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**

ADE'S RESPONSE TO LRSD AND JOSHUA'S
MOTION FOR SUMMARY JUDGMENT

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 LRSD and Joshua's Motion for Summary Judgment:

Without once stating how doing so would serve any desegregation purpose, LRSD and Joshua ask the Court to impose desegregation obligations on open-enrollment charter schools that have never been found to have violated the Constitution. LRSD and Joshua present no proof that the open-enrollment charter schools in Pulaski County are having negative impact on any desegregation efforts remaining in this case. For the reasons stated below and in the ADE's Response to LRSD's Motion to Enforce 1989 Settlement Agreement (DE 4465, incorporated herein by reference), the Court should decline to further displace local control of the State and local officials over education in Pulaski County. LRSD and Joshua's request for relief regarding programs to close the achievement gap should also be denied. Much has been done in the last twenty years to improve education and to focus educational resources on all students (including low performing African-American students) and improve their academic achievement.

LRSD and Joshua raise a number of issues that were not discussed in the LRSD's Motion to Enforce. These claims should be denied also, as explained below.

I. Open-Enrollment Charter Schools in Pulaski County Neither Violate the 1989 Settlement Agreement, Nor Have They Been Shown to Have Any Adverse Effect on LRSD Schools, Stipulation Magnet Schools, or the M-to-M Program.

First, it should be noted that LRSD waited over eleven years to challenge in court the charter school laws and ten years to challenge in court the first charter school. LRSD and Joshua have certainly unreasonably delayed the filing of this action. This unreasonable delay prejudices the State, the ADE, and the charter schools. *Brown-Mitchell v. Kansas City Power & Light Co*, 267 F.3d 825 (8th Cir. 2001)(elements of laches); *Pegues v. Morehouse Parish School Bd.*, 632 F.2d 1279 (5th Cir. 1980). The ADE, the State Board, and the charter schools have spent significant time, money, and resources supporting these schools while LRSD and Joshua never raised an objection in court or asked any court to rule on the propriety of the charter schools. More than 4,000 students now attend the charter schools, including some 2,000 African-American students. The relief requested by LRSD and Joshua would undeniably disrupt the educational opportunities being offered to these students. There is no reason LRSD and Joshua could not have brought their claims to the Court in 1999 when the Act was passed or in 2001 when the first charter school in Pulaski County was being considered. Moreover, while sitting on its rights, LRSD accepted substantial benefits under the 1989 Settlement Agreement and the Charter Schools Act. From 2001-02 to the 2009-2010 school year, LRSD received approximately $289 million from the State under the Settlement Agreement. ADE Ex. 1, 2, Summary of State Costs. LRSD and Joshua's requested relief should be denied because of their unreasonable delay.

It should be noted as well that the Joshua Intervenors purport to represent a class of all African-American students in Pulaski County. *LRSD v. PCSSD*, 237 F.Supp.2d 988, 993 fn. 5 (E.D.Ark. 2002). From the 2004-05 school year through the 2010-11 school year some 5,400 African-American students chose to attend open-enrollment charter schools in Pulaski County. ADE Ex. 8, Charter School Enrollment. In the 2010-11 school year alone, 2,025 African-American students were enrolled in open-enrollment charter schools in Pulaski County. The Joshua Intervenors have made no attempt to explain how their joinder in LRSD's Motion to Enforce serves the interests of these African-American students. ADE Ex. 22, Aaron Dep. p. 26-27. When asked in his deposition, the Joshua representative could not explain how Joshua's position in this proceeding represented the interests of either the African-American students who have chosen to attend open-enrollment charter schools or African-Americans who have sought to start open-enrollment charter schools. ADE Ex. 22, Aaron Dep. p. 29-30.

In terms of Rule 23, the Joshua Intervenors' claims are not typical to the class they purport to represent, and their representation is not adequate as to the portion of the class that attends or have sought to attend open-enrollment charter schools. Fed. R. Civ. Pro. 23(a)(3) & (4). Courts are responsible for monitoring typicality and adequacy and should continue to question those components throughout the pendency of litigation. *See Richardson v. Byrd*, 709 F.2d 1016 (5th Cir. 1983). *See also Lyons v. Georgia-Pacific Corp. Salaried Employees Retirement Plan*, 221 F.3d 1235, 1253 n.32 (11th Cir. 2000); *Grigsby v. North Mississippi Medical Center, Inc.*, 586 F.2d 457 (5th Cir. 1978); *Bywaters v. U.S.*, 196 F.R.D. 458 (D.C.Tex. 2000); *County of Suffolk v. Long Island Lighting Co.*, 710 F. Supp. 1407, (D.C.N.Y. (1989). The Court has authority to take action when a conflict arises within a class that the Court has recognized, including redefining the class, recognizing a sub-class and appointing counsel, and

decertifying the class. *Id.* African-American students and parents at charter schools are also entitled to representation from the class representative.

LRSD and Joshua appear to have narrowed their allegations against the State regarding open-enrollment charter schools in Pulaski County to a claim that open-enrollment charter schools have attracted students away from the stipulation magnet schools and the M-to-M program. The facts LRSD claims support this allegation are as follows: 1) the transfer of 331 (really 324) students from the stipulation magnet schools to open enrollment charter schools over the course of six school years, and 2) the transfer of twenty (20) students from the M-to-M program to open-enrollment charter schools over the same time period. Docket Entry (DE) 4705, Memorandum Brief in Support of LRSD's and Joshua's Motion for Summary Judgment p. 5 fn. 1. Neither LRSD nor Joshua make any attempt to even argue what desegregation objective is impeded by these transfers. Nor could they.

