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

LITTLE ROCK SCHOOL DISTRICT — PLAINTIFF

v. 4:82-CV-00866-DPM

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

MRS. LORENE JOSHUA, ET AL — INTERVENORS

KATHERINE KNIGHT, ET AL — INTERVENORS

LIGHTHOUSE ACADEMIES OF ARKANSAS, INC., ET AL. — INTERVENORS

MEMORANDUM BRIEF IN SUPPORT OF LRSD'S AND JOSHUA'S MOTION FOR SUMMARY JUDGMENT

I. Introduction.

This Court should grant the Plaintiff, Little Rock School District ("LRSD"), and the Joshua Intervenors ("Joshua") summary judgment finding as a matter of law that the State of Arkansas, the State Board of Education ("State Board") and/or the Arkansas Department of Education ("ADE") (collectively, the "State") violated the consent decree by:

(1) Authorizing open-enrollment charter schools in Pulaski County without Court approval;

(2) Failing to identify or develop programs to remediate the racial achievement disparity;

(3) Abandoning its monitoring responsibilities;

(4) Adopting a new system of transportation funding that funds the Pulaski County

districts to a lesser degree than other districts in the state; and,

(5) Retaliating against the Pulaski County districts by:

(a) Failing to adopt a standards-based formula for the distribution of transportation funding;

(b) Failing to reimburse LRSD for its attorneys' fees incurred in obtaining unitary status; and,

(c) Passing Act 701 of 2011 and subjecting the Pulaski County districts to "forensic audits" purportedly to ensure that settlement funds are being spent on "desegregation."

As to each of the State's violations, the material facts are not in dispute, and the Court may construe the consent decree as a matter of law. Accordingly, LRSD and Joshua should be granted summary judgment. Fed.R.Civ.P. 56(a).

II. Interpretation of a Consent Decree.

LRSD and Joshua seek enforcement of a consent decree. For enforcement purposes, consent decrees are construed as contracts. *White v. National Football League*, 585 F.3d 1129, 1141 (8th Cir. 2009) ("[B]ecause the content of a consent decree is generally a product of negotiations between the parties, decrees are construed for enforcement purposes as contracts.") (quoting *Martin v. Wilks*, 490 U.S. 755, 788 n. 27, 109 S.Ct. 2180, 104 L.Ed.2d 835 (1989)). The consent decree in this case should be interpreted consistent with Arkansas law. *See Little Rock Sch. Dist. v. North Little Rock Sch. Dist.*, 451 F.3d 528, 537 (8th Cir. 2006). Even so, "[t]he interpretation of a consent decree should be a practical enterprise, influenced, perhaps, by technical rules of construction, but not controlled by them." *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.*, 60 F.3d 435, 436 (8th Cir. 1995).

Arkansas law holds that interpretation of an unambiguous contract is a question of law

for the court. *Keller v. Safeco Ins. Co. of America*, 877 S.W.2d 90 (Ark. 1994). Even when a contract is ambiguous, if the meaning of the ambiguous term does not depend on disputed extrinsic evidence, the construction and legal effect of the contract remains a question of law. *Smith v. Prudential Prop. & Cas. Ins. Co.*, 10 S.W.3d 846, 850 (2000). *See U.S. v. Knote*, 29 F.3d 1297, 1299-1300 (8th Cir. 1994)("Our review is de novo where the district court's interpretation of the decree is based solely on the written document, and clearly erroneous where the interpretation is based on extrinsic evidence.").

III. Discussion.

A. Open-Enrollment Charter Schools in Pulaski County.

1. The Consent Decree Prohibits the Removal of Students from the Interdistrict System Governed by the M-to-M and Magnet Stipulations.

It is the law of the case that the consent decree prohibits the removal of students from the interdistrict system of school choice governed by the M-to-M and magnet stipulations without Court approval. *DN 4440, Ex. 7, Tr. 18 August 2003.* In rejecting the State's attempt to create a Jacksonville splinter district, the Court (the Honorable Billy Roy Wilson) adopted the reasoning of Arkansas' then Attorney General, Governor Mike Beebe. *DN 4440, Ex. 7, p. 54-55.* In a 4 June 2003 opinion letter, Beebe advised the State Board:

> As a general matter, the Settlement Agreement and the PCSSD's existing desegregation plan were written in the context of the PCSSD having control over the schools in the proposed detachment area, having the benefit of the local revenue derived from taxes on property within the proposed detachment area, *and having available the students residing in the proposed detachment area who might, through M-M transfers and other reassignment, be available to lessen racial disparities in individual schools in the PCSSD, the LRSD or the NLRSD.* In light of this, any detachment of a significant amount of territory from the PCSSD could almost certainly be expected to have an "impact" on the PCSSD's ability to comply with its desegregation plan and have an impact on the operation of the Settlement Agreement, including the Agreement's provisions concerning M-M students and the Magnet schools in LRSD.

DN 4440, Ex. 7A, p. 5 (emphasis supplied). After quoting the 4 June 2003 Attorney General Opinion, Judge Wilson added, "While the author of this Advisory Opinion chose to leave the obvious point unstated, the impact he was referring to on the Pulaski County Special School District and its ability to comply with its desegregation obligation (sic) was unquestionably going to be a negative impact." *DN 4440, Ex. 7, p. 55.* Judge Wilson concluded:

> It is, of course, elementary law that [under] the Supremacy Clause of the United States Constitution, . . . the Arkansas legislature cannot properly enact legislation that in any way appreciably limits the role of the Court in this desegregation case or that attempts to reduce the constitutional authority of the Court to that of a safety net for state sponsored detachment schemes . . . that, as I have said before, appear to be constitutionally infirm on a number of different grounds.
>
> Because the State Board of Education under the Arkansas Department of Education failed to obtain this Court's prior approval of the proposed new school district in northeast Pulaski County before they voted to allow an election to take place to create the detached district, possible created, I conclude that the state violated its obligations under the '89 settlement agreement and the obligation under the Eighth Circuit's decision in the 1986 case that I have cited earlier.

DN 4440, Ex. 7, p. 58.

The State did not appeal Judge Wilson's Jacksonville splinter district decision, *see Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.*, 378 F.3d 774 (8th Cir. 2004), and therefore, that decision is now the law of the case. *See Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.*, 148 F.3d at 966 n.3 ("We did not so interpret Sections II.E. and II.L. in our previous decision, however, and that decision has become the law of the case."); *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.*, 237 F.Supp.2d 988, 1034 (E.D. Ark. 2002) ("On April 10, 1998, Judge Wright entered an order (docket no. 3144) approving the Revised Plan which was *not* appealed as is now a *final consent decree that represents the law of the case.*" (emphasis in original)). Accordingly, the State must seek and obtain this Court's approval before taking any action that has the impact of removing students from the interdistrict system of school choice

created by the M-to-M and magnet stipulations. *See DN 4440, Ex. 7, p. 64* ("[I]t's the effect and impact rather than the intent which is the critical inquiry under these circumstances.").

