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

BRIEF IN RESPONSE TO LRSD AND JOSHUA INTERVENORS' MOTION FOR SUMMARY JUDGMENT ON MOTION TO ENFORCE 1989 SETTLEMENT AGREEMENT

For more than 10 years after adoption of the Arkansas Charter School Act in 1999, LRSD opened its own charter schools, agreed to some open-enrollment charter applications and opposed others, and failed to raise any concern about whether the Act violates any part of the 1989 settlement agreement. In 2010, after obtaining unitary status and apparently looking for reasons to keep this case alive to continue settlement funding at the rate of about $6 million per month, LRSD changed course and claimed that open-enrollment charter schools violate the obligations of the State under the settlement. Even after filing that motion, however, LRSD agreed to another application for an open-enrollment charter in September 2010.

LRSD's Motion concerning charter schools must be denied for many reasons, including: First, the settlement contains no provision concerning charters, and LRSD has failed to show any negative effect of charters upon the M-M or magnet programs. Second, LRSD has repeatedly agreed to applications for open-enrollment public charter schools in Little Rock and cannot now claim they violate the settlement. Third, the very basis for LRSD's theory, the M-M and magnet stipulations, contain illegal and judicially unenforceable racial quotas. Fourth, this Court has no jurisdiction over state-law charter school issues.

In its motion for summary judgment, LRSD contends the M-M and magnet stipulations and the 1989 settlement agreement are a "consent decree." This is wrong. The State of Arkansas and its subdivisions were dismissed with prejudice from this case and granted a full and final release by LRSD and the Joshua Intervenors more than 20 years ago; LRSD was dismissed with prejudice in 1998 when this case was closed; and LRSD now is completely unitary. The M-M and magnet stipulations were not incorporated into a judgment of this Court before the State was dismissed with prejudice.

The Charter Intervenors first review the law of consent decrees and the history of this case to explain LRSD's error, and then turn to the

particular reasons why LRSD and the Joshua Intervenors' motion must be denied as to charters. Finally, the Charter Intervenors suggest that, before taking up charter-school issues, this Court should first decide whether the race-conscious student assignment system of the M-M and magnet stipulations survive the equal-protection strict-scrutiny analysis of *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701 (2007), because this is the foundation for the motion involving charters. And if the State accepts the Eighth Circuit's recent invitation to move to terminate the 1989 settlement in its entirety, this Court should also first resolve that matter, for the same reason. If the 1989 settlement is terminated or the stipulations are unlawful, the charter issues become moot.[1]

I. THE STIPULATIONS AND SETTLEMENT ARE NOT CONSENT DECREES

"A consent decree is defined as '[a] *court decree* that all parties agree to.' Black's Law Dictionary 419 (7th ed. 1999) (emphasis added)." *Christina A. v. Bloomberg*, 315 F.3d 990, 994 n.4 (8th Cir. 2003). By contrast, "Private settlements do not entail the judicial approval and oversight involved in consent decrees." *Buckhannon Bd. & Care Home, Inc.*

[1] The Charter Intervenors have observed the limitations placed on their intervention. The Charter Intervenors are entitled to defend their interests under any argument available to the State, whether the State makes the argument or not, because the attack on the charter schools is derivative of the State's asserted obligations under the stipulations and settlement. In addition, the Charter Intervenors reiterate their reservation of the right to revisit the limitations, which were placed primarily because the Court believed other parties in the case would soon "ventilate" the serious constitutional problems with the stipulations. So far no party has done so.

v. West Virginia Dep't of Health and Human Res., 532 U.S. 598, 604 n.7, (2001). The fact that an order is *approved* by a federal court does not make it a consent decree. "Although *Rule 23(e)* requires the district court to approve [a] class action agreement, it does not require the court to establish the *terms* of the agreement. Therefore, the district court's approval of the settlement agreement does not, by itself, create a consent decree." *Christina A.*, 315 F.3d at 992-93 (emphasis in original).

