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

LITTLE ROCK SCHOOL DISTRICT	PLAINTIFF
v. 4:82-cv-00866-DPM	
PULASKI COUNTY SPECIAL SCHOOL DISTRICT NO. 1, ET AL.	DEFENDANTS
MRS. LORENE JOSHUA, ET AL.	INTERVENORS
KATHERINE KNIGHT, ET AL.	INTERVENORS
LIGHTHOUSE ACADEMIES OF ARKANSAS, INC., ET AL.	INTERVENORS

RESPONSE TO STATEMENT OF MATERIAL FACTS NOT IN DISPUTE IN SUPPORT OF LRSD'S AND JOSHUA'S MOTION FOR SUMMARY JUDGMENT

The Charter Intervenors submit this response to the statement of material facts not in dispute in support of LRSD's and Joshua's motion for summary judgment, filed as document No. 4706 on February 14, 2012.

I. The Consent Decree. (There was no consent decree containing the M-M stipulation, the magnet stipulation, or the 1989 settlement agreement, as set forth in detail in the following paragraphs.)

A. M-M Stipulation

1. Denied. Neither the Joshua Intervenors nor the Knight Intervenors agreed to the M-M stipulation. The Charter Intervenors do not deny the terms of the M-M stipulation as attached as Ex. D to this Court's opinion at 659 F.Supp. 363 (E.D. Ark. 1987). The M-M stipulation is an unlawful agreement because government actors subject to the Fourteenth Amendment agreed to a racial quota. *Parents Involved In Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 720-21 (2007) (four-justice plurality opinion of the Chief Justice, which was joined in as to this holding by Justice Kennedy, *id*. at 783). The M-M stipulation was not decreed as a judicial remedy for *de jure* segregation.

2. The Charter Intervenors admit the terms of the M-M stipulation and deny all other facts in this paragraph. The M-M stipulation is an illegal contract.

3. The Charter Intervenors admit the terms of the M-M stipulation and deny all other facts in this paragraph. The M-M stipulation is an illegal contract.

4. The Charter Intervenors admit the terms of the M-M stipulation and deny all other facts in this paragraph. The M-M stipulation is an illegal contract.

5. The Charter Intervenors admit the terms of the M-M stipulation and deny all other facts in this paragraph. The M-M stipulation is an illegal contract.

6. The Charter Intervenors admit the terms of the M-M stipulation and deny all other facts in this paragraph. The M-M stipulation is an illegal contract. The financial incentives and funding costs referred to in the M-M stipulation in 1986 are based on long since abandoned funding formulas.

7. Denied. The Charter Intervenors admit the terms of the M-M stipulation and deny all other facts in this paragraph. The Eighth Circuit's 1985 *en banc* opinion predates the M-M stipulation. The Eighth Circuit's 1985 *en banc* opinion did not impose the M-M stipulation as a judicial remedy for *de jure* segregation. The quote from this Court's 1996 opinion at 934 F.Supp. 299, 301 references the 1989 settlement agreement rather than the M-M stipulation. The M-M stipulation is an illegal contract.

B. Magnet Stipulation.

8. Denied. The Charter Intervenors admit the terms of the magnet stipulation as attached as Ex. A to this Court's opinion at 659 F.Supp. 363 (E.D. Ark. 1987). The Knight Intervenors did not agree to the magnet stipulation. 659 F.Supp. at 365. The Joshua Intervenors did not sign the magnet stipulation but "were in general agreement with its terms." *Id*. The

magnet stipulation is an unlawful agreement because government actors subject to the Fourteenth Amendment agreed to a racial quota. *Parents Involved*, 551 U.S. at 720-21 (four-justice plurality opinion of the Chief Justice, which was joined in as to this holding by Justice Kennedy, *id*. at 783). The magnet stipulation was not decreed as a judicial remedy for *de jure* segregation.

9. The Charter Intervenors admit the terms of the magnet stipulation and deny all other facts in this paragraph. The magnet stipulation is an illegal contract.