The State Board's approval of open-enrollment charter schools in Pulaski County cannot be distinguished from the State Board's attempt to create a Jacksonville splinter district. While charter schools have no boundaries, the impact is the same -- they attract students "who might, through M-M transfers and other reassignment, be available to lessen racial disparities in individual schools in the PCSSD, the LRSD or the NLRSD." *DN 4440, Ex. 7A, p. 5*. Judge Wilson found this impact to be "undeniable." *DN 4440, Ex. 7, p. 59.* Neither the State nor the Charter Intervenors deny that open-enrollment charter schools in Pulaski County attract students who might otherwise participate in the magnet or M-to-M programs.[1] *See DN 4699, ¶¶ 79-80* ("Charter schools are one of the array of educational choices available to families in and around Pulaski County . . . Of these choices, only open-enrollment public charter schools offer an alternative to the LRSD for those who seek public education in Little Rock.").

Even if Judge Wilson's ruling on the Jacksonville splinter district was not the law of the case, his interpretation of the consent decree represents the only reasonable interpretation of the decree read as a whole. *See Pure Country, Inc. v. Sigma Chi Fraternity*, 312 F.3d 952, 958 (8th Cir.2002) ("When construing a consent decree, courts are guided by principles of contract interpretation and, where possible, will discern the parties' intent from the unambiguous terms of the written consent decree, read as a whole."). Various terms of the consent decree read together unambiguously prohibit the State from creating a competing system of interdistrict magnet

[1] Data provided by ADE shows that from the 2005-2006 school year to the 2010-2011 school year, 331 LRSD students moved directly from magnet schools to charter schools. LRSD Ex. 90. Twenty more LRSD students left the M-to-M program for charter schools. LRSD Ex. 91. The ADE refused to provide data about the movement of PCSSD and NLRSD M-to-M students to charter schools.

schools in Pulaski County in the form of open-enrollment charter schools.[2] First, the Magnet Stipulation recognized this Court's ongoing jurisdiction to determine the appropriate number of interdistrict magnet schools in Pulaski County. *See Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.*, 921 F.2d 1371, 1389 (8th Cir. 1990). It provided:

> New magnets or expansion of magnets already existing may be provided for in subsequent school years beginning 1988-89 under the provisions of the Order of September 3, 1986. Any party may present applications for a magnet school or program not later than the beginning of each school year preceding the proposed year of implementation. The Committee's decision and recommendation shall be submitted to the parties no later than November 15. The MRC shall make its recommendation to the Court not later than December 15.

DN 4440, Ex. 2, p. 2. Thus, the Magnet Stipulation included a process for opening new interdistrict magnet schools in Pulaski County, and "any party", including the State, could have presented an application to the Magnet Review Committee ("MRC") to open new interdistrict magnet schools in Pulaski County. This is a clear expression of intent to limit the number of interdistrict magnet schools in Pulaski County to those approved by the MRC and the Court – as required by the Eighth Circuit. *LRSD v. PCSSD*, 778 F.2d at 436 ("The district court may require a limited number of magnet or specialty schools or programs to be established at locations to be determined initially by a Magnet Review Committee and approved by the district court after a hearing.").

While the 1989 Settlement Agreement limited some of the State's funding obligations to the Stipulation Magnet schools, it did not limit the Court's jurisdiction to determine the appropriate number of interdistrict magnet schools in Pulaski County. In approving the funding limitation, the Eighth Circuit explained:

[2] While the "magnet" charters raise concerns different from the "no-excuses" charter schools, *see DN 4442, ¶¶ 121-137,* both types of charter schools may draw students from all three districts, and therefore, are interdistrict "generic magnet schools." *See LRSD v. PCSSD*, 921 F.2d at 1389.

> It is important to recall, at this point, the various uses that the phrase "magnet schools" can have. In compliance with the direction in our 1985 en banc opinion, 778 F.2d at 436, the parties stipulated to the creation of six interdistrict magnet schools. The State is required to pay half the necessary capital outlays to establish these schools, and half the cost of educating the students attending them. Each district must contribute towards their operating expenses in appropriate proportions. *See* 659 F.Supp. at 370. *The settlement plans and the settlement agreement contemplate additional interdistrict facilities, to be distinguished from "magnet schools" specifically so called.* These interdistrict schools will, it is hoped, attract voluntary transfers because of the excellence and distinctive nature of their programs. They will be, as the parties put it, "generic magnet schools." *The settlement plans and the settlement agreement do not purport to limit the District Court's ability to require the creation of such additional interdistrict schools.* They limit only how such new schools may be funded. This funding may include payments by the State for majority-to-minority transfers, but it may not include the imposition on the State of a share of the capital costs of these new facilities. We see nothing facially unconstitutional or improper about such an agreement. *The agreement does not bar the creation of additional interdistrict schools; it simply provides that, when created, they will not be funded in the same way as the six stipulation magnets.*

LRSD v. PCSSD, 921 F.2d at 1389 (emphasis supplied). Thus, the 1989 Settlement Agreement did not affect the Court's jurisdiction to determine the appropriate number of interdistrict magnet schools in Pulaski County. *See also Appeal of LRSD*, 949 F.2d 253, 256 (8th Cir. 1991) (Among the crucial elements of the settlement agreement with respect to which no retreat should be approved were "(2) operation of the *agreed number* of magnet schools according to the agreed timetable; (3) operation of the *agreed number* of interdistrict schools according to the agreed timetable. . . ." (emphasis supplied)).

Second, the State Board's unilateral authorization of new interdistrict magnet schools in Pulaski County (in the form of open-enrollment charter schools) is also inconsistent with its commitment to promote the goals of the consent decree. The State expressly "committed" to the principle that "[t]he ADE and the Districts should work cooperatively to promote the desegregation goals of the State and the Districts . . . ." *DN 4440, Ex. 3, § III, ¶ F; see also DN 4440, Ex. 10, AG Opinion 8 March 2000* ("In the Agreement that settled the Pulaski County

desegregation case, the State and the [State] Board [of Education] committed 'to promote the desegregation goals of the State and the [Pulaski County] districts."); *DN 4440, Ex. 12, AG Opinion 5 January 2001* (same). One goal of the consent decree was to increase participation in the magnet and M-to-M programs. *See DN 2337, p. 10* ("The State's application of loss funding and growth funding encourages the PCSSD to lose students to neighboring predominately white districts, not to LRSD. This is contrary to the Eighth Circuit's intent to encourage voluntary majority-to-minority transfers between the Districts and to require the State to pay for such transfers."). To encourage participation, the consent decree required the districts to cooperate and recruit students to participate in the magnet and M-to-M programs and provided financial incentives for the districts to increase participation in the programs. *DN 4440, Ex. 1, ¶¶ 1, 12-14; DN 4440*; *Ex. 2, pp. 3-4, 8*; *see Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.*, 934 F.Supp.299, 301 (E.D. Ark. 1996) (adopting an interpretation of the consent decree agreement that rewards effective recruiting of M-to-M students because "the primary purpose of the M-to-M concept was to promote voluntary interdistrict transfers."), *aff'd Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.*, 109 F.3d 514, 516 (8th Cir. 1997) ("The district court's interpretation . . . will promote voluntary interdistrict transfers to interdistrict schools, and it will provide a financial incentive to both districts to receive M-to-M transfer students.").