The *sine qua non* of a consent decree is judicial incorporation of the parties' agreement into a judgment of the Court:

> This court has held that consent decrees are distinguishable from private settlements by the means of enforcement. "Consent decrees . . . are enforceable through the supervising court's exercise of its contempt powers, and private settlements [are] enforceable only through a new action for breach of contract." *Hazen ex rel. LeGear v. Reagen, 208 F.3d 697, 699 (8th Cir. 2000)* (citing *Benjamin v. Jacobson, 172 F.3d 144, 157 (2d Cir. 1999))*. We are convinced that the court's dismissal order of December 13, 2000, would not support a citation for contempt. As earlier noted, no specifically enumerated contract terms were incorporated into the court's order.

Christina A., 315 F.3d at 993. Neither the M-M and magnet stipulations nor the 1989 settlement were incorporated into a judgment or decree and cannot be enforced by contempt. They therefore are not a "consent decree."

In its *en banc* decision at 778 F.2d 404 (8th Cir. 1985), the Eighth Circuit determined that this Court should implement remedies consistent

with eight strictures set forth in 778 F.2d at 434-36, among which were the discretion to encourage or require majority to minority ("M-M") transfers and magnet schools. Though this Court held hearings on magnet schools and other discretionary remedies, the parties short-circuited that judicial process and offered agreed M-M and magnet stipulations in 1986 and 1987. This Court reviewed and approved those agreements in its opinion at 659 F. Supp. 363 (E.D. Ark. 1987). The stipulations are attached as addenda to the published opinion. Later this Court reviewed and, after reversal on appeal, approved the 1989 settlement and dismissed the State as a party. Order, January 18, 1991, Docket No. 1418. But this Court did not incorporate the stipulations or settlement into any judgment of this Court.

By contrast, in May 1992, more than a year after the State was dismissed, this Court approved changes to the districts' desegregation plans and incorporated those changes into its Order, both by attaching the modified plans and by requiring that the districts comply with those approved plans. Ex. A, Order, May 1, 1992, Docket No. 1587. LRSD mistakenly believes this Order was entered on April 29, 1992, which is incorrect, and erroneously claims it incorporated the M-M and magnet stipulations and the 1989 settlement, which is also wrong. *Id.* See Statement of Undisputed Fact No. 25 and Charter Intervenors' Response to it.

Finally, on January 26, 1998, more than a year before the Charter School Act became effective, this Court dismissed LRSD with prejudice as a party, Order, Docket No. 3109, and administratively terminated this case, Order, Docket No. 3110. The fact that this Court has retained power to enforce the stipulations and settlement since then does not make them a consent decree. "[E]nforcement jurisdiction alone is not enough to establish a judicial '*imprimatur'* on the settlement contract," *Christina A.*, 315 F.3d at 993, and "fails to support the conclusion that the settlement agreement serves essentially as a consent decree." *Id.* at 994.

Since the State was dismissed as a party to this case in 1991, all enforcement of the settlement against the State, including the instant motion, has been by motion to enforce rather than contempt. The M-M and magnet stipulations and 1989 settlement are agreements of the parties that do not bear the necessary *imprimatur* of a court to make them consent decrees. And their illegal provisions are subject to attack. As the Eighth Circuit has noted in this case, "A settlement plan proposing a return to separate but equal . . . schools would be unconstitutional." 921 F.2d 1371, 1384 (8th Cir. 1990).

II. THE MOTION AGAINST CHARTERS MUST BE DENIED ON THE MERITS FOR FAILURE OF PROOF

LRSD and the Joshua Intervenors contend (a) open-enrollment public charter schools are identical to magnet schools for purposes of the settlement

and the magnet and M-M stipulations, (b) this Court therefore should have approved all open-enrollment public charter schools in Pulaski County, and (c) LRSD should receive settlement funding for each child enrolled in an open-enrollment public charter school in Pulaski County. This section explains why this argument fails for lack of proof.

Charter schools are not mentioned anywhere in the stipulations or the settlement, and the settlement and stipulations do not regulate or involve public charter schools in any way. LRSD has opened its own charter schools and has approved applications of open-enrollment public charter schools since 1999 without Court approval and cannot now claim to the contrary. LRSD and the Joshua Intervenors have failed to demonstrate by any degree of evidence that open-enrollment public charter schools interfere with the M-M or magnet programs.

