) & (b). The State of Arkansas provides foundation and categorical funding to school districts on a "per student" basis; meaning that a district is paid a statutorily specified amount of money for each student that attends school in the district. *Lake View School Dist. No. 25 v. Huckabee,* 358 Ark. 137, 141-142, 189 S.W.3d 1, 4-5 (2004)(*Lake View 2004*). Foundation funding is the base amount that is paid for every student in the district. Ark. Code Ann. § 6-20-2305(a). Categorical funding provides additional funding based on certain special needs of the student: NSLA funding (National School Lunch Act) for students in poverty, Ark. Code Ann. § 6-20-2303(12); ALE funding (Alternative Learning Environment) for students not served sufficiently by a traditional classroom setting, Ark. Code Ann. § 6-20-2303(2); and ELL funding (English Language Learners) for students who are not proficient in the English language (typically students for whom English is not their first language). Ark. Code Ann. § 6-20-2303(5).

The Arkansas General Assembly determines the amount of funding that should be paid in foundation and categorical funding on an evidence-based study. *Lake View 2004*, 358 Ark. at 144; Ark. Code Ann. § 10-3-2101, et seq. Through this study the General Assembly determines how much funding needs to be provided for each funding element in order to provide an equitable opportunity for an adequate education for each student in the State. Id. Quite obviously, it takes more than one student to adequately fund a whole school district so that it can provide all of the services needed to prepare students to enter the 21st Century workforce. The General Assembly (with the assistance of the Department of Education) determines what amount of foundation and categorical funding is adequate based on a prototypical school district. *Lake View 2004*, 358 Ark. at 142. As the number of students in the school district decreases, the amount of funding provided to the school district decreases as well. Therefore, the General

Assembly had to determine at what point the funding drops to a constitutionally unacceptable level (also called an inadequate level). The General Assembly determined that when a school district's ADM drops below 350 students for two consecutive years, the district's funding has become inadequate; i.e. constitutionally infirm. Ark. Code Ann. § 6-13-1602.

II. SUMMARY OF THE ARGUMENT

For the following reasons, Plaintiff's Complaint should be dismissed in its entirety, with prejudice:

A. Sovereign Immunity – Article 5, Section 20 of the Arkansas Constitution provides that the State "shall never be made a defendant in her courts." Plaintiff fails to plead any factual allegations against the Defendants in their official capacities that would overcome the State's sovereign immunity.

B. Legislative Immunity – When the Governor, Lieutenant Governor, legislators, and members of State Boards act in a legislative capacity, they cannot be sued in their individual capacity for legislative actions.

C. *Res Judicata* – In 2007, the Arkansas Supreme Court held "that our system of public-school financing is now in constitutional compliance." *Lake View School District v. Beebe*, 370 Ark. 139, 146, 257 S.W.3d 879, 883 (2007). Plaintiff in this case, the Deer/Mt. Judea School District, was a member of the class of plaintiffs in *Lake View*. Accordingly, the opinion in *Lake View* bars Deer/Mt. Judea's attempt to re-litigate the issues decided finally in the Supreme Court's 2007 *Lake View* decision.

D. No Illegal Exaction Claim Pleaded – The Supreme Court has recognized two types of illegal exaction claims: 1) the "illegal tax" type, and 2) the "public funds" type. Plaintiff does not challenge any tax and does not claim that any tax revenue is being used for purposes other than for which they were levied. Thus, Plaintiff has not pleaded an illegal exaction claim.

E. No Standing to Bring Illegal Exaction Claim – School Districts do not pay taxes. Deer/Mt. Judea has not alleged any injury from an illegal tax or misuse of tax funds. Thus, Deer/Mt. Judea lacks standing to bring an illegal exaction claim.

F. Separation of Powers – Much of Plaintiff's Complaint is spent disputing specific policy decisions or funding decisions made by the executive or legislative branches. As explained by the Supreme Court in *Lake View*, it is not the judicial branch's role "to legislate, to implement legislation, or to serve as a watchdog agency" over the policy or funding decisions made by the legislative branch and carried out by the executive branch. The General Assembly has engaged in an evidence-based study of K-12 funding in the

State and made rational decisions based on that study. Thus, Plaintiff's Complaint must be dismissed.

G. Statutory Immunity – State officers and employees are protected from lawsuits against them in their individual capacities by statutory immunity. Ark. Code Ann. § 19-10-305(a). Deer/Mt. Judea has made no allegations of any action or omission by any of the defendants. Thus, Defendants in their individual capacities are entitled to statutory immunity, and the Complaint should be dismissed.

H. Rule 12(b)(6) Failure to State a Claim – Plaintiff Deer/Mt. Judea fails to make any factual allegations about any actions taken by any of the Defendants that demonstrates a violation of any rights held by Deer/Mt. Judea. Therefore, Deer/Mt. Judea's Complaint should be dismissed.

I. The Education Funding System is Constitutional – With regard to Plaintiff Deer/Mt Judea's specific requests for relief, the State has taken action in each of these areas as shown in its evidence-based studies of the education system. Therefore, Deer/Mt. Judea does not have a claim that the education system is inadequate.

1. Academic Evaluation: The State has a system in place to evaluate, assess, and improve programs for improving student achievement. Throughout a child's education career her mastery of the curriculum she is taught is evaluated to determine whether she is learning what she needs to succeed in the 21st Century workforce.

2. Professional Development – The State has an extensive professional development program and many resources to help districts target their individual needs for continuing education of teachers.

3. Teacher Recruitment and Isolated School Funding – The State engages in substantial recruitment efforts to help districts attract quality teachers. Moreover, the State provides additional special funding to Deer/Mt. Judea as a district with "isolated" schools. The isolated funding Deer/Mt. Judea receives is unrestricted and can be used for any purpose.

4. Transportation Funding – As shown in the Adequacy Reports, the State provides an adequate level of funding for districts to transport students "who would not otherwise be able to realize this opportunity but for such transportation being provided by the state." Ex. 1, 2008 Adequacy Report p. 56.[1]

5. Teacher Retirement and Health Insurance – The Supreme Court has previously held that teacher retirement and health insurance are not directly related to

[1] The exhibits attached to this brief are all public records that may be judicially noticed, and do not require the conversion of this Motion to Dismiss into a Motion for Summary Judgment. *Friends of Lake View School District Incorporation No. 25 of Phillips County v. Beebe*, 578 F.3d 753, fn. 12 (8th Cir. 2009)(relying on public school enrollment data in affirming motion to dismiss). Moreover, Arkansas Rule of Civil Procedure 10 requires a "copy of any written instrument or document upon which a claim or defense is based shall be attached as an exhibit." Ark. R. Civ. Pro. 10(d)

educational adequacy. Moreover, the State provides substantial funding in these areas.

6. Facilities Funding – Deer/Mt. Judea's allegations about facilities funding are, essentially, the same allegations that were made in the *Lake View* case. The district's whole argument appears to be that the Supreme Court was wrong in its conclusion that the State's facilities funding system is constitutional.

7. Administrative Consolidation – Deer/Mt. Judea's fear that its student population may fall to a point that would require its administrative consolidation with another district or districts is its primary motivation behind this lawsuit. This law has been challenged many times and has never been found unconstitutional. In fact, the Supreme Court has said "an efficient education is what Article 14, § 1, of the Arkansas Constitution requires, which begs the question of whether this State can ever offer an adequate and substantially equal education to all its children without effective consolidation." *Lake View 2004*, 358 Ark. 137, 156, 189 S.W.3d 1, 14 (2004). Even so, Deer/Mt. Judea is under no requirement to consolidate, and may not ever be under such a requirement.

8. Extended Isolated Funding in Act 293 of 2010 § 32 – This section of this Act allows isolated school funding to continue to be provided to an isolated elementary school after the high school on the same campus was closed. The General Assembly had provided this flexibility to several other isolated school districts (including Deer/Mt. Judea) and represented an effort to bring more uniformity to isolated school funding laws, not less.

K. Other Issues – Deer/Mt. Judea raises many issues in its Complaint for which it requests no specific relief. Instead, the District appears to be trying to use these asserted deficiencies for some other purpose. However, the Complaint is plainly mistaken with regard to many of these issues.

III. ARGUMENT

A. Plaintiffs' Claims are Barred by Sovereign Immunity.

The Official Capacity Defendants in this case are immune from suit for money damages, costs, attorney's fees, and for relief that would inhibit or override their discretionary decision-making authority. Plaintiff has brought this suit against the Governor, the Lieutenant Governor, the Arkansas State Board of Education, the Director of the Department of Finance and Administration, the President of the Arkansas Development Finance Authority, the Speaker of the House of Representatives, and the President Pro Tem of the Senate in their official capacities.

While Plaintiff's only explicit request for monetary relief is for attorney's fees and costs, the "injunctive" relief requested would tap the State treasury for substantial additional funds. For example, Plaintiff's request that no school bus ride in the State be longer than 45 minutes would require a capital investment in the hundreds of millions of dollars. *See* Plaintiffs' Complaint, ¶ 4, p. 110. Under Arkansas law the Defendants are shielded from Plaintiff's claims by the sovereign immunity set forth in Article 5, Section 20 of the Arkansas Constitution. *Lake View School Dist. No. 25 of Phillips County v. Huckabee*, 340 Ark. 481, 10 S.W.3d 892 (2000)(holding that sovereign immunity applies to the *Lake View* case).

Article 5, Section 20 states that "[t]he State of Arkansas shall never be made a defendant in any of her courts." The Arkansas Supreme Court has consistently interpreted this provision as a grant of sovereign immunity which deprives a court of jurisdiction where suit is brought against the State. *See, e.g., Cross v. Arkansas Livestock and Poultry Comm'n*, 328 Ark. 255, 259-60, 943 S.W.2d 230, 232-33 (1997). Where a suit is brought against a state agency or officer for matters in which the agency or officer represents the State, that suit is also one against the State and is prohibited by Article 5, Section 20. Sovereign immunity bars both claims for damages to be paid out of the State Treasury and actions attempting to control discretionary decisions of executive and legislative branch officials. *Id. See also Fireman's Ins. Co. v. Arkansas State Claims Comm'n*, 301 Ark. 451, 455, 784 S.W.2d 771, 773-74 (1990). Plaintiffs' Complaint is plainly brought against sixteen state officials regarding matters allegedly done in furtherance of their official duties, thus Plaintiff's claims for relief are barred by sovereign immunity. *Arkansas Public Defender Comm'n v. Burnett*, 340 Ark. 233, 12 S.W.3d 191 (2000) (writ of certiorari was necessary to prohibit the trial court from requiring the Commission to pay

fees in violation of the sovereign immunity of the State). In addition, the Arkansas Civil Rights Act preserves the State's sovereign immunity. Ark. Code Ann. § 16-123-104.

In addition to barring recovery of money damages, attorneys' fees, and costs, sovereign immunity also forecloses Plaintiff's requested relief that would require significant amounts of general revenue to accomplish. When a suit would have "the effect of tapping the state treasury" to satisfy any judgment rendered, it is barred by sovereign immunity. *Office of Child Support Enforcement v. Mitchell*, 330 Ark. 338, 347, 954 S.W.2d 907, 911 (1997) *citing Magnolia Sch. Bd. infra.* Any order requiring the State to fund the major changes to the State education system requested by Plaintiff would violate Art. V, Section 20 of the Arkansas Constitution. *Magnolia School Board No. 14 v. Arkansas State Board of Education*, 303 Ark. 666, 799 S.W.2d 791 (1990). Plaintiff's lawsuit should be dismissed. *Id.*

B. Plaintiff's Claims are also Barred by Legislative Immunity.

Plaintiff has sued the members of the state legislature and the Governor because the "General Assembly passes bills that become law upon signature of the Governor and that create and fund the State's education system." Plaintiff's Complaint ¶ 13, p. 9. Any claim against members of the General Assembly for passing legislation or against the Governor for approving or vetoing legislation is barred by legislative immunity. Also, the State Board of Education, the Commissioner of Education, and the Commission for Public School Academic Facilities and Transportation are likewise immune from claims based on actions taken in their legislative capacities (e.g. passing rules of general applicability to the education system in their role as board members).

Legislative immunity bars suits against public officials for their activities while acting in their "legislative capacities." *Massongill v. County of Scott*, 337 Ark. 281, 991 S.W.2d 105

(1999). Grounded in the common law and the doctrine of separation of powers, the purpose of legislative immunity "is to ensure that the legislative function may be performed independently without fear of outside interference." *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 731 (1980). To preserve legislative independence, officials engaged in legislative activity "should be protected not only from the consequences of litigation's results but also from the burden of defending themselves," *id.* at 732 (citing *Tenney v. Brandhove*, 341 U.S. 367 (1951), and *Dombrowski v. Eastland*, 387 U.S. 82 (1967)), and legislative immunity is accordingly "absolute" in that it is immunity from suit (not merely immunity from liability or judgment), it applies regardless of the official's motivation, and it precludes not only claims for damages, but claims for declaratory or injunctive relief as well. *Consumers Union, supra*, 446 U.S. at 732-34.

State legislators passing laws are plainly protected by legislative immunity. The Governor's actions in approving or vetoing bills passed by both houses of the General Assembly are also legislative in nature and an integral step in the legislative process, and thus any claims against the Governor based upon his exercise of that power is barred by legislative immunity. *Bogan v. Scott-Harris, supra*, 523 U.S. at 55 (mayor's act of signing ordinance into law was "formally legislative" and mayor was entitled to legislative immunity from suit based upon such conduct) (citing *Edwards v. United States*, 286 U.S. 482, 490 (1932) and *Smiley v. Holm*, 285 U.S. 355, 372-73 (1932)); *see also Baraka v. McGreevey, supra*, 481 F.3d at 201-02 (3d Cir. 2007) (Governor's act of signing legislation into law "is properly characterized as a legislative action" that is protected by legislative immunity).