A. The 1989 Settlement Agreement Does Not Prohibit the Creation of Charter Schools

The State agreed to the 1989 Settlement Agreement in order to limit its financial liability and the intrusion of its sovereignty over education in Pulaski County while providing support for the desegregation plans of the three Pulaski County school districts. *LRSD v. PCSSD*, 921 F.2d 1371, 1376 (8th Cir. 1990). When the Court accepted the 1989 Settlement Agreement, it also dismissed the State and ADE as a parties to this lawsuit. DE 1418, Order filed Jan. 18, 1991. Soon after, the Joshua Intervenors requested that the State be reinstated as a party to the case. This Court declined to do so. DE 1947, Order entered Aug. 18, 1993. As explained in the ADE's Response to LRSD's Motion to Enforce 1989 Settlement Agreement, the fact that the State is not a party and has entered a settlement agreement limiting its liability in this case has consequences for the current litigation. DE 4465 p. 2-5. Principally, the Court may not impose

any additional or different obligations on the State or the ADE. *See Knight v. PCSSD*, 112 F.3d 953, 954 (8th Cir. 1997)("Since the agreement is silent on the subject of a strike by the teachers, the authority of the District Court to issue its order must be found elsewhere if at all.")

The 1989 Settlement Agreement does not limit the State's sovereignty over the delivery of education in Pulaski County except as specifically authorized in that Agreement. The 1989 Settlement Agreement in many sections expresses the intent that the State's liability will be limited to what is contained in the document. 1989 Settlement Agreement p. 4, 11, 13-14, 18-19, & Attachment A. With regard to stipulation magnet schools, the Settlement Agreement specifically provides that "[t]he State will have no further obligation to contribute any additional funds to magnet schools other than under paragraph II.E. below." 1989 Settlement Agreement II.D., p. 4. For the stipulation magnet program and the M-to-M program, the Settlement Agreement sets out specifically what the State's obligations were to be. *LRSD v.* PCSSD, 237 F.Supp.2d 988, 1003 fn. 39 (E.D. Ark. 2002)("The 1990 Settlement Agreement contained detailed provisions governing the State/ADE's role in funding and implementing the separate LRSD, NLRSD, PCSSD, and Interdistrict Settlement Plans."). The Settlement Agreement, not the magnet or M-to-M stipulations, governs the States obligations (except to the extent the 1989 Settlement Agreement specifically refers to or relies upon provisions of the magnet or M-to-M stipulation). *See Haskins Law Firm v. American Nat. Property and Cas. Co.*, 304 Ark. 684, 804 S.W.2d 714 (1991)(holding that a "substituted contract discharges the original duty").

LRSD cobbles together different parts of the 1989 Settlement Agreement, the Magnet Stipulation, and the M-to-M Stipulation in an attempt to have the Court read into those documents a limit that the State cannot allow the creation of new public charter schools. The 1989 Settlement Agreement, the Magnet and M-to-M stipulations, and the interdistrict

desegregation plans do not guarantee any particular number of students to the voluntary magnet or M-to-M programs. None of the documents governing this case prohibit the creation of new or additional schools. In fact, the Eighth Circuit specifically recognized that the 1989 Settlement 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 1371, 1389 (8th Cir. 1990).

LRSD points to the magnet stipulation and its process for creation of new magnets or expansion of existing magnets. DE 4705 p. 6. However, the Settlement Agreement, the stipulation, and the court orders accepting the Settlement Agreement make clear that this provision limits only the State's funding obligation for new or additional magnet schools. There is no text in the Settlement Agreement that limits the power of the State to allow the creation of charter schools. *Jenkins v. Missouri*, 216 F.3d 720, 729 (8th Cir. 2000)(Heaney, J. concurring)("It is, of course, appropriate for the State to create charter schools.").

In fact, the history of this case (the orders, agreements, plans, and actions of the parties) demonstrate that no such limit is imposed by the Settlement Agreement. The Eighth Circuit has specifically held that the agreements established a floor of constitutional compliance and that the parties are free to provide educational opportunities in excess of that provided in the Settlement Agreement and plans. "Nothing in its orders prevents the districts, without necessarily coming to the Court for approval, from voluntarily increasing their desegregation efforts, as long as these efforts do not conflict with the districts' pre-existing obligations under the 1989 plan, as it may be modified from time to time. The District Court's July 15 opinion makes this clear: 'The plans are a floor, not a ceiling.'" *LRSD v. PCSSD*, 949 F.2d 253, 258 (8th Cir. 1991). In other words, the districts were free to adopt magnet schools without state funding. And, in fact, LRSD

and PCSSD have done so at the following schools: Central High – International Studies magnet; McClellan High School – Engineering/Multimedia/Business Finance Magnet; J.A. Fair – Environmental Sciences, Medical Technology, Communications Systems Magnet; Henderson Middle School – Health/Sciences Magnet; Dunbar Middle School – Gifted and Talented, International Studies Magnet; Mabelvale Middle Environmental Sciences, Medical Technology, Communications Systems Magnet; Clinton Elementary – Speech and Technology Magnet; Crystal Hill Interdistrict Elementary – Oral, Written, & Visual Communications Magnet; Franklin Incentive Elementary – Communications and Technology specialty theme; King Interdistrict Elementary – High Intensity Learning Magnet; Rockefeller Elementary – Early Childhood Magnet; Washington Interdistrict Elementary – Basic Skills/Math Science Magnet. See http://www.lrsd.org/schools.cfm and http://www.magnetschool.com

Moreover, LRSD's actions negate its own argument. Essentially, LRSD argues that the magnet and M-to-M stipulations and the 1989 Settlement Agreement prohibit any action that might draw any students away from the magnet schools or from choosing M-to-M transfers. However, LRSD has adopted an official School Board policy that supports school choice as "a key component of the [District's student] assignment plan." ADE Ex. 38, LRSD Policy JCA. Consistent with this policy LRSD allows students to apply to transfer to **any** LRSD school. ADE Ex. 39, LRSD Transfer Forms; ADE Ex. 15, Eggelston Dep. p. 31-32; see also DE 3410 Notice of Filing Compliance Report and Request for Scheduling Order filed March 15, 2001, (noting that in 2000-01 "twenty-percent of the District's students [about 5,000] chose to attend school other than their zone school."). One type of transfer allowed by LRSD is called a "Transfer No Transportation" or "TNT." Curiously, LRSD forbids TNT transfer requests to the stipulation magnet schools. Id. The principals of the stipulation magnet schools acknowledge that LRSD's