The State's duty to promote the decree's goal of encouraging participation in the magnet and M-to-M programs necessarily prohibits the State from creating a competing system of interdistrict magnet schools in Pulaski County. Any other interpretation would be inconsistent with the terms of the consent decree and with the implied duty of good faith and fair dealing. *See Cantrell-Waind & Assoc., Inc. v. Guillaume Motorsports, Inc.*, 968 S.W.2d 72, 74 (Ark. 1998) ("A party has an implied obligation not to do anything that would prevent, hinder, or delay

performance."); *Southern Wine and Spirits of Nevada v. Mountain Valley Spring Co., LLC*, 646 F.3d 526, 535 (8th Cir. 2011) (applying Arizona law) (evidence sufficient to support a jury verdict based on breach of implied covenant of good faith and fair dealing where exclusive distributor "contravened 'the intention and spirit of the contract' in failing to promote and distribute Mountain Valley's high-end glass bottled water products . . . .").

Therefore, read as a whole, the consent decree unambiguously prohibited the State from creating new interdistrict magnet schools in Pulaski County that hinder the districts' efforts to recruit students to participate in the magnet and M-to-M programs. *Pure Country, Inc.*, 312 F.3d at 958; *Cantrell-Waind & Assoc., Inc.*, 968 S.W.2d at 74. The Eighth Circuit authorized and the parties agreed to a "limited number" of interdistrict magnet schools in Pulaski County. *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.,* 778 F.2d 404, 436 (8th Cir. 1985); *Appeal of LRSD*, 949 F.2d at 256; *DN 4440, Ex. 2, p. 2.* All parties agreed to promote the magnet and M-to-M programs and to encourage participation in the programs. *DN 4440, Ex. 1, ¶¶ 1, 12-14; DN 4440*; *Ex. 2, pp. 3-4; DN 4440, Ex. 3, § III, ¶ F.* The State's duty to encourage participation in the magnet and M-to-M programs necessarily prohibits the State from creating a competing system of interdistrict magnet schools in Pulaski County. *See Cantrell-Waind & Assoc., Inc.*, 968 S.W.2d at 74. Because the consent decree is unambiguous, its interpretation is a question of law for the Court and summary judgment is appropriate. *Smith*, 10 S.W.3d at 850.

The State argues that the consent decree "cannot be expanded to unduly limit charter schools." *DN 4465, p. 2.* To support this argument, the State cites a parenthetical that appears on three occasions in provisions related to funding to be provided to LRSD. *DN 4440, Ex. 3, § II, ¶ F, § VI, ¶¶ A and B.* For example, section II, paragraph F of the 1989 Settlement Agreement provides:

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

DN 4440, Ex. 3, § II, ¶ F (emphasis supplied by State). Based on this parenthetical, the State concludes, "Clearly, the settlement agreement contemplated that LRSD would not maintain exclusive control over delivery of publicly funded education services in its boundaries; and that the State maintained its control over the direction of public education in Little Rock." *DN 4465, p. 7.* The State's interpretation of this parenthetical phrase finds no support in the facts or the law.

Consent decrees should be construed as written. *Little Rock Sch. Dist. v. North Little Rock Sch. Dist.*, 451 F.3d 528, 537 (8th Cir. 2006) (Gruender, C.J., concurring in part and dissenting in part) (*citing Holland v. N.J. Dep't of Corr.,* 246 F.3d 267, 281 (3d Cir.2001) ("A court should interpret a consent decree as written and should not impose terms when the parties did not agree to those terms."). When the parties express their intention in clear and unambiguous language, it is the Court's duty to construe the contract in accordance with the plain meaning of the language employed. *Id.* The plain meaning of parenthetical phrase is that LRSD students are guaranteed funding under the 1989 Settlement Agreement even if another entity becomes responsible for their education. *DN 4440, Ex. 3, § II, ¶ F, § VI, ¶¶ A and B.* The phrase clearly limits the State's ability to avoid its obligations to LRSD students under the consent decree. To read the parenthetical to grant the State unilateral authority to create new

interdistrict magnet schools in Pulaski County would be inconsistent with the Eighth Circuit's decisions affirming this Court's ongoing jurisdiction over interdistrict schools in Pulaski County. *LRSD v. PCSSD*, 921 F.2d at 1389; *Appeal of LRSD*, 949 F.2d at 256. It would also be inconsistent with the Magnet Stipulation which provided the State Board a process to obtain the Court's approval to operate new interdistrict magnet schools in Pulaski County. *DN 4440, Ex. 2, p. 2.* The State's proposed interpretation renders the Magnet Stipulation process for opening new interdistrict magnet schools superfluous and must be rejected. *See Southway Corp.v. Metropolitan Realty and Development Co., LLC*, 206 S.W.3d 250, 254 (Ark. App. 2005) ("A construction which neutralizes any provision of a contract should never be adopted if the contract can be construed to give effect to all provisions."); *Fryer v. Boyett*, 978 S.W.2d 304, 306 (Ark. App. 1998) ("Different clauses of a contract must be read together and the contract construed so that all of its parts harmonize, if that is at all possible.").

The Charter Intervenors appear to concede that the consent decree grants the Court jurisdiction over interdistrict magnet schools in Pulaski County. *See DN 4699, ¶ 49, quoting LRSD v. PCSSD,* 921 F.2d at 1380. According to the Charter Intervenors, they should not be subject to the decree because it is "unconstitutional" and because "freedom of choice" will "help reverse patterns of segregation." *DN 4699, ¶ 86. But see Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 379 F.Supp. 1102, 1104 (D.C. N.C. 1974) ("'Freedom of choice' was a synonym for segregation for many years, and though a high ideal in theory, it should not be resurrected at this late date . . ."). As LRSD understands the Court's orders, the constitutionality and continuing efficacy of the consent decree are not issues to be determined in this proceeding. *DN 4608; DN 4690.* Accordingly, LRSD will not respond to those arguments at this time.

