**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**

**BRIEF IN SUPPORT OF**
**MOTION FOR RELEASE FROM 1989 SETTLEMENT AGREEMENT**

The Arkansas Department of Education (ADE), by and through its attorneys, Attorney General Dustin McDaniel and Assistant Attorney General Scott P. Richardson, state for their Motion for Release from 1989 Settlement Agreement:

## INTRODUCTION

For more than two decades the 1989 Settlement Agreement has imposed obligations on the State of Arkansas in support of certain unitary status efforts of the Pulaski County school districts. In those two decades the education system in Arkansas and Pulaski County has changed dramatically. These changes are sufficient to warrant release of the State from the 1989 Settlement Agreement. Moreover, the State has complied with the 1989 Settlement Agreement for over two decades. Pursuant to the Agreement and subsequent court orders, the State has disbursed to the Districts more than one billion dollars ($1,000,000,000). At the end of this school year State disbursements will exceed $1.1 billion dollars. The Little Rock and North Little Rock School Districts are fully unitary. PCSSD is partially unitary; in particular it is unitary with respect to student assignments to schools. It is time to end the 1989 Settlement

Agreement and the desegregation litigation that has embroiled Pulaski County and the State of Arkansas for nearly sixty years.

**ARGUMENT**

Federal Rule of Civil Procedure 60 provides as follows:

> On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
>
> (6) any other reason that justifies relief.

Fed. R. Civ. Pro. 60(b)

Desegregation decrees such as the 1989 Settlement Agreement were never intended to continue forever. *Board of Education of Oklahoma City Public Schools v. Dowell,* 498 U.S. 237, 248, 111 S.Ct. 630, 637 (1991). They are "a temporary measure to remedy past discrimination." *Id.* "The legal justification for displacement of local authority by an injunctive decree in a school desegregation case is a violation of the Constitution by the local authorities." *Id*. A desegregation decree should not continue any longer than necessary to remedy the identified constitutional violation; i.e. to remedy the effects of past discrimination addressed by the consent decree "to the extent practicable." *Id.; see also Milliken v. Bradley*, 433 U.S. 267, 97 S.Ct. 2749 (1977)(*Milliken II*). Once the constitutional violation is remedied, control of children's education must be returned to local school officials and the state. *Id.*

Even where not all of the constitutional violations are remedied, a court should relinquish control over areas where no violation of the Constitution exists. Federal courts have discretion to partially withdraw supervision over a school system and incrementally return control to the local governments. *Freeman v. Pitts*, 503 U.S. 467, 112 S.Ct. 1430 (1992). "By withdrawing control

over areas where judicial supervision is no longer needed, a district court can concentrate both its own resources and those of the school district on the areas where the effects of *de jure* discrimination have not been eliminated and further action is necessary in order to provide real and tangible relief to minority students." *LRSD v. PCSSD*, 237 F.Supp.2d 988, 1028 (E.D. Ark. 2002)[1] *quoting Freeman*, 503 U.S. at 493, 112 S.Ct. 1430. Partial withdrawal of supervision over a plan also fulfills the Court's duty to return control of the areas of a school system that are operating in compliance with federal law back to the the patrons and taxpayers supporting the schools. *Freeman*, 503 U.S. at 490 ("Returning schools to the control of local authorities at the earliest practicable date is essential to restore their true accountability in our governmental system.").

With regard to the State, there are serious constitutional questions about federal-state relations that must be considered as well. This case and the 1989 Settlement Agreement are subject to constitutional limitations on the federal court's judicial powers and the 1989 Settlement Agreement must be interpreted according to contract principals. In the context of institutional reform litigation against a state, a consent decree and its enforcement against a state may only extend to violations of federal law. *Horne v. Flores*, 557 U.S. 433, 129 S.Ct. 2579 (2009). Consent decrees do not strip states of their sovereignty, and federal courts must exercise caution so that enforcement of a consent decree does not displace the democratic governance of a state over its institutions. *Id*.; *Frew v. Hawkins*, 540 U.S. 431, 124 S.Ct. 899 (2004). These constitutional rules recognize that "[f]ederal courts operate according to institutional rules and

[1] Because of the number of opinions in this case this brief will refer to the opinions by year of decision. For example, Judge Wilson's comprehensive opinion from 2002 finding the LRSD unitary will be referred to as *LRSD 2002*, 237 F.Supp.2d 988.

procedures that are poorly suited to the management of state agencies." *Angela R. v. Clinton*, 999 F.2d 320, 325 (8th Cir. 1993).