transfer policies put the stipulation magnet schools in competition with all other LRSD schools. See e.g., LRSD Ex. 100, Barksdale Dep. p. 10; LRSD Ex. 101, Carson Dep. p. 28; LRSD Ex. 102, Boykin Dep. p. 21; See also LRSD Ex. 93, Bacon Dep. p. 73 ("when I was at Dunbar, most of the families that were looking at our specialty program were the same families that were looking at the Mann Magnet program."). Moreover, the LRSD converted Cloverdale Middle School to a charter school beginning in the 2010-11 school year. Cloverdale adopted an aerospace technology theme. LRSD and Cloverdale hope to attract students from outside the Cloverdale attendance zone. ADE Ex. 20, Vinson Dep. 12, 28, 64-65. Also, LRSD established program tracks that divert students away from the magnet schools. For example, Gibbs is the international studies stipulation magnet. But, if a student wishes to continue in international studies, she must then go to Dunbar Middle School and then Central High School. If a student wishes to focus on health sciences, magnet schools will not be her choice; Henderson Middle and J.A. Fair High Schools have those programs.

In its Response to LRSD's original motion to enforce, the State pointed out language contained in the 1989 Settlement Agreement contemplating that LRSD may not be the only educational agency in charge of education in Little Rock. DE 4465 p. 6-7, quoting 1989 Settlement Agreement p. 6 ¶ F, p. 22 ¶ VI.A., and p. 24 ¶ VI.B. LRSD argues in its Brief in Support of Summary Judgment that these words do not mean what they say. However, even the 8th Circuit has acknowledged that the General Assembly of Arkansas could provide for a change in how education is managed within the boundaries of the LRSD:

> Some have characterized our decision as holding that consolidation was forbidden. This is a misunderstanding of the nature of this lawsuit. Consolidation may be, in terms of educational quality and racial fairness, a good thing. It is unquestionably permissible, given the proper circumstances, under state law. And the General Assembly, if it saw fit, could require consolidation, or relax the

> state-law requirements for achieving it. Nothing we have said or held is inconsistent with these propositions. We have held only that the Constitution does not compel consolidation. What the parties might choose to do of their own volition is, in general, their own business.

LRSD v. PCSSD, 921 F.2d 1371, 1377 fn. 2 (8th Cir. 1990).

B. LRSD and Joshua Make No Showing that Charter Schools Relate to Any Constitutional Violation or Impede Any Desegregation Purpose or Obligation

"[F]ederal-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 or if they are imposed upon governmental units that were neither involved in nor affected by the constitutional violation." *Milliken v. Bradley*, 433 U.S. 267, 282, 97 S.Ct. 2749, 2758 (1977)("*Milliken II*")(emphasis added); *see also Missouri v. Jenkins*, 515 U.S. 70, 115 S.Ct. 2038 (1995); *Horne, supra*.

Neither LRSD nor Joshua attempt to explain in any way how the open-enrollment charter schools authorized in Pulaski County relate to any Constitutional violation or any situation flowing from such a violation. Moreover, LRSD and Joshua completely ignore the fact that the Charter Schools Act post-dates this Court's findings of Constitutional violations by fourteen years (most of the constitutional violations the Court found predated the 1984 ruling by ten to twenty years). *See LRSD v. PCSSD*, 659 F.Supp. 363, 369 (E.D. Ark. 1987)("Many of the [constitutional] violations have already been cured – either by court order or by affirmative actions of the PCSSD."). Most of the charter schools themselves postdate the Court's 1984 opinion by twenty years, during which time the interdistrict programs in this case successfully assisted the districts in racially balancing the schools and achieving unitary status in student assignments to schools. (Academics Plus – 17 years; LISA Acad. – 20 years; Dreamland Acad. – 23 years; Covenant Keepers, ESTEM, and LISA North Little Rock – 24 years; Little Rock

Prep. Acad., Jacksonville Lighthouse – 25 years; SIA Tech. – 28 years). LRSD and Joshua simply produce no evidence that the open-enrollment charter schools relate in any way to prior violations of the Constitution, nor do they even suggest that the existence of these schools violates the Constitution in any way. Because the charter schools have never been found to have violated the Constitution, to have been involved in the Constitutional violations identified by this Court in 1984, or to have been affected by those constitutional violations; the Court may not impose remedial responsibilities on the charter schools based on this record. *Milliken II*, 433 U.S. 267, 97 S.Ct. 2749 (1977).

It should be noted as well, that each one of the open-enrollment charter schools are required to be open to all students who choose to attend. As the charter school enrollment numbers show, all of the charter schools enroll some mix of students by race. The enrollment numbers that LRSD presents show this. LRSD Ex. 76. Dr. David Armor, a desegregation expert whose opinions have been recognized and accepted by courts across the nation, analyzed the racial balance of the charter schools and came to the opinion that those schools are racially balanced as a whole, and that the enrollment of the charter schools "is comparable to the Pulaski county public school enrollment overall, which is 57 percent black." ADE Ex. 3, Armor Report. Indeed, the enrollment of the open-enrollment charter schools in Pulaski County is "more racially balanced than LRSD schools at all grade levels." Id. p. 1.

Furthermore, the open-enrollment charter schools benefit African-American students. All of the charter schools enroll African-American students who are free to participate in all of the programs without limit. Dreamland and Little Rock Preparatory Academy in particular serve a predominately African-American student enrollment with a focus on trying to provide enhanced educational opportunities to those students. LRSD Ex. 31, 49. These schools remove African-

American students from LRSD (as do the other charter schools in lesser amounts) and, therefore, may actually assist with greater racial balance in LRSD schools. These schools also attempt to provide enhanced educational opportunities to students who would be ineligible to attend the stipulation magnet schools.