Finally, there is no dispute that the State is a constitutional violator and that it has

continuing obligations pursuant to the consent decree. *Little Rock Sch. Dist. v. State of Ark.*, 664 F.3d 738, 758 (8th Cir. 2011). The State's past policy of racially segregated schools *and neighborhoods* is among the reasons the assignment of interdistrict students in Pulaski County is governed a federal consent decree. *LRSD v. PCSSD,* 778 F.2d at 423. That decree shall remain in place until the State pleads and proves that it complied with the consent decree in good faith and eliminated the vestiges of its past discrimination to the extent practicable. *Little Rock Sch. Dist. v. State of Ark.*, 664 F.3d 738, 744 (8th Cir. 2011). To date, the State has done neither. The consent decree remains a valid and enforceable contract between the parties, as well as an order of the Court. *See Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.*, 131 F.3d 1255, 1258 (8th Cir. 1997)("[T]he desegregation plaintiffs may bring proceedings to enforce the terms of the settlement agreement and the terms of the desegregation plans."); *Jenkins v. Kansas City Missouri School District*, 516 F.3d 1074, 1081 (8th Cir. 2008) (district court "retains ancillary jurisdiction to manage its proceedings, vindicate its authority, and effectuate it decrees."). As a matter of law, the State breached the parties' agreement and violated the consent decree by failing to seek and obtain this Court's approval before authorizing open-enrollment charter schools in Pulaski County. *DN 4440, Ex. 7, p. 58.*

The State Board's authorization of open-enrollment charter schools in Pulaski County constitutes a material breach of the parties' agreement. *See Roberts Contracting Co., Inc. v. Valentine–Wooten Rd. Pub. Facility Bd.,* 2009 Ark.App. 437, at 8, 320 S.W.3d 1, 7. Open-enrollment charter schools in Pulaski County, excluding the Arkansas Virtual Academy, are authorized to enroll 5518 students in the 2011-12 school year and 5618 students through the 2014-15 school year. *LRSD Ex. 75.* As of October 1, 2011, open-enrollment charter schools in Pulaski County reported enrollment of 4398 students. *LRSD Ex. 76*. For comparison, the

proposed Jacksonville splinter district would have enrolled between 5,750 and 6,159 students, depending on the proposed district's boundaries. *DN 3761, PCSSD Ex. 15, pp. 9-13*. These enrollment projections were "based on the number of students residing in the alternative areas and attending the schools in the area," *DN 3761, PCSSD Ex. 15, p. 15*, and only about five percent (approximately 300) of these students would be expected to leave their neighborhood school and participate in the magnet or M-to-M programs.[3] All 4398 charter school students, on the other hand, chose to leave their neighborhood school, and but for charter schools, might have participated in the magnet or M-to-M programs.

The negative impact of open-enrollment charter schools in Pulaski County has been exacerbated by the State Board's failure to require charter schools to provide student transportation. The Eighth Circuit specifically ordered that the State pay for the interdistrict transportation of students, *see LRSD v. PCSSD,* 778 F.2d at 436, and accordingly, the 1989 Settlement Agreement requires the State to pay for the transportation of magnet and M-to-M students. *DN 4440, Ex. 3,* § II, ¶ E(4) and (5). The Supreme Court has recognized that transportation must be provided for desegregation plans to be effective. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 26-27 ("In order to be effective, such a transfer arrangement must grant the transferring student free transportation . . . ."). *See Swann*, 379 F.Supp. at 1103-04 (Freedom of choice plan failed due to "the failure thus far to provide transportation (. . . which of course must be provided for such schools in the future)."). The lack of transportation has a greater impact on African-American students because they are more likely to be economically disadvantaged, and economically disadvantaged students are more likely to

[3] For 2011-12, for example, 2936 students attended schools through the magnet and M-to-M programs – only 5.6% of the 52,201 students in LRSD, PCSSD and NLRSD combined. *See DN 4684, ODM 2011-12 Racial Balance Report, pp. 55-56.*

lack the means to provide their own transportation. *Statement of Material Facts,* ¶*56* .

For the reasons set forth above, LRSD and Joshua should be granted summary judgment on their claim that the State violated the consent decree by authorizing open-enrollment charter schools in Pulaski County without Court approval.

B. Remediation of the Racial Achievement Disparity.

1. The State Committed to Identify or Develop Programs to Remediate the Racial Achievement Disparity.

In the 1989 Settlement Agreement, the State agreed that "[t]here should be a remediation of the racial academic achievement disparities for Arkansas students." *DN 4440, Ex. 3, § III,* ¶ *F*. To that end, the State promised:

> The ADE, with the assistance of the Court's desegregation expert(s), will develop and will search for programs to remediate achievement disparities between black and white students. If necessary to develop such programs, the ADE will employ appropriately trained and experienced consultants in the field of remediation of racial achievement disparities and/or hire as staff members persons with such training and experience. The remediation of racial achievement disparities shall remain a high priority with the ADE.

DN 4440, Ex. 3, § III, ¶ *G.* In 1991, the Eighth Circuit considered modifications to the consent decree agreed to by the parties but rejected by this Court. In so doing, the Eighth Circuit identified "crucial" elements of the decree "with respect to which no retreat should be approved." *Appeal of LRSD*, 949 F.2d 253, 256 (8th Cir. 1991). Among those crucial elements was "the agreed effort to eliminate achievement disparities between the races." *Id*.

2. The State Failed to Develop or Identify Programs to Remediate the Racial Achievement Disparity.

There is no dispute that the State has not identified or developed programs to remediate the racial achievement disparity. The State's current position is that there is nothing the State can do to remediate the racial achievement disparity, *see LRSD Ex. 78, Armor Ach. Rpt., p. 2,*

and accordingly, Dr. Tom Kimbrell, Commission of Education, admitted that ADE has no programs in place specifically designed to remediate the racial achievement disparity in Pulaski County. *LRSD Ex. 79, Kimbrell Dep., p. 12.* Instead, the State argues that everything it has done since 1989 to improve education will benefit African-American students (as well as all students), and therefore, these efforts satisfy its obligation to remediate the racial achievement disparity. *LRSD Ex. 79, Kimbrell Dep., pp. 12-13.* These arguments should be rejected as a matter of law because they render the State's commitment to remediate the racial achievement disparity superfluous. *See Southway Corp., LLC*, 206 S.W.3d at 254; *Fryer*, 978 S.W.2d at 306. There is no dispute that the State has failed to identify or develop programs to remediate the racial achievement disparity in Pulaski County, and accordingly, LRSD and Joshua should be granted summary judgment.