Similarly, members of administrative boards sued in their individual capacities for engaging in legislative functions are also protected by legislative immunity. Administrative boards in Arkansas (like the State Board of Education and the Public School Academic Facilities

and Transportation Commission) often serve two important functions: an adjudicatory function (in which they fill a quasi-judicial role) and a rule-making function (in which they fill a quasi-legislative role). Ark. Code Ann. § 25-15-201, et seq. The adjudication (or quasi-judicial) function of boards is set out at Arkansas Code Annotated § 25-15-208. The rule-making (or quasi-legislative) function of boards is set out at Arkansas Code Annotated § 25-15-203, 204. Members of administrative boards in Arkansas exercising judicial functions (i.e. presiding over adjudications (Ark. Code Ann. § 25-15-208)) are shielded from suit by judicial immunity. *Dunham v. Wadley*, 195 F.3d 1007 (8th Cir. 1999); *In re Procedures of Arkansas Supreme Court Regulating Professional Conduct of Attorneys*, 331 Ark. 537, 963 S.W.2d 562, 565 (1998)(Granting judicial immunity to members of professional conduct review committee). In the same way, members of administrative boards in Arkansas exercising legislative functions (i.e. rule-making Ark. Code Ann. § 25-15-203, 204) should be shielded from suit by legislative immunity.

The only exception to legislative immunity in Arkansas is when a person acting in a legislative capacity receives a personal financial benefit from an illegal legislation. *Massongill*, 337 Ark. 281, 991 S.W.2d 105 (1999). In that case the person may be compelled to return the amount received under the illegal ordinance or law. *Id.* Otherwise, the immunity is a complete defense from any claim of liability. Plaintiff Deer/Mt. Judea makes no claim that any of the defendants fall into this exception, therefore, the Defendants exercising legislative functions are immune from this lawsuit.

Even if they were not barred by legislative immunity, any claims against the legislators for passing legislation, members of Boards for exercising their discretionary functions, or the Governor for vetoing or not vetoing legislation would be barred by the Separation of Powers

doctrine. Article 4 of our Constitution establishes three separate, distinct branches of government – legislative, executive, and judicial -- and provides that no branch may exercise any power that is given to another branch by the Constitution. Specifically, Article 4, Section 2 states plainly that "[n]o person or collection of persons, being of one of these departments, shall exercise any power belonging to either of the others, except in the instances hereinafter expressly directed or permitted." Here, Plaintiff's attempt to obtain judicial relief as against legislators for legislating, administrative boards for exercising their discretionary authority, and the Governor for his authority to veto or "line item veto" a bill passed by the General Assembly would require the judicial branch to encroach upon the legislative powers that are constitutionally granted solely to the General Assembly and the Executive branch. The exercise of jurisdiction or the grant of any form of relief in such a case is plainly barred by the separation of powers provisions of our Constitution.

The Supreme Court outlined the limits of the judiciary's power to compel or prohibit legislative action in *Wells v. Purcell*, 267 Ark. 456, 592 S.W.2d 100 (1979). In that case, a citizen and taxpayer sought a writ of mandamus directing the Lieutenant Governor, the President Pro Tem of the Senate, and Speaker of the House of Representatives to adjourn, or attempt to adjourn, their respective chambers of the General Assembly (which were, at the time, in extended recess), or to certify their disagreement over adjournment to the Governor so he could declare an adjournment. The Supreme Court held that the Courts are prohibited by the Separation of Powers provisions of the Constitution from issuing such a writ to the legislature, even where the alleged duty sought to be compelled is clear and unmistakable:

> The writ of mandamus cannot be issued to the legislature, even when the duty sought to be compelled is clear and unmistakable. . . . The doctrine of separation of powers, stated in Article 4, §2 of our constitution, has probably been the barrier to attempts to extend the reach of the writ to the legislature. Neither of the three

separate departments of government is subordinate to the other and neither can arrogate to itself any control over either one of the other in matters which have been confided by the constitution to such other department. The legislature, under the separation of powers, can be neither coerced nor controlled by judicial power.

The legislature is responsible to the people alone, not to the courts, for its disregard of, or failure to perform, a duty clearly enjoined upon it by the constitution, and the remedy is with the people, by electing other servants, and not through the courts.

The matter is summarized concisely in an annotation appearing in 153 A.L.R. at p. 522, viz:

> It is well-settled that the courts have no power to enforce the mandates of the Constitution which are directed at the legislative branch of the government or to coerce the legislature to obey its duty, no matter how clearly or mandatorily imposed upon it, with respect to its legislative function.

* * *

Adjourning and extending a legislative session are clearly among the powers of the General Assembly. It has exercised its powers. Even if they have been exercised erroneously, it is clear that the Circuit Court of Pulaski County had no power, without violating Article 4, § 2 of the Arkansas Constitution . . . to issue the writ to that body. . . .

* * *

The courts cannot interfere with the legislature or the legislative process; they can only determine the validity of its acts.

Id., 267 Ark. at 462-67 (internal citations omitted).

Like the constitutional provisions governing adjournment of sessions of the General Assembly that were at issue in *Wells v. Purcell*, which assigned the power to adjourn to the General Assembly and the Governor, our constitution plainly and clearly delegates to the General Assembly, and the Governor, the power to enact the laws of the State, including laws appropriating funds from the state treasury. The precise procedures for the enactment of such laws are spelled out and are to be performed by the General Assembly and the Governor alone.

Nothing in our Constitution delegates any portion of that legislative power or procedure to the judicial branch. And, while the judicial branch may, in the context of deciding an appropriate dispute, determine the validity of legislatively-adopted acts, the Court may not compel the legislature, or the Governor, to pass or approve a legislative act, or direct the legislature or the Governor to rescind legislative action already taken. "Mandamus cannot be used to undo legislative action or to compel revocation or rescission of legislative action in violation of the doctrine of separation of powers." *Wells, supra*, 267 Ark. at 465 (*citing State v. City of Shreveport*, 231 La. 840, 93 So.2d 187 (1957).

Much of Plaintiff's Complaint invites the Court to substitute its judgment of what laws should be passed and what decisions should be made in the management of elementary and secondary education in the State for that of the General Assembly, the Governor, and the Board of Education. The Separation of Powers doctrine prevents this Court from accepting such an invitation. So long as the Executive and Legislative branches are acting within their Constitutional authority, Courts cannot compel the Governor to approve, veto, or line-item veto a bill passed by the General Assembly; cannot order the Defendant Boards to adopt a particular rule; and cannot direct the General Assembly what laws should or should not be passed or tell the legislature what the content of its laws must be.

The Supreme Court in *Lake View* consistently refused to direct specific remedies because of the separation of powers doctrine. In its 2002 opinion the Supreme Court stated: "We recognize that the proper scope of our review is limited to determining whether the current system meets constitutional muster and we refuse to encroach upon the clearly legislative function of deciding what the new legislation will be." *Lake View 2002*, 351 Ark. 31, 91, 91

S.W.3d 472 (2002) *quoting DeRolph v. State*, 78 Ohio St.3d 193, 213, n. 9, 677 N.E.2d 733, 747 (1997). In its 2004 opinion the Supreme Court stated:

> First, it is not this court's role under our system of government, as created by the Arkansas Constitution, and under the fundamental principle of separation of powers, as set out in Article 4, § 2 of that document, to legislate, to implement legislation, or to serve as a watchdog agency, when there is no matter to be presently decided. This court made it perfectly clear in *Wells v. Purcell*, 267 Ark. 456, 592 S.W.2d 100 (1979), that the judicial branch cannot arrogate to itself control of the legislative branch. Our role is to hear appeals and decide cases where we have original jurisdiction.

Lake View 2004, 358 Ark. 137, 160, 189 S.W.3d 1, 16 (2004). When asked to direct specific funding decisions in 2005, the Court again made clear that doing so would overstep the boundaries placed on its jurisdiction by the separation of powers doctrine. *Lake View 2005*, 364 Ark. 398, 415, 220 S.W.3d 645, 657 (2005). Accordingly, the judiciary's review of the education funding decisions made by the Legislature remains subject to the separation of powers doctrine. Plaintiffs request that this Court direct the Legislature how to appropriate state revenues or what decisions should be made with regard to particular educational issues should be dismissed.

C. Plaintiff's Claims are Barred by *Res Judicata*.

The doctrine of *Res Judicata* encompasses the two distinct concepts of issue and claim preclusion. Issue preclusion provides that "a decision by a court of competent jurisdiction on matters which were at issue, and which were directly and necessarily adjudicated, bars any further litigation on those issues by the plaintiff or his privies against the defendant or his privies on the same issue." *Mason v. State*, 361 Ark. 357, 367, 868 S.W.2d 89 (2005). Claim preclusion provides that "a valid and final judgment rendered on the merits by a court of competent jurisdiction bars another action by the plaintiff or his privies against the defendant or his privies on the same claim." *Id.*, citing *Searcy v. Davenport*, 352 Ark. 307, 100 S.W.3d 711 (2003).

> *Res judicata* bars not only the relitigation of claims which were actually litigated in the first suit, but also those which could be litigated. Where a case is based on the same events as the subject matter of a previous lawsuit, *res judicata* will apply even if the subsequent lawsuit raises new legal issues and seeks additional remedies.

Huffman v. Alderson, 335 Ark. 411, 415, 983 S.W.2d 899, 901 (1998).

These common law doctrines exist to promote the finality of judgments and to prevent the relitigation of issues already decided. *Id.*, see also *Brown v. Felsen*, 442 U.S. 127, 131 (1979). As such, they are rules of "fundamental and substantial justice," because by permitting contested matters to achieve a state of repose, *res judicata* encourages reliance on adjudication, bars vexatious litigation, and promotes economy of judicial resources. *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 299, (1917); *Allen v. McCurry*, 449 U.S. 90 (1980); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979). Both issue and claim preclusion apply to bar the claims asserted by the Plaintiff in this case.

As Plaintiffs are aware, almost every aspect of the system used by the State of Arkansas to fund elementary and secondary public education in the state was (or could have been) comprehensively litigated for some fifteen years in the case of *Lake View School District No. 25 v. Huckabee, et al.*, 364 Ark. 398, 220 S.W.3d 645 (2005); *Lake View 2004*,[2] 358 Ark. 137, 189 S.W.3d 1, 209 Ed. Law Rep. 537 (2004); *Lake View 2002*, 351 Ark. 31, 91 S.W.3d 472, 173 Ed. Law Rep. 248 (2002); *Lake View 2000*, 340 Ark. 481, 10 S.W.3d 892, 141 Ed. Law Rep. 1183 (2000);[3] *Tucker v. Lake View School Dist. No. 25*, 323 Ark. 693, 917 S.W.2d 530, 108 Ed. Law Rep. 430 (1996). The *Lake View* case ended in 2007 with a declaration that the State's education system is constitutional. *Lake View 2007*, 370 Ark. 139, 257 S.W.3d 879 (2007).

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[2] Because of the number of appellate decisions in the *Lake View* case, this brief will refer to the opinions by the year of decision for ease of reference. For example, the opinion handed down in 2004 will be referred to as *Lake View 2004*.

[3] A fairly detailed chronology of the "long and tortured" history of the *Lake View* case, pre-2000, can be found in the *Lake View 2000* opinion.

The school district Plaintiff in this case was a member of the class represented in the *Lake View* case. A timeline of the pertinent events in *Lake View*, including Plaintiffs' involvement, follows:

August 19, 1992 – The original complaint was filed in the *Lake View* case.

November 9, 1994 – Then Chancellor Imber issued a 52 page ruling with 147 findings of fact and 18 conclusions of law holding that the Arkansas school funding system was unconstitutionally inequitable and inadequate. Chancellor Imber stayed the application of her ruling for two years "to give the Arkansas General Assembly time to implement a constitutional system." *Lake View 2000*, 340 Ark. at 485, 10 S.W.3d at 894.

1995 – The General Assembly revised the school funding system in response to Chancellor Imber's ruling. *Id.*

August 22, 1996 – Chancellor Imber certified a class in *Lake View* of "all school districts in the state, students and parents of students in all school districts, school board members of all school districts and school district taxpayers who have paid taxes to support the public school system." *Lake View 2000*, 340 Ark. at 486, 10 S.W.3d at 895; accord *Lake View 2002*, 351 Ark. at 43, 91 S.W.3d 478.

November 5, 1996 – Amendment 74 to the Arkansas Constitution is adopted by the people of Arkansas. It amends Article 15 of the Arkansas Constitution and provides that any constitutional provision in conflict with Amendment 74 is repealed. Amendment 74 established a uniform rate of tax, or a base millage rate, of 25 mills for maintenance and operation of all school districts in the state. Amendment 74 also acknowledged and allowed "funding variations" among the school districts.

August 17, 1998 – Chancellor Collins Kilgore entered a final order dismissing the Lake View school district's complaint as "moot because Amendment 74 [and the legislation passed by the General Assembly in 1995 and 1997] had changed the standard for the school funding system and allowed funding variances among the school districts." *Lake View 2000*, 340 Ark. at 492, 10 S.W.3d at 898-9.

March 2, 2000 – The Arkansas Supreme Court reversed Chancellor Kilgore's August 17, 1998, final order and remanded the case for a trial on the "constitutionality of state initiatives since 1994." *Lake View 2000*, 340 Ark. at 493-5, 10 S.W.3d at 899-900.

September 8, 2000 – Chancellor Kilgore commenced the compliance trial pursuant to *Lake View 2000*. The trial lasted nineteen days in September and October of 2000. Thirty-six witnesses were called to testify and 187 exhibits were

introduced resulting in a 99 volume appellate record spanning 20,878 pages. *Lake View 2002*, 351 Ark. at 45, 91 S.W.3d 479.

May 25, 2001 – Chancellor Kilgore entered his 64 page final order "in which he declared the current school-funding system to be unconstitutional on the twin grounds of inadequacy under the Education Article and inequality under the Equality provisions of the Arkansas Constitution." *Lake View 2002*, 351 Ark. at 45. 91 S.W.3d at 479. Chancellor Kilgore discussed in detail the school funding system and sources of those funds. He also discussed various aspects of the educational funding system including transportation funding, teacher salaries. In other words, Chancellor Kilgore specifically addressed the issues raised in Plaintiff's Complaint in this case.

