UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

LITTLE ROCK SCHOOL DISTRICT **PLAINTIFF**

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

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

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

KATHERINE KNIGHT, et al. **INTERVENORS**

RESPONSE TO ORDER (DE 4608)
SOLICITING VIEWS ON PERIODIC REVIEW OF
1989 SETTLEMENT AGREEMENT

The Arkansas Department of Education (ADE), by and through its attorneys, Attorney General Dustin McDaniel and Assistant Attorney General Scott P. Richardson, state for their Response to Order Soliciting Views on Periodic Review of 1989 Settlement Agreement:

LRSD in its "Motion to Enforce 1989 Settlement Agreement" requests that the Court direct the State "to retain experts approved by LRSD to review the 1989 Settlement Agreement to determine whether a race-neutral student assignment system can achieve the goals of the 1989 Settlement Agreement." In its three sentences requesting periodic review in LRSD's Brief in Support of Motion to Enforce 1989 Settlement Agreement, LRSD cites to *Grutter v. Bollinger* as the basis for the requested periodic review. 539 U.S. 306, 342 (2003). The relevant language from *Grutter* is as follows:

> We are mindful, however, that "[a] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race." *Palmore v. Sidoti*, 466 U. S. 429, 432 (1984). Accordingly, race-conscious admissions policies must be limited in time. This requirement reflects that racial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands. Enshrining a permanent justification for racial preferences would offend this fundamental equal protection principle. We see no reason to exempt race-conscious admissions

> programs from the requirement that all governmental use of race must have a logical end point. The Law School, too, concedes that all "race-conscious programs must have reasonable durational limits." Brief for Respondent Bollinger et al. 32.
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> In the context of higher education, the durational requirement can be met by sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity. Universities in California, Florida, and Washington State, where racial preferences in admissions are prohibited by state law, are currently engaged in experimenting with a wide variety of alternative approaches. Universities in other States can and should draw on the most promising aspects of these race-neutral alternatives as they develop. *Cf. United States v. Lopez*, 514 U. S. 549, 581 (1995) (KENNEDY, J., concurring) ("[T]he States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear").
>
> The requirement that all race-conscious admissions programs have a termination point "assure[s] all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself." *Richmond v. J. A. Croson Co*., 488 U. S., at 510 (plurality opinion); see also Nathanson & Bartnik, The Constitutionality of Preferential Treatment for Minority Applicants to Professional Schools,

Grutter, 539 U.S. at 342. The admissions policies at issue in *Grutter* were voluntarily adopted by the University of Michigan Law School. The question for the Supreme Court was whether federal law prevented the university's voluntarily adopted race-conscious admissions policy. The question in this case, however, is whether the federal court retains authority to compel the State to fund an interdistrict transfer program.

LRSD does not identify what "goals of the 1989 Settlement Agreement" that it believes this "periodic review" should be directed towards or what basis would continue to support federal jurisdiction over the Department of Education (ADE). In paragraph 124 of its Brief in Support (DE 4442), LRSD alleges that one "implicit goal of the 1989 Settlement Agreement was to reduce the number of racially-identifiable black, high-poverty schools." DE 4442 p. 60 ¶ 124. This, of course, assumes that the goal of desegregation litigation is to racially balance the schools in perpetuity. This assumption has been thoroughly rejected by the Supreme Court as a basis for

continued federal jurisdiction. *Swann v. Charlotte-Mecklenburg Board of Ed.*, 402 U.S. 1, 91 S.Ct. 1267 (1971); *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 96 S.Ct. 2697 (1976). "The ultimate objective [of a desegregation case is] to return school districts to the control of local authorities." *Freeman v. Pitts*, 503 U.S. 467, 489-490, 112 S.Ct. 1430, 1445 (1992).