The State's argument is analogous to the argument advanced by PCSSD in its unitary status hearing that was rejected by this Court and the Eighth Circuit. PCSSD agreed to implement the "Ross Plan" to improve student achievement. *Little Rock Sch. Dist. v. State of Ark.,* 664 F.3d 738, 755-56 (8th Cir. 2011). This Court found that PCSSD failed to implement the Ross Plan, and on appeal, PCSSD did not challenge that finding. *Id*. at 756. Instead, PCSSD argued "that it should be excused from its obligations because of a previous finding that 'socioeconomic factors are the root cause for most, if not all, of the achievement gap.'" *Id., quoting LRSD v. PCSSD,* 237 F.Supp.2d at 1074.[4] The Eighth Circuit rejected this argument

[4] The State should be estopped from arguing that schools cannot overcome a bad home environment because, in addition its duty under the Arkansas Constitution (Article 14, § 1 and Article 2, §§ 2, 3 and 18) to provide *all* students an opportunity for an adequate education, the State also has a duty to ensure that parents discharge their obligations at home. *See Dick v. State*, 217 S.W.3d 778, 782 (2005) ("The State's constitutional interest extends to the welfare of the child, and parental rights are not immune from interference by the State in its role of *parens patriae*."). In other words, if a child's home environment is so bad that the child cannot receive

stating, "Regardless of whether the specific intervention programs required by Plan 2000 eventually bear fruit, however, PCSSD cannot disavow its agreed upon obligation to make a good-faith effort. Accordingly, we affirm the denial of unitary status for PCSSD in the area of student achievement." *Id.* at 757.

Similarly, the State argues that any effort to remediate the racial achievement disparity would have failed, and therefore, it should be excused from its agreed upon obligation to identify or develop programs to remediate the racial achievement disparity. To support this argument, the State relies on the opinion of Dr. David Armor that "there is no known, existing program or policy that enables a school district or a state to close, or even substantially reduce, the achievement gap between African American and white students." *LRSD Ex. 78, Armor Ach. Rpt., p. 2.* Dr. Armor admits , however, that federal programs directed at remediating the racial achievement disparity "have produced some reductions in the achievement gap," although "the effects are generally small compared to the size of the gap." *LRSD Ex. 78, Armor Ach. Rpt., pp. 1-2*. Notably, Dr. Armor's report does not identify any programs developed and implemented by the State directed at remediating the racial achievement disparity. *LRSD Ex. 78, Armor Ach. Rpt.*

As with PCSSD, the State's failure to identify or develop programs to remediate the racial achievement disparity cannot be excused because, according to the State, they would not have worked. The State agreed to make the effort, and only after the State makes a good-faith effort may the State argue that the consent decree should be modified to relieve it of its commitment to remediate that racial achievement disparity. *LRSD v. State*, 664 F.3d at 757; *Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367, 384, 112 S.Ct. 748, 761, 116 L.Ed.2d 867 (1992) ("If it is clear that a party anticipated changing conditions that would make

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an adequate education, the State has the right and duty to intervene at home, and it should not be excused from providing the child an adequate education because it failed to intervene at home.

performance of the decree more onerous but nevertheless agreed to the decree, that party would have to satisfy a heavy burden to convince a court that it agreed to the decree in good faith, made a reasonable effort to comply with the decree, and should be relieved of the undertaking under Rule 60(b).").

Finally, the State cannot rely on efforts to improve education generally to satisfy its obligations under the consent decree. When the State committed to remediate the racial achievement disparity in Pulaski County, it already had an obligation under Arkansas Constitution to provide all students a substantially equal opportunity for an adequate education. *See Lake View School District v. Huckabee,* 363 Ark. 520, 210 S.W.3d 28, 29-30 (2005) ("This Court's determination that Arkansas' public school funding system does not pass constitutional muster dates back twenty-two years. *See DuPree v. Alma Sch. Dist. No. 30,* 279 Ark. 340, 651 S.W.2d 90 (1983)."). To interpret the State' s commitment to remediate the racial achievement disparity to require nothing more than what was already required under the Arkansas Constitution renders the State's commitment superfluous. To give meaning to the State's commitment, it must be construed to require something different from the State's general obligation to provide all students an adequate education. *See Southway Corp., LLC*, 206 S.W.3d at 254; *Fryer*, 978 S.W.2d at 306.

Dr. Armor confirms that the State must specifically target African-American students to remediate the racial achievement disparity. Dr. Armor reports that "achievement gaps start before most children enter school" and that "[t]o close the achievement gap entirely, black students would have to gain *four* percentile points every year, over and above the normal white student gain." *LRSD Ex. 78, Armor Ach. Rpt., p. 2* (emphasis in original). It follows that a good-faith effort to remediate the racial achievement disparity required the State do something

specifically targeting African-American students – otherwise the achievement gap that exists when children enter school will persist. *LRSD Ex. 78, Armor Ach. Rpt., p. 13* ("The problem is that when groups start school with a large academic skill difference, the only way to close the gap is to find a way to increase the rate of black student learning above the rate of white student learning. This has proven to be a daunting task, and one that has not yet been accomplished, at least not for the black student population as a whole."). But the State has no programs which specifically target African-American students. *LRSD Ex. 95; Bednar Dep. p. 71*. The state has hired experts to testify (incorrectly) that PCSSD was unitary but it has not hired any consultants or experts to address the problem of the achievement disparity. *LRSD Ex. 79; Kimbrell Dep. p. 117*. The State Board of Education has not even discussed any State effort to narrow the achievement disparity for at least two years. *LRSD Ex. 79; Kimbrell Dep. p. 117*.

Therefore, there is no dispute that the State has not identified or developed programs to remediate the racial achievement disparity, and LRSD and Joshua should be granted summary judgment. Fed. R. Civ. P. 56(a).

C. State Monitoring.

1. The State Agreed to Monitor the Districts and Provide Regular Written Monitoring Reports to the Parties and the Court.

Section III, paragraph A of the 1989 Settlement Agreement provides:

> The State shall be required (as a non-party) to monitor, through the ADE, the implementation of compensatory education programs by the Districts. If necessary as a last resort, ADE may petition the court for modification or changes in such programs being implemented by the Districts (but not for a reduction in the agreed level of State funding). If such petitions are filed, the undersigned parties will not object based upon lack of standing. ADE shall provide regular written monitoring reports to the parties and the court.
>
> Monitoring by the State shall be independent of that of the other parties. *It is being done to ensure that the State will have a continuing role in satisfactorily remediating achievement disparities.* Any recommendations made by ADE shall

> not form the basis of any additional funding responsibilities of the State.
>
> A State plan for monitoring implementation of compensatory education will be submitted to the parties within 60 days following execution of the settlement agreement.

DN 4440, Ex. 3, § 3, ¶ A (emphasis supplied). On May 31, 1989, the State submitted to the parties and the Court a monitoring plan, commonly referred to as the "Allen Letter" after its author, H. William Allen. *LRSD Ex. 80, Allen Letter*.