November 21, 2002 – The Arkansas Supreme Court affirms Chancellor Kilgore's May 25, 2001, final order. *Lake View 2002*, 351 Ark. 31, 91 S.W.3d 479. The Court stays the issuance of its mandate until January 1, 2004, to "give the General Assembly and the Department of Education . . . time to correct [the] constitutional disability in public school funding and time to chart a new course for public education in this state." *Id.* at 97, 91 S.W.3d at 511.

2003 – The General Assembly meets in its regular session and two extraordinary sessions in response to the Supreme Court's 2002 opinion in the *Lake View* case. The 2003 sessions of the General Assembly charted that new course and overhauled the public school funding system. Their efforts lead the Supreme Court to later state in 2004 that "[t]he legislative accomplishments have been truly impressive." *Lake View 2004*, 358 Ark. at 158. The current educational funding system is essentially the same as the one put in place in 2003.

January 1, 2004 – the Arkansas Supreme Court issues its mandate following its November 21, 2002, opinion.

January 22, 2004 – The Arkansas Supreme Court recalls its mandate issued 21 days earlier.

February 3, 2004 – The Supreme Court appointed two special masters to examine the changes passed by the General Assembly in 2003 to the public school system, including the funding system in ten specified areas as well as "to examine and evaluate any other issue they deem relevant to compliance with this court's November 21, 2002 opinion." *Lake View*, 356 Ark. 1, 144 S.W.3d 741 (2004).

April 2, 2004 – The Special Masters file their report to the Supreme Court regarding the adequacy and equity of the school system implemented in the 2003 legislative sessions. The Masters describe the accomplishments of the General Assembly as "laudable." *Lake View 2004*, 358 Ark. 137, 189 S.W.3d 1 (2004).

June 18, 2004 – The Supreme Court adopts the report of the Special Masters, releases jurisdiction over the case, and orders the mandate to issue. Although urged to do

so, the Court declines to hold that the school funding system put in place in 2003 is unconstitutional. *Id.*

June 9, 2005 – The Supreme Court recalls its mandate in the *Lake View* case and reappoints the Special Masters for another round of litigation regarding the constitutionality of the school funding system. *Lake View*, 362 Ark. 520, 210 S.W.3d 28 (2005).

October 3, 2005 – The Special Masters issue their report to the Supreme Court in the second round of proceedings. The report covers and discusses many of the issues presented in Plaintiffs Amended Complaint filed in this case. Ex. 5, 2005 Report of the Special Masters.

December 15, 2005 – The Supreme Court issues its opinion adopting, in part, the report of the Special Masters, and holding that "the public school-funding system continues to be inadequate [and] that our public schools are operating under a constitutional infirmity." *Lake View 2005*, 364 Ark. 398, 220 S.W.3d 645 (2005). The Court stays the issuance of its mandate "until December 1, 2006, to allow the necessary time to correct the constitutional deficiencies." *Id.* at 415-416.

November 30, 2006 – The Supreme Court, upon motion by the Rogers School District No. 30, Little Rock School District, Pulaski County Special School District, and Barton-Lexa School District (the class representative) deferred the issuance of the mandate from the *Lake View 2005* opinion for 180 days and reappointed the Special Masters.

February 9, 2007 – The parties to the Lake View case submit a Joint Report "addressing the constitutional-deficiency issues" in the case. Plaintiffs in this case did not object or file any motions or papers in response to the Joint Report.

April 26, 2007 – The Special Masters issue their third and final Report in the Lake View case generally approving the funding system in place after the 2007 session of the 86th General Assembly.

May 31, 2007 – The Supreme Court issues its final opinion in the *Lake View* case, signed individually by each of the seven Justices. In that opinion the Supreme Court holds, "[b]ecause we conclude that our system of public-school financing is now in constitutional compliance, we direct the clerk of this court to issue the mandate in this case forthwith." *Lake View 2007*, 370 Ark. 139, 257 S.W.3d 879 (2007)

The Special Masters concluded their 2007 review of the education system with the following statement: "Meeting the challenge of using the support which is in place, and that which will ensue, to give adequate education to Arkansas's children now passes to the local school districts." *Lake View 2007*, 370 Ark. 139, 145, 257 S.W.3d 879, 883. The Special

Masters and the Supreme Court specifically reviewed several areas upon which Deer/Mt. Judea base their claims. The Court's conclusion was that all of these areas met the standards in the Constitution for educational adequacy. Accordingly, Plaintiff Deer/Mt. Judea's claims regarding components of the educational system that were in place in 2007 and events that occurred before then are barred by *res judicata* and its complaint should be dismissed.

D. Plaintiff's Complaint Fails to State an Illegal Exaction Claim.

The Arkansas Supreme Court has recognized two types of illegal exaction claims. First is the "public funds" type of illegal exaction claim where a plaintiff alleges that public funds generated from tax dollars are being misapplied or illegally spent. Second is the "illegal-tax" type of claim where a plaintiff alleges that the tax itself was illegally adopted and is invalid. *Austin v. Center Point Energy Arkla*, 365 Ark. 138, 147 (2006).

The first type of exaction claim (the "public funds" type) arises when public funds are used in ways not allowed by law; usually the misapplication of public funds or recovery of funds wrongly paid to a public official. *Pledger v. Featherlite*, 308 Ark. 124, 128 (1992). The second type of exaction claim (or "illegal-tax" type) is where the tax is alleged to be illegal itself. *Id.* There are many "illegal-tax" type exaction claims where the tax has been enjoined, but in all those cases the tax itself was declared illegal. *Pledger* at 128. *(citing Schumer v. Ouachita County,* 218 Ark. 46 (1950)) *see also Missouri Pacific Ry. Co v. Fish,* 181 Ark. 863 (1931).

Nowhere in Deer/Mt. Judea's 112 page complaint do they ever allege that any tax was illegally levied or that any tax proceeds are not being used for the purposes for which they were levied. Plaintiff Deer/Mt. Judea claims, essentially, that more money should be spent on education than what the General Assembly has approved. They do not (and cannot) claim that a tax was illegally passed or that education funds are being used for non-education purposes. The

complaint simply fails to allege any facts which, even if true, would state a claim based on the illegal exaction provision of the Arkansas Constitution. That claim should, therefore, be dismissed.

E. School Districts Lack Standing to Bring an Illegal Exaction Claim.

Section 13 of Article 16 of the Arkansas Constitution allows a citizen to challenge an illegally levied tax or the misapplication of tax funds. *Brewer v. Carter*, 365 Ark. 531, 231 S.W.3d 707 (2006). To have standing to bring such an illegal exaction claim the plaintiff must be a citizen and must have paid the allegedly illegal tax. *Id.* The plaintiff must also have suffered some injury-in-fact fairly traceable to the allegedly illegal conduct. *Id.* The plaintiff school districts are exempted from paying property taxes. Ark. Const. Art. 16 § 5(b); Ark. Code Ann. § 26-3-301. Further, the plaintiff school district has not even alleged it is a taxpayer within the meaning of Article 16 section 13. See Amended Complaint filed May 23, 2006. Therefore, the plaintiff does not have standing to pursue an illegal exaction claim, even if one had been stated; this claim should be dismissed. See *Worth v. City of Rogers*, 351 Ark. 183, 89 S.W.3d 875 (2002)(noting that "[a]n illegal-exaction suit is a constitutionally created class of **taxpayers**")(emphasis added).

Further, the Plaintiff school district is not a "citizen" under Section 13 of Article 16 of the Arkansas Constitution. In *Chicago, Rock Island and Pacific Railroad Company v. State*, 86 Ark. 412, 111 S.W. 456, *aff'd* 219 U.S. 453, 31 S.Ct. 275, 55 L.Ed.2d 90 (1908), the Court dealt with the issue of whether Article II, Section 18 of the State Constitution applied to corporations. Noting that "it has long been settled that a corporation is not a citizen within the meaning of [Article IV, Section 2 of the United States Constitution]," the Court held the same with regard to the Arkansas provision. The Court explained this holding in *Standard Pipeline Co. v. Burnett*, 188 Ark. 491, 66 S.W.2d 637 (1933). There, the Court noted that there is a:

> fundamental difference between natural and artificial persons [recognized] in our own constitution . . . by which laws are forbidden denying any person equal protection, or which do not secure equal protection, or which do not secure equal privileges and immunities, do not relate to corporations, because these do not exist naturally, but are the creatures of law, possessing only such powers as are granted them, and making only such contracts as they are authorized to enter into, and that, wherever an act is general and inform in its operation upon all persons coming within the class to which it applies, it does not come within the prohibition of the Constitution. We have many times upheld the validity of actions relating to corporations, limiting their rights beyond those of natural citizens for the reason that a citizen or natural person has the inherent right, independent of any legislation, to contract, while the corporation is clothed only with such power as may be given it by the legislative will, and this may be altered, revoked, or annulled at the pleasure of the legislature, and terms prescribed under which they may conduct their business.

Id. at 639. The same reasoning applies with regard to whether a school district is entitled to the protections of the state constitutional provision allowing illegal exaction lawsuits. Logically, school districts cannot be a "citizen or class of citizens" which are entitled to the equality of privileges and immunities guaranteed in Article 2, Section 18. Likewise, as both the United States Supreme Court and the Arkansas Supreme Court have noted with regard to the equal protection provision of the United States Constitution, a school district cannot be a person who is entitled to "equality . . . before the law" as guaranteed in Article 2, Section 3. *See, Delta Special School District No. 5 v. State Board of Education*, 745 F.2d 532 (8th Cir. 1984). As the Supreme Court said in *Trenton v. New Jersey*, 262, U.S. 182, 43 S.Ct. 534, 67 L.Ed. 937 (1923),

> the number, nature and duration of the powers conferred upon [municipal] corporations and the territory over which they shall be exercised rests in the absolute discretion of the state . . . . The State . . . at its pleasure, may modify or withdraw all such powers . . . expand or contract the territorial area . . . unite the whole or a part of it with another municipality . . . with or without the consent of the citizens, or even against their protest. In all these respects the state is supreme; and its legislative body, conforming its action

> to the State Constitution may do as it will, unrestrained by any provision of the Constitution of the United States.

Here, the State has created the Plaintiff school district, and has granted it only certain powers. A.C.A. § 6-13-101 et seq. School districts are not natural, independently existing entities, but depend upon the State for their very existence. Although citizens of Arkansas, including school children, have certain constitutional rights, school districts do not meet the definition of "persons" provided in the Arkansas Constitution. School districts are not "citizens" protected by Article 16, Section 12. School districts are political subdivisions of the state and do not have the authority to bring this claim (*See East Jackson Public Schools v. State*, 133 Mich. App. 132, 348 N.W.2d 303, 306 (Mich. 1984).)

Only a party having a right to be enforced or a wrong to be prevented or redressed may maintain an action. *Des Arc & Powhatan Bridge Company v. Austin Bridge Company*, 94 F.2d 494 (8th Cir. 1938). In order to establish standing to challenge a statutory law, "a party must demonstrate that he is possessed of a right which the [law] infringes and that he is within the class of persons affected by the [law]." *Thompson v. Arkansas Social Services*, 282 Ark. 369, 373, 669 S.W.2d 878 (1984). Plaintiffs here are mere political subdivisions of the State that do not pay property taxes and they are not entitled to be heard in this Court on the issues raised in their Complaint. Because they lack standing to bring this lawsuit, Plaintiffs' claims should be dismissed.

F. Plaintiff's Claims are Barred by Separation of Powers

Plaintiff challenges how the General Assembly appropriates state money to fund the public school system. Plaintiff also asks this Court to overturn the discretionary decisions of the legislative branch and direct the details of how the State's educational funding system should be established. This form of relief is clearly barred by separation of powers:

> Our state Constitution is not a grant of power, but constitutes a limitation, and, if there be no limitation of power, impliedly or specifically expressed, the Legislature, in the exercise of its sovereign right, may authorize such appropriations as it deems necessary. *Newton v. Edwards*, 203 Ark. 18, 155 S.W.2d 591; *Smart v. Gates*, 234 Ark. 858, 355 S.W.2d 184; *Hooker v. Parkin*, 235 Ark. 218, 357 S.W.2d 534. Courts are without jurisdiction to review the discretion of the Legislature in the exercise of the power it possesses. *Russell v. Cone*, 168 Ark. 989, 272 S.W. 678.

Berry v. Gordon, 237 Ark. 865, 376 S.W.2d 279 (1964).

The only limits on the Legislature's power are the Federal and State Constitutions. *Hand v. H & R Block, Inc.*, 258 Ark. 774, 376 S.W.2d 279 (1975). All Acts passed by the legislature are presumed to be consistent with these documents. This heavy presumption requires any and all doubts to be resolved in favor of the constitutionality of the acts of the General Assembly; if it is possible for the judiciary to construe an act to be constitutional, then it must do so. *Stone v. State*, 254 Ark. 1011, 498 S.W.2d 634 (1973). These rules are "essential to the welfare of the checks and balances provided by the American tripartite system of government." *Id.* at 1013, 498 S.W.2d at 635. Indeed, the discretion of the Arkansas General Assembly in making appropriations is so strong that the Constitution prevents one legislature from being bound by a prior legislature's appropriations. Ark. Const. Art. 5 § 29 ("no appropriations shall be for a longer period than two years").

Plaintiffs' dispute in this case is, in essence, a challenge to how the General Assembly has decided to use the state's monetary resources to fund education in this state. Plaintiff asks this Court to make particular decisions about the details of the State's educational funding system. The Supreme Court explained in *Lake View* that this was not the Court's role:

> First, it is not this court's role under our system of government, as created by the Arkansas Constitution, and under the fundamental principle of separation of powers, as set out in Article 4, § 2 of that document, to legislate, to implement legislation, or to serve as a watchdog agency, when there is no matter to be presently decided. This court made it perfectly clear in *Wells v. Purcell*, 267 Ark. 456, 592 S.W.2d 100 (1979), that the judicial branch cannot arrogate to itself

> control of the legislative branch. Our role is to hear appeals and decide cases where we have original jurisdiction. . . . Various parties and the dissent call upon this court to continue to monitor the General Assembly. But for how long? Until the adjournment sine die of the 2005 General Session? Until all legislative programs discussed in this opinion have been fully funded? Until all facilities and equipment and curricula deemed essential for an adequate education have been made substantially equal? What has been set in motion by the General Assembly and Executive Department will take years and perhaps even a decade to implement fully. Again, it is not this court's constitutional role to monitor the General Assembly on an ongoing basis over an extended period of time until the educational programs have all been completely implemented or until the dictates of Lake View III have been totally realized.