The goal of a desegregation case with regard to assignment of students to schools is to "achieve a system of determining admission to the public schools on a non-racial basis." *Spangler*, 427 U.S. at 435 *quoting Brown v. Board of Education*, 349 U.S. 294, 300-301, 75 S.Ct. 753, 756 (1955). Once that goal is attained "the District Court [has] fully performed its function of providing the appropriate remedy for previous racially discriminatory attendance patterns." *Spangler*, 427 U.S. at 437. At that point the Court has reached the constitutional limit upon its authority and jurisdiction must be released. *Id.* at 434 ("[A]bsent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis."). "Federal Courts may not order States or local governments, over their objection, to undertake a course of conduct not tailored to curing a constitutional violation that has been adjudicated." *Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367, 389, 112 S.Ct. 748, 762 (citing *Milliken v. Bradley (Milliken II*), 433 U.S. 267, 97 S.Ct. 2749 (1977)). If enforcement of the 1989 Settlement Agreement is not "supported by an ongoing violation of federal law" then the Court is without jurisdiction to order any current or additional remedies against the ADE. *Horne v. Flores*, 129 S.Ct. 2579, 2597 (2009); *Swann*, 402 U.S. 1, 22, 91 S.Ct. 1267, 1279 ("We are concerned in these cases with the elimination of the discrimination inherent in the dual school systems, not with myriad factors of human existence which can cause discrimination.")

It is appropriate to examine the propriety of continued enforcement of the 1989 Settlement Agreement. The real question for such a review is whether "the judgment has been satisfied, released, or discharged; . . . applying it prospectively is no longer equitable; . . . or [whether] any other reason . . . justifies [release from the Court's enforcement of the 1989 Settlement Agreement]." Fed. R. Civ. Pro. 60(b)(5), (6).

The true goal of the 1989 Settlement Agreement is stated in paragraph nineteen of LRSD's Brief in Support of Motion to Enforce, where the District quotes Judge Wright: "the mutual goal of constitutionally desegregated public school systems." Memorandum Brief in Support of Motion to Enforce 1989 Settlement Agreement (DE 4442) p. 11 quoting Order (DE 1442) p. 4; see also 1989 Settlement Agreement p. 1, ¶ 1 (identifying the purpose of the agreement as "achieving unitary school systems in these three districts which are free from the vestiges of racial discrimination.") So, in reviewing the continued propriety of the 1989 Settlement Agreement and the continuation of this Court's exercise of federal jurisdiction over the ADE, the principal question should be whether the Settlement Agreement's role in pursuit of the goal of "constitutionally desegregated public school systems" has been satisfied, in whole or in part. If the answer to that question is "yes" then the Court is without jurisdiction to exercise any authority over the ADE. *Horne*, 129 S.Ct. 2579. If the answer to that question is "yes, in part" then the Court should release jurisdiction over the ADE for those areas where a Constitutional violation no longer exists. *Freeman*, 503 U.S. 467, 112 S.Ct. 1430 (1992).

The Court, rather than some outside expert, should answer this question of law. In fact, the Court has already answered key components of this question. LRSD is fully unitary. *LRSD v. PCSSD*, 561 F.3d 746 (8th Cir. 2009). NLRSD is fully unitary except for a documentation requirement in staff recruitment. Findings of Fact and Conclusions of Law, DE # 4507. PCSSD

is unitary in its operations except for (1) one-race classroom reporting (2) advanced placement, gifted and talented and honors programs; (3) discipline; (4) school facilities; (5) scholarships; (6) special education; (7) staff; and (8) student achievement. Id. Thus, as to the principal desegregation issue for which the State provides funding under the 1989 Settlement Agreement - namely student assignments to schools - all three districts are fully unitary.