10. The Charter Intervenors admit the terms of the magnet stipulation and deny all other facts in this paragraph. The magnet stipulation is an illegal contract.

11. The Charter Intervenors admit the terms of the magnet stipulation and deny all other facts in this paragraph. The magnet stipulation is an illegal contract.

12. Admitted. The magnet stipulation is an illegal contract.

13. Denied. The Eighth Circuit's 1984 decision in *Liddell v. State of Missouri*, 731 F. 2d 1294, preceded the magnet stipulation by three years. The best statement of the purpose of the stipulation magnet schools is set

forth in the magnet stipulation itself and in this Court's opinion at 659 F. Supp., at 365. The magnet stipulation is an illegal contract.

C. The 1989 Settlement Agreement.

14. Denied. The 1989 settlement agreement speaks for itself. The 1989 settlement agreement did not incorporate the M-M or magnet stipulations.

15. Denied. The 1989 settlement agreement did not incorporate by reference the interdistrict desegregation plans of the district or the interdistrict desegregation plan. Further, after the State was dismissed with prejudice as a party to this action by order dated January 18, 1991, the school districts remaining in the case unilaterally altered their intradistrict and interdistrict desegregation plans without agreement of the State.

16. Denied. The 1989 settlement agreement speaks for itself. Its purpose was to permit continued state funding until LRSD achieved unitary status, which the State did. LRSD Ex. 3 at pp. 1, 6-7, 18-19.

17. The Charter Intervenors agree that the 1989 settlement agreement deals almost exclusively with funding issues and the plans are mentioned incidentally, but they deny all other facts asserted in this paragraph.

18. Denied. While the 1989 settlement agreement does not include a termination provision, that omission does not mean that it is a perpetual agreement. A perpetual agreement would by definition include a term of perpetuity, and the 1989 settlement agreement lacks any such term. In the absence of a material provision concerning termination, courts imply a reasonable term based on an interpretation of the contract. Restatement, 2d, Contracts, §204; *Zierinski v. Pabst Brewing Co.,* 463 F.3d 615, 620 (7th Cir. 2006); but see *Cottrell v. Cottrell*, 332 Ark. 352 (1998) (employment agreement in writing but lacking a definite duration was terminable at will under the at-will employment doctrine in Arkansas; Court refused to imply a term providing for a definite duration).

19. Admitted. The 1989 settlement agreement speaks for itself.

20. Admitted.

21. Admitted.

22. Admitted. However, LRSD and the Joshua Intervenors later unilaterally changed their efforts to remediate achievement disparities between black and white students and altered the material terms of the 1989 settlement agreement in this respect in so doing. As this Court found in the following order:

> The LRSD and Joshua have agreed that, if approved, the proposed Plan:

> shall supersede and extinguish all prior agreements and orders in the *Little Rock School District v. Pulaski County Special School District,* U.S.D.C. No. LR-C-82-866, and all consolidated cases related to the desegregation of the Little Rock School District ("LRSD") with the following exceptions:
>
> a. The Pulaski County School Desegregation Case Settlement Agreement as revised on September 28, 1989 ("Settlement Agreement");
>
> b. The Magnet School Stipulation dated February 27, 1987;
>
> c. Order dated September 3, 1986, pertaining to the Magnet Review Committee;
>
> d. The M-to-M Stipulation dated August 26, 1986; and,
>
> e. Orders of the district court and court of appeals interpreting and enforcing sections a. through d. above to the extent not inconsistent with this Revised Plan.
>
> *Based upon this provision, this Court considers the LRSD Proposed Revised Plan an entirely new consent decree or settlement agreement between the LRSD and Joshua.*

April 10, 1998 Memorandum Opinion and Order at 3 (docket no. 3144) (emphasis supplied), *quoted in* 227 F.Supp.2d 988, 1017 (E.D. Ark. 2002). While LRSD and the Joshua Intervenors tried to retain their rights under the 1989 Settlement Agreement even as they unilaterally changed their desegregation plans, the unilateral change was a material breach of their obligations under the 1989 Settlement Agreement.