> Injunctions of this sort bind state and local officials to the policy preferences of their predecessors and may thereby "improperly deprive future officials of their designated legislative and executive powers." *Frew v. Hawkins*, 540 U.S. 431, 441, 124 S.Ct. 899, 157 L.Ed.2d 855 (2004). . . . States and localities "depen[d] upon successor officials, both appointed and elected, to bring new insights and solutions to problems of allocating revenues and resources." *Frew, supra*, at 442, 124 S.Ct. 899. Where "state and local officials ... inherit overbroad or outdated consent decrees that limit their ability to respond to the priorities and concerns of their constituents," they are constrained in their ability to fulfill their duties as democratically-elected officials.

*Horne*, 129 S.Ct. 2579, 2594.

In *Horne*, the Supreme Court reaffirmed that courts "must take a flexible approach to Rule 60(b)(5) motions addressing [institutional reform] decrees." *Horne*, 129 S.Ct. at 2594-95 (internal quotations omitted). This "flexible approach" requires courts to "remain attentive to the fact that federal court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate federal law or does not flow from such a violation." *Id.* at 2595. A court evaluating release of a long-standing, institutional reform decree must apply "a flexible standard that seeks to return control to state and local officials as soon as a violation of federal law has been remedied." *Id.*

This Court's decisions regarding whether to modify its consent decree are reviewed for abuse of discretion. *LRSD v. PCSSD, et al*., 451 F.3d 528, 531 (8th Cir. 2006). However, once a party seeking relief from a consent decree establishes that changed circumstances warrant relief, "a court abuses its discretion when it refuses to modify an injunction or consent decree in light of such changes." *Horne*, 129 S.Ct. 2579, 2593 quoting *Agostini v. Felton*, 521 U.S. 203, 117 S.Ct. 1997 (1997).

The *Horne* opinion by the United States Supreme Court is of particular importance because in it, the Court made clear that plan compliance is not the touchstone of consent decree release decisions. *Horne*, 129 S.Ct. 2579. In *Horne*, a District Court entered a number of injunctions against the State of Arizona to change the way the state funded English Language Learner ("ELL," also sometimes called "English as a Second Language" or "ESL") programs to comply with federal law. *Id.* at 2590. The case had a fairly complicated procedural history in part because of apparent disagreements among executive branch officers of the State (including the Governor and Attorney General) and the Arizona Legislature. *Id.* Ultimately, the Arizona Legislature requested relief from the prior injunctive orders under Federal Rule of Civil Procedure 60(b)(5). The District Court refused to grant relief, holding that Arizona had not complied with the court's prior decree and failed to show changed circumstances. *Flores v. Arizona*, 480 F.Supp.2d 1157 (D.Ariz. 2007). The Ninth Circuit affirmed. *Flores v. Arizona*, 516 F.3d 1140 (9th Cir. 2008). In doing so, the Ninth Circuit dealt directly with Arizona's argument that the court should "look away from Arizona's attempt to comply [with the prior decrees] – HB 2064 – and turn instead to other factors – a generalized increase in state funding, changes in the management of [the local school district], and passage of the No Child Left Behind Act of 2001." *Id.* at 1167. The Ninth Circuit rejected "the novel proposition that the judgment need no longer be complied with." *Id.* The Supreme Court, however, reversed the Ninth Circuit and clarified that this proposition was not novel at all but, in fact, represents the state of the law.

**A. Changed Circumstances in this Case Support Release of the State**

The 1989 Settlement Agreement has been in place for over two decades. When this case began in the 1980s, Arkansas typically ranked poorly among education systems in the United States. Today, Arkansas has greatly advanced in the quality of its education system. The state of

education has changed significantly in many ways and at all levels: federal, state, and school district.

*1. LRSD and NLRSD are fully unitary and PCSSD is nearly there.*

The most significant change in this case is the unitary status of the three Pulaski County school districts. The purpose and goal of the 1989 Settlement Agreement is set out in its first paragraph: "achieving unitary school systems in these three districts which are free from the vestiges of racial discrimination." 1989 Settlement Agreement p. 1; see also Memorandum Brief in Support of Motion to Enforce 1989 Settlement Agreement (DE 4442), p. 11, quoting Order (DE 1442) p. 3-4 (identifying goal of the Settlement Agreement as "the mutual goal of constitutionally desegregated public school systems."). This goal has been achieved in large measure. LRSD has been unitary in the majority of its operations since 2002, and it has been fully unitary since 2007. *LRSD 2009*, 561 F.3d 746 (8th Cir. 2009). NLRSD was declared fully unitary except for a documentation requirement in staff recruitment in 2010 (although the NLRSD has been understood to have been fully unitary long before then). Findings of Fact and Conclusions of Law, DE # 4507. The Eighth Circuit recently confirmed that NLRSD is fully unitary. *Little Rock School District v. State of Arkansas*, 664 F.3d 738, 748 (8th Cir. 2011). PCSSD is unitary in its operations except for (1) one-race classroom reporting; (2) advanced placement, gifted and talented and honors programs; (3) discipline; (4) school facilities; (5) scholarships; (6) special education; (7) staff; and (8) student achievement.