The Majority to Minority and Magnet stipulations form the bulk of the State's remaining obligations under the 1989 Settlement Agreement. The primary purpose of these programs was to promote desegregation in student assignments to the schools of the County. See Stipulation for Proposed Order on Voluntary Majority to Minority Transfers, p. 7-8 entered August 26, 1986; *LRSD v. PCSSD*, 659 F.Supp. 363 (E.D. Ark. 1987)(Magnet Stipulation and at "Exhibit D" M to M Stipulation). All of the Pulaski County school districts are unitary as to student assignments, i.e. the "system of determining admission to the public schools" now operates on a non-racial basis. *Spangler*, 427 U.S. at 435. Accordingly, the task of these two interdistrict transfer programs has been accomplished. Moreover, the only Pulaski County district with significant desegregation responsibilities still in place is PCSSD (assuming that PCSSD is not successful on appeal). Even there, the remaining areas requiring desegregation efforts do not depend on interdistrict transfers to attain compliance with the Fourteenth Amendment's equal protection clause. *Dowell*, 498 U.S. at 245-246. For that reason the provisions of the 1989 Settlement agreement regarding interdistrict transfers and State payments for such transfers are no longer necessary and "applying [the 89 Settlement Agreement] prospectively is no longer equitable." Fed. R. Civ. Pro. 60(b)(5); *Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367, 112 S.Ct. 748 (1992); *Board of Education of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237, 248, 111 S.Ct. 630, 637 (1991).

In addition to paying for M to M and magnet school programs to facilitate interdistrict transfers, the bulk of the remainder of the State's payments is prescribed for teacher retirement and health insurance. The 1989 Settlement Agreement does not mention teacher retirement or health insurance payments. This funding requirement is a result of two orders of the Court and an opinion by the Eighth Circuit. Memorandum Opinion and Order regarding teacher retirement funding DE 2930 filed Feb. 18, 1997; Memorandum Opinion and Order regarding health insurance funding, DE 2967, filed April 22, 1997; *LRSD v. NLRSD*, 148 F.3d 956 (8th Cir. 1998). The Court ordered this funding because it found that a) the State changed the method of funding teacher retirement and health insurance for the districts to a lower amount than what had previously been provided, b) while this was a consistent change for all districts across the State, the new system affected the three Pulaski County school districts to their detriment, and c) this detriment was a result of "desegregation obligations, beyond the control of school districts which dictate the number of employees and salaries of teachers." Memorandum Opinion and Order regarding teacher retirement funding, DE 2930 p. 10. The Court required the excess teacher retirement and health insurance payments because "those programs are directly impacted by the obligations imposed by the desegregation settlement plans." Memorandum Opinion and Order regarding health insurance, DE 2967 p. 7. Accordingly, any review of the propriety of continuing this funding requirement would need to consider whether the districts have continuing "obligations imposed by [their] desegregation settlement plans." Again, that question has largely been answered by the unitary status rulings that have been rendered in this case. Additionally, the Court would need to address whether it is equitable to continue to require the ADE to fund these costs for the three Pulaski County districts at a level above that provided to every other school district in the State. The State suggests that the answer to this question is "no."

Finally, the Court should assess whether any ongoing desegregation obligations imposed upon the ADE are traceable in a proximate way to the previous *de jure* segregated system. *Freeman*, 503 U.S. 467, 494; *LRSD 2002*, 237 F.Supp.2d 988, 1036-1040. Accordingly, if the remedy imposed under the 1989 Settlement Agreement is no longer directed at curing any unconstitutional condition that currently exists in the Pulaski County school districts as a result of the unconstitutional conduct identified in 1984 and that contributes to a denial of equal educational opportunities on the order of a Fourteenth Amendment violation, then jurisdiction over the ADE must be released. *Dowell*, 498 U.S. at 247("[F]ederal-court decrees must directly address and relate to the constitutional violation itself."); *Milliken II*, 433 U.S. 267, 282 (holding that "federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation"); *Horne*, 129 S.Ct. at 2595 (reversing because "[r]ather than applying a flexible standard that seeks to return control to state and local officials as soon as a violation of federal law has been remedied, the Court of Appeals used a heightened standard that paid insufficient attention to federalism concerns").