For example, Little Rock Prep Academy is located near to Gibbs Elementary Magnet School. Ben Lindquist, the executive director of Little Rock Prep, testified in his deposition about the efforts of Little Rock Prep to serve a population of students (predominately African-American) who are struggling academically. ADE Ex. 21, Lindquist Dep. p. 62-64, 73-74, 75-76. Gibbs is the most oversubscribed of all the stipulation magnet elementary schools with 336 African-American students on the waiting list to enter. LRSD Ex. 66. Little Rock Prep, located just a few blocks from Gibbs, provides enhanced educational opportunities to students who cannot otherwise obtain admission to Gibbs. The principal of Carver Elementary testified in about these race-based limitations of the stipulation magnet schools:

> Q: [W]hat do you think are some of the reasons why parents choose not to send their children to Carver?
>
> A: They can't get in. Some of them can't get in, because of their race.
>
> Q: Explain that to me.
>
> A: We have seats available for non-black children and we have a waiting list of black children. And because of our percentage requirements, some can't get in.
>
> Q: What do you think of that limit?
>
> A: I don't like it at all.
>
> Q: Do you think that's fair to those black students who want to come to Carver?
>
> A: No.

LRSD Ex. 100, Barksdale Dep. p. 41.

C. The Open-Enrollment Charter Schools Provide Equal Educational Opportunities to Students of all Races

a. Open-Enrollment Charter Schools are Specifically Required to Accept Students Without Regard to Race

Arkansas charter school statutes specifically require all charter schools to accept students without regard to race. Ark. Code Ann. § 6-23-306(6). As long as seats are available, open-enrollment charter schools must take every student that applies for admission unless the student has been expelled from another public school district (if the charter provides for the exclusion of expelled students) or as allowed by federal law. Ark. Code Ann. § 6-23-306(6)(A); see also Ark. Code Ann. §§ 6-18-208(c) & 6-18-510; LRSD Ex. 93, Bacon Dep. p. 70. If a charter school receives more applications than it has space for students, then the charter school must use a "random, anonymous student selection method" specified in the charter; i.e. a lottery. Ark. Code Ann. § 6-23-306(14)(B). See ADE Ex. 18, McGill Dep. p. 15-16 (describing lottery process at Academics Plus); LRSD Ex. 93, Bacon Dep. p. 18-19.

Using this open-enrollment method, the charter schools result in reasonably racially balanced schools. ADE Ex. 3, Armor Report. Moreover, Dr. Armor performed a study of the charter schools in which he analyzed what would happen to the racial balance of schools in LRSD and PCSSD if students in the charter schools are returned to their residential zone school. Id. For the vast majority of schools, there was no effect. For a only very few schools, there was a minor effect.

b. Rates of Free and Reduced Lunch Students have No Relevance to This Case

LRSD argued in its Motion to Enforce that the combination of poverty and the charter schools' transportation policies had an effect on poverty levels in LRSD schools. However, even

after conducting discovery, LRSD did not produce any evidence whatsoever of this supposed effect. Moreover, this argued effect is irrelevant. This case has never been about poverty; it is a racial desegregation case. In no order, ruling, or appellate opinion is any party or the State cited for any fault with regard to poverty. None of the agreements require any particular balance of poverty students in a school. Poverty, in fact, is not a protected class. Classifications based on poverty status are subject only to rational basis review, with good reason. The State should be able to focus on poor students for special services without running afoul of the equal protection clause.

Since 2004, the State's education funding formula has provided both funding foundation funding and categorical funding for special needs to school districts. One of the categorical funds is National School Lunch Act (or NSLA) funding. Ark. Code Ann. § 6-20-2303(1), (12). NSLA funds are state funds paid out of general revenue. They are different and in addition to federal school lunch dollars and Title I funds. NSLA categorical funds are distributed to school districts on a per student basis, meaning that for every student that qualifies for free or reduced lunch districts receive a certain amount of State money.[1]

NSLA funds are tiered so that for the current, 2011-12 school year, districts with less than 70% NSLA enrollment receive $506 per NSLA student; districts with 70 to 90% NSLA students receive $1,012 per NSLA student; and districts with more than 90% NSLA students receive $1,518 per NSLA student. Ark. Code Ann. § 6-20-2305(b)(4). When a school district

[1] Stipulation Magnet students count in LRSD's Average Daily Membership (or ADM) upon which regular state funding is based. See Ark. Code Ann. § 6-20-2303(3). These students also count in the student numbers for NSLA funding. So for each student in the stipulation magnet schools that qualifies for NSLA funding, LRSD receives those dollars over and above the State's magnet school funding obligation under the 1989 Settlement Agreement.

passes the 70 or 90% thresholds, the additional funding is phased in over three years. Ark. Code Ann. § 6-20-2305(b)(4)(B)(ii). Prior to the 2009-10 school year, LRSD qualified for funding at the less than 70% NSLA student enrollment tier. After 09-10, LRSD's NSLA student enrollment passed 70% and it qualified for increased NSLA funding from the State. So in the 2008-09 school year, LRSD received $8.1 million in NSLA categorical funding from the State; the next year (when the district broke the 70% threshold) LRSD received $7.9 million in NSLA funds; and in 2010-11 LRSD received $11.2 million in NSLA funds. ADE Ex. 27. Whatever effect LRSD is claims (without having proven) of an increasing free and reduced lunch student rate, the State's funding formula already compensates LRSD for that increase.

With regard to open-enrollment charter schools, however, LRSD has not offered any proof that charter schools are having any effect on the increase of NSLA rates in the district. Statewide there has been an increase in NSLA rates in the school districts. This is due to the recent economic recession, changes in the way students are identified for NSLA services, and to increased efforts of school districts to identify these students so that the districts can secure the benefit of the funding associated with these students. This is particularly true for LRSD as well.

When a district experiences an increase of NSLA percentages beyond a certain rate, the school district must submit documentation to the Child Nutrition Unit at ADE explaining the reasons for the increase. In the 2009-2010 school year, LRSD had to explain to ADE the reason for its increase in NSLA rates. ADE Ex. 28, 29, NSLA justification letters. On February 26, 2010, LRSD listed the following reasons for increases in its schools: recruitment of free and reduced meal applications, new USDA guidelines, increase in overall unemployment for the county, and (in a few instances) reorganization of district, grade levels, school opening. ADE Ex. 28, 29. LRSD never mentioned student transfers to charter schools as a reason for increased

NSLA rates. LRSD's suggestion in its pleadings that increased NSLA rates and transfers to open-enrollment charter schools might be connected is wholly inconsistent with the clear representation it made to the ADE Child Nutrition office.