As to the area most significant to the programs of the 1989 Settlement Agreement (student assignments to schools) all three districts are fully unitary. About two-thirds of the required desegregation payments go to support the magnet and M-to-M student-transfer programs. The Eighth Circuit ordered these programs to address the perceived flow of white

students from LRSD into NLRSD and PCSSD, and black students from PCSSD and NLRSD into LRSD. *LRSD 1985*, 778 F.2d 404 (8th Cir. 1985); see also DE 4557, State's Response to Court's Order Requesting Briefing on the M-to-M Program Funding, filed June 27, 2011. In short, each of the school districts is now unitary as to student assignments to schools, and there is no remaining "vestige of segregation" with regard to how students are assigned to schools. Therefore, these student transfer programs have remedied the unconstitutional condition to which they were directed.

As explained in other filings by the ADE in this case, the fact that all three districts are unitary as to assignment of students to schools means that the State's obligations to fund the Magnet and M-to-M programs should end. See DE 4631, Response to Order (DE 4608) Soliciting Views on Periodic Review of 1989 Settlement Agreement filed Sept. 30, 2011; DE 4557 Response to Court's Order Requesting Briefing on the M-to-M Program Funding, filed June 27, 2011. The State incorporates these briefs by reference. Fed. R. Civ. Pro. 10(c).

2. *The State Payments Under the 1989 Settlement Agreement do not Resolve Any Remaining Desegregation Obligations*

Under the 1989 Settlement Agreement the State pays money to each of the three school districts in Pulaski County. The total amount of money provided to these three school districts as a result of the 1989 Settlement Agreement has now exceeded $1.1 billion. Originally, this money included funds for "compensatory education" as well as interdistrict transfers under the Magnet and M-to-M programs. The compensatory education payments ended in the 1996-97 school year. The State's payments are now over $70 million each year, or $6 million each month. ADE Ex. 1, Summary of State Payments.

These funds are unrestricted and may be used by the districts for any purpose. *Little Rock School Dist. v. Pulaski County Special School Dist.*, 921 F.2d 1371, 1390 (8th Cir. 1990). LRSD uses the magnet funding (about $15 million per year) to fund the six stipulation magnet schools; the districts use the rest of the funding as additional general, unrestricted revenue. In May 2011, Judge Brian Miller acted on what many in the State have recognized for years: this flow of money incentivizes delay and litigation. When one compares the desegregation obligations that remain in this case (i.e. the areas in which PCSSD was not declared unitary) and the State's obligations under the 1989 Settlement Agreement, there is no convergence. That is, the unitary status of the PCSSD does not depend on maintaining additional State funding to the stipulation magnet schools, M-to-M transfers, or teacher retirement and health insurance payments. PCSSD can attain unitary status without those programs. Also, PCSSD as a district in fiscal distress is subject to the control of the State in a way that it has not been before. The State and the ADE have made PCSSD's compliance with Plan 2000 one of their top priorities. The ADE will continue to hold PCSSD's progress toward unitary status as a high priority and will assist PCSSD in that effort through monitoring and technical assistance as needed without regard to whether the State remains bound to the 1989 Settlement Agreement.

*3. Arkansas Laws and Regulations Have Changed Significantly Since 1989*

The education system in Arkansas has changed significantly since 1989 in ways that increase support and accountability for students in the State, including low performing students. In 1999, the General Assembly created the Arkansas Comprehensive Testing, Assessment, and Accountability Program ("ACTAAP"). Act 999 of 1999. ACTAAP and the State Board regulations implementing it formed a comprehensive system that provides increased academic standards, student assessments, professional development for educators, and accountability for

schools. Ark. Code Ann. § 6-15-402. Since it was enacted in 1999, ACTAAP has been enhanced several times, most significantly in 2003 and 2004 when much of the State's education system was enhanced by the General Assembly with the Quality Education Act of 2003 (Act 1467 of 2003) and other Acts passed by the General Assembly at that time. *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)("We hold that the General Assembly has now taken the required and necessary legislative steps to assure that the school children of this state are provided an adequate education and a substantially equal educational opportunity. A critical component of this undertaking has been the comprehensive system for accounting and accountability, which has been put in place to provide state oversight of school-district expenditures.")

Under the authority provided by ACTAAP, the Quality Education Act, and the State Board regulations, the State

- Sets rigorous curriculum standards for schools;
- Provides validated assessments to measure each student's understanding of State curriculum standards (i.e. academic performance);
- Requires Academic Improvement Plans (AIPs) for each student who does not adequately perform on the State assessments;
- Provides training to educators (professional development) concerning state curriculum, assessments, and student interventions; and
- Holds school districts, schools, and educators accountable for meeting state standards.