On the question of whether additional or different remedies may be ordered against the State, the Court must grapple not only with the Supreme Court precedent noted above that but also with both the existence of the detailed settlement agreement and release as well as the previous dismissal of the State as a party to this suit. First, all of the parties to this litigation released the State

> "from any and all actions, causes of action, claims and demands which the [parties had] or may hereafter have arising out of or in any way related to any acts or omissions of any and every kind to the date of the execution of this release by the released parties which in any way relate to racial discrimination or segregation in public education in the three school districts in Pulaski County, Arkansas or to the violation of constitutional or other rights of school children based on race or color in the three school districts in Pulaski County, Arkansas."

1989 Settlement Agreement Attachment A "Release of All Claims Against the State;" *LRSD v. PCSSD*, 237 F.Supp.2d 988, 1005-1006. Under the Settlement Agreement, the State has been released from any and all claims or obligations not provided by the 1989 Settlement Agreement. LRSD's request for periodic review suggests that different or additional obligations ought to be imposed on the State. To that extent, LRSD's request violates the 1989 Settlement Agreement and is barred by that agreement and the Eleventh Amendment. The only question for the Court at this time is whether the provisions of the 1989 Settlement Agreement continue to be required by any ongoing effects of any prior constitutional violations. The State's position is that they are not so required.

WHEREFORE, the State of Arkansas requests that LRSD's Motion to Enforce the 1989 Settlement Agreement be denied, that the State be released from any further obligations under the 1989 Settlement Agreement or this case, and for all other relief to which it is entitled.

Respectfully submitted,

DUSTIN McDANIEL
Attorney General

BY: /s/ Scott P. Richardson
SCOTT P. RICHARDSON, Bar No. 01208
Assistant Attorneys General
323 Center Street, Suite 1100
Little Rock, AR 72201-2610
(501) 682-1019 direct
(501) 682-2591 facsimile
Email: scott.richardson@arkansasag.gov

ATTORNEYS FOR STATE OF ARKANSAS AND
ARKANSAS DEPARTMENT OF EDUCATION

CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which shall send notification of such filing to the following:

Mr. Clayton R. Blackstock
cblackstock@mbbwi.com

Mr. John W. Walker
johnwalkeratty@aol.com

Mr. Mark Terry Burnette
mburnette@mbbwi.com

Mr. Stephen W. Jones
sjones@jlj.com

Mr. John Clayburn Fendley , Jr
clayfendley@comcast.net

Ms. Deborah Linton
dlinton@jacknelsonjones.com

Mr. Christopher J. Heller
heller@fec.net

Ms. Mika Shadid Tucker
mika.tucker@jacknelsonjones.com

Mr. M. Samuel Jones , III
sjones@mwsgw.com

Office of Desegregation Monitor
mqpowell@odmemail.com, lfbryant@odmemail.com, paramer@odmemail.com

I, Scott P. Richardson, Assistant Attorney General, do hereby certify that I have served the foregoing and a copy of the Notice of Electronic Filing by depositing a copy in the United States Mail, postage prepaid, on September 30, 2011, to the following non-CM/ECF participants:

Mr. Robert Pressman
22 Locust Avenue
Lexington, Mass. 02173

/s/ Scott P. Richardson
SCOTT P. RICHARDSON

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

LITTLE ROCK SCHOOL DISTRICT — PLAINTIFF

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PULASKI COUNTY SPECIAL SCHOOL DISTRICT NO. 1, ET AL — DEFENDANTS

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PLAINTIFF'S FILING REGARDING
A PERIODIC REVIEW OF THE INTERDISTRICT REMEDY

Plaintiff Little Rock School District ("LRSD") for its Filing Regarding a Periodic Review of the Interdistrict Remedy states:

1. **Should the interdistrict remedy be subject to periodic review?** In its May 19, 2010 Motion to Enforce 1989 Settlement Agreement, LRSD requested a periodic review "to determine whether a race-neutral student assignment system can achieve the goals of the 1989 Settlement Agreement." This request was based on the concern expressed by the United States Supreme Court, primarily in cases where racial classifications served a compelling interest other than remedying past discrimination, that racial classifications are potentially dangerous and should be employed no more broadly that the interest demands. *See, e.g., Grutter v. Bollinger,* 539 U.S. 306, 342 (2003). The Supreme Court's reasoning would seem to apply even to a case such as this one where racial classifications were initially used specifically to remedy past racial discrimination.