Further, both LRSD and the Joshua Intervenors admitted in requesting this unilateral change that they could not achieve the reduction in the

achievement gap that they now attempt to hold the State of Arkansas liable to achieve under the 1989 Settlement Agreement. "One such group of potentially unreachable goals cited by Judge Wright were the 'goals in the 1990 Plan regarding achievement disparities [which] may never be met regardless of the effort put forth by LRSD.' *Id.*" *Id.* at 1018. The fact that LRSD and the Joshua Intervenors abandoned this goal themselves discharges the State from its identical obligation and furnishes a complete defense to the motion to enforce on this point.

23. Denied. The 1989 settlement agreement speaks for itself.

24. Denied. The 1989 settlement agreement speaks for itself.

25. Denied. The docket in this action shows there was no order of this Court dated April 29, 1992. LRSD and the Joshua Intervenors apparently are referring to an order of this Court dated May 1, 1992, in which this Court approved changes to the intradistrict and interdistrict desegregation plans previously submitted to this Court and approved. In particular, the May 1, 1992 order of this Court had no relation to the M-M stipulation, the magnet stipulation, or the 1989 settlement agreement. The May 1, 1992 order of this Court is attached and incorporated by reference as Exhibit A to the Charter Intervenors' Response.

Neither the M-M stipulation, the magnet stipulation, nor the 1989 settlement agreement was ever adopted by this Court as a consent decree. They did not contain any judgment by this Court of actions required to remedy any effects of *de jure* segregation. The M-M stipulation and the magnet stipulation are illegal contracts.

The State of Arkansas was dismissed with prejudice as to a party to this action on January 18, 1991, more than one year before this Court entered its May 1, 1992 order. The May 1, 1992 order therefore was not binding on the State of Arkansas.

26. Denied. The State of Arkansas was a constitutional violator as determined by this Court and the Eighth Circuit, but there is no consent decree to which the State of Arkansas is a party, and the State of Arkansas has no continuing obligations pursuant to any judgments of this Court. The 1989 settlement agreement is not a judgment of this Court.

27. Denied. The State of Arkansas was a constitutional violator as determined by this Court and the Eighth Circuit, but there is no consent decree to which the State of Arkansas is a party, and the State of Arkansas has no continuing obligations pursuant to any judgments of this Court. The 1989 settlement agreement is not a judgment of this Court.

28. Denied. LRSD implemented its 1998 revised intradistrict desegregation plan and was declared completely unitary in 2007.

29. Denied. There is no consent decree to which the State of Arkansas is a party, and LRSD has been declared unitary and fully released from its obligations to remedy any constitutional wrong in this action. LRSD remains a party to the 1989 settlement agreement and has breached the 1989 settlement agreement in several material respects.

II. Arkansas Charter Schools Act.

30. Admitted. For more than a decade after the Charter Schools Act was in effect, LRSD raised no question concerning whether the Act or the actions of the State of Arkansas pursuant to the Act violated any provision of the 1989 settlement agreement.

Further, LRSD *affirmatively used* the Charter Schools Act (1) to open and operate conversion charter schools and (2) to consent to the applications of Dreamland Academy and SIATech to operate open-enrollment public charter schools within the territory served by LRSD. Indeed, LRSD consented to the application of SIATech even *after* LRSD filed this motion to enforce. See Response Exs. B and C, LRSD letter dated September 24, 2010 supporting open-enrollment charter application of SIATech, and

Minutes of September 23, 2010 board meeting of LRSD discussing and approving the application.

31. Admitted.

32. Denied. Ark. Code Ann. § 6-23-103 correctly defines open-enrollment public charter schools and who may operate them.

33. The facts are true, but the statutory citation is incorrect.

34. Admitted in part. Public school districts are permitted to operate conversion and limited charter schools under the Arkansas Charter Schools Act. LRSD has applied for and operated conversion charter schools under the Arkansas Charter Schools Act.