Lake View 2004, 358 Ark. at 160-161. The rule from the *Lake View* line of decisions is that when the legislature makes rational, evidence-based decisions in funding education it acts constitutionally. The General Assembly accomplishes this effort through its Act 57 studies. *Lake View 2005*, 364 Ark. at 415 ("While we recognize that failures in the process due to noncompliance with Act 57 and Act 108 are evident, this court does not direct the General Assembly to appropriate a specific increase in foundation or categorized funding amounts.")

It is beyond dispute that the General Assembly has prepared adequacy reports covering all areas that Plaintiff complains about. Accordingly, the General Assembly has addressed Plaintiff's concerns in a rational, thoughtful manner through compliance with Act 57. As such, this Court is without authority to reverse the decisions that were made by the General Assembly, and this case should be dismissed.

G. The Individual Capacity Defendants are Entitled to Statutory Immunity

The legislature has chosen to grant limited immunity to the State's officers and employees by statute. *See* Ark. Code Ann. 19-10-305(a). State officers and employees acting without malice in the course and scope of their employment are immune from an award of damages in litigation. *Grine v. Bd. of Trustees*, 338 Ark. 791, 797, 2 S.W.3d 54, 58 (1999). This immunity is similar to a public official's qualified immunity recognized by federal law. *Fegans*

v. Norris, 351 Ark. 200, 206, 89 S.W.3d 919, 924 (2002). Accordingly, a state official is immune "if his actions did not violate clearly established principles of law of which a reasonable person would have knowledge." *Simons v. Marshall*, 369 Ark. 447, 255 S.W.3d 838 (2007)(holding that action based on conclusory allegations of sexual groping by state trooper barred by qualified immunity). A bare allegation of willful and wanton conduct cannot overcome this statutory immunity. *Arkansas Dept. of Environmental Quality v. Al-Madhoun*, 374 Ark. 28, ___ S.W.3d ___ (2008).

Plaintiffs' Complaint concedes that the individual capacity Defendants are sued simply for holding their respective offices as members of State Boards, the Governor, and the Commissioner of Education[4] and, further, that all of whatever actions Deer/Mt. Judea believes they did wrongly (which is not revealed in the 112 page complaint) were taken in their respective roles as board members or executive branch officials. Complaint ¶¶ 13-20. In other words, Plaintiffs' allege that the individual defendants acted within the scope of authority they were granted. Id. Therefore, the individual capacity Defendants are entitled to state statutory immunity on any individual capacity claims and should be dismissed from this suit.

H. Plaintiff's Complaint fails to State a Claim Against Any of the Named Defendants

Arkansas is a fact-pleading state, meaning that a plaintiff must state facts not mere conclusions in order to be entitled to relief. Plaintiffs must plead sufficient facts to support the application of the legal doctrines they invoke and to support arguments to toll the statute of limitations. *Floyd v. Koenig*, 101 Ark. App. 230, 274 S.W.3d 339 (2008). A complaint that states only conclusions without any factual support must be dismissed. *Arkansas Dept. of Environmental Quality v. Al-Madhoun*, 374 Ark. 28, ___ S.W.3d ___ (2008).

[4] Although, three of the Defendants, Darr, Moore, and Bookout, were sued before they took office.

Deer/Mt. Judea's Complaint makes no allegations of any sort of conduct of any of the Defendants except for Governor Beebe and Richard Weiss. It is simply devoid of any allegations regarding any actions taken (or not taken) by any of the Defendants. As to the Governor and Weiss, the Complaint only alleges that last August they provided information to a legislative committee for it to consider during its deliberative process. This is core First Amendment speech that should be protected from suit. Plaintiff's Complaint fails to give the Defendants fair notice of what claims are being made against them; what it is that Deer/Mt. Judea claims that they did wrong. *Urban Renewal Agency of City of Harrison v. Hefley*, 237 Ark. 39, 371 S.W.2d 141 (1963). Plaintiff's naming of Defendant Mark Darr individually, is especially curious given that Lt. Gov. Darr has never held political office before. Therefore, the Complaint should be dismissed for failure to state a claim upon which relief could be granted. Ark. R. Civ. Pro. 12(b)(6).

I. The Education Funding System is Constitutional

As noted above, the Supreme Court has declared Arkansas's educational funding system to be constitutional. *Lake View 2007*, *supra*. Deer/Mt. Judea's complaint can essentially be summarized as a demand to retain their small population school district while having the State run the district for them; this the Constitution does not require.

The "linchpin for achieving adequacy in public education" is the General Assembly's biennial assessment of educational needs in the State. *Lake View 2005*, 364 Ark. at 411-412. As part of the massive education reforms passed in 2003 and 2004, the General Assembly passed Act 57 of the Second Extraordinary Session of 2003. Act 57 established the parameters of the biennial study that the legislative committees on education are to perform to assess the education funding system in the State and determine, based on the evidence gathered in that study, whether

any changes need to be made in the system and what those changes should be. Ark. Code Ann. § 10-3-2101 *et seq.*

The Plaintiff's Complaint is premised on the fiction that no Act 57 study has been done and then invokes the *Lake View 2005* opinion in support of its claim that having failed to undertake such a study the education funding system is unconstitutional. This argument is misconceived. In 2005, when the Supreme Court recalled its previously issued mandate, the State had not yet performed an Act 57 study. *Lake View 2005*, 364 Ark. at 411-413. Every biennium since then, however, the Senate and House Committees on Education have conducted Act 57 studies. Exs. 1 & 2, 2008, 2010 Adequacy Studies. Plaintiff's argument that the General Assembly and the State are "flying blind" in making decisions about the State's education system is simply false. The Acts and reports of the General Assembly themselves make clear that the allegation that the General Assembly has undertaken no Act 57 study simply is untrue. In reality Plaintiff's complaint is not that the General Assembly failed to undertake an Act 57 study, but rather that Plaintiff disagrees with the conclusions that were reached in the Act 57 study process and the laws enacted by the General Assembly as a result of its studies.

After the 2005 decision in *Lake View* upon which Plaintiff relies, the Arkansas Supreme Court found in 2007 that the General Assembly had conducted an Act 57 study and passed legislation based on that study. *Lake View 2007*, 370 Ark. 139, 257 S.W.3d 879 (2007). In the strongest terms possible, the Court then released jurisdiction and held that the state's educational system was constitutional. "To emphasize the unanimity of the court on this matter, each justice has affixed his or her signature at the end of this opinion." *Id.* at 140.

In each biennium since the Supreme Court's 2007 *Lake View* opinion the General Assembly has studied the State's education system in accordance with Act 57. Ark. Code Ann. §

10-3-2101, et seq. The 2008 Adequacy Report was some 59 pages long and addressed all aspects of the State's education system. Ex. 1, 2008 Adequacy Report. The report was based on many individual studies of different aspects of the State's education system. That study then formed the basis for the education funding legislation enacted in the 2009 regular legislative session.

The 2010 Adequacy Report was submitted to the Joint Education Committee on or about November 1, 2010. Ex. 2, 2010 Adequacy Report. It is over 60 pages long and, again, addresses all aspects of the State's education system. The report is based on many individual studies of different aspects of the State's education system, including a thorough and detailed report on the school districts' use of the state resources provided to them. Ex. 3, 2010 Resource Study. The 2011 session of the 88th General Assembly just began on January 10, 2011. Any claims about what may or may not happen during this legislative session are not ripe for review. One thing that cannot be maintained, however, is that the 88th General Assembly will be "flying blind." It has a comprehensive report on which to base its decisions.

The following section of this brief addresses each of the forms of relief requested by Plaintiff.

1. The State has a System in Place to Evaluate Programs for Improving Student Achievement.

Deer/Mt. Judea is simply wrong in its claim that the State does not have a system in place to evaluate programs for improving student achievement. The publicly available Acts and Reports of the General Assembly demonstrate otherwise. See Ex. 2, 2010 Adequacy Report pp. 13-20; Ex. 1, 2008 Adequacy Report pp. 13-19.

In 2003, the General Assembly passed the Omnibus Quality Education Act of 2003. Act 1467 of 2003. This near forty page Act established fundamental aspects of Arkansas's academic

program. The Omnibus Act established or strengthened a) Accreditation Standards for schools and school districts adopted by the State Board of Education, Ark. Code Ann. § 6-15-202; b) state-wide curriculum with rigorous content, Ark. Code Ann. § 6-15-404; c) the Arkansas Comprehensive Testing, Assessment, and Accountability Program or "benchmark" and end-of-course testing for assessing individual student progress as well as academic attainment of schools and school districts, Ark. Code Ann. § 6-15-401, et seq.; d) Arkansas Comprehensive School Improvement Plans for schools and school districts to use to advance learning in the state, Ark. Code Ann. § 6-15-426; and e) sanctions and interventions for schools that are not able to meet academic goals set for them. Ark. Code Ann. § 6-15-425. A short summary of each of these programs will be discussed in turn.

a) Accreditation Standards

At the direction of the General Assembly, the State Board of Education has adopted a comprehensive set of school and district accreditation standards. Ex. 6, Rules Governing Standards for Accreditation. The standards govern nearly every aspect of education in school districts; from administration operating procedures (§ 7) to curriculum frameworks (§ 9) to maximum class size (§ 10.02) to professional development and in-service training for teachers and administrators (§ 15.04). Id. Performance and reporting standards are set out in the rules. All schools and school districts are required to meet the standards. They were adopted in 2003 and have been part of a constitutional education system since then. *Lake View 2004*, 358 Ark. at 146. The Supreme Court in 2004 approved the Legislative framework for the accreditation rules, and quoted Dr. James Guthrie as describing them as "state-of-the-art." *Id.* at 150. In the Education Week "Quality Counts" study cited by Plaintiff in their Complaint, Arkansas received

an "A" and the seventh highest score for its standards, assessments, and accountability measures. See Complaint p. 5 ¶ 5.

b) State-wide Curriculum

The ADE has established curriculum frameworks that define the content standards and student learning expectations in the core curriculum for students in Kindergarten through twelfth grade. Frameworks exist for each subject area which is identified in the course content frameworks. The core content areas covered by the frameworks are defined in Section 9.00 of the Standards of Accreditation. Ex. 6, Rules Governing Standards for Accreditation. The curriculum for at least one subject area is to be revised each year. At the secondary level, the State has adopted the "Smart Core" curriculum.

c) ACTAAP/Benchmark Testing and Other Academic Performance Assessments

The main component of the State's assessment of children's academic abilities is the ACTAAP or Benchmark Testing. Ark. Code Ann. § 6-15-401. Children begin Benchmark tests at the end of third grade and continue to periodically take the test through the eighth grade. Schools, school districts, and the State use the results of these tests to assess whether students are performing at grade level on their course work and to assess the schools' and districts' ability to educate their students to a proficient level of mastery of the prescribed curriculum. The National Office for Research on Measurement and Evaluation Systems (or NORMES) makes aggregate information on student performance on Benchmark exams available for anyone interested (http://normessasweb.uark.edu/schoolperformance/). This allows parents with internet access to see the academic performance of every school in the State, including Deer/Mt. Judea schools.

In addition to Benchmark testing, Arkansas public schools also use other exams to assess the academic progress of students: End-of-course exams, Grade 11 literacy exams, and norm-referenced tests in grades Kindergarten, second, and ninth. Ex. 1, 2008 Adequacy Report p. 13.

d) Arkansas Comprehensive School Improvement Plans (ACSIP)

A school's efforts to improve its curriculum, assessment, and, more generally, the academic performance of its students is brought together in the school's Arkansas Comprehensive School Improvement Plan or ACSIP. Every school must have an ACSIP plan in place to guide the school's efforts to improve instruction and the academic achievement of its students. Ark. Code Ann. § 6-15-426. Attached as exhibit nine (9) is the Deer Elementary School's ACSIP plan for the 2010-2011 school year. Deer Elementary's ACSIP plan shows how the district is using the State curriculum frameworks, benchmark testing, and other State and local resources to try to improve learning in the school.

2. The State has Many Professional Development Resources for Teachers, Schools, and Districts.

Plaintiff asks for the Court to order the State to adopt a certain type of professional development program. *See Lake View 2005*, 364 Ark. at 403. "Professional development" is the education term for continuing education for educators. The State, by statute, mandates that school districts prepare a professional development plan. Ark. Code Ann. § 6-17-704. Teachers, administrators, and classified school employees develop the plan. Id. Allowing district personnel to develop their own professional development plans allows them to tailor the plan to the district's professional development needs. The ADE requires all certified employees (district employees holding a teaching certificate) to have at least sixty (60) hours of professional development each year. Ex. 7, Professional Development Rule § 4.00.

In addition to requiring professional development, Arkansas provides numerous professional development resources to assist the districts. The ADE has a professional development office that is available to assist districts in all aspects of delivering quality continuing education to district personnel. http://arkansased.org/pd/index.html The ADE and Arkansas Educational Television Network (AETN) host "Arkansas IDEAS" or Internet Delivered Education for Arkansas Schools. http://ideas.aetn.org It is an on-line resource for teachers and administrators that provides many educational opportunities for them. Arkansas has multiple courses to support on-going literacy, math, and science education for teachers that are offered year-round during in-person classes. Additionally, the ADE and the fifteen regional education service cooperatives coordinate with colleges and universities throughout the state to provide professional development opportunities through twelve "STEM centers." "STEM" is a common acronym in education for "science, technology, engineering, and mathematics." The State provides many more resources for professional development in districts. In fact, the National Staff Development Council rated Arkansas as one of the best states in the nation for professional development opportunities for educators. Ex. 11, NSDC Executive Summary.