All of these efforts are directly related to improving academic quality and outcomes for all students in Pulaski Count and in the State of Arkansas, regardless of race.

Arkansas Consolidated School Improvement Plan (ACSIP): Implemented in 1999, ACTAAP requires every school and school district in the State to adopt a comprehensive, researched-based plan through a team planning process. The ACSIP must set out the school and district's plan to support educational opportunities for all students. Included within that planning process the school and district must also identify within the ACSIP groups of students who are low-performing and provide a plan by which the school and school district will address the academic needs of those students. Finally, the school and school district must explain in the ACSIP how the programs and strategies will be funded in order to provide the identified services. The goal of the ACSIP planning process is "to ensure that all students have an opportunity to obtain an adequate education and demonstrate proficiency on all portions of the state-mandated augmented, criterion-referenced, or norm-referenced assessments." Ark. Code Ann. § 6-15-426(e). ACSIP was adopted in 2003 (Act 1467 of 2003 (Reg. Sess.) sec. 16) and was expanded in 2007.

Academic Improvement Plans ("AIPs") were first introduced with the ACTAAP in 1999. Act 999 of 1999 (Reg. Sess.) sec. 3, 7; codified at Ark. Code Ann. § 6-15-419(3) and 6-15-420(e). AIPs must be drafted for each student not performing at a proficient level (i.e. grade level) on the benchmark exam. Ex. 3, Rules Governing the Arkansas Comprehensive Testing, Assessment and Accountability Program and the Academic Distress Program (hereinafter "ACTAAP Rule") § 7.0. State standards require the AIP to be a detailed document based on data about the areas where the student is below proficiency, what interventions will be used to

improve the student's learning, and how those interventions will be used by everyone involved to improve the student's academic performance.

Arkansas Public School Computer Network (APSCN): The APSCN program provides a computerized database (paid for by the State, and free to school districts) that allows computerized gathering and monitoring of district financial data and a vast array of data on students. Ark. Code Ann. § 6-11-128. APSCN began in 1991. Act 4 of 1991 (1st Ext. Sess.). The program has been substantially expanded since that time. Act 35 of 2003 (2nd Ext. Sess.) sec. 3, codified at Ark. Code Ann. §§ 6-15-402(a)(4); 6-15-419(21); 6-15-435(2)(A). Particularly with the enhancements to APSCN in 2003, schools, school districts, and parents have available a wide array of data and information on students to assist in determining how best to meet the students' needs and increase their academic performance. The longitudinal tracking aspect means that as students transfer from school to school, this information travels with the student so that teachers and administrators at a new school have available all of the student's prior academic information so they can use that information to assess the students' strengths and weaknesses and keep improving those students' learning. *See Lake View School Dist. No. 25 v. Huckabee*, 358 Ark. 137, 150, 189 S.W.3d 1, 10 (2004). This data system provides much of the basis for decisions educators make to identify students' strengths and weaknesses and to tailor instructional practices to the evidence presented by the data.

No Child Left Behind Act (NCLB): In addition, the federal NCLB has had a significant impact on education in the State. 115 Stat. 1702, 20 U.S.C. § 6842, *et seq*. "NCLB marked a dramatic shift in federal education policy. It reflects Congress' judgment that the best way to raise the level of education nationwide is by granting state and local officials flexibility to develop and implement educational programs that address local needs, while holding them

accountable for the results." *Horne*, 129 S.Ct. 2579, 2601. The NCLB brought a significant focus on improving the performance of students who are performing below grade-level. It does this by requiring performance standards for all students in all schools and sanctions for schools when the students do not perform to that level.

Education Funding in Arkansas: Funding changes in Arkansas's education system since the turn of the century have been significant. *Lake View School Dist. No. 25*, 358 Ark. 137, 159, 189 S.W.3d 1, 15 (2004)(quoting state's expert: "I have never before seen a state which leapfrogged an entire century and went from the 19th century into the 21st century. The enactments are dramatic, comprehensive, and the amount of money that will be distributed as a consequence of them is about the largest I've ever seen proportionally."); *Lake View School Dist. No. 25*, 370 Ark. 139, 145-146, 257 S.W.3d 879 (2007)(quoting the special masters: "The framework for a much improved Arkansas public education system is now in place. The funds to support it are now at hand."). The changes to the State's education funding system have brought about a massive increase in funding provided to school districts (including the Pulaski County school districts) and, importantly, brought a high level of predictability and stability to the education funding that school districts receive from year to year.