LRSD asserts that the open-enrollment charter schools are the same as the Jacksonville detachment proposed in 2003. There are, in fact, **major** differences. The Pulaski County school districts retain all of their geographic territory, all of their facilities, all of their equipment, all of their property, all of their local tax base. Student transfers to open-enrollment public charter schools are entirely voluntary at the discretion of parents, and not mandatory on the basis of residence. Unlike the proposed Jacksonville detachment, nothing about the current status of open-enrollment public charter school students removes their eligibility to participate in the magnet or M-to-M programs, provided those students are otherwise eligible. There was no assurance provided in the proposed Jacksonville detachment regarding how (or even if) the students in Jacksonville would participate in those programs. In fact, very little has changed in the Pulaski County school districts as a result of the charter schools.

While LRSD makes a vague assertion that it has lost revenue due to the presence of open-enrollment charter schools, the facts show otherwise. Stipulation magnet school funding in 2001-02 was $11,628,631; in 2009-10 it was $15,382,372. ADE Ex. 1, 2. From 2001-02 to 2009-10, LRSD's overall state aid increased by over $40 million; LRSD's overall revenue has increased in the same time period by over $112,000,000. ADE Ex. 41.

The only real "impact" that LRSD and Joshua can point to is a net loss of 70 students from the magnet schools and a total loss of 20 students from the M-to-M program over a six-year period. There is not a shred of evidence that this circumstance has had any appreciable adverse impact on LRSD. More importantly, no evidence indicates that charter schools have negatively

impacted any desegregation obligations in the unitary Little Rock School District. This claim should be denied.

II. The State of Arkansas Has a Wide Array of Programs and Initiatives Intended to Increase the Academic Performance of Low Performing Students and Remediate the Racial Achievement Gap.

For LRSD to suggest that the State and ADE have not taken great strides in efforts to improve the performance of low performing students in the State and to remediate the racial achievement gap borders on bad faith.

1. LRSD Now Argues a Position that LRSD Argued Against and was Released from by the Court

Originally, in 1989, all of the Pulaski County school districts committed themselves to closing the racial achievement gap[2] as part of their unitary status efforts. *LRSD v. PCSSD*, 949 F.2d 253, 256 (8th Cir. 1991)("It may be helpful for us to state those elements of the 1989 plan that we consider crucial, and with respect to which no retreat should be approved . . . (5) the agreed effort to eliminate achievement disparity between the races."). After several years of effort at closing the gap and over $100 million from the State aimed at "compensatory education" programs for this purpose, it became clear to the Court that the problem of the achievement gap may be more than a federal court can remedy through desegregation plans.

Judge Susan Webber-Wright invited three nationally recognized experts to come and testify in court about the achievement gap and the probability of closing the gap by judicial fiat. The experts were Drs. David Armor (DE 2693, transcript), Herbert Wallberg (DE 2692,

[2] A number of gaps can be identified between different groups of students: e.g. Asian versus White students, Hispanic versus White students, Hispanic versus African-American students, Free and Reduced Lunch versus non-Free and Reduced Lunch students. LRSD has concerned itself in this proceeding only with the gap in academic achievement between African-American and White students.

transcript), and Gary Orfield (DE 2768, transcript). See DE 2821. It was the testimony of these experts that forged the basis for the Districts to amend their desegregation plans to change from a commitment to close the racial achievement gap to a commitment to address the achievement gap. In fact, Judge Wright specifically found that LRSD had demonstrated changed circumstances sufficient to warrant changing its desegregation plan and that LRSD should be released from the "goals in the 1990 Plan regarding achievement disparities [which] may never be met regardless of the effort put forth by LRSD." DE 3144, Memorandum and Opinion entered April 10, 1998. The reasoning behind this is well summed up by Judge Billy Roy Wilson in his 2002 order declaring LRSD partially unitary. *LRSD v. PCSSD*, 237 F.Supp.2d 988, 1018, 1036-1040 (E.D.Ark. 2002). LRSD now attempts to hold the State and the ADE to a standard different from that which the Court held all of the districts.

2. The State and the ADE Have a Wide Array of Plans, Programs, and Initiatives in Place to Increase Academic Performance of Students

The State and the ADE have fully engaged in the effort to remediate not just the racial achievement gap, but also to improve the academic achievement of all students including low performing. No educator would suggest, as LRSD does, that there is a single program to close the achievement gaps or to improve below-grade-level performance of students. Success in these endeavors requires much hard work and a whole-school approach. LRSD Ex. 78, Armor Achievement Report. Arkansas's education system supports this approach with a wide array of programs that have been developed, updated, and identified since 1989.

The Arkansas Comprehensive Testing, Assessment, and Accountability Program ("ACTAAP") forms the foundation of Arkansas's efforts to improve instruction and academic outcomes for all students. Act 999 of 1999 codified at Ark. Code Ann. § 6-15-401, et seq. Through ACTAAP, the General Assembly, the State Board of Education, and the ADE have

established a comprehensive system of increased academic standards, student assessments, professional development for educators, and accountability for schools. Ark. Code Ann. §§ 6-15-402, 6-15-419(10). Under ACTAAP, the State established standards for a rigorous curriculum with high expectations for students. Ark. Code Ann. §§ 6-15-404(a)-(c); 6-15-419(2). Students are then assessed for their grade level mastery of that curriculum through the State's Benchmark testing. Ark. Code Ann. §§ 6-15-404(e)-(g), 6-15-419(9). For those students who do not score at grade level (also known as proficiency), schools are required by ACTAAP to develop what is known as an Academic Improvement Plan or AIP. Ark. Code Ann. §§ 6-15-419(3), 6-15-420. AIPs are drafted for individual students and must provide a plan for increasing that student's academic performance. Id. The law requires school districts to provide remedial education services to students performing below grade level (i.e. at "basic" or "below basic" on benchmark exams). These services are designed to bring those students up to grade level in literacy and mathematics. Ark. Code Ann. §§ 6-15-419(30), 6-15-420. The ADE publishes the aggregate results of benchmark testing for individual schools and school districts, and those schools that do not meet targets for the number of students performing at grade level are identified as schools needing improvement. Ark. Code Ann. § 6-15-421. The annual performance targets and identification of schools needing improvement are also a component of the No Child Left Behind Act. 115 Stat. 1702, 20 U.S.C. § 6842, *et seq*.; *Horne*, 129 S.Ct. 2579, 2601.