In short, the State has a broad-based professional development system. Plaintiff says nothing about why this system is inadequate. Its case is simply that it would have the State organize the system differently. This fails to state a constitutional claim.

3. The State Engages in Substantial Teacher Recruitment and Retention Efforts, and Also Provides Additional Funding to Deer/Mt. Judea School District as an Isolated District.

One of the significant focuses of the *Lake View* litigation was the State's efforts to attract and retain highly qualified teachers to districts in the State. *Lake View 2002*, 351 Ark. at 61-64, *Lake View 2004*, 358 Ark. at 142-143, 148-149, 157; *Lake View 2007*, 370 Ark. at 144. Several

of the State's teacher retention and recruitment programs are explained in the 2010 Equity Plan for the State. Ex. 4, 2010 Equity Plan.

The General Assembly has provided additional funding for districts with geographically remote (or isolated) schools. Ex. 2, 2010 Adequacy Report p. 26-27; Ark. Code Ann. § 6-20-601, 603, 604. In the 2008-09 school year, the Deer/Mt. Judea School District received $722,096 (or $1,910 per ADM) in isolated funding from the State. This funding is unrestricted; the District can use this revenue as it sees fit. Ex. 10, 2008-2009 Annual Statistical Report. Over $10,000,000 has been budgeted for the 2010-11 school years for isolated and special needs isolated funding. Ex. 2, 2010 Adequacy Study p. 26-27. Deer/Mt. Judea qualifies for the highest level of special needs isolated funding (20% of foundation funding) under Arkansas Code Annotated § 6-20-604(c). Both campuses of the Deer/Mt. Judea School District qualify for continued isolated funding at the levels specified in Arkansas Code Annotated § 6-20-603. The State has addressed the needs raised by Deer/Mt. Judea in its Complaint relative to providing incentives to support teacher recruitment and pay at the School District. Plaintiff's complaint is that it wants the State to do something different. This fails to state a claim that the State's teacher recruitment and retention efforts no long meet the Constitution's requirements. Accordingly, the Complaint should be dismissed.

4. The State's Transportation Funding System is Constitutional.

Plaintiff Deer/Mt. Judea's Complaint describes the transportation funding system that was held constitutional by the Supreme Court in 2007. *Lake View 2007, supra.* The Complaint, however, misrepresents the General Assembly's work in this area since 2007. For the 2008 Adequacy Report, the General Assembly studied the issue of student transportation funding. Part of the decisional process was deciding what adequacy requires in the area of student

transportation. The conclusion reached, based on the evidence presented to the legislative committees conducting the study was as follows:

> The Education Committees have determined that state-funded transportation for public education may be a necessary component to providing students with an equitable opportunity for an adequate education to the extent that a student would not otherwise be able to realize this opportunity but for such transportation being provided by the state. There is currently no data available to determine each district's essential route miles for students whose access to an equitable opportunity for an adequate education would be prevented by disability, poverty, distance, or geography. However, that determination is not required at the present time, as the committees' recommendation for the distribution methodology for the Enhanced Transportation Funding, which is in addition to the foundation funding matrix amount, utilizes a function of each district's historical route miles that is well above this minimum adequacy standard.

Ex. 1, 2008 Adequacy Report p. 56 (emphasis added). Thus, the determination was that the transportation funding needed to ensure that students are provided with an equitable opportunity for an adequate education has been made available through the foundation funding formula. Plaintiff's theory is that the State must fund transportation for every student in the State that wants a ride to school. The General Assembly determined that the State's adequacy obligation was to fund transportation for every student in the State who needs a ride to school. What the General Assembly declined to adopt was $25,000,000 in enhanced transportation funding that would have gone beyond the base amount needed for adequacy. The 2010 Resource Study, conducted in conjunction with the 2010 Adequacy Report, supports this conclusion. For the 2008-09 school year, the Resource Study found that school districts spent a total of $117.3 million on transportation. Per student, this figure translates to $30.34 less than what was provided for in foundation funding ($284 per student provided compared to $255.66 per student spent). Ex. 3, 2010 Resource Study p. 39.

Counsel for Plaintiff brought a claim about "excessive transportation time" before this Court in another case. *Walker v. Arkansas State Board of Education*, 2010 Ark. 277, ___

S.W.3d ___ (2010). In that case, the plaintiff alleged that the Arkansas State Board of Education ("ASBE") violated the Constitution by ordering the closure of a school campus that would result in school bus rides up to four hours a day for students. The Pulaski County Circuit Court rejected the claim, as did the Supreme Court. Specifically, the Supreme Court held that their review "of the record reveals that the Board's decision to approve the District's petition for closure did not violate a constitutional provision and complied with the Board's statutory authority. Because the Parents have not demonstrated that the Board's action in approving the petition for closure prejudiced their substantial rights under one of the bases of section 25-15-212(h), we affirm." *Id.* Although in form that case was an appeal under the Administrative Procedures Act from an ASBE decision, the basis of the claim was the same, i.e. that "excessive" transportation time violated the Constitution. That claim was specifically rejected. Indeed, Deer/Mt. Judea does not allege that anything about transportation times in the district (or other districts around the State) was any different before the Supreme Court's decision in 2007 holding the education funding system constitutional. Moreover, Deer/Mt. Judea School District does not even allege that the supposed "excessive transportation times" affect any rights held by the District. Accordingly, this claim should be dismissed because a) it has been addressed by the General Assembly; b) it is barred by *res judicata*; and c) Deer/Mt. Judea School District lacks standing to raise the claim.

5. The Constitution Does Not Require Teacher Retirement and Health Insurance to be Funded Separately.

As Plaintiff Deer/Mt. Judea alleges in its brief, funding for retirement contributions and health insurance for teachers has been an element of foundation funding since before 2007. Complaint ¶ 166, p. 105. It was part of the educational funding formula that was held to be Constitutional by the Supreme Court in 2007. *Lake View 2007, supra.* In the *Lake View 2005*

opinion, the Supreme Court directly addressed the issue of increased funding for teacher health insurance. In the 2005 legislative session, the General Assembly appropriated $35,000,000 as a direct payment to help sustain the teacher health insurance system. The Special Masters and the Court "found that the $35 million for teachers' health-insurance premiums was a 'good thing,' but that its effect on education was 'indirect at best.'" *Lake View 2005*, 364 Ark. at 409. As such, the Court found that the relief Plaintiff asks for here (direct payment to the teacher health insurance system) was not related to educational adequacy.

Even so, the General Assembly studied the issue of teacher health insurance payments and whether increased funding was necessary to maintain educational adequacy. Ex. 1, 2008 Adequacy Study p. 57-58. While the report recommended increased funding, the finding in the report was as follows:

> There was no evidence presented to the Adequacy Subcommittee that the cost of health insurance premiums for public school employees will prevent Arkansas public schools from teaching the required curriculum or prevent Arkansas public school students from achieving proficiency. Therefore, the Adequacy Subcommittee finds that the issue of public school employee health insurance is a matter for the full Education Committees to consider.
>
> The Education Committees determined that the employee health insurance cost is one factor that impacts teacher recruitment and retention in Arkansas, but there has been no clear evidence that health insurance costs, alone, deprive the public school system of the teachers needed for providing a substantially equal opportunity for an adequate education.

Ex. 1, 2008 Adequacy Report p. 58.

Plaintiff Deer/Mt. Judea does not explain why it believes that teacher retirement must be funded separately, other than their conclusory allegation that funding teacher retirement as part of the matrix is not rational. Foundation funding is based on the staffing and expenses of a prototypical student K-12 school district. Utilizing the State standards on maximum class size, one can determine how many teachers are needed to staff a school based on the number of

students enrolled. One can (and the State does) then determine the amount of revenue necessary, per pupil, to staff a school with a given student population. If one can determine the staffing needs, then one can determine how much money is needed to pay that staff. This is essentially what the funding matrix is and what foundation funding is based upon. It is rational to base teacher compensation on a per student amount (as the Supreme Court has approved doing) because one can calculate how many teachers will be needed based on the number of students attending the school.

Plaintiff attempts to relate this case to the Little Rock desegregation case in this area. The ultimate justification for increased funding for teacher retirement and health insurance in the Pulaski County desegregation case was increased staffing needs in the Pulaski County schools because of the obligations imposed on the districts in the desegregation case. *Little Rock School District v. Pulaski County Special School District*, 148 F.3d 956 (8th Cir. 1998). Deer/Mt. Judea is not subject to a desegregation decree and has no desegregation obligations approaching anything like what was imposed on the Pulaski County school districts. Plaintiff's request to force the State to change how teacher retirement and health insurance is funded should, therefore, be denied.

6. The State's Facilities Funding Programs are Constitutional.

Deer/Mt. Judea asks this Court to revisit the Supreme Court's ruling in 2007 holding that the State's system for funding academic facilities is Constitutional. Plaintiff's Complaint is devoid of any allegations that something has changed in relation to school facilities funding since 2007 that would call into question the facilities funding system. In fact, the district's whole argument on this point appears to be that the issue was before the Supreme Court and the Supreme Court should not have ruled the system constitutional. Complaint ¶¶ 169-171, p. 107-

109. This Court is bound by the *Lake View 2007* decision and cannot declare unconstitutional what the Supreme Court has declared constitutional. Thus, Plaintiff's claims as to facilities funding are barred by *res judicata.*

7. Act 60 of 2003 (2nd Extra. Session) is Constitutional.

Deer/Mt. Judea's claims about Act 60 are what drive this case. As explained above, the State funds school districts on a "per student" basis; that is districts receive funding for each student attending the district. The General Assembly (with the assistance of the Department of Education) determines what amount of foundation and categorical funding is adequate based on a prototypical school district comprised of 500 students. *Lake View 2004*, 358 Ark. at 142. In other words, optimal funding is achieved when the average daily membership (ADM, Ark. Code Ann. § 6-20-2303(3)) of a school district is 500 or more students. As the number of students in the school district decreases, the amount of funding provided to the school district decreases as well. Therefore, the General Assembly had to determine at what point the funding drops to a constitutionally unacceptable level (also called an inadequate level). The General Assembly determined that when a school district's ADM drops below 350 students for two consecutive years, the district's funding has become inadequate; i.e. constitutionally infirm. Ark. Code Ann. § 6-13-1602.

When a school district's ADM has been below 350 students for two consecutive years it is given the option to voluntarily consolidate with another school district or the State Board of Education may involuntarily consolidate the district with another, larger school district. Ark. Code Ann. § 6-13-1603. A few important points about this type of consolidation: 1) It is an administrative consolidation, meaning that the school district's upper level administration (the school board, the superintendent, assistant superintendents, and other central office staff and

facilities) are consolidated. Ark. Code Ann. § 6-13-1603. 2) The actual school buildings may remain open because State law specifically does NOT require the closing of any school or school facility. Ark. Code Ann. § 6-13-1603(e).

Over sixty small school districts that have been required to consolidate administrations with another school district pursuant to Act 60 of 2003 (2nd Ext. Sess.) in order to maintain adequate and equitable funding. Ex. 21, Consolidation List. Shortly after Act 60 was passed it was challenged as unconstitutional in the *Lake View* case. *Lake View 2004*, 358 Ark. 137, 189 S.W.3d 1. Act 60 has been challenged in other State court cases and federal court cases. *James v. Williams*, 372 Ark. 82, 270 S.W.3d 855 (2008); *Friends of Lake View School District Incorporation No. 25 of Phillips County v. Beebe*, 578 F.3d 753 (8th Cir. 2009); *Friends of Eudora Public School Dist. v. Beebe*, 2008 WL 828360, NO. 5:06CV0044 SWW (E.D.Ark. Mar 25, 2008); *Friends of Lakeview School Dist. Incorporation No. 25 of Phillips County v. Huckabee*, 2007 WL 3005336, NO. 2:04CV00184-WRW (E.D.Ark. October 11, 2007). Most recently, it was challenged by patrons of the former Weiner School District. *Friends of Weiner School District v. State of Arkansas*, 3:10 CV 00138 JMM (E.D. Ark.), Ex. 12, 11/29/10 Order Dismissing Case. Every time it has been challenged, Act 60 has been upheld.

As noted above, when Act 60 became effective, both the former Deer and Mt. Judea School Districts had enrollments below 350 ADM. The two districts voluntarily consolidated to form the Deer/Mt. Judea School District. The Deer/Mt. Judea School District has never been placed on the consolidation list. Thus, the district cannot be subject to an Act 60 consolidation for at least three years, even if half the students did not return next year. Moreover, the law states that even after a school district is consolidated under Act 60, the schools in the district cannot be closed for a year after the consolidation. In other words, neither the Deer nor the Mt.

Judea school campus could be eliminated under Act 60 for at least four years. Even then, it is up to the School Board of the resulting district to determine whether to close a campus or not to do so. Accordingly, Plaintiff lacks standing to challenge Act 60 because neither campus in the district is at risk of closure under Act 60 anytime in the foreseeable future. Moreover, there is no right to a particular administrative structure for school districts (certainly not for the school district itself).

The purpose of the consolidation, as explained above, is to provide more resources for the students in resulting district, to improve the ability of resulting district's students to obtain quality education, and to strengthen their ability to contribute to Arkansas. The Arkansas Supreme Court has recognized that the larger student population of consolidated school districts should give the new district greater efficiency in its spending. The benefits to the resulting district include enhanced purchasing power, ability to offer enhanced curriculum offerings, more courses than are currently available, sharing teacher power, and other benefits. Plaintiff has not demonstrated an injury-in-fact and has failed to allege that their asserted injury is fairly traceable to the consolidation of the school districts. Accordingly, the Complaint should be dismissed.

8. Section 32 of Act 293 of 2010 is Constitutional

As a preliminary matter, Arkansas Rule of Civil Procedure 19(a) provides as follows:

> A person who is subject to service of process shall be joined as a party in the action if . . . he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter, impair or impede his ability to protect that interest, or, (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of his claimed interest. If he has not been joined, the court shall order that he be made a party. If he should join as a plaintiff, but refuses to do so, he may be made a defendant; or, in a proper case, an involuntary plaintiff

Ark. R. Civ. Pro. 19(a). In attacking this Act, Plaintiff Deer/Mt. Judea directly challenges the Melbourne School Districts receipt of financing under the Act. However, Deer/Mt. Judea has

not, apparently, attempted to make the Melbourne School District a party to this case or provided any sort of notice to Melbourne. Accordingly, this claim should be dismissed for failure to join a necessary party.