1. Charters Are Not Governed by The Stipulations or Settlement

The stipulations and the settlement are agreements of the parties who signed them. They do not mention public charter schools of any kind in any provision. A contract is construed according to the ordinary meaning of the language used. In a similar situation involving the 1996 teacher strike in PCSSD, the Eighth Circuit ruled that teacher strikes are not covered by the settlement:

> The difficulty [with PCSSD's motion] is that the settlement agreement says nothing about the teachers' right to strike. The job of the District Court is to enforce the settlement agreement. But 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.

Knight v. PCSSD, 112 F.3d 953, 954 (8th Cir. 1997). The Eighth Circuit reversed an injunction from this Court that had prohibited the strike.

The same problem exists here for LRSD and the Joshua Intervenors. The stipulations and the settlement say nothing about charter schools. Moreover, the State was dismissed as a party in 1991, and this case was dismissed in its entirety in 1998, both before the Charter School Act was adopted in 1999. Not only do the documents not address charter schools, but this case was over before charter schools came into existence. A court could enforce every sentence and clause of these agreements and still have no power to reach charter schools.

LRSD and the Joshua Intervenors do not even claim that the agreements mention charters; instead they argue that the settlement prohibits the State "from creating a competing system of interdistrict magnet schools in Pulaski County in the form of open-enrollment charter school." Br. at 5-6. The settlement does not say this either. The stipulations, settlement and court decisions in this case govern only magnet schools or interdistrict magnet schools <u>created by the terms of the stipulations and the settlement</u>.

By contrast, charter schools are creatures of state law of general applicability, and the stipulations and settlement say nothing about them.

Judge Arnold summed up the problem here in these words:

> The fact that the case has been settled does not make the three school districts involved wards of the Court. They are not in receivership. Except as provided in the settlement agreement, or by reasonable implication therefrom, the rights and duties of the three school districts . . . are governed by other applicable law, primarily state law.

Knight, 112 F.3d at 954. LRSD and the Joshua Intervenors overlook this critical reality.

There is no good faith interpretation of the settlement or the stipulations that supports this motion to enforce with respect to charter schools. Indeed, the conduct of LRSD speaks more loudly than its arguments. LRSD has (1) never before questioned the Charter School Act and the State's role under it, (2) opened at least two charter schools itself—without Court approval—and (3) approved the opening of two open-enrollment public charter schools, again, without Court approval. One of these open-enrollment charters, SIATech, was approved *after* LRSD filed its motion to enforce.[2] The conduct of the parties is important evidence of their understanding of the terms of a contract.

[2] See Exhibits B & C to Response.

Other provisions of the settlement contradict LRSD's theory concerning charter schools. In the settlement, all the parties agreed to protect the autonomy of PCSSD and NLRSD, but no one agreed to protect the autonomy of LRSD. Settlement, LRSD Ex. 3, at II.J. To the contrary, all parties, including LRSD, contemplated in three separate provisions that territory and the students then assigned to LRSD could be assigned to other districts "if the State *or any other entity becomes responsible for their education*." *Id*. at II.F., VI.A., and VI.B. (emphasis supplied). Thus the parties agreed that other entities could become responsible to educate LRSD students within Pulaski County.

Further, the settlement provides at page 18 that ADE will develop standards for site selection of new schools, major expansions and school closing, requiring that a district "provide a desegregation impact statement setting forth evidence that the proposed improvements do not have a segregative effect." *Id.* at III.M. This is reflected in the Charter School Act at Ark. Code Ann. § 6-23-106, and presumably LRSD complied with this provision in its own charter applications.

But the more important provision for present purposes is in the next paragraph of the settlement, which says:

> ADE will not recommend or approve the site of any school in any county contiguous to Pulaski County if the construction or

> expansion of the school at the requested location of such school will have a substantial negative impact on any District's ability to desegregate.

Id. Thus LRSD negotiated and obtained a restriction concerning new school siting in counties adjacent to Pulaski County, *but not in Pulaski County itself.* This is the settlement as written and approved, and LRSD and the Joshua Intervenors must live with it.