ACTAAP also requires schools and school districts each year to draft ACSIPs or Arkansas Consolidated School Improvement Plans. Ark. Code Ann. § 6-15-426(e), (f); Ex. 32, LRSD ACSIP; Ex. 33, Booker ACSIP; Ex. 34, Carver ACSIP; Ex. 35, Gibbs ACSIP; Ex. 36, Williams ACSIP; Ex. 37, Mann ACSIP. In its ACSIP, a school and school district must identify problem areas in academic performance, set out research-based programs and interventions to

improve instruction and academic performance in those areas, and identify funds to be utilized to implement the interventions and programs. Id. Schools and school districts have the flexibility to adopt programs and initiatives (with ADE support) that meet the challenges unique to their student populations. A school in school improvement must revise their ACSIP to explain the efforts the school will undertake to improve the academic performance of its students and meet the standards put in place by ADE. Ark. Code Ann. §§ 6-15-425, 6-15-426.

These and other changes brought about in the delivery of education in the State by ACTAAP and the Quality Education Act of 2003 (Act 1467 of 2003) have greatly enhanced the State's ability to address the academic needs of students, especially students performing below grade level. *Lake View School Dist. No. 25 v. Huckabee*, 358 Ark. 137, 189 S.W.3d 1 (2004)("The accounting and accountability measures set in place appear to be state-of-the-art. . . . The legislative accomplishments have been truly impressive."); *Lake View School Dist. No. 25 v. Huckabee*, 370 Ark. 139, 146, 257 S.W.3d 879, 883 (2007). In fact, Arkansas has been recognized by Education Week in its annual Quality Counts survey as one of the top education systems in the nation. Quality Counts 2012, Education Week, Jan. 12, 2012, at 43-62; see also www.edweek.org/go/qc12 Dr. Armor's report on academic achievement shows that, while the achievement gap has not closed in Pulaski County, students are achieving at higher rates now than they did just five years ago. LRSD Ex. 78, p. 4. In fact, from 2006 to 2011, the academic performance of African-American students in LRSD, PCSSD, NLRSD, and the State as a whole has doubled in many areas. LRSD Ex. 78, p. 4. Significant gains have been made in other areas as well. LRSD Ex. 78, p. 4-7.

Arkansas has established many other initiatives and programs designed to improve academic performance as well.

The Arkansas Better Chance and Better Chance for School Success Programs ("ABC") is Arkansas's pre-kindergarten (pre-k) program codified at Ark. Code Ann. § 6-45-104. The ABC program provides early care and education services for children three and four years old. The program is free for students from at-risk or low-income families, although any child may attend. Pre-K programs are strongly associated with improved academic performance of students. *See Lake View School Dist. No. 25 v. Huckabee*, 351 Ark. 31, 79-82, 91 S.W.3d 472, 500-503 (2002)(discussing value of pre-kindergarten programs). For the 2011-12 school year, the General Assembly appropriated $111 million for the ABC and ABCSS programs. Act 1075 of 2011 sec. 1(09).

Professional Development: this term describes educational opportunities for educators. Ark. Code Ann. § 6-20-2303(15). Because the State does not directly deliver education to students but instead delegates that authority to school districts, much of the State's efforts to improve academic instruction and outcomes are achieved through professional development programs. http://arkansased.org/pd/index.html. One example is the Arkansas Leadership Academy (Ark. Code Ann. § 6-15-1007) and the Master School Principal Program at the Academy (Ark. Code Ann. § 6-17-1602) which were instituted by the General Assembly to increase professionalism and abilities of educators and education administrators in the State. See http://arkansasleadershipacademy.org DE 3410, Notice of Filing Compliance Report and Request for Scheduling Order, p. 1 ("All principals received intensive TQM training through the Arkansas Leadership Academy.") The only cost to the participants of the Master School Principal Program are travel to the classes and incidentals. LRSD Ex. 100, Barksdale Dep. p. 6-9. Ms. Diane Barksdale, the principal at Carver Elementary Stipulation Magnet, completed the

training and is a Master Principal. She testified that it was a very beneficial program and helped her to be a more effective principal at Carver.

Other professional development programs include Early Literacy Learning in Arkansas (ELLA), is a program developed by the ADE to improve literacy in the State. LRSD Ex. 95, Bednar Dep. p. 53-55. This program is cited in all of the stipulation magnet school ACSIPs as an intervention to improve academic outcomes. Also, Cognitively Guided Instruction or CGI while not developed by ADE, is a math instruction strategy provided by the ADE to educators in the State. LRSD Ex. 95, Bednar Dep. p. 88. Dr. Felicia Hobbs is the principal at Gibbs International Studies Stipulation Magnet School. ADE Ex. 16, Hobbs Dep. p. 7. Dr. Hobbs has implemented CGI at Gibbs as an instructional approach to teaching math skills or math strategies. Id. at 42. Gibbs lists CGI as one of its strategies to improve academic outcomes of low-performing students in its ACSIP. Id. "All schools in the Little Rock School District are working to get teachers trained under cognitive guided instruction principles." Id. at 43; ADE Ex. 19, Register Dep. p. 51-52. Dr. Hobbs learned about CGI and implemented it at Gibbs as a result of ADE training she attended about five years ago. Id. at 42.

ADE provides a host of professional development opportunities for training in many other instructional strategies and programs. Many of these are provided online and free of charge to educators in the State so that they can learn at their own convenience. For example, Arkansas IDEAS or Internet Delivered Education for Arkansas Schools developed in partnership with the Arkansas Educational Television Network, offers research-based courses delivered over the internet. http://ideas.aetn.org; Act 2318 of 2005. Arkansas iTunes U is an education podcast network that provides instruction for students and teachers in content areas. http://adepodcast.arkansas.gov. The Arkansas Digital Sandbox allows teachers to collaborate

and share digital resources for use in the classroom and allows students to access that information as well. http://adesandbox.arkansas.gov/akdsb/welcome.php.