In its 2004 opinion in *Lake View* the Arkansas Supreme Court noted that the General Assembly increased education funding for the 2004-05 school year by $394,479,900. *Lake View 2004*, 358 Ark. at 153-154. In the LRSD alone, the increases in education funding since 2001 have been dramatic. Foundation funding, when initially adopted in 2004, was set at $5,400 per student, which provided approximately $123,245,000 in base level revenue to LRSD for the 2004-05 school year (PCSSD = $94,379,000; NLRSD = $46,429,000). For the current school year (2011-12), foundation funding is set at $6,144 per student (an increase of $1,144 in seven

years), which provides approximately $139,857,000 in base level revenue to LRSD, an increase of approximately $16,600,000 in per student funding. PCSSD's current (SY 2011-12) foundation funding amount is approximately $100,845,000, an increase of approximately $6,400,000. NLRSD's current (SY 2010-11) foundation funding is approximately $52,623,000, an increase of approximately $6,200,000.

According to the Annual Statistical Report ("ASR") prepared by the ADE, LRSD's total revenue in the 2001-02 school year (SY 2001-02) was $219,179,331. In SY 2009-10 it was $325,861,969; an increase of over $106 million. Within that funding, state aid to LRSD in the 2001-02 school year, according to the ASR, was $96,187,394. In SY 2009-10 it was $139,629,771. In other words, since the school year preceding LRSD's initial declaration of unitary status, state general revenue flowing to the district has increased by $43,442,377. These significant increases in funding to LRSD, NLRSD, and PCSSD are due in large measure to the changes in the State's education funding system and concomitant funding increases passed by the General Assembly in the last decade.

Ongoing Initiatives: More changes are happening now that will increase educational opportunities for all students including low performing students in Pulaski County. Primarily, the State has adopted what is known as the Common Core State Standards. With the Common Core State Standards Initiative, Arkansas joins forty-three (43) other states in adopting a set of shared learning expectations in English language arts and mathematics. Much information about the Common Core is available at the ADE's website: arkansased.org and www.commoncorearkansas.org. Common Core will provide greater consistency in instruction, more academic rigor, and more consistent assessments of learning (even across states), and

should allow teachers to collaborate better to improve instruction. Common Core is being implemented in all schools and districts in the state as required by the State Board of Education.

These changes and many others have propelled forward educational opportunities for all students in the State. The laws passed in the last ten years have earned the State praise from recognized experts in the field of education. *Lake View School Dist. No. 5*, 358 Ark. 137, 189 S.W.3d 1 (2004). In one national ranking of the states' educational systems, Arkansas is now considered to have one of the top five education systems in the United States. Quality Counts 2012, Education Week, Jan. 12, 2012, at 43-62; see also www.edweek.org/go/qc12.

*4. Other Changes in the Last Twenty Years Support Release of the State from the 1989 Settlement Agreement*

The increase in educational opportunities for students in this State and in Pulaski County brought about by any one of the changes noted above would constitute changed circumstances sufficient to warrant relief under Rule 60(b) and release of the State from the 1989 Settlement Agreement. Even so, many other changes in the State's laws and policies since the adoption of the 1989 Settlement Agreement would satisfy the "flexible approach" the Supreme Court requires for evaluation of Rule 60 relief from this institutional reform decree.

- Education in Arkansas is the State's Highest Funding Priority: Doomsday Clause, Act 108 of 2003 (2nd Ext. Sess.): the State's commitment to education is perhaps best shown by Act 108 of 2003. The so-called "doomsday clause" in this Act provides that education will be funded before all other needs in the State. If the funding available falls below that necessary to provide an adequate education, then the Director of the Department of Finance and Administration is to make transfers from all other areas of state government to ensure the adequacy of funding to education. At the time of its enactment this clause was "unprecedented in any other state in this nation." *Lake View School Dist. No. 25 v. Huckabee*, 358 Ark. 137, 158, 189 S.W.3d 1, 15 (2004). Indeed, over the past few years of economic recession in this country all areas of state government have been cut or not increased except education. Many other states have cut education funding during the recession. However, Arkansas has increased funding for education every year, including for the Pulaski County school districts.

- Categorical Funding: In 1989, the State provided funding to schools through a complicated formula. Act 34 of 1983. Among other things, the formula provided a base level of revenue and certain additional revenue to school districts through what was known as "Weighted Average Daily Membership" or WADM. In this formula the "weights" increased funding for special education students and students enrolled in gifted and talented programs. Ark. Code Ann. § 6-20-302(2)(Repl. 1987). The funding system that was in place in 1989 has undergone major changes several times since then. The last major revision to the State's funding system was in 2003 and 2004. At that time, the General Assembly implemented a categorical funding system that provided additional funding to school districts in four categories 1) National School Lunch Act (NSLA) funding for students in poverty; 2) Alternative Learning Environment (ALE) funding for students who do not function well in a traditional classroom (this includes some special education students and students with serious discipline problems); 3) English Language Learner (ELL) funding for students who are learning to speak English; and 4) Professional Development funding to help with training educators. Ark. Code Ann. § 6-20-2305(b)(1) – (4). NSLA funds are directed, in particular, to students who may be performing below grade level. Ark. Code Ann. § 6-20-2305(b)(4)(C). In the 2010-11 school year, the three Pulaski County School Districts received NSLA funding in the following amounts: LRSD = $11,243,933; NLRSD = $2,897,632; PCSSD = $4,325,120.