Moreover, the challenged law is not local or special legislation. Prior to 2009, school districts only received isolated school funding under Ark. Code Ann. § 6-20-604 if they maintained an isolated school campus that served all grades (K–12). If part of the campus was closed then the school no longer qualified the district for isolated funding. In 2009, the General Assembly passed Act 811 of 2009 which changed the law so that if a school that qualified for funding at the 20% level (under Ark. Code Ann. § 6-20-604(c)) closed part of its isolated campus, the district would still qualify for isolated funding under 604(c). Act 811 did not extend this benefit to districts that qualify for funding at the 10% level (under Ark. Code Ann. § 6-20-604(e)). With section 32 of Act 293 of 2010, the legislature changed 604(e) funding so that a district that qualified for funding at the 10% level and closed part of a K–12 campus could still qualify for isolated funding.

Deer/Mt. Judea qualifies for isolated funding at the 20% level and, after Act 811 of 2009, would have continued to qualify for funding at the 20% level if it had closed part of one of its school campuses (e.g. to combine the high schools). Ex. 10, 08-09 Annual Statistical Report. The Melbourne School District qualified for funding under section 32 of Act 293 (just like the districts covered by Act 811) because in the spring of 2008 it closed the Mt. Pleasant Middle and High School, but left the Mt. Pleasant Elementary School open. No other districts qualifying for 10% funding under 604(e) have partially closed a campus. Two Rivers School District, with the closure of the Fourche Valley campus did not qualify under either scenario because they closed the entire campus.

J. Other Issues in Plaintiff's Complaint

Plaintiff Deer/Mt. Judea raises a number of other issues in their Complaint for which they request no relief. For instance, Deer/Mt. Judea invokes the Quality Counts 2009 report as suggesting that the State's education system is somehow inadequate. Unfortunately, Deer/Mt. Judea failed to include the entire report. Rule 10 provides that "[a] copy of any written instrument or document upon which a claim or defense is based shall be attached as an exhibit to the pleading in which such claim or defense is averred unless good cause is shown for its absence in such pleading." Ark. R. Civ. Pro. 10(d). Since Deer/Mt. Judea appears to be basing some of their claims on the Quality Counts Report, Defendants have attached the complete tables. Ex. 14, Quality Counts 2010 Data Tables. These tables show much of the data that lead Education Week to rate Arkansas's educational system as the tenth best in the nation in 2010. Ex. 13, 1/14/2010 ADE press release. In fact, in one area where Deer/Mt. Judea is highly critical, support for the teaching profession, Education Week rated the State as the second best in the nation. Ex. 14, 2010 Quality Counts tables. Another area that Deer/Mt. Judea is critical of is the State's standards and assessments for academic progress of students; the Quality Counts study they invoke, however, rated Arkansas as seventh best in the nation in this area. Ex. 14, 2010 Quality Counts tables. Deer/Mt. Judea also raises the "Chance for Success" index to try to malign the State's educational system. The problem with Deer/Mt. Judea's contention is that the "Chance for Success" index takes into account many factors outside the classroom such as family income, parent education, parental employment, linguistic integration, post-secondary education enrollment, adult educational attainment, annual income, and steady employment. Thus, the Quality Counts 2010 study does not support Plaintiff's position, but, instead, shows

that Arkansas is working hard and doing many good things to boost performance despite outcomes that are not where we would like.

Deer/Mt. Judea takes issue with students' performance on the National Assessment of Educational Progress exam (NAEP) as compared to students' performance on the State Benchmark Exam. This effort should be rejected. The two tests are completely different and test two completely different things. The NAEP compares a select group of students' knowledge against that of other students throughout the nation. The Benchmark exam tests every student in the State for their knowledge of the state-defined curriculum for their grade level. The two tests cover two different sets of knowledge.

The district takes issue with what it alleges were "unfunded mandates" enacted during the 2009 legislative session. It lists five, but each one reveals that it either was not an unfunded mandate or that it is something the districts were required to do prior to the *Lake View 2007* opinion. Act 397 amended a law that already required districts to have a parent involvement plan. Ex. 16, Act. 397 of 2009. Act 397 simply added more detail to the requirements that had already been enacted. Act 314 streamlined the sharing of educational records of military children who tend to change schools often. Ex. 15, Act 314 of 2009. Deer/Mt. Judea alleges that Act 1473 required districts to develop a school bus safety plan; however, that Act did not do that. Ex. 20, Act 1473 of 2009. Act 1373 simply enhanced requirements of the Arkansas Comprehensive School Improvement Plans that districts were already required to have in place, and it required districts to post the plans on their websites so parents could have greater involvement in the process. Ex. 19, Act 1373 of 2009. Finally, Deer/Mt. Judea alleges that the State required the districts to purchase automatic external defibrillators without reimbursement; this is simply wrong. Ex. 17, Act 496 of 2009. The General Assembly appropriated funds for

this purpose in Section 16 of Act 386 of 2009. Section 31 of Act 386 also created a state board to support district efforts in putting into place the requirements of Act 496.

Finally, in several places in the Complaint Deer/Mt. Judea alleges that "[s]chool districts have been either unable or unwilling" to do what is necessary to implement the adequacy requirements set in place by the State. Complaint ¶ 81, 86. In *Lake View 2007*, the Supreme Court quoted the Special Masters' conclusion responsibility to implement the now constitutional education funding system falls to the districts:

> The framework for a much improved Arkansas public education system is now in place. The funds to support it are now at hand. We have no doubt that a successful future for Arkansas's public schools will depend, in large measure, upon the continuous financial and standards review that the General Assembly has undertaken at this point. Meeting the challenge of using the support which is in place and that which will ensue, to give adequate education to Arkansas's children now passes to the local school districts.

Deer/Mt. Judea's unwillingness to address the adequacy of the education it provides its students (if that is in fact the case) is no basis to sue the State. As held by the Supreme Court in 2007, the State's education funding system is (and remains) constitutional and the responsibility to implement what the State has established falls on the school districts, including Deer/Mt. Judea.

IV. CONCLUSION

Therefore, Defendants request that Plaintiff's Complaint be dismissed with prejudice as and that they be granted all other relief to which they are entitled.

Respectfully submitted,

DUSTIN MCDANIEL
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CERTIFICATE OF SERVICE

I hereby certify that on January 18, 2011, I mailed a copy of the foregoing to the following by U.S. Mail and electronic mail:

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SCOTT P. RICHARDSON

DEER/MT. JUDEA SCHOOL DISTRICT v. BEEBE, et al.
DEFENDANTS' MOTION TO DISMISS
EXHIBIT LIST

Ex. 1, 2008 Adequacy Report

Ex. 2, 2010 Adequacy Studies

Ex. 3, 2010 Resource Study

Ex. 4, 2010 Equity Plan

Ex. 5, 2005 Report of the Special Masters.

Ex. 6, Rules Governing Standards for Accreditation

Ex. 7, Professional Development Rule § 4.00

Ex. 8, ACTAAP Rule

Ex. 9, 2010-11 Deer Elementary ACSIP

Ex. 10, 2008-2009 Deer/Mt. Judea Annual Statistical Report

Ex. 11, NSDC Executive Summary.

Ex. 12, 11/29/10 Order Dismissing Case.

Ex. 13, 1/14/2010 ADE press release.

Ex. 14, Quality Counts 2010 Data Tables.

Ex. 15, Act 314 of 2009

Ex. 16, Act. 397 of 2009

Ex. 17, Act 496 of 2009

Ex. 18, Act 811 of 2009

Ex. 19, Act 1373 of 2009

Ex. 20, Act 1473 of 2009

Ex. 21, ADE Consolidation/Annexations of LEA's

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
SECOND DIVISION

DEER/MT. JUDEA SCHOOL DISTRICT **PLAINTIFF**

v. **NO. 60CV-10-6936**

MIKE BEEBE, Individually And In His Official Capacity As Governor Of The State Of Arkansas, **Et al.** **DEFENDANTS**

FILED 01/28/11 11:13:27
Larry Crane Pulaski Circuit Clerk
CR01

MOTION TO DISMISS

Comes now Lieutenant Governor Mark Darr, Speaker of the House Robert S. Moore, Jr., and Senate President Pro Tem Paul Bookout, in their official and individual capacities, by and through their attorneys, Arkansas Attorney General Dustin McDaniel and Assistant Attorney General Scott P. Richardson, and for their *Motion to Dismiss*, state:

1. The Deer/Mt. Judea School District has filed this lawsuit challenging the State's elementary and secondary education funding system.

2. Defendants Darr, Moore, and Bookout were served with copies of the Complaint on or about January 10, 2011. These Defendants incorporate the defenses raised and legal authorities cited in the other Defendants' Motion to Dismiss and Brief in Support of Motion to Dismiss filed January 18, 2011, as if set forth herein word for word. Their defenses raised in good faith and authorities cited by the other Defendants support dismissal of the above-styled case against these Defendants.

3. In 2007, the Supreme Court held that the State's elementary and secondary education system complies with the Arkansas Constitution. Since that time, the General Assembly has conducted extensive studies on the adequacy of the State's education system and

made changes, when necessary, based on those evidence based studies. See Exs. 1 & 2 to Brief in Support of Motion to Dismiss filed by Defendants Beebe, et al.

4. Thus, the State's elementary and secondary education system remains Constitutional.

5. Defendant Mark Darr was sworn into office on January 11, 2011; about thirty-eight days after the Complaint was filed. Lt. Gov. Darr has not served in State elected office prior to January 11, 2011.

6. Defendant Robert Moore was elected and sworn as Speaker of the House on January 10, 2011. Speaker Moore has served in the Arkansas House of Representatives since January 2007.

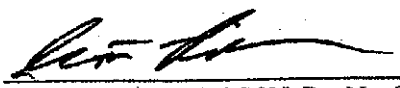
7. Defendant Paul Bookout was elected and sworn as President Pro Tem of the Senate on January 10, 2011. Senate President Bookout has served in the Arkansas Senate since April of 2006.

8. Plaintiff makes no allegation of any wrongful conduct by Lt. Gov. Darr, Speaker Moore, or Senate President Bookout.

Wherefore, Defendants request that Plaintiff's Complaint be dismissed with prejudice and that they be granted all other relief to which they are entitled.

Respectfully submitted,

DUSTIN MCDANIEL
ATTORNEY GENERAL

By: 

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IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
SECOND DIVISION

DEER/MT. JUDEA SCHOOL DISTRICT **PLAINTIFF**

v. **NO. 60CV-10-6936**

MIKE BEEBE, Individually And In His Official Capacity As Governor Of The State Of Arkansas; **Et. al.** **DEFENDANTS**

BRIEF IN SUPPORT OF MOTION TO DISMISS

Comes now Lieutenant Governor Mark Darr, Speaker of the House Robert S. Moore, Jr., and Senate President Pro Tem Paul Bookout, in their official and individual capacities, by and through their attorneys, Arkansas Attorney General Dustin McDaniel and Assistant Attorney General Scott P. Richardson, and for their *Brief in Support of Motion to Dismiss*, state:

> The Arkansas Rules of Civil Procedure provide as follows:
>
> Adoption by Reference; Exhibits. Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion.

Ark. R. Civ. Pro. 10(c). Defendants Darr, Moore, and Bookout were served with copies of the Complaint on or about January 10, 2011. These Defendants incorporate the defenses raised and legal authorities cited in the other Defendants' Motion to Dismiss and Brief in Support of Motion to Dismiss filed January 18, 2011, as if set forth herein word for word. Their defenses raised in good faith and authorities cited by the other Defendants support dismissal of the above-styled case against these Defendants.

In 2007, the Supreme Court held that the State's elementary and secondary education system complies with the Arkansas Constitution. Since that time, the General Assembly has conducted extensive studies on the adequacy of the State's education system and made changes, when necessary, based on those evidence based studies. See Exs. 1 & 2 to Brief in Support of

Motion to Dismiss filed by Defendants Beebe, et al. Thus, the State's elementary and secondary education system remains Constitutional.

Moreover, Plaintiff's Complaint fails to state a claim as to these three Defendants. Lt. Gov. Mark Darr was sworn into office on January 11, 2011; about thirty-eight days after the Complaint was filed. Other than his current position as Lieutenant Governor, Defendant Darr has never held any state-level political office. The Complaint makes no allegation, nor could it, that Lt. Gov. Darr has done anything unconstitutional or that he has taken any action in relation to State laws or regulations on elementary and secondary education. Similarly, the Complaint provides no reason for naming the Lieutenant Governor as a Defendant in his official capacity. Accordingly, Lt. Gov. Darr should be dismissed from this case in both his official and individual capacities.

Speaker Moore and President Pro Tem Bookout were elected and sworn in as Speaker and President Pro Tem on January 10, 2011. They have also served in the State House of Representatives and Senate before this session. The Complaint fails to make any allegations related to Speaker Moore and President Pro Tem Bookout. As with Lt. Gov. Darr there are simply no allegations about any action Speaker Moore or President Pro Tem Bookout have taken that are allegedly constitutionally suspect. They appear to have been named individually simply because they have served in the legislature. Similarly, the Complaint is devoid of any allegation shedding any light on why the Speaker or the President Pro Tem (in their official capacities) should be named in this lawsuit. As such, they should be dismissed from their case in both their official and individual capacities.

Therefore, Defendants request that Plaintiff's Complaint be dismissed with prejudice and that they be granted all other relief to which they are entitled.