The State Personnel Development Grant (SPDG) is another of the State's initiatives to improve academic outcomes and includes research-based programs specifically developed to remediate the achievement gap between white and black students as well as other achievement gaps. LRSD Ex. 95 Bednar Dep. p. 40-41, 49-48; http://www.arstudentsuccess.org/ In fact, the SPDG houses the State's "Closing the Achievement Gap" (or CTAG) model, which was developed and is overseen by Dr. Howard Knoff in conjunction with the ADE. LRSD Ex. 95 Bednar Dep. p. 48. The CTAG model incorporates professional development, positive behavioral support systems, and instructional leadership in a comprehensive way with the goal of closing the achievement gap. LRSD Ex. 95, Bednar Dep. p. 40-43. CTAG is designed not only to educate the educators, but also to help schools modify their curriculum, remediate student skills, and implement strategic interventions and strategies to improve student learning. One of the components of the SPDG is an initiative called Project ACHIEVE, which is designed to improve student discipline, school climate, and classroom management. Project ACHIEVE has been implemented at Carver Magnet School. Ms. Barksdale, principal at Carver, testified that Project ACHIEVE has been very helpful in helping to identify low performing students and "zero in on their needs." LRSD Ex. 100, Barksedale Dep. p. 33-35.

Finally, ADE is engaged in a major initiative to adopt what is known as the Common Core State Standards. http://www.commoncorearkansas.org/ With the Common Core, the State joins forty-three (43) other states in adopting a common set of learning expectations in English language arts and mathematics. The goal of Common Core is to provide similar standards and curriculum in these areas, to increase the ability of educators to collaborate across the State and

the Nation, to improve instruction, and learning outcomes. LRSD Ex. 95 Bednar Dep. p. 77. Just a few months ago, the ADE offered two high schools in LRSD an opportunity attend training that would have helped LRSD in the implementation of Common Core at the high school level. ADE Ex. 17, Holmes Dep. p. 56-58. Unfortunately, LRSD declined this opportunity.

It should be remembered as well, that in section 2.7 of its 1998 Revised Desegregation and Education Plan, LRSD committed to "implement programs, policies and/or procedures designed to improve and remediate the academic achievement of African-American students." LRSD Ex. 5, p. 5; *LRSD v. PCSSD*, 237 F.Supp.2d 988, 1070 (E.D. Ark. 2002). This did not mean that the section 2.7 plans had to actually close the achievement gap; only that they had to be designed to improve the performance of those students. *Id.* at 1075 ("19. Under the Revised Plan, I find that LRSD was *not* obligated to eliminate the achievement gap between African-American and white students."). "During the term of the Revised Plan, LRSD implemented many dozens of programs" as required by section 2.7. *Id.* at 1072; DE 4103 Order entered Feb. 23, 2007, declaring LRSD fully unitary.

In March of 2010, LRSD adopted a "Strategic Plan" with a goal of "dramatically improv[ing] student learning in" LRSD, includeing an effort to close the achievement gap between African-American and other students. Ex. 31, LRSD Strategic Plan. Part of the plan includes an effort to "[r]educe the number of student interventions, and improve the effectiveness of those interventions that remain in place." Ex. 31, LRSD Strategic Plan p. iv. The District is implementing this plan, including its recommendation to reduce the number and improve the effectiveness of special programs. Ex. 17, Holmes Dep. p. 41, 42, 44-46. The District has the ability to implement this recommendation and is aware that if it need help the ADE is available to assist. Ex. 17, Holmes Dep. p. 46-47.

III. The Court Should Not Consider LRSD and Joshua's Proffered Hearsay Documents

LRSD bases some of its claims at this stage on newspaper articles. In particular, LRSD makes a vague allegation about charter schools "weeding out" certain students. The basis of this claim is a newspaper article (LRSD Ex. 98) that is contradicted by deposition testimony. *Shaver v. Independent Stave Company*, 350 F.3d 716, 723 (8th Cir. 2003)(holding that inadmissible evidence, hearsay in particular, cannot be used to support summary judgment).

Also, LRSD Exhibit 92 appears to be some sort of evaluation report of stipulation magnet schools. This report was never disclosed in discovery and the unknown author was never identified as a potential expert or witness. Moreover, some of the data in the document appears to be wrong. See ADE Response to Statement of Facts ¶ 53.f. ADE objects to its consideration.

IV. LRSD's New Claims Should Not Be Considered by the Court

A. LRSD's Claims Regarding Transportation Funding Were Dismissed

LRSD's Motion to Enforce 1989 Settlement Agreement included a section that challenged the State's education funding formula and in particular the method utilized by the State to fund student transportation. DE 4442, p. 77-93. This claim was based solely on the Arkansas Constitution and Arkansas law, not federal law. The ADE requested that this state law claim be dismissed. "[T]his Court lacks jurisdiction over the *Lake View* claims about transportation funding. . . . The motion may go forward, however, on the State's actions about charter schools and remediation of achievement disparity." DE 4608 p. 8. There was no indication in LRSD's motion that this claim was anything other than a state law claim brought in federal court against the State. ADE objects to LRSD's attempt to expand this issue into a new claim under the 1989 Settlement Agreement, however baseless that claim is. Moreover, the funding formula change that LRSD complains about occurred, according to LRSD, in 2005.

LRSD never challenged the funding formula in this case, and, in fact, agreed that it was not an issue in 2007 in the *Lake View* case, in which LRSD was a party. ADE Ex. 30, Joint Report in Response to Special Masters.

B. LRSD is Fully Unitary and There is No Reason to Monitor Its Desegregation Compliance

First, LRSD never raised the issue of the State's monitoring in its original Motion to Enforce filed on May 19, 2010. Based on that motion and the Court's August 15, 2011, Order (DE 4608) the State proceeded in discovery on the two issues that remained after the August Order State monitoring was not one of the two issues. For this reason, LRSD's arguments concerning State Monitoring should not be considered.