2. The State Failed to Monitor and Produce Reports as Required by the Allen Letter.

In 1997, the Office of Desegregation Monitoring ("ODM") issued a report critical of the State's monitoring pursuant to the Allen Letter. *DN 3097, Report on the Arkansas Department of Education's Monitoring of the School Districts in Pulaski County.* With regard to the State's monitoring reports, ODM reported

> In particular, the staff of all three districts found ADE's voluminous report to be collections of data that, without the benefit of analysis, summaries, conclusion, or recommendations, were essentially and ultimately useless, because the reports did not help them develop strategies for quality desegregated education. None of the staff members was able to recall a single incident in which the schools and districts have used the reports for educational purposes.

DN 3097, p. 38. Following ODM's 1997 report on ADE monitoring, ADE, LRSD and PCSSD agreed that the State's monitoring plan should be modified and jointly moved to *temporarily*[5] relieve the ADE from its obligations under the Allen Letter so that a new monitoring plan could be developed. *DN 3220 and 3230*. ADE moved for approval of a new monitoring plan on 1

[5] ADE has never been released from its obligations under the Allen Letter. On 18 December 1998, the Court relieved ADE "from its obligation to file a February 1999 Semiannual Monitoring Report" for the purpose of "developing proposed changes to ADE's monitoring and reporting responsibilities." *DN 3230, p. 2.* ADE was later also relieved of its obligation to file the July 1999 Semiannual Monitoring Report. *See DN 3277*. Rather than filing its February 2000 Semiannual Monitoring Report, ADE filed its proposed revised monitoring plan on 1 February 2000. *DN 3327.* That motion was denied on 12 May 2000. *DN 3360.*

February 2000. *DN 3327*. Joshua and LRSD objected to the new plan, although both agreed that changed circumstances justified modification. *DN 3334 and 3340.* LRSD argued that ADE's "role should shift from one of monitoring to one of active participation[6] in the district's effort to eliminate the achievement disparity between African-American and other students." *DN 3340, p.* 3. The Court (the Honorable Susan Webber Wright) denied ADE's motion to modify the Allen Letter stating, "The Court acknowledges that changed circumstances may warrant revision of ADE's monitoring plan but finds that ADE has failed to demonstrate that [the proposed revised monitoring plan] is tailored to address the changed circumstances." *DN 3360*. Despite universal agreement that its monitoring plan should be modified, ADE never proposed another monitoring plan and continues to be bound by the Allen Letter. *See DN 3360, p. 2* ("Thus, the Allen [L]etter contains substantive terms of a consent decree, which relate to the vindication of constitutional rights.").

As far as LRSD can determine, ADE has not produced a monitoring report as required by the Allen Letter since 2 February 1998 (*DN 3119*), although the Allen Letter required ADE to "provide a written report to the parties and the Court on a semiannual schedule . . . on February 1 (or nearest workday) and July 15 (or nearest workday)." *LRSD Ex. 80, Allen Letter, p. 8*. ADE does still file a monthly "project management tool" ("PMT") intended to "enable ADE to stay on track as it sets in motion both the development phase and the subsequent action steps that constitute the implementation phase." *DN 2045, p. 5*.[7] The 1 September 2011 PMT documents ADE's failure to follow-through on developing a revised monitoring plan. It includes the following entry:

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[6] If for the last 20 years ADE had been systematically evaluating programs designed to eliminate the racial achievement disparity, the State might by now have developed or identified a program that remediates the racial achievement disparity.

[7] The PMT is not a monitoring report. *See LRSD Ex. 81, Morris Dep., p.34.*

> ***XVIII. Work with the Parties and ODM to Develop Proposed Revisions to ADE's Monitoring and Reporting Obligations***
>
> * * *
>
> A court decision regarding the LRSD Unitary Status is expected soon. . . . The next meeting about the Desegregation Monitoring and Assistance Plan will be held in August, 2002, after school starts.

DN 4615, p.355. The 1 September 2011 PMT documents the fact that the August 2002 meeting never occurred and that ADE took no additional steps to develop a monitoring plan to replace the Allen Letter.

Willie Morris, ADE Director of Desegregation, has been responsible for desegregation monitoring at ADE since 2001. *See LRSD Ex. 81, Morris Dep., pp.6, 10 and 26.* Morris testified that he has never monitored the Pulaski County districts as required by the Allen Letter. Morris explained that he thought ADE was relieved of its obligations under the Allen Letter, and he was unaware that the Court denied ADE's motion to modify the Allen Letter in 2000. *See LRSD Ex. 81, Morris Dep., pp.26, 35 and 60.*

Therefore, there is no dispute that ADE has failed to comply with the Allen Letter and monitor the districts, and LRSD and Joshua should be granted summary judgment. Fed. R. Civ. P. 56(a).

D. Retaliation – Transportation Funding.

At the time of the 1989 Settlement Agreement, the State funded student transportation as a separate grant based on the number of students transported. *DN 4440, Ex. 69, p. 3.* In 1997, the State adopted a more complex formula for calculating transportation aid but that formula continued to be based on the number of students transported with adjustments for population density and other factors. *DN 4440, Ex. 69, p. 3; see Act 1133 of 1997.* Effective July 1, 2005, the State stopped distributing transportation aid as a separate grant and made transportation aid a

component of foundation funding distributed based on the number of students -- average daily membership ("ADM"). *DN 4440, Ex. 69, p. 3; LRSD Ex. 72, pp. 61, 72 and 79; see Act 2138 of 2005.* The State's decision to distribute transportation aid based on ADM rather the number of students transported violates section II, paragraphs E and L of the 1989 Settlement Agreement, as interpreted by the Eighth Circuit. *See Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.*, 148 F.3d 956 (8th Cir. 1998); *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.,* 83 F.3d 1013 (8th Cir. 1996).

> The relevant part of section II, paragraph E provides:
>
> In addition to any payment described elsewhere in this agreement, the State will continue to pay the following costs:
>
> * * * * * *
>
> (6) The State's share of any and all programs for which the Districts now receive State funding.

DN 4440, Ex. 3, p. 4-5. Section II, paragraph L provides:

> The State shall take no action (including the enactment of legislation) for the purpose of retaliating against the Districts (including retaliatory failure to increase State aid and retaliatory reduction in State aid) because of this Litigation or this settlement. The State will enact no legislation which has a substantial adverse impact on the ability of the Districts to desegregate. Fair and rational adjustments to the funding formula which have general applicability but which reduce the proportion of State aid to any of the Districts shall not be considered to have an adverse impact on the desegregation of the Districts.

DN 4440, Ex. 3, p.10. The Eighth Circuit has read these two sections together as "an anti-retaliation clause" that prohibits the State from adjusting funding programs so that they fund "the Pulaski County districts to a lesser degree than other districts in the state." *LRSD v. PCSSD,* 83 F.3d 1013 at 1018.