- Arkansas Public School Choice Act of 1989, codified at Ark. Code Ann. § 6-18-206: Starting in 1989, the State encouraged integrative transfers of students across district lines by allowing student transfers where the percentage of enrollment for the student's race exceeds that percentage in the student's resident district. *See Edgerson v. Clinton*, 86 F.3d 833 (8th Cir. 1996)(denying interdistrict desegregation relief in part because "since 1987, Arkansas law has prohibited transfers that would negatively affect the racial balance in the Gould and Grady districts, and those districts have refused to grant transfers.").

- Arkansas Civil Rights Act of 1993, codified at Ark. Code Ann. § 16-123-101, *et seq*.: grants a private right of action to citizens against governmental discrimination. It allows a cause of action against a school district in certain circumstances for discrimination in employment and discrimination in other contexts as well. *Manila School Dist. No. 15 v. Wagner*, 356 Ark. 149, 148 S.W.3d 244 (2004)(allowing race discrimination in employment claim by superintendent against former school district).

- State law mandates equality of educational opportunities. Act 852 of 1989, §§ 1, 2, codified at Ark. Code Ann. § 6-10-114. Beginning in 1989 it has been a crime in Arkansas to deny a student admission to a program because of that student's race.

- Advanced Placement Courses: Arkansas has long provided support for Advanced Placement ("AP") courses from the College Board. However, that support has

increased significantly in the last ten years. Beginning with the 2008-09 school year, the State increased the number of AP courses that school districts must provide to a minimum of four AP courses. Ark. Code Ann. § 6-16-1204(c), (d). At the end of an AP course, students can take an exam that many colleges recognize and provide college credit for scores of three (3) and above on the exam. In order to increase the availability of the exam and participation in AP, Arkansas provides subsidies to school districts to provide AP courses including a subsidy for low-income students to pay for the AP test. Act 929 of 1997. In 2005, the General Assembly expanded the Advanced Placement Incentive Program to provide a subsidy for all students who take an AP exam. Ark. Code Ann. § 6-16-801. As a result, the State has seen a ten-fold increase in the number of students taking the exam in the past ten years (from 1,187 in 2001 to 11,326 in 2011.) Ex. 4, AP Report. In addition, the Arkansas Advanced Initiative for Math and Sciences, with support from the State, has implemented programs in high schools (including high schools in all three Pulaski County school districts) to improve the quality of the State's AP offerings. See http://ualr.edu/aaims/

- Arkansas Leadership Academy (Ark. Code Ann. § 6-15-1007) and the Master School Principal Program. Ark. Code Ann. § 6-17-1602. Established by the General Assembly in 1991, the Arkansas Leadership Academy provides significant training to educators in the State. See http://arkansasleadershipacademy.org. In particular, in 2004, the General Assembly provided for the establishment of a "Master School Principal Program" at the Leadership Academy. The Master School Principal designation is a competitive, highly sought after enhancement to the skills and knowledge of school principals in the State. Master principles are eligible for state paid salary bonuses of up to $25,000 annually. State paid salary bonuses are also available for teachers who attain National Board Certification. Ark. Code Ann. § 6-17-412 & 413

- Minority teacher and administrator recruitment plans. Ark. Code Ann. § 6-17-1901. Beginning in 1991, the State began requiring all school districts with more than five percent (5%) minority student population in the State to adopt plans for recruitment of minority teachers and administrators.

- Arkansas Better Chance (or ABC) Program, codified at Ark. Code Ann. § 6-45-104, provides early childhood instruction and pre-kindergarten programs. The program started in 1991 as the Arkansas Better Chance Program for educationally deprived children from birth to five years old. Act 212 of 1991 codified at Ark. Code Ann. § 6-45-101. In 2004, the ABC program was expanded to include the Arkansas Better Chance for School Success (ABCSS) program for children three and four years old; this is the State's pre-K program. Act 1332 of 2003 (Reg. Sess.) and Act 1105 of 2003 (Reg. Sess.). The ABC program provides early care and education services for children three and four year olds. Services are provided for free to at-risk or low-income families, but all children may participate. *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). In 2001, the General Assembly appropriated $9.9 million to the ABC program. Act 1667 of 2001 sec. 1(33). 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).