Accordingly, the settlement is silent as to charters, as it is about teacher strikes; the past conduct of LRSD contradicts its current legal argument; and the words of the settlement permit others to become responsible for educating children and to take land and students away from LRSD. The contract contradicts the motion to enforce as to charters.

Faced with this obvious problem, LRSD and the Joshua Intervenors compare charter schools to the "Jacksonville splinter district" before this Court in 2003, asserting that decision is "law of the case" and wins the day. The comparison fails. The biggest difference is that the settlement says that the parties will recognize the autonomy of PCSSD, and the Jacksonville "splinter" violated that provision. But the differences do not end there, and it is probably easiest to portray them in a table comparing the PCSSD issue to the LRSD issue on charters.

PCSSD/Jacksonville Issue	LRSD/Charter Fact
Settlement guaranteed autonomy of PCSSD	LRSD autonomy not guaranteed, and LRSD subject to losing land and students to others responsible for educating children
Jacksonville district would have removed land from PCSSD	Charters do not remove any land from a district
Jacksonville district would have removed portion of tax base from PCSSD	Charters do not impair tax base of a district (if anything, they promote economic activity and investment in a district and add to the tax base)
Jacksonville district would have removed existing schools from PCSSD	Open-enrollment public charters do not remove existing schools from a district
PCSSD was and remains non-unitary	LRSD is unitary
PCSSD did not establish Jacksonville splinter district	LRSD has established its own charters and has approved open-enrollment public charters
Jacksonville splinter district arose after Arkansas Charter School Act adopted	LRSD established its own charters and approved open-enrollment public charter applications *after* Jacksonville splinter issue litigated
Issue involved detaching land and creating new school district with new boundaries, affecting school funding, attendance, voting for board members, all under Ark. Code Ann. § 6-13-1501	No comparable detachment issues

The law of the case doctrine applies when the same legal question reappears in a lawsuit. Here, the differences between the Jacksonville splinter district and charters under the stipulations and settlement could not be more pronounced and distinct. The Jacksonville splinter issue is not law

of the case as to charters. In fact, if it were, then LRSD would have itself broken the settlement under its own legal analysis, because it has acted to create its own charters and to approve open-enrollment public charter schools within LRSD.

2. The Lack of Proof of Interference With Magnet Schools

When LRSD filed its motion to enforce, its theory involved what it called "magnet charters" and "no excuses charters," and it used both the M-M and the magnet stipulation in its motion. After discovery, LRSD has dropped the semantics. It now calls all the open-enrollment public charter schools in Pulaski County "interdistrict magnet schools" and claims they interfere with operation of the stipulation magnets. Br. at 5-12.

The evidence is not there. LRSD and the Joshua Intervenors do not attempt to put on expert or statistical proof. They do not offer any survey data which might try to answer the question why children have chosen to leave LRSD schools for other options or why children have chosen to attend open-enrollment public charter schools. They do not contend that open-enrollment public charter schools "cherry pick" the best and brightest students or operate as racially identifiable havens promoting white flight.

LRSD and the Joshua Intervenors have not made and cannot make a prima facie case to prove their allegations. The heart of their argument is

that open-enrollment public charters in Pulaski County attract students who *might* otherwise attend stipulation magnets or make M-M transfers. This is based on speculation, not evidence, as discussed in paragraphs 50-53 of the parties' Statements of Undisputed Facts.

LRSD and the Joshua Intervenors have no evidence of any sort to prove their claim. Students move to open-enrollment public charters in Pulaski County from home schools, private schools, parochial schools, and other counties, as well as the three districts in Pulaski County. LRSD and the Joshua Intervenors cannot and do not prove otherwise.

Instead they rest on the point that of the 4,398 students in open-enrollment public charter schools, 331 students have "left" stipulation magnet schools and 20 "left" the M-M program. But the story does not end there, and the full telling defeats the interference argument. The majority of the 331 students from stipulation magnets did not "leave;" they graduated and had to move on to another school. Fifth graders at a magnet became sixth graders, and they had no right to attend a magnet in middle school and may have had no seat available, and the same with eighth graders moving on to high school. What is worse, for African-American fifth and eighth graders within LRSD, the odds of getting a seat at a new magnet school were limited by the race-based limits on available seats, so that, according to LRSD Ex.