1. Transportation Aid was a Program.[8]

At the time of the 1989 Settlement Agreement, transportation aid was a "program" for purposes of section II, paragraphs E and L. This Court (the Honorable Susan Webber Wright) has in the past identified transportation aid as a "program." *DN 2967, p. 2* ("In addition, the State funded other programs such as Transportation Aid and At-Risk Grants by formulas or based on need."). *See DN 2930, p. 8* ("The Court agrees that this explanation strongly suggests the recognition that the sums which would have been paid under the old formula through MFPA as teacher retirement and health insurance matching, transportation aid and at-risk grants are now distributed as State equalization funds."). In finding workers' compensation to be a "program" as defined by section II, paragraph E, the Eighth Circuit explained:

> While the State is correct in its assertion that workers' compensation funding is not a direct educational program, it is still an expense that districts must bear. Assuming finite funds, workers' compensation payments will decrease the funds available for more direct educational programs. Moreover, State payments for workers' compensation costs were a source of funds for school districts when the parties entered into the Settlement Agreement. Thus, funding of workers' compensation by the State is a "program" for purposes of the Settlement Agreement.

LRSD v. PCSSD, 83 F.3d at 1018. Similarly, transportation is an expense that districts must bear. *DN 4440, Ex. 71, p. 56* ("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."); *LRSD Ex. 79; Kimbrell Dep. pp. 128-29*. Assuming finite funds, transportation costs decrease the funds available for more direct educational programs. *See LRSD v. PCSSD*, 83 F.3d at 1018.

[8] The Court dismissed LRSD's transportation claim to the extent it was based on the Arkansas Constitution. *DN 4608, p. 8.* LRSD did not understand this dismissal to preclude LRSD from seeking relief under the terms of the consent decree.

State payments for transportation were a source of funds for school districts at the time the parties entered into the 1989 Settlement Agreement. *DN4440, Ex. 69, p. 2-3*. For these reasons, this Court should find as a matter of law that transportation was a "program" for purposes of section II, paragraphs E and L of the 1989 Settlement Agreement.

2. The Pulaski County Districts are Funded to a Lesser Degree.

A decision by the State's to end transportation funding for all school districts would not violate the consent decree because it would "affect[] all districts to the same degree." *See LRSD v. PCSSD*, 83 F.3d at 1018. The State violated the "anti-retaliation clause" by changing to a system that distributes transportation aid based on ADM. *DN 4440, Ex. 69, p. 3; LRSD Ex. 72, pp. 61, 72 and 79; see Act 2138 of 2005. See LRSD v. PCSSD,* 148 F.3d at 965. This change violated the consent decree because it results in the Pulaski County districts receiving proportionately less transportation aid than districts statewide. *See LRSD v. PCSSD*, 83 F.3d at 1018.

The change in transportation aid is analogous to the change made by the State with regard to workers' compensation, teacher retirement and health insurance that have been found to violate section II, paragraphs E and L of the 1989 Settlement Agreement. *See LRSD v. PCSSD*, 148 F.3d at 967; *LRSD v. PCSSD,* 83 F.3d at 1018. At the time of the settlement, the State distributed funds for these programs as a separate grant; after the settlement, the State stopped funding these programs separately and distributed funding for these programs based on ADM as a part of regular state aid. With regard to workers compensation funding, the State distributed "seed money" based on ADM for just one year. The Eighth Circuit explained why distributing the workers' compensation "seed money" based on ADM violated the "anti-retaliation clause":

> When the State disbursed "seed money" to help school districts make the transition to paying their own workers' compensation costs, it paid about one-half

> of the expense statewide. In the Pulaski County districts, it paid only about one-third of the expense. This disparity arose because the State's formula used enrollment rather than number of employees to determine how much money each district would receive. The Pulaski County districts are employee heavy compared to other districts, increasing their workers' compensation costs. This result is precisely what the anti-retaliation clause was meant to prevent. It funds the Pulaski County districts to a lesser degree than other districts in the state. It is of no moment that the State reached this result in a mathematically consistent manner. *The District Court correctly held that the State must disburse seed money to the Pulaski County districts in the same percentage as it does statewide.*

LRSD v. PCSSD, 83 F.3d at 1018 (emphasis supplied). *See LRSD v. PCSSD*, 148 F.3d at 966-67.

Similarly, the State's current method of distributing transportation aid violates the anti-retaliation clause because it funds the Pulaski County districts to a lesser degree than other districts in the state. *LRSD v. PCSSD,* 83 F.3d at 1018; *LRSD v. PCSSD*, 148 F.3d at 966-67. Using ADE's 2009-10 Annual Statistical Report,[9] school districts statewide received 73.82 percent of their actual transportation cost in transportation funding 2009-10 while LRSD received 54.61 percent, PCSSD received 42.48 percent and NLRSD received 41.50 percent. *LRSD Ex. 82, p. 5.* In 2009-10, the Pulaski County districts' actual transportation cost was $32,276,147.82, but the districts only received $14,073,641.15 in transportation aid. *LRSD Ex. 82, p. 7; See Bill Goff Dep. p. 47* (PCSSD "obviously" spends millions more for student transportation than it receives from the State.). If Pulaski County districts received the same percentage of their transportation cost as districts statewide, they would have received $23,827,114.28 in transportation funding -- $9,753,473.13 more than they actually received. *LRSD Ex. 82, p. 5.*

Therefore, this Court should rule as a matter of law that transportation aid was a "program" at the time of the settlement; that transportation aid used to be paid as a separate grant

[9] The 2009-10 Annual Statistical Report is the most recent available online. See http://www.apscn.org/reports/hld/asr/asr.htm

based on the number of students transported; that in 2005 the State changed its method of distributing transportation aid and began distributing transportation aid based on ADM; that the current system for distributing transportation aid funds the Pulaski County districts to a lesser degree than other districts in the State; and as a result, the current system for distributing transportation aid violates Section II, paragraphs E and L as interpreted by the Eighth Circuit. *LRSD v. PCSSD,* 83 F.3d at 1018; *LRSD v. PCSSD*, 148 F.3d at 966-67. Accordingly, LRSD and Joshua should be granted summary judgment on their transportation funding retaliation claim. Fed. R. Civ. P. 56(a).