Moreover, shortly after the August 2002 meeting (which neither Joshua nor LRSD attended) LRSD was declared unitary in all of its operations save one contractual commitment. *LRSD v. PCSSD*, 237 F.Supp.2d 988 (E.D.Ark. 2002). The question of State monitoring was not raised as an issue then, nor was it raised in the four years afterward when LRSD attempted to comply with its contractual obligations in the 1998 Revised Desegregation Plan. In fact, two years prior to LRSD's unitary status declaration ADE requested approval from the Court of a revised monitoring plan. DE 3327, Motion for Approval of Monitoring Plan filed Feb. 1, 2000. LRSD and the other parties participated in developing the revised monitoring plan. Without any warning, however, LRSD objected not just to the monitoring plan that the State proposed to the Court on March 6, 2000, but it also objected to State monitoring altogether. DE 3340, LRSD's Response to ADE's Motion for Approval of Monitoring Plan, p. 2, ("Moreover, ADE monitoring of LRSD does not make senses given the status of the parties."). LRSD's response makes clear that LRSD did not want monitoring; it wanted more money. The ADE is currently monitoring

PCSSD's compliance with its desegregation plan. There is no reason to monitor LRSD because it is a unitary school district.

C. The State Has Not "Retaliated" Against LRSD

1. Act 701 of 2011

In contrast to LRSD's newly raised claim about State monitoring, it also complains that the State has done some monitoring of the District in recent years. This claim should be rejected because LRSD first raised it in the Motion for Summary Judgment. It should also be rejected because the State is entitled to ask its largest school district, what it is doing with the near $40 million it receives each year from the State's taxpayers. *Dermott Special School Dist. v. Johnson*, 343 Ark. 90, 30 S.W.3d 477 (2000)(holding that school district is a political subdivision of the State).

2. LRSD's attorneys' fees claim

First, LRSD's attorneys' fees claim rests solely on State law. Federal Courts do not have authority to order states to comply with state law. *Pennhurst State School & Hospital v. Halderman*, 104 S.Ct. 900 (1984). Second, LRSD complains about not receiving $250,000 for attorneys' fees under Act 395 of 2007, which only authorized negotiations for this amount. Since 1989 the State has paid the LRSD over $600 million dollars. Under the 1989 Settlement Agreement the State granted LRSD a $20 million loan. In 2001, the State forgave $15 million of this loan so LRSD would pursue unitary Status. *LRSD v. PCSSD*, 237 F.Supp.2d 988, 1075 (E.D.Ark. 2002). Third, this was not a claim for relief presented by LRSD's May 15, 2010, Motion to Enforce. Accordingly, this claim should be denied.

V. Conclusion

LRSD was declared completely unitary in all of its operations on February 23, 2007. DE 4103, Order. Consequently, LRSD was "released from all further supervision and monitoring from the Court, ODM, and Joshua." Id. This accomplishment was one of the major motives behind the original filing of this case in by LRSD in 1982. It means that LRSD has no desegregation obligations and that there are no desegregation activities needed to eliminate any vestiges of segregation in LRSD. Although the stipulation magnet schools and M-to-M programs are still in place, they do not serve to eliminate any vestige of segregation in LRSD, and neither LRSD nor Joshua argues that the schools do. Similarly, neither LRSD nor Joshua argue that either program is needed to eliminate any remaining vestiges of segregation in PCSSD, NLRSD, or the County as a whole. The reason is simple: there is no Constitutional requirement to racially balance the schools in Pulaski County anymore. All of the school districts are unitary in student assignments to schools (meaning they have eliminated the vestiges of segregation).

LRSD's complaint with regard to the open-enrollment charter schools boils down to a complaint that some students are voluntarily choosing to attend those schools. This voluntary choice by students and parents has not been shown to have a negative impact on any desegregation obligations that remain in this case. In fact, even if all of the open-enrollment charter students returned to their zone schools, it would not have a significant impact on the racial balance of those schools. ADE Ex. 3, Armor Charter Report.

Nor has LRSD presented any proof that the open-enrollment charter schools have had any substantial impact on LRSD's ability to educate its students. The District, in fact, is moving forward with its strategic plan and implementing the new Common Core curriculum. Its student

test scores are improving. LRSD Ex. 78, Armor Achievement Report. The State is aware of no case in which a court has subjected open-enrollment charter schools located in a unitary school district to desegregation obligations. LRSD and Joshua ask this Court to order limits on charter schools in Pulaski County without even arguing (and while presenting no proof) that doing so would have any desegregation benefit. If the Court entertains this suggestion, it will entangle the Court in the local school operations, expand the scope of this lawsuit, and leave the Court and the parties with no clear path to resolution of this lawsuit. The Court should decline LRSD and Joshua's improvident request to expand this case beyond the relatively few issues that remain (i.e. PCSSD's remaining unitary status obligations).

With regard to LRSD and Joshua's arguments concerning the achievement gap, these two parties simply make a baseless assertion. The past twenty years have seen great change in education in Arkansas. The State has engaged in substantial efforts to improve the academic achievement of all students. The Court specifically found long ago that the achievement gap in LRSD is not a vestige of segregation. LRSD and Joshua's request relative to the achievement gap is unnecessary (in that the State and ADE are engaged in substantial efforts in this area) and would not serve any desegregation objective. As such, the Court should deny LRSD and Joshua's Motion to Enforce the 1989 Settlement Agreement.

WHEREFORE, the ADE requests that the Court deny LRSD's Motion for Summary Judgment and deny LRSD's Motion to Enforce 1989 Settlement Agreement, and for all other relief to which it is entitled.

Respectfully submitted,

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ATTORNEYS FOR STATE OF ARKANSAS AND
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CERTIFICATE OF SERVICE

I hereby certify that on March 12, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which shall send notification of such filing to the following:

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I, Scott P. Richardson, Assistant Attorney General, do hereby certify that I have served the foregoing and a copy of the Notice of Electronic Filing by depositing a copy in the United States Mail, postage prepaid, on March 12, 2012, to the following non-CM/ECF participants:

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/s/ Scott P. Richardson
SCOTT P. RICHARDSON