66, thousands of African-American students were on wait lists for stipulation magnets while they contained empty seats.[3]

So the argument that these matriculating students "left" a magnet for an open-enrollment charter is not true. They graduated and had no guarantee of continued placement in a magnet, and most were subject to an illegal handicap in the competition for magnet seats at their next grade due to their race. Once these matriculating students are removed from the mix and the data are otherwise cleaned up to permit analysis, it is evident that fewer than two students per year since 2006 have left each stipulation magnet for an open-enrollment public charter school—eleven students total per year on average. This is against a total open-enrollment public charter school population of 4,398.

LRSD and the Joshua Intervenors do not even attempt to argue that this paltry number of students "interferes" with operation of the stipulation magnets. Instead they focus on the total enrollment of the open-enrollment charters, forgetting that the basis for their motion is the magnet stipulation, not the simple existence of open-enrollment public charter schools. If

[3] As explained more fully in Responses to Undisputed Fact No. 50-53, the race-based limitation in the M-M and magnet stipulations disproves LRSD and the Joshua Intervenors' claims that children at open-enrollment public charter schools in Pulaski County could go to stipulation magnets rather than the charters. The limited number of African-American seats at the magnet stipulations are already oversubscribed, and the waiting list is in the thousands. LRSD Ex. 66. African-American students in LRSD zones who left an open-enrollment public charter school would not be able to walk into a stipulation magnet.

attempted, the argument of interference with magnets would fall flat because LRSD's own Ex. 66 shows that the stipulation magnets have thousands of children on wait lists, easily enough to absorb the eleven spots per year (and LRSD's claimed 331 total transfers) that open up due to transfers to open-enrollment public charter schools. To this point the response may be that African-American students can take one of these open seats at stipulation magnets only if an African-American student transfers to a public charter, but this underscores the trouble with the magnet stipulation, not a problem caused by open-enrollment public charter schools.

Rather than argue these numbers, LRSD and the Joshua Intervenors argue the "impact" of the total enrollment of open-enrollment public charters and compare that number to a projected number of potential students at a Jacksonville splinter district. The comparison to the Jacksonville splinter is both speculative, because know one knows how many students would have enrolled, and unavailing, because the issues are not comparable. In addition, the "impact" argument is misplaced, as Judge Arnold observed in response to a similar "impact" argument in *Knight*:

> PCSSD argues that if it cannot hold school at all, it cannot carry out the desegregation plan, and this is perhaps the most appealing argument the school district has. The trouble with the argument is that it proves too much. If, for example, the school district's water bill were raised to an exorbitant level, making it financially difficult or impossible to operate, we do not think

> the District Court, as an aspect of its authority to monitor the settlement agreement, would have power to order the utility furnishing the water to reduce its rates. No doubt the example is an extreme one, but it makes the point. The teachers, unlike the putative water utility, are parties to the settlement agreement, but the agreement does not address their right to strike.

112 F.3d at 955. Unlike the PCSSD teachers, the open-enrollment public charter schools are *not* parties to the settlement. The State is, but the settlement says nothing about charter schools. The "impact" argument involving open-enrollment public charter schools, like the "impact" argument involving water bills or the right of PCSSD teachers to strike, falls outside the settlement agreement.

Thus LRSD and the Joshua Intervenors' motion to enforce must be denied for failure of proof in addition to the fact that the settlement does not address public charter schools.

III. EQUITABLE DEFENSES TO THE MOTION TO ENFORCE

The motion to enforce requests equitable remedies. LRSD and the Joshua Intervenors ask this Court to reshape the settlement funding and enforce the settlement to their liking. Thus their motion is subject to equitable defenses. Here the relief should be denied due to laches, estoppel, waiver, consent and illegality.