35. The Charter Intervenors admit that the Charter Schools Act requires an applicant for an open-enrollment public charter school to submit its application to the school board for the traditional public school district in which the open-enrollment public charter school would be located, but it denies any other facts inconsistent with this response.

36. Admitted. In fact, the board of directors of LRSD has twice consented to applications for open-enrollment public charter schools to be located in the territory covered by LRSD. These two open enrollment public charter schools, Dreamland and SIATech, are among the open-enrollment public charter schools that LRSD now claims operate in violation of the

1989 settlement agreement. LRSD consented to SIATech's application *after* filing the instant motion to enforce. Response Exs. B and C.

37. Denied. LRSD and the Joshua Intervenors misstate the law. While LRSD may argue against applications for open-enrollment public charter schools to be located within LRSD, the State Board has no authority to approve a charter with or without conditions.

38. Denied. Although charters may include provisions concerning the matters described in this paragraph, the State Board is not authorized to insert or include conditions concerning these matters into a charter.

39. Admitted. Further, section III.M on page 18 of the 1989 settlement agreement contains an agreement of LRSD and the Joshua Intervenors that the State of Arkansas through the Arkansas Department of Education ("ADE") may conduct such an analysis in approving the construction of a new school or a major expansion of a school, and this paragraph of the 1989 settlement agreement forbids the State of Arkansas from approving schools *only* in counties *contiguous to* Pulaski County, not within Pulaski County.

40. Denied. The charter application as approved by the State Board serves as the terms of the contract between the open-enrollment public

charter school and the Arkansas State Board of Education. The State Board is not permitted to insert conditions into an application.

III. Open-Enrollment Charter Schools in Pulaski County.

41. Denied. Due to closings, there are 17 currently operating open-enrollment public charter schools in Arkansas, but the State Board has authorized more.

42. Admitted.

43. Denied. LRSD did object to nine applications for open-enrollment public charter schools in Pulaski County, but it consented to two open-enrollment public charter schools in the area served by LRSD. Court approval is not required.

44. Denied. There is a state statute limiting the number of open-enrollment public charter schools that may be authorized in the State of Arkansas, and therefore in Pulaski County.

45. Admitted.

46. Denied. This is a principle of law, like the legal principle that the Equal Protection Clause of Fourteenth Amendment prohibits public school districts from agreeing to or enforcing racial quotas in the absence of a narrowly tailored judicial remedy necessary to redress *de jure* segregation. *Parents Involved, supra.*

47. Denied. While the Charter Intervenors do not dispute Mr. Kimbrell's deposition testimony, Mr. Kimbrell has been Commissioner of the Arkansas Department of Education for two or three years, is not a member of the State Board, and is not competent to testify to the knowledge of individual members of the State Board in casting votes to approve or disapprove applications for open-enrollment public charter schools.

48. Denied. There is no consent decree. The cited exhibits do not establish this proposition of fact. LRSD and the Joshua Intervenors have participated in agreements after the dismissal of the State of Arkansas with prejudice from this action that have changed the original desegregation plans and obligations of LRSD and the other districts in this action.

In addition, LRSD has, as a board policy and a policy implemented by TNT ('transfer-no-transportation') voluntary transfers, a system of choice that permits students within LRSD who have means of private transportation to transfer from one school to another. Accordingly, LRSD maintains a system that permits students of any race to transfer from Hall High School to Central High School if they can provide their own private transportation. LRSD's own choice systems are inconsistent with this asserted proposition of fact.

49. Admitted. Students from anyplace in Arkansas may attend open-enrollment public charter schools in Pulaski County.

50. Denied. Attendance at stipulation magnet schools is limited based on the race of individual students so that thousands of African American students in LRSD cannot attend magnet schools in LRSD. LRSD Motion to Enforce Ex. 66. This is an illegal contract and is wholly unlike the choice permitted for students of all races to attend open-enrollment public charter schools.

51. Denied. Participation in the M-M program is limited based on the race of individual students. African American students in PCSSD cannot attend schools in LRSD, but African American students in LRSD can attend schools in PCSSD. This is an illegal contract and is wholly unlike the choice permitted for students of all races to attend open-enrollment public charter schools.