5. *Supreme Court Precedent has Changed, Calling into Question the Validity of the Orders upon which the 1989 Settlement Agreement is Based*

All three Pulaski County school districts are unitary in student assignments to schools. PCSSD was recently declared unitary as to student assignments to interdistrict schools. In fact, every public school in Pulaski County has been found unitary in the manner in which students are assigned to the schools. This means that all three school districts have been released from obligations to promote racial balance in their schools. Yet, the magnet and M-to-M programs persist as programs that promote racial balance and rely on explicit, binary racial classifications to determine students' eligibility to participate.

The U.S. Supreme Court has emphasized time and again, that "[r]acial balance is not to be achieved for its own sake." *Freeman v. Pitts*, 503 U.S. 467, 494, 112 S.Ct. 1430, 1447 (1992). Once racial imbalance in schools has been remedied, school districts are no longer under any obligation to continue to remedy any lingering racial imbalance that is not traceable to the prior constitutional violation. *Id.*; *see also Missouri v. Jenkins*, 515 U.S. 70, 91, 115 S.Ct. 2038, 2050 (1995). "An order contemplating the substantive constitutional right to a particular degree of racial balance or mixing is therefore infirm as a matter of law." *Milliken v. Bradley*, 433 U.S. 267, 280 fn 14, 97 S.Ct. 2749, 2757 (1977); s*ee also Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 127 S.Ct. 2738 (2007).

Despite the unitary status of the school districts with regard to assignments of students to schools, binary racial classifications persist. The stipulation magnet schools in LRSD (Williams Elementary, Gibbs Elementary, Booker Elementary, Carver Elementary, Mann Middle School,

and Parkview High School) are required to maintain a racial balance of 50-55% black students. LRSD manages this racial balance requirement by denying black students admission to these specialty schools unless a non-black student is also available to enroll in the school. This policy leads to the anomalous situation that black students may be denied admission to the stipulation magnet schools and their specialty programs simply because of their race; they may even be denied admission to the school based solely on their race if space is available for them to attend the schools. In other words, the 1989 Settlement Agreement requires what was prohibited fifty years ago: exclusion of black children from LRSD schools solely because they are black. *Cooper v. Aaron*, 358 U.S. 1, 78 S.Ct. 1401 (1958)("[T]he constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this Court in the *Brown* case can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation."). This circumstance, in light of the school districts' unitary student assignment policies, may violate the Equal Protection clause of the U.S. Constitution. *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 127 S.Ct. 2738 (2007)(holding that school district recently declared unitary violated the constitution by denying admission to schools on the sole basis of a student's race). Moreover, the Eighth Circuit warned against this circumstance in releasing LRSD from court-supervision in 1983:

> A magnet school is held out, in some respects, as being the best that the school district has to offer. There should be no implication, direct or indirect, that black students are not as welcome there as white students. In a district with a student body that is 65% black or more, an arbitrary limit of 50% on the black enrollment in a magnet school could send a message to the black students that they are somehow less desirable than whites. The District Court, as part of its continuing duty to oversee desegregation in the Little Rock School District, should be alert to guard against any such danger.

*Clark v. Board of Educ. of Little Rock School Dist.*, 705 F.2d 265, 269 fn. 6 (8th Cir. 1983).

In addition to the problems with the stipulation magnet school admission prohibition, the Court presides over an interdistrict transfer system that disqualifies students from participation based simply on their race. While both black and non-black students do have some opportunity to attend the stipulation magnet schools, the same cannot be said of the majority-to-minority transfers. Black students from the PCSSD are prohibited from participating in the M-to-M program. White students from LRSD and NLRSD are prohibited from participating in the M-to-M program. State law allows students to apply for transfer between districts based on factors affecting their individual situation and without regard to race. Ark. Code Ann. § 6-18-316. The 1989 Settlement Agreement, however, does not. The unitary status of the Pulaski County schools in student assignments makes this situation, while perhaps appropriate at one time, currently inequitable.

*6. Conclusion*

There can be little doubt that much has changed in Arkansas and in Pulaski County over the last twenty years. Circumstances, both factual and legal, have changed to such an extent as to render the 1989 Settlement Agreement superfluous. With the changes in State and Federal laws, education has changed from a simple concept of teaching and learning, to a dedicated focus on the knowledge and skills children should learn in order to succeed in life. The current system assesses student learning in such a way that children who do not adequately absorb all of the curriculum can be identified and provided supplemental education services tailored to their learning needs. There is simply no good-faith basis for any of the parties to this case to contend that the changes in education in Arkansas over the last twenty years have been anything other than substantial; benefitting all students in the State, and especially students that do not perform

on grade level. The changed circumstances are significant enough to warrant full release of the State on this basis alone.