1. Laches and Estoppel

Laches is unreasonable delay by the party seeking equity that causes prejudice to the opponent. *Wachter Elec. Co. v. Elec. Sys*., 2010 U.S. Dist. LEXIS 131272, *9 (E.D. Ark. 2010) (citing *Summit Mall Company, LLC, v. Lemond*, 355 Ark. 190, 206, 132 S.W.3d 725, 735 (2003)); *see also Masters v. UHS of Del., Inc*., 631 F.3d 464, 469 (8th Cir. 2011). Estoppel is conduct by the party seeking equity that causes prejudice to the opponent. *Noblin v. Unum Life Ins. Co. of Am*., 2011 U.S. Dist. LEXIS 93895, *10 (W.D. Ark. 2011); *see also Masters*, 631 F.3d at 469. Here, the opposing party is the State, and the Charter Intervenors use the State's defense derivatively to protect their interests.

LRSD and the Joshua Intervenors waited more than 10 years after adoption of the Charter School Act before raising the current claim that open-enrollment public charter schools in Pulaski County must be approved by this Court under the settlement or the magnet stipulation. In the interim, LRSD acted pursuant to the Act, as described in this Brief, and the State was reasonably justified in believing that LRSD and the Joshua Intervenors did not question the right of the State through ADE to approve open-enrollment public charter schools in Pulaski County without this Court's approval. Indeed, since the Act was adopted, the Jacksonville splinter issue came and went, further lulling the State into the belief that the parties, and particularly

LRSD and the Joshua Intervenors, had concluded there was no problem approving open-enrollment public charter applications without Court approval.

Against this background, the State, through the ADE and the State Board, have approved numerous applications for open-enrollment public charter schools in Pulaski County without Court approval. These are solemn contracts of the State and create vested contract rights and expectations on the part of innocent third parties, the Charter Intervenors, that the State must now honor. This was reasonable reliance in the circumstances, and the motion to enforce is therefore barred by laches.[4]

The estoppel analysis is identical except for the trigger—estoppel is based on conduct of LRSD rather than delay. LRSD sought and received approval of its own charter schools under the Act without questioning whether Court approval was required. LRSD reviewed all applications of open-enrollment public charter schools in Little Rock for more than 10 years, approving two and disapproving others. LRSD even approved the SIATech application for an open-enrollment public charter school in September 2010, *after* it filed the motion to enforce.

[4] Laches bears a relationship to limitations. *Midwestern Mach. Co. v. Northwest Airlines, Inc*., 392 F.3d 265, 277 (8th Cir. 2004). The five-year statute of limitations for an action for breach of contract raised by adoption of the Act expired in 2004. The five-year limitations period for the first open-enrollment charter approval in Pulaski County, Academics Plus, expired in 2006.

This conduct by LRSD was inconsistent with its position in this motion and induced reasonable reliance on the part of the State that charter applications in general, and open-enrollment public charter applications in particular, could be approved for schools in Little Rock without Court approval. The prejudice to the State is the same as explained above. Estoppel therefore bars the equitable relief that LRSD seeks.

2. Waiver

Waiver is conduct inconsistent with a position taken in court, with full knowledge of the rights and obligations of the parties. *Jackson v. Swift-Eckrich*, 830 F. Supp. 486, 494-95 (W.D. Ark. 1993) (citing *Stephens v. West Pontiac-GMC, Inc*., 7 Ark. App. 275, 278, 647 S.W.2d 492 (1983)); *see also Webster Bus. Credit Corp. v. Bradley Lumber Co*., 2011 U.S. Dist. LEXIS 137102 (W.D. Ark. 2011). LRSD and the Joshua Intervenors have known of their rights and the State's obligations under the stipulations and settlement since the late 1980s, and they have demonstrated several times that they know how to enforce their rights.

Yet, with full knowledge of these rights and obligations, LRSD approved two applications for open-enrollment charter schools and opened two of its own without Court approval. Both LRSD and the Joshua Intervenors knew or should have known of these actions and failed to assert

any rights under the stipulations or the settlement. They acted as if nothing were amiss. LRSD even approved SIATech after filing the instant motion.

The prejudice to the State has been explained above. Waiver bars the relief requested.[5]

3. Consent

Consent is agreement by the complaining party to the conduct that allegedly requires a remedy.[6] *See Masters*, 631 F.3d at 469. Here, LRSD affirmatively used the Act to create its own charter schools. It affirmatively approved two open-enrollment public charter school applications that it now opposes. It approved one of these two after filing its motion to enforce. It consented to these four charter schools without Court approval.