Respectfully submitted,

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SCOTT P. RICHARDSON

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
SECOND DIVISION

DEER/MT. JUDEA SCHOOL DISTRICT PLAINTIFF

v. NO. 60-CV-2010-6936

MIKE BEEBE, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF ARKANSAS, ETAL. DEFENDANTS

DEER/MT. JUDEA SCHOOL DISTRICT'S RESPONSE TO MOTION TO DISMISS WITH SUPPORTING AUTHORITY

Deer/Mt. Judea School District ("Deer/Mt. Judea) for its Response to Defendants' Motion to Dismiss[1] with Supporting Authority states:

Introduction

1. The Arkansas Supreme Court's school-funding decisions clearly establish that school districts have standing to challenge the constitutionality of the State's education system. The State's claim that the constitutionality of the education system is a nonjusticiable political question has been repeatedly rejected. In *Lake View*, the court stated, "[W]e believe that the issue of the nonjusticiability was laid to rest in a previous school-funding case in which we discussed the distinctive roles of the legislative and judicial branches." *Lake View Sch. Dist. v.*

[1] Defendants' Darr, Moore and Bookout filed a Motion to Dismiss on or about January 28, 2011. That motion simply incorporated the Motion to Dismiss filed by the remaining defendants on or about January 18, 2011. To avoid wasteful duplication, Deer/Mt. Judea is filing this single response to both motions.

Huckabee, 351 Ark. 31, 52, 91 S.W.3d 472, 483 (2000) ("*Lake View II*")(citing *DuPree v. Alma Sch. Dist.*, 279 Ark. 340, 651 S.W.2d 90 (1983)). The Arkansas Supreme Court explained that Article 14, § 1 of the Constitution of Arkansas, the "Education Article," provides for judicial review of the education system. "The people of this state unquestionably wanted all departments of state government to be responsible for providing a general, suitable, and efficient system of public education to the children of this state." *Lake View II*, 351 Ark. at 53, 91 S.W.3d at 484. The Arkansas Supreme Court concluded:

> This court's refusal to review school funding under our state constitution would be a complete abrogation of our judicial responsibility and would work a severe disservice to the people of this state. We refuse to close our eyes or turn a deaf ear to claims of a dereliction of duty in the field of education.

Lake View II, 351 Ark. at 54, 91 S.W.3d at 484.

2. The present case cannot be distinguished from *DuPree* and *Lake View*. Both of those cases were filed by school districts and sought a declaration that the State's education system was unconstitutional. The Education Article grants the judicial branch authority to determine the constitutionality of the education system created, funded and implemented by the legislative and executive branches. Accordingly, Defendants' Motion to Dismiss should be denied.

Motion to Dismiss Standard

3. Defendants move to dismiss Deer/Mt. Judea's Complaint pursuant to Ark. R. Civ. P. 12(b). In reviewing a motion to dismiss, this Court must "treat the facts alleged in the complaint as true and view them in the light most favorable to the plaintiff, . . . all reasonable inferences must be resolved in favor of the complaint, and the pleadings are to be liberally construed." *Baptist Health v. Murphy*, 2010 Ark. 358, ___ S.W.3d ___, 2010 WL 383844. "[I]t is improper for the trial court to look beyond the complaint to decide the motion to dismiss." *Thomas v. Pierce*, 87 Ark. App. 26, 28, 184 S.W.3d 489, 490 (2004).

4. Defendants' entitled their pleading a "Motion to Dismiss," so it is fair to assume they meant it to be just that.[2] Even so, Defendants' supporting brief includes 15 pages of argument and 21 exhibits to support the argument that the current education system is constitutional. As stated above, in ruling on a motion to dismiss this Court must assume Deer/Mt. Judea's allegations are true and cannot look beyond Deer/Mt. Judea's Complaint in deciding a motion to dismiss. *See*

[2] Deer/Mt. Judea objects to the Court converting Defendants' motion into one for summary judgment. Defendants have not yet filed an Answer to Deer/Mt. Judea's Complaint, and thus, it cannot be determined what factual issues will remain to be decided by the Court. Deer/Mt. Judea has had no opportunity to conduct discovery, and it prepared this response within the time required for a response to a motion to dismiss as set forth in Ark. R. Civ. P. (6)(c). For these reasons, Deer/Mt. Judea would be unfairly prejudiced if Defendants' Motion to Dismiss was converted into a motion for summary judgment. If the Court intends to do this, Deer/Mt. Judea respectfully requests notice and an opportunity to prepare an appropriate summary judgment response.

Gutherie v. Tyson Foods, Inc., 285 Ark. 95, 96, 685 S.W.2d 164, 165 (1985). Accordingly, the Court should ignore the Defendants' argument and exhibits disputing the facts alleged in Deer/Mt. Judea's Complaint.

Sovereign Immunity/Legislative Immunity/Separation of Powers

5. "Sovereign immunity is jurisdictional immunity from suit, and jurisdiction must be determined entirely from the pleadings." *Clowers v. Lassiter*, 363 Ark. 241, 244, 213 S.W.3d 6, 9 (2005). Deer/Mt. Judea addressed Defendants' sovereign immunity it its Complaint, ¶¶ 24-26. Deer/Mt. Judea alleges that two exceptions to the doctrine apply to the present case. First, the Constitution of Arkansas, Article 16, § 13, overrides Article 5, § 20 and allows illegal exaction suits against state officials in their official capacities. *Streight v. Ragland,* 280 Ark. 206, 209-10 n. 7, 655 S.W.2d 459, 461 n. 7 (1983). Second, a suit against a state official to prevent him or her from acting *ultra vires* is treated as a suit against the state official personally and not as a suit against the State. *Grine v. Bd. of Trustees*, 338 Ark. 791, 797, 2 S.W.3d 54, 58 (1999). *See Clowers*, 363 Ark. at 244, 213 S.W.3d at 9 ("There are, however, exceptions to that rule [sovereign immunity]. For example, if the state agency is acting illegally or if a state agency officer refuses to do a purely ministerial action required by statute, an action against the agency or officer is not prohibited."); *Ark. Tech Univ. v. Link*, 341 Ark. 495, 503, 17 S.W.3d 809, 814 (2000)("One of those exceptions [to

sovereign immunity] is that equity has jurisdiction to enjoin or restrain State officials or agencies from acts which are *ultra vires,* in bad faith, or arbitrary and capricious.").

6. Defendants ask this Court to overrule the Arkansas Supreme Court and rule that Deer/Mt. Judea's Complaint raises a nonjusticiable political question. As noted above, this argument was repeatedly made by the State and rejected by the Arkansas Supreme Court in *Lake View*. *See Lake View II*, 351 Ark. at 53, 91 S.W.3d at 484 (quoted above); *Lake View Sch. Dist. v. Huckabee,* 364 Ark. 398, 410-11, 220 S.W.3d 645, 653-54 (2005)("*Lake View V*") ("The State now demands that the court replow the same ground . . . We reject this argument once more as having no merit."). This Court must follow precedent of the Arkansas Supreme Court and reject this argument. *See Rice v. Ragsdale*, 104 Ark. App. 364, 368, 292 S.W.3d 856, 860 (2009)("We must, however, follow the precedent set by the supreme court, and are powerless to overrule its decisions.").

Res Judicata

7. Deer/Mt. Judea does not seek to re-litigate the constitutionality of the education system as it existed in 2007 when the Arkansas Supreme Court issued its mandate in *Lake View*. Since 2007, the State has twice failed to conduct adequacy studies as required by Act 57. *See* Complaint, ¶¶ 69-82. Moreover, the adequacy studies produced by the State have identified problems that deny some students an

adequate and equitable education, but the State has simply ignored the problems. *See* Complaint, ¶¶ 83-171. Deer/Mt. Judea alleges that the State's failure to address these problems means the education system is once again "operating under a constitutional infirmity." *Lake View v. Huckabee*, 351 Ark. 31, 96, 91 S.W.3d 472, 510 (2002)("*Lake View III*").

8. Defendants' *res judicata* argument also ignores the State's ongoing obligation to identify and remedy problems with the education system. In finding the system constitutional in 2007, the Arkansas Supreme Court noted the Special Masters' finding that "the General Assembly . . . understands now that the job for an adequate education system is 'continuous' and that there has to be 'continued vigilance' for constitutionality to be maintained." *Lake View v. Huckabee*, 370 Ark. 139, 145, 257 S.W.3d 879, 883 (2007)("*Lake View VI*"). The Arkansas Supreme Court then emphasized the importance of this finding. It stated, "What is especially meaningful to this court is the Masters' finding that the General Assembly has expressly shown that constitutional compliance in the field of education is an ongoing task requiring constant study, review, and adjustment." *Lake View VI*, 370 Ark. at 146, 257 S.W.3d at 883. Even assuming the State had studied and reviewed the education system as required by Act 57, the State failed to make the "adjustment[s]" necessary for constitutionality to be maintained.

Declaratory Judgment Act

9. Other than arguing this case presents a nonjusticiable political question, Defendants provide the Court no basis for dismissing Deer/Mt. Judea's Declaratory Judgment Act claim. The primary relief sought by Deer/Mt. Judea is:

> a. A declaration that the State's K-12 school-funding system is inequitable and inadequate in violation of the Constitution of Arkansas, Article 14, § 1 and Article 2, §§ 2, 3 and 18;
>
> b. A declaration that the State's K-12 education system is inequitable and inadequate in violation of the Constitution of Arkansas, Article 14, § 1 and Article 2, §§ 2, 3 and 18;

Complaint, Prayer for Relief, p. 109. The *Dupree* and *Lake View* decisions are directly on point and hold that a school district has standing to pursue this type of declaratory relief. *Lake View II*, 351 Ark. at 52, 91 S.W.3d at 483 (quoted above). This Court is bound by those decisions. *See Rice*, 104 Ark. App. at 368, 292 S.W.3d at 860. Accordingly, the Court must deny Defendants' motion as to Deer/Mt. Judea's requests for declaratory relief.

Illegal Exaction Claim

10. This is a public funds illegal exaction case pursuant to Article 16, § 13 of the Constitution of Arkansas. Deer/Mt. Judea contends that public funds generated from tax dollars are being misapplied or illegally spent to support an unconstitutional education system. *See* Complaint, ¶¶ 7-11. The Arkansas Supreme Court in *Lake View* recognized that it is unlawful to spend tax dollars on

an unconstitutional education system. In staying the issuance of its mandate in 2002, the Arkansas Supreme Court stated, "Were we not to stay our mandate in this case, every dollar spent on public education in Arkansas would be constitutionally suspect." *Lake View II,* 351 Ark. at 97, 91 S.W.3d at 511. Accordingly, Deer/Mt. Judea's allegations that tax dollars are being illegally spent are sufficient to defeat Defendants' motion to dismiss. *See Fort Smith Sch. Dist. v. Beebe*, 2009 Ark. 333, at 5, 322 S.W.3d 1, 4 (2009)("This is a public funds case, and to prevail on their claim, Appellants must show that the State misapplied or illegally spent money that was lawfully collected pursuant to ad valorem property taxes.")

11. Defendants argue that Deer/Mt. Judea lacks standing because it is not a "taxpayer," citing *Brewer v. Carter*, 365 Ark. 531, 231 S.W.3d 707 (2006). However, neither *Brewer* nor the constitution requires that Deer/Mt. Judea be a "taxpayer" to bring an illegal exaction case.[3] *Brewer* holds that "before a public-funds type illegal exaction case will be allowed to proceed, there must be facts showing that monies generated by tax dollars or arising from taxation are at stake."

[3] Deer/Mt. Judea levies an ad valorem property tax and is required by Amendment 74 of the Constitution of Arkansas to remit a portion of its ad valorem property tax revenue to the State Treasurer for distribution by the State to school districts as provided by law. Thus, even if Article 16, Section 13 required that Deer/Mt. Judea be a taxpayer, Deer/Mt. Judea would satisfy that requirement. Moreover, Deer/Mt. Judea brings this suit on behalf of individual taxpayers. *See* Complaint, ¶ 2.

Brewer, 365 Ark. at 535, 231 S.W.3d at 710. There is no dispute in the present case that tax dollars support the State's education system.

12. Article 16, Section 13 of the Constitution of Arkansas provides:

> Any citizen of any county, city or town may institute suit in behalf of himself and all others interested, to protect the inhabitants thereof against the enforcement of any illegal exactions whatever.

Rather than "taxpayer," the constitution requires that Deer/Mt. Judea be a "citizen." In *McCarroll v. Gregory-Robinson-Speas, Inc.*, 198 Ark. 235, 129 S.W.2d 254 (1939), the Arkansas Supreme Court held that a corporate entity is a "citizen" as used in Article 16, § 13. Under Arkansas law, school districts are corporate entities that may sue and be sued in their own name. Ark. Code Ann. § 6-13-102(a). Thus, school districts are citizens that may file illegal exaction cases. *See Fort Smith Sch. Dist,* 2009 Ark. 333, at 5, 322 S.W.3d at 4.

13. Because Deer/Mt. Judea is a "citizen" as used in Article 16, § 13, the sole issue in this case is whether Deer/Mt. Judea is sufficiently "interested" to confer standing. *Ghegan & Ghegan, Inc. v. Weiss*, 338 Ark. 9, 991 S.W.2d 536 (1999). As the Court in *Ghegan* explained:

> The plain and unambiguous language of Ark. Const. art. 16, § 13, provides that "any" "interested" "citizen" has standing to bring an illegal-exaction case. In *McCarroll v. Gregory-Robinson-Speas, Inc.*, 198 Ark. 235, 129 S.W.2d 254 (1939), we held that a corporation is a "citizen" as used in Article 16, Section 13. Hence, the sole issue we must decide in this case is whether Ghegan is sufficiently "interested"

such that it has standing to bring an illegal-exaction case under Article 16, Section 13.

Id. 338 Ark. at 14, 991 S.W.2d at 538-39. To answer this question, the court turned to the traditional standing requirement that "plaintiffs must show that the questioned act has a prejudicial impact on them." *Id.* 338 Ark. at 15, 991 S.W.2d at 539. As an Arkansas school district, Deer/Mt. Judea is charged with providing its students a substantially equal opportunity for an adequate education as required by the Constitution of Arkansas, Article 14, § 1, and Article 2, §§ 2, 3 and 18. For the reasons set forth in the Complaint, ¶¶ 83-171, Deer/Mt. Judea's ability to meet this charge is prejudiced by the unconstitutional education system.