3. Retaliation in Violation of Section II, Paragraph L.

The State quickly recognized that it was a mistake to distribute transportation aid based on ADM without regard to the actual transportation costs of districts. After the Arkansas Supreme Court recalled its mandate in 2005, *see Lake View Sch. Dist. No. 25 v. Huckabee*, 220 S.W.3d 645 (Ark. 2005), the State retained Lawrence O. Picus and Associates ("Picus") "to recalibrate the existing school funding model and provide estimates of the amount of money needed to fund the system for the 2007-08 school year." *DN4440, Ex. 72, p. 1.* In their August 30, 2006 "Recalibration Report," Picus noted its recommendation that transportation funding be removed from foundation funding; that districts receive transportation funding "as separate grant" and that transportation aid should remain in foundation funding only "until the state creates a more standards- and research-based transportation funding formula." *DN4440, Ex. 72, p. 79.* Picus based this recommendation on the need to "find a way to allocate transportation funds that more accurately reflects the realities of individual school districts." *DN4440, Ex. 72, p. 61*. Picus anticipated "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.)." *DN4440, Ex. 72, p. 61*. The State, by all indications, accepted Picus' recommendation. *DN 4440, Ex. 69, p. 6, citing Ex. 72, p. 80.* (noting Picus' recommendation that transportation aid be included in foundation funding for 2007-08 "AND to be replaced by a standards-based formula in the future." (emphasis in original)). However, the 2007 and 2009 regular legislative sessions passed without the State adopting a standards-based transportation funding formula, although representations were made that the Bureau of Legislative Research ("BLR") was working on a standards-based formula. *See DN 4440, Ex. 71, p. 56.*

Before the 2011 Legislative Session, the BLR developed a standards-based formula based on route miles that was 98 percent accurate in predicting districts' actual transportation cost. *LRSD Ex. 83,* p. 12. BLR presented the formula to the House and Senate Interim Committees on Education ("Joint Committee") on December 1, 2010. *LRSD Ex. 83 (email from Wilson).* BLR's presentation made it clear that the Pulaski County districts, and LRSD in particular, would benefit the most from the State adopting BLR's route miles formula. *LRSD Ex. 83, p. 11.* In explaining to the Joint Committee what has been identified as LRSD Ex. 83, p. 11, BLR identified the three districts furthest above the line representing current funding (i.e. most under-funded) as the Pulaski County districts. BLR's Statewide Summary showed that, under the current formula for 2011-12, approximately $137 million would be included in the funding matrix for transportation; however, the 2010 actual transportation cost for Arkansas school districts was approximately $176 million – a difference of approximately $40 million. *LRSD Ex. 83, p. 11.* Of that additional $40 million in transportation funding that would be paid if the State adopted BLR's formula and fully funded transportation, approximately $9 million would go to LRSD. *LRSD Ex. 83, p. 11.*

Ignoring Picus' recommendation, the Joint Committee recommended that only the two percent cost of living adjustment ("COLA") for transportation funding be distributed pursuant to BLR's formula. *LRSD Ex. 84, p.66*. The General Assembly rejected this recommendation and adopted instead section 32 of Act 1075 of 2011. *LRSD Ex. 85, Act 1075 of 2011.* Act 1075 appropriates $500,000.00 for "supplemental education funding" that will be distributed to school districts based on the extent to which districts' transportation costs exceed the transportation component of foundation funding. *LRSD Ex. 86*, *ADE Rules*, *§§ 3 and 4*.

This Court should find as a matter of law that the State's decision to ignore Picus' recommendation and to reject BLR's transportation aid formula violated section II, paragraph L of the 1989 Settlement Agreement. Paragraph L prohibits that State from retaliating against the Pulaski County districts "including retaliatory failure to increase State aid . . . ." *DN4440, Ex. 3, p. 10.* No rational basis supports the State's decision to reject BLR's standards-based funding formula for transportation which would have accurately (*Goff Dep. pp. 49-50*) and fairly funded student transportation costs in Arkansas.

School districts have widely varying transportation costs. In 2006, Picus found that per student (ADM) transportation cost varied "from a low of $67 to a high of $695." *DN 4440, Ex. 69, p. 4, citing Ex. 72, p. 72.* In 2008-09, the State paid $286 per student for transportation; the statewide average transportation cost per student was $369; and LRSD spent $646 per student. *DN 4440, Ex. 73, p. 5.* Assuming finite funds, every dollar spent on transportation is a dollar that cannot be spent on direct educational programs needed to remediate the racial achievement disparity. *See LRSD v. PCSSD,* 83 F.3d at 1018. Because no rational basis supports the State's failure to adopt BLR's formula for distributing transportation aid, the Court should find as a matter of law that the failure constitutes a "retaliatory failure to increase State aid" and a

violation of section II, paragraph L of the 1989 Settlement Agreement.

E. Retaliation – Generally.

This Court should also find as a matter of law that the State violated section II, paragraph L by failing to reimburse LRSD for its attorneys' fees incurred in obtaining unitary status and by subjecting the Pulaski County districts to "forensic audits" purportedly to ensure they are spending their settlement funding "on desegregation purposes." *LRSD Ex. 87, AG News Release 21 April 2011.*

First, ADE has failed to reimburse LRSD for its attorneys' fees incurred to achieve unitary status as authorized by Ark. Code Ann. § 6-20-416(c). LRSD first demanded payment on or about 23 December 2008 and most recently 29 July 2011. *LRSD Ex. 89, pp. 1 and 5.* Neither ADE nor the AG has offered any legitimate reason for refusing to reimburse LRSD its attorneys' fees as authorized by Ark. Code Ann. § 6-20-416(c). *LRSD Ex. 89.*

Second, the State adopted Act 701 of 2011 forcing the three Pulaski County district to submit to "forensic audits" of their desegregation funding under threat of being identified by State as in "fiscal distress" and subject to State takeover. *LRSD Ex. 88, Act 701 of 2011*. This singling out of the Pulaski County districts for additional oversight simply because they are parties to the 1989 Settlement Agreement violates section II, paragraph L of the consent decree. ADE made no request for this additional oversight and had no evidence that additional oversight was needed. *LRSD Ex. 79, Kimbrell Dep., p. 130; LRSD Ex. 96, Goff Dep., p. 62.* Act 701 was part of the Attorney General's legislative package, and it was understood that it would only apply to the Pulaski County districts. *LRSD Ex. 87, AG News Release 21 April 2011.* The AG released the audit reports of NLRSD and PCSSD and criticized the districts for not spending settlement funding "on desegregation purposes," *see LRSD Ex. 87, AG News Release 21 April 2011*, even

though the districts have no obligation to spend settlement funding on "desegregation." *See LRSD v. PCSSD*, 921 F.2d at 1390. As noted by the Eighth Circuit, this Court retained jurisdiction to take remedial action should it become "convinced in the future that money is being wasted." *Id.* If the State really believed that settlement funding was being wasted, it should have come to this Court and requested appropriate relief. Instead, the State used state law to unilaterally modify the parties' agreement. *See DN 2337, p. 10* ("A party may not unilaterally change the implementation or language of an agreement or order without the prior approval of the Court and/or consent of the parties . . . ADE should have approached the parties and petitioned the Court for a modification."). This was a violation of section II, paragraph L of the consent decree.

CONCLUSION

The State's admissions and other undisputed evidence show significant and continuing State violations of the 1989 Settlement Agreement. None of the facts necessary for the Court to rule in favor of LRSD and Joshua are in dispute. LRSD and Joshua should be granted summary judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 14, 2012, 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