Based the prejudice to the State explained above and LRSD's consent to the State's operation of and actions pursuant to the Act over more than a decade, the relief sought is barred by the doctrine of consent.

4. Illegality

A court sitting in equity will not enforce an illegal contract. *Teamsters Local Union 682 v. KCI Constr. Co*., 384 F.3d 532, 537 (8th Cir. 2004) ("[W]e must not enforce illegal contracts. We have an absolute duty to

[5] Waiver, like laches, reverberates with limitations, and footnote 4 above applies here also.
[6] One may argue that a citizen cannot consent to a constitutional violation by a state actor. But this is a motion to enforce a contract; the constitutional issues were resolved long ago. 451 F.3d 528, 530 (8th Cir. 2006).

determine whether a contract violates federal law before enforcing it."); *see also Kansas City Community Center v. Heritage Industries, Inc*., 972 F.2d 185, 188 (8th Cir. 1992) ("[I]llegality inhering at the inception of … contracts taints them throughout and effectively bars enforcement.") LRSD and the Joshua Intervenors seek enforcement of the M-M stipulation and the magnet stipulation, both of which contain illegal race-based limitations on the ability of any person to obtain seats at public schools in Pulaski County.

This is clear from the Supreme Court's most recent pronouncement in the area of race-based student assignment in elementary and secondary schools, *Parents Involved In Community Schools v. Seattle School Dist. No. 1*, 521 U.S. 701 (2007). Under this case, the only compelling governmental interest permitting race-based classification of individuals are those that currently remedy past *de jure* segregation in the schools.

The four-justice plurality opinion written by Chief Justice Roberts contained several different parts, some of which were joined by the deciding fifth justice, Justice Kennedy. Justice Kennedy explicitly joined in parts III-A and III-C of the opinion written by the Chief Justice. Importantly, part III-A of the opinion of the Chief Justice, which represents the opinion of a majority of the Supreme Court, stated:

> Without attempting in these cases to set forth all the interests a school district might assert, it suffices to note that our prior

> cases, evaluating the use of racial classifications in the school context, have recognized two interests that qualify as compelling. The first is the compelling interest of remedying the effects of past intentional discrimination.
>
> . . . [W]e have emphasized that the harm being remedied by mandatory desegregation plans is the harm that is traceable to segregation, and that "the Constitution is not violated by racial imbalance in the schools, without more." *Milliken v. Bradley*, 433 U.S. 267, 280, n. 14 (1977). Once Jefferson County achieved unitary status, it had remedied the constitutional wrong that allowed race-based assignments. Any continued use of race must be justified on some other basis.

551 U.S. at 720-21 (citations and footnote omitted).

LRSD is unitary and has been since *Parents Involved* was decided. "Once [LRSD] achieved unitary status, it had remedied the constitutional wrong that allowed race-based assignments. Any continued use of race must be justified on some other basis." 551 U.S. at 721 (footnote omitted).

In addition to joining part III-A of the opinion of the Chief Justice, Justice Kennedy made clear in his separate concurring opinion the strict limits on race-based classification by a state in student assignment. He wrote:

> Our cases recognized a fundamental difference between those school districts that had engaged in *de jure* segregation and those whose segregation was the result of other factors. School districts that had been engaged in *de jure* segregation had an affirmative constitutional duty to desegregate; those that were *de facto* segregated did not. The distinctions between *de jure* and *de facto* segregation extended to the remedies available to governmental units in addition to the courts. For example, in

> *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986), the plurality noted: "This Court never has held that societal discrimination alone is sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination."
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> * * *
>
> The Court has allowed school districts to remedy their prior *de jure* segregation by classifying individual students based on their race. The limitation of this power to instances where there has been *de jure* segregation serves to confine the nature, extent, and duration of governmental reliance on individual racial classifications.
>
> The cases here were argued on the assumption, and come to us on the premise, that the discrimination in question did not result from *de jure* actions. And when *de facto* discrimination is at issue our tradition has been that the remedial rules are different. The state must seek alternatives to the classification and differential treatment of race, at least absent some extraordinary showing not present here.