52. Admitted in part. Because of the race-based limitations of the M-M and magnet stipulations, an African American student in LRSD may be able to attend an open-enrollment public charter school located in LRSD but not a magnet school located in LRSD. Similarly, a Caucasian student in LRSD may be able to attend an open-enrollment public charter school located in LRSD but not make an M-M transfer to a school in PCSSD.

53. Denied. This paragraph and its subparts are pure speculation in asserting that students who attend open-enrollment public charter schools in Pulaski County might otherwise participate in the magnet or M-M programs. LRSD has no evidence to support this claim. Students residing in LRSD and attending open-enrollment public charter schools in Pulaski County have the option to attend a private school, a parochial school, home school, or physically move out of the LRSD rather than attend schools in LRSD. Decades of history since 1989 show that people have exercised these options in overwhelming numbers. LRSD offers no proof whatsoever for the reasons why any student has chosen not to attend schools in LRSD. LRSD's assertions are based on speculation without evidence.

As stated, the magnet and M-M stipulations contain race-based limitations that exclude individuals from participating in the programs based entirely on their race, while the open-enrollment public charter schools in Pulaski County suffer no such illegal limitation. Thus, students who attend open-enrollment public charter schools in Pulaski County may *not* be able to attend a magnet school or make an M-M transfer, depending on the race of the individual student. Ironically, and shamefully, it is thousands of the very African American students in LRSD victimized by past *de jure* segregation

who are prevented by racial quota and waiting lists from attending magnet schools but may attend any open-enrollment public charter school.

In addition, the Charter Intervenors adopt and join in the response of the State of Arkansas to paragraph 53 and its subparts.

54. Denied. The State Board has approved applications for open-enrollment public charter schools in Pulaski County for eStem that include obligations that the open-enrollment public charter schools will provide student transportation to and from school.

55. Denied. While it is true that no open-enrollment public charter school in Pulaski County uses yellow school buses or contracts with Laidlaw Transportation or its successor in Pulaski County to transport children to and from school, open-enrollment public charter schools in Pulaski County do in fact provide transportation funding for their children. Indeed, buying an $18 monthly bus pass on Central Arkansas Transit for student transportation to and from school may be a far more economical use of state funds than the means used by LRSD. Further, transporting children on Central Arkansas Transit buses is safer for children than riding traditional yellow school buses within LRSD. *LRSD Ex.93*, *Bacon Dep. p. 35-36* eStem and Academics Plus both spend state funds for student transportation to and from school, and LISA Academy will begin doing so in the fall of 2012.

56. Denied. Based on the evidence in this case, eStem and Academics Plus both provide transportation to and from school to students who want it, and Little Rock Preparatory Academy experiences no problems with transportation of its students. *LRSD Ex. 93, Bacon Dep. p.33* The disputed factual assertion of LRSD and the Joshua Intervenors is based on inadmissible opinions that do not involve the facts of this case.

57. Denied. In defending this motion to enforce, the State Board and ADE have evaluated the cumulative impact of open-enrollment public charter schools on the magnet and M-M programs and traditional public schools in Pulaski County. As LRSD and the Joshua Intervenors admit in their motion for summary judgment and the supporting papers, the total impact on magnet schools cannot exceed 331 students, and the total impact on M-M students cannot exceed 20 students. In fact, as set forth by the State of Arkansas in response to the factual proposition in paragraph 53, the actual effect is far smaller.

Open-enrollment public charter schools in Little Rock and in Pulaski County have begun to reverse the decades-long trend of population movement away from Pulaski County into surrounding counties. Now, students from surrounding counties have—and take advantage of—a new

and attractive option to participate in public education in schools located in Pulaski County. *LRSD Ex. 93, Bacon Dep. p.90*

All remaining factual assertions are directed to issues other than those that confront the Charter Intervenors, and the Charter Intervenors are not required to respond to them. To the extent any response to these assertions may be required, the assertions are denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on March 9, 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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