14. Deer/Mt. Judea's public funds illegal exaction claim distinguishes this case from *Dupree* and *Lake View*. Those cases were decided solely based on Constitution of Arkansas, Article 14, § 1, and Article 2, §§ 2, 3 and 18. Based on those provisions, Defendants correctly point out that the Arkansas Supreme Court limited its role "to a determination of whether the existing school-funding system satisfies constitutional dictates and, if not, why not." *Lake View II,* 351 Ark. at 91, 91 S.W.3d at 508. Under Article 16, § 13, however, this Court has jurisdiction to grant both affirmative and injunctive relief. *Revis v. Harris*, 217 Ark. 25, 29, 228 S.W.2d 624, 626 (1950) ("Chancery had jurisdiction and the power to grant affirmative as well as injunctive relief in the circumstances."); *Grooms v. Bartlett*, 123 Ark. 255, 185 S.W. 282, 283 ("[I]in such cases chancery has the power to

grant affirmative, as well as injunctive relief."). Thus, not only may this Court enjoin payment of public funds in violation of the law, it may also grant mandatory injunctive relief directing state officials to take such actions as necessary to remedy the illegal exaction. *See, e.g., Massongill v. County of Scott*, 337 Ark. 281, 991 S.W.2d 105 (1999).

Arkansas Civil Rights Act/Qualified Immunity

15. Defendants raise their qualified immunity as a defense to Deer/Mt. Judea's Arkansas Civil Rights Act claim. Deer/Mt. Judea addressed the Defendants' qualified immunity in its Complaint, ¶¶ 27 and 28. Even the State concedes that the Defendants are only entitled to qualified immunity to the extent they "acted within the scope of authority they were granted." Defendants' Brief, p. 25. Defendants do not have authority to create, fund and implement an unconstitutional education system. *See Lake View II*, 351 Ark. at 53, 91 S.W.3d at 484. Thus, Defendants are not entitled to qualified immunity against claims that they are acting outside their authority and operating an unconstitutional education system. For this reason, Deer/Mt. Judea's Arkansas Civil Rights claim should not be dismissed.

Amendment 14/Failure to Join Necessary Party

16. Defendants' motion largely ignores Deer/Mt. Judea's claim that Section 32 of Act 293 of 2010 is local or special legislation in violation of

Amendment 14 of the Constitution of Arkansas. Defendants make the conclusory allegation that the Melbourne School District ("Melbourne") is a necessary party to this claim. However, Arkansas requires fact pleading, and Defendants fail to allege any facts supporting this conclusion. Complete relief may be accorded without Melbourne as a party, and Melbourne has no legally recognized "interest" to protect in this case. *See* Ark. R. Civ. P. 19(a). Accordingly, Melbourne is not a necessary party, and Defendants' Motion to Dismiss should be denied.

Claims Against Individual Defendants

17. Deer/Mt. Judea has sued the named defendants because, as the leaders of the executive and legislative branches of government, they are responsible for remedying the unconstitutional education system. Deer/Mt. Judea does not seek to recover damages from the Defendants based on their individual acts or omissions. First and foremost, Deer/Mt. Judea seeks a declaration from that the current school-funding system and education system are unconstitutional. *See* Complaint, Prayer for Relief, ¶¶ (a) and (b). Defendants have an absolute duty to provide the children of Arkansas an adequate and equitable education system. *Lake View III,* 351 Ark. at 66-67, 91 S.W.3d at 492. Deer/Mt. Judea alleges with the requisite factual specificity that Defendants are in breach of that duty.

18. Defendants Darr, Bookout and Moore attempt to distinguish themselves by arguing that they just took office, and therefore, they did not create

the current education system alleged to be unconstitutional. Even so, if Deer/Mt. Judea prevails, they, along with the other defendants, will be responsible for creating, funding and implementing a new, constitutional education system. Defendants are leaders of the executive and legislative branches of government and are proper parties to this case.

Failure to Attach Exhibits

19. Defendants argue that Ark. R. Civ. P. 10(d) required Deer/Mt. Judea to attach as exhibits the documents citied in its Complaint. Rule 10(d) requires "[a] copy of any written instrument or document upon which a claim or defense is based shall be attached as an exhibit to the pleading in which such claim or defense is averred unless good cause is show for its absence in such pleading." Deer/Mt. Judea does not raise any claim or defense based on a particular document, such as the Education Week's Quality Counts Report. As Deer/Mt. Judea understands Rule 10(d), it requires, for example, that a written contract be attached to a complaint alleging breach of that contract. *See Ray & Son Masonry Contractors, Inc. v. U.S. Fidelity & Guar. Co.*, 353 Ark. 201, 213, 114 S.W.3d 189, 196 (2003). It does not require that a plaintiff attach to a complaint every document that may eventually be introduced as an exhibit at the trial of the case. *See Harrison v. Harrison*, 82 Ark. App. 521, 529-30, 120 S.W.3d 144, 149 (2003).

Conclusion

20. The Arkansas Supreme Court's numerous school-funding decisions clearly establish that school districts have standing to challenge the constitutionality of the State's education system. The State's claim that the constitutionality of the State's education system is a nonjusticiable political question has been repeatedly rejected. *Lake View II*, 351 Ark. at 52, 91 S.W.3d at 483. Article 14, § 1 of the Constitution of Arkansas, the "Education Article," provides for judicial review of the education system. This Court cannot "close [its] eyes or turn a deaf ear to claims of a dereliction of duty in the field of education." *Lake View II*, 351 Ark. at 54, 91 S.W.3d at 484. For all the reasons set forth above, Defendants' Motion to Dismiss should be denied.

WHEREFORE, Deer/Mt. Judea prays that Defendants' Motion to Dismiss be denied; that a hearing be scheduled on Defendants' Motion to Dismiss at the Court's earliest convenience; that Deer/Mt. Judea be awarded its costs and attorneys' fees expended herein; and that Deer/Mt. Judea be awarded all other just and proper relief to which it may be entitled.

Respectfully submitted,

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By: Clay Fendley
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IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
SECOND DIVISION

DEER/MT. JUDEA SCHOOL DISTRICT PLAINTIFF

v. NO. 60-CV-2010-6936

MIKE BEEBE, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF ARKANSAS, ETAL. DEFENDANTS

DEER/MT. JUDEA SCHOOL DISTRICT'S
MOTION FOR VOLUNTARY DISMISSAL WITHOUT PREJUDICE

Deer/Mt. Judea School District ("Deer/Mt. Judea) for its Motion for Voluntary Dismissal Without Prejudice states:

1. On December 3, 2010, Deer/Mt. Judea filed its Complaint seeking declaratory and injunctive relief based on the Constitution of Arkansas, Article 14, § 1 and Article 2, §§ 2, 3 and 18 and based on the Constitution of Arkansas, Amendment 14.

2. On January 18, 2011, Defendants moved to dismiss Deer/Mt. Judea's claims based on Constitution of Arkansas, Article 14, § 1 and Article 2, §§ 2, 3 and 18 on a variety of grounds. On March 17, 2011, the Court held a hearing and stated it would grant Defendants' motion to dismiss these claims based on the doctrine of *res judicata*.

3. The State also moved to dismiss Deer/Mt. Judea's claim based on Constitution of Arkansas, Amendment 14 for failure to include a necessary party,

the Melbourne School District. In short, Deer/Mt. Judea alleges that Section 32 to Act 293 of 2010 is local or special legislation in violation of Amendment 14 for the benefit of the Melbourne School District. See Complaint, ¶¶ 112-117, which is hereby incorporated by reference. At the May 17, 2011, hearing, Deer/Mt. Judea did not understand the Court's finding that the education system claims were barred by *res judicata* to decide this claim.

4. To facilitate an immediate appeal upon entry of an order granting Defendants' motion to dismiss Deer/Mt. Judea's education system claims, Deer/Mt. Judea moves for entry of an order dismissing its Amendment 14 claim without prejudice pursuant to Ark. R. Civ. P. 41(a).

5. Defendants were provided advanced notice of the filing of this motion, and they have no objection to the Court granting this motion.

WHEREFORE, Deer/Mt. Judea prays that the Court dismiss without prejudice its claim that Section 32 to Act 293 of 2010 is local or special legislation in violation of the Constitution of Arkansas, Amendment 14 for the benefit of the Melbourne School District; and that Deer/Mt. Judea be awarded all other just and proper relief to which it may be entitled.

Respectfully submitted,

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CV.2.2011.366

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
SECOND DIVISION

DEER/MT. JUDEA SCHOOL DISTRICT PLAINTIFF

v. NO. 60-CV-2010-6936

MIKE BEEBE, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF ARKANSAS, ETAL. DEFENDANTS

FILED 04/11/11 10:56:11
LARRY CRANE PULASKI CIRCUIT COURT
DMB

ORDER

Pending before the Court is Deer/Mt. Judea School District's Motion for Voluntary Dismissal Without Prejudice made pursuant to Ark. R. Civ. P. 41(a). Deer/Mt. Judea seeks dismissal without prejudice of its claim based on the Constitution of Arkansas, Amendment 14. Deer/Mt. Judea alleges that Section 32 to Act 293 of 2010 is local or special legislation in violation of Amendment 14 for the benefit of the Melbourne School District. See Complaint, ¶¶ 112-117. Defendants have no objection to Deer/Mt. Judea's motion.

IT IS HEREBY ORDERED AND ADJUDGED:

Deer/Mt. Judea's claim that Section 32 to Act 293 of 2010 is local or special legislation in violation of Amendment 14 is dismissed without prejudice pursuant to Ark. R. Civ. P. 41(a).

CIRCUIT JUDGE

DATE: 04.11.2011

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CIRCUIT COURT JU30

Order prepared by:

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CV.2.2011.380

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
SECOND DIVISION

DEER/MT. JUDEA SCHOOL DISTRICT **PLAINTIFF**

v. **NO. 60CV-10-6936**

MIKE BEEBE, et al. **DEFENDANTS**

FILED 04/12/11 16:21:51
LARRY CRANE PULASKI CIRCUIT COURT
DMB

ORDER ON MOTION TO DISMISS

On March 17, 2011, the Court held a hearing on the Defendants' *Motion to Dismiss.* Plaintiff appeared by and through its attorneys Mr. Clay Fendley and Mr. Bill Lewellen. Defendants appeared by and through their attorney Assistant Attorney General Scott P. Richardson. The Court has reviewed and considered the pleadings on file, the Motion to Dismiss, brief in support, the Plaintiff's Response to the Motion to Dismiss, the Complaint, the authorities cited therein, and the arguments of counsel at the hearing. The Court, being well and sufficiently advised rules as follows:

Plaintiff's Complaint challenges the adequacy of the State's system for funding elementary and secondary education. In its Response to Defendants' Motion to Dismiss Plaintiff states that "[t]he present case cannot be distinguished from *DuPree* and *Lake View*." The Court agrees and finds that this case is barred by *res judicata*.

Claim preclusion provides that "a valid and final judgment rendered on the merits by a court of competent jurisdiction bars another action by the plaintiff or his privies against the defendant or his privies on the same claim." *Mason v. State*, 361 Ark. 357, 367, 868 S.W.2d 89 (2005). Defendant was a member of the class of plaintiffs in the *Lake View* school funding case. *Lake View School District No. 25 v. Huckabee*, 340 Ark. 481, 486, 10 S.W.3d 892, 895 (2000)("*Lake View 2000*"); *Lake View 2002*, 351 Ark. 31, 43, 91 S.W.3d 472, 478 (2002). The

Defendants in this case are essentially the same as the defendants in *Lake View* or are in privity with the *Lake View* defendants. *Lake View 2002*, 351 Ark. at 42. In 2007 the Supreme Court issued a final opinion in that case finding that all of the issues had been resolved and that the case should be dismissed. *Lake View 2007*, 370 Ark. 139, 257 S.W.3d 879 (2007). As pleaded by Plaintiff, the claims in this case are the same as the claims in the *Lake View* case.

Therefore, Plaintiff's claims are precluded by the doctrine of *res judicata*. Defendants' *Motion to Dismiss* is GRANTED and Plaintiff's claims against all Defendants are DISMISSED WITH PREJUDICE.

So Ordered this 12th day of April, 2011.

Hon. Chris Piazza
Circuit Court Judge

Approved as to form:

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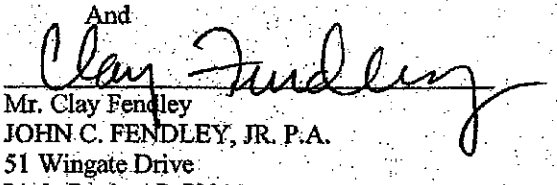

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IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
SECOND DIVISION

DEER/MT. JUDEA SCHOOL DISTRICT PLAINTIFF

v. NO. 60-CV-2010-6936

FILED 04/14/11 10:08:03 JE
Larry Crane Pulaski Circuit CLerk
CR01

MIKE BEEBE, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF ARKANSAS, ETAL. DEFENDANTS

NOTICE OF APPEAL

Deer/Mt. Judea School District ("Deer/Mt. Judea) for its Notice of Appeal states:

1. Deer/Mt. Judea appeals the Order on Motion to Dismiss entered on April 12, 2011 dismissing its Complaint with prejudice based on the doctrine of *res judicata*.

2. Deer/Mt. Judea designates the complete Circuit Court record, including all the evidence, transcripts of all hearings and testimony, and all pleadings and rulings filed with the circuit clerk, as the record on appeal.

3. Deer/Mt. Judea has ordered the transcript from the court reporter and has made financial arrangements with the court reporter as required by Ark. Code Ann. § 16-13-510(c).

4. This appeal is taken to the Arkansas Supreme Court pursuant to Ark. Sup. Ct. R. 1-2(a)(1) as it involves the interpretation or construction of the Constitution of Arkansas, Article 14, § 1 and Article 2, §§ 2, 3 and 18.

5. Deer/Mt. Judea abandons any pending but unresolved claim.

Dated this 14th day of April, 2011.

Respectfully submitted,

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By: Clay Fendley
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Certificate of Service

I hereby certify that on April 14, 2011, I mailed a copy of this notice to the persons below by a form of mail which requires a signed receipt:

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