551 U.S. at 794-96 (citations omitted).

Despite the record of past *de jure* segregation affecting these school districts, using race-based classifications in student assignment now, in 2012, requires both an existing judicially crafted remedy to cure that past *de jure* evil and a current need to continue that race-based classification for the specific remedial purpose. The stipulations were never judicial remedies, and both LRSD and NLRSD are completely unitary, while PCSSD is unitary in the area of student assignments. The race-based limitations of the

stipulations, which prohibit African-American students in LRSD from competing for all the seats in magnet schools, are illegal and unenforceable in equity.

IV. THIS COURT LACKS JURISDICTION OVER CHARTERS

In *Knight*, as here, a party to the settlement asked this Court to enforce the settlement with respect to a matter on which the settlement was silent. This Court issued the requested relief, and the Eighth Circuit reversed, stating:

> These arguments have nothing to do with the settlement agreement and depend on state law. Likewise, the suggestion on the other side that state law forbids strikes by public employees raises no issue within the particular competence of the federal court. . . . The jurisdiction of the District Court to enforce that agreement does not include the authority to resolve other disputes among the parties or to adjust their legal rights and responsibilities arising from other sources. No independent basis of jurisdiction has been suggested. In these circumstances, and especially in view of the fact that an earlier-filed case is now pending in the state courts, we think it best to leave issues of state law and contract interpretation to those courts.

112 F.3d 954-55.

The pendency of state-court litigation over the issue in *Knight*, while mentioned in the opinion, was not germane to the question of federal jurisdiction, which exists or not on its own footings, not on the basis of whether litigation occurs in state court. *Knight* holds that a dispute among the parties to this case concerning matters not addressed in the settlement

agreement does not belong in federal court. That is the case here, and this Court should deny the requested relief for this additional reason.

V. MOOTING OF THE MOTION AS TO CHARTERS

The Charter Intervenors are mindful of this Court's limitation on their intervention. The limitation was based on the belief that the parties to the case would soon ventilate the constitutional issues raised by *Parents Involved* as part of LRSD's requested *Grutter* Review. Not surprisingly to the Charter Intervenors, no party has attempted to raise the issues. They have been apparent for five years, since *Parents Involved* was decided in 2007, and no party has aired them yet.

If the stipulations are illegal race-based classification of individuals in violation of the Equal Protection Clause, as the Charter Intervenors believe they are, then the motion to enforce as to the Charter Intervenors would be mooted by a determination to this effect. The motion to enforce respecting the open-enrollment public charter schools depends on the continued viability of the stipulations, and their demise would moot the motion. Similarly, if the State were to act on the Eighth Circuit's invitation to seek to terminate the settlement agreement in its entirety, the resolution of that question could likewise moot the motion with respect to the Charter Intervenors.

Resolution of the motion to enforce against the rights and interests of the Charter Intervenors could create a number of difficult and costly issues for them and the State and could create uncertainty concerning present or future public education and attendance in Pulaski County. More than 4,300 children currently patronize open-enrollment public charter schools in Pulaski County, an equal number are on waiting lists for additional seats as they are created or become open, and Arkansas Virtual Academy educates another 500. Many of these children came from private, parochial and home schools rather than LRSD, and a number reside outside Pulaski County—in this manner they have attempted to avoid the swirling tides of LRSD while seeking a public education within Pulaski County and Little Rock.

For these reasons, if the motion to enforce is not summarily denied as to charters, the Charter Intervenors respectfully request that this Court consider and, if appropriate, decide to resolve the pending *Grutter* Review motion and a potential termination motion before resolving the merits of the motion to enforce with respect to open-enrollment public charter schools.

CONCLUSION

Open-enrollment public charter schools are not addressed by the M-M and magnet stipulations or the 1989 settlement. In any event, LRSD has used the Charter School Act itself to open charter schools and to approve two of

the open-enrollment public charter schools that it now attacks. LRSD and the Joshua Intervenors cannot prove their allegations. This Court should summarily deny the motion to enforce.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on March 12, 2012, I electronically filed the forgoing 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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