The interdistrict remedy in this case addresses over a century of state-imposed residential segregation in Pulaski County that caused a "disproportionate number of whites" to reside outside of LRSD and "substantially more blacks" to reside within LRSD. *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.*, 778 F.2d 404, 428 (8th Cir. 1985). The parties, including the State, agreed to the M-to-M Stipulation and Magnet Stipulation to remedy their interdistrict constitutional violations. *See id.* at 433 ("The overriding goal of [a desegregation remedy] is to eradicate all vestiges of state-imposed segregation."). The M-to-M Stipulation and Magnet Stipulation use racial classifications to assign students. *M-to-M Stipulation, ¶ 2 and Magnet Stipulation, p. 5*.

If a race-neutral alternative can achieve the same remedial purpose, it makes sense to consider replacing a potentially dangerous race-based remedy with one that does not require racial classifications. Thus, the purpose of the periodic review should be to determine whether race-neutral alternatives would be effective in remedying defendants' constitutional violations. *Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 733 (2007).

2. **If a periodic review is required, how should it be done?** The Court should set a deadline for all parties to the M-to-M Stipulation and Magnet Stipulation, including the State, to meet and report to the Court concerning whether continued use of racial classifications remains necessary to remedy defendants' constitutional violations. In particular, the parties, including the State, should be required to consider and report to the Court on the likely effectiveness of race-neutral alternatives such as free or reduced-price meal status, a student's past academic achievement, or other demographic, socioeconomic or achievement characteristics. School districts across the United States are using one or more of these race-neutral alternatives to improve the racial diversity of their schools. *See, e.g., Docket No. 4440,*

Ex. 59, Appendix (Identifying 69 districts enrolling 3.5 million students that employ socioeconomic status in some fashion to assign students to schools). Race-neutral strategies for improving racial diversity may be equally effective in remedying residential segregation in Pulaski County resulting from defendants' constitutional violations.

LRSD suggests that a periodic review might be more effective once the Court has decided LRSD's Motion to Enforce 1989 Settlement Agreement. *See Docket No. 4440 to 4442 (LRSD's Motion to Enforce and Brief)*. Once that issue is resolved, LRSD suggests that the Court order the parties to meet and report to the Court about whether the continued use of racial classifications is necessary to remedy defendants' constitutional violations. If a race-neutral remedy could be equally efficacious, LRSD suggests that the Court establish a deadline for the parties to agree and submit a new interdistrict remedy to the Court for approval. If the parties are unable to reach an agreement, the Court should schedule a hearing on whether the use of racial classifications remains necessary to remedy defendants' constitutional violations and whether race-neutral alternatives may be equally effective in remedying over a century of state-imposed residential segregation in Pulaski County.

Respectfully submitted,

LITTLE ROCK SCHOOL DISTRICT
Friday, Eldredge & Clark
Christopher Heller (#81083)
400 West Capitol, Suite 2000
Little Rock, AR 72201-3493
(501) 370-1506
heller@fridayfirm.com

/s/ Christopher Heller

Clay Fendley (#92182)
John C. Fendley, Jr., P.A.
Attorney at Law
51 Wingate Drive
Little Rock, AR 72205
(501) 907-9797
clayfendley@comcast.net

CERTIFICATE OF SERVICE

I certify that on September 30, 2011, I have electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which shall send notification of such filing to the parties of record.

/s/ Christopher Heller