**B. The State Should Be Released From the 1989 Settlement Agreement**

The jurisdiction of federal courts is limited to that provided for by the Constitution or by statute. *Kokonnen v. Guardian Life Ins. Co.*, 511 U.S. 375, 114 S.Ct. 1673 (1994). The party seeking to invoke or maintain the remedial authority of a federal court bears the burden of demonstrating that the Court retains jurisdiction. *Id.* A party bound by a consent decree is entitled to modification of the decree when a significant change in circumstances warranting revision of the decree occurs and the proposed modification is suitably tailored to the change in circumstances. *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 383, 112 S.Ct. 748, 760 (1992). Federalism concerns require district courts to exercise flexibility when presented with a request to modify a consent decree. *Horne*, supra. "As public servants, the officials of the State must be presumed to have a high degree of competence in deciding how best to discharge their governmental responsibilities." *Frew v. Hawkins*, 540 U.S. 431, 442, 124 S.Ct. 899, 906 (2004)(noting that "principles of federalism and simple common sense require the district court to give significant weight to the views of government officials").

In a desegregation case, a federal court's remedial authority ends when the Constitutional violations found to exist in the school district have been remedied. *Dowell*, 498 U.S. 237, s*ee also Kindred v. Duckworth*, 9 F.3d 638, 644 (7th Cir.1993) ("[D]ecrees imposing obligations upon state institutions normally should be enforceable no longer than the need for them."); *Cody v. Hillard*, 139 F.3d 1197 (8th Cir. 1998). As noted above, this limited authority furthers the goal of returning school systems to local control. In determining whether a consent decree should be modified, courts look to the following factors:

> (1) any specific terms providing for continued supervision and jurisdiction over the consent decree; (2) the consent decree's underlying goals; (3) whether there has been compliance with prior court orders; (4) whether defendants made a good faith effort to comply; (5) the length of time the consent decree has been in effect; and (6) the continuing efficacy of the consent decree's enforcement.

*Cody v. Hillard*, 139 F.3d 1197, 1199 (8th Cir. 1998); *see also Board of Educ. v. Dowell*, 498 U.S. 237, 247, 111 S.Ct. 630, 636-37, 112 L.Ed.2d 715 (1991) (if district court finds a defendant operating in compliance with Constitution and unlikely to return to "its former ways," purposes of injunction have been achieved).

*1. No Term in 1989 Settlement Agreement Regarding Duration of the Agreement*

The 1989 Settlement Agreement does not contain any specific terms governing its duration. The school districts have argued for years that this means the Agreement extends forever and will always be an enforceable order of the Court. This argument runs directly contrary to the clear law, overturns the federalist nature of our American system of government, and serves no federal purpose. Any such argument should be dismissed out of hand.

*2. The "Underlying Goal" of the 1989 Settlement Agreement is Unitary Status of the Districts*

The underlying goal of the 1989 Settlement Agreement is unitary status, primarily for LRSD, but also for NLRSD and PCSSD. The LRSD filed this case on November 30, 1982,[2] alleging that the other two districts (PCSSD and NLRSD) without restrictions from the State had taken actions which were having segregative effects in the LRSD; primarily, a widening racial imbalance in LRSD. *LRSD v. PCSSD,* 584 F.Supp. 328 (E.D. Ark. 1984); *LRSD v. PCSSD,* 778 F.2d 404 (8th Cir. 1985). Specifically, LRSD alleged "that PCSSD and NLRSD engaged in 'a

[2] This complaint was a continuation of the prior LRSD desegregation case that began on February 8, 1956. *Aaron v. Cooper*, 143 F.Supp. 855 (D.Ark. 1956); *See LRSD 2002*, 237 F.Supp.2d 988, 996-997 fn. 15, 18. In fact, the filing of this case overlapped by some three months with desegregation obligations imposed on the LRSD in the prior case. *Clark v. Board of Education of the Little Rock School District*, 705 F.2d 265 (8th Cir.1983).

series of intradistrict constitutional violations with interdistrict effects' and that the State of Arkansas and Arkansas Department of Education . . . through funding and other state action, 'operated maintained and/or condoned a racially segregated structure of public education under color of state law.'" *LRSD 2002*, 237 F.Supp.2d 988 at 1000-1001.

In 1984, Judge Henry Woods found that the then-Defendants[3] to the case were liable for certain alleged constitutional violations. *LRSD 1984*, 584 F.Supp. 328. This liability finding was premised primarily on Judge Woods' finding that the proportion of African-American students in the LRSD was increasing because of actions taken by the then-Defendants. *LRSD 1985*, 778 F.2d at 438 (J. Arnold, concurring in part and dissenting in part)(noting that "one senses that the major impetus behind the District Court's decision to order consolidation is a determination not to permit LRSD to become all black, or virtually so."). Judge Woods held that the interdistrict effects he found to exist required an interdistrict remedy and ordered consolidation of the three school districts. *LRSD 1984*, 597 F.Supp. 1220 (E.D. Ark. 1984)(stating that "[f]ailure to utilize a countywide consolidation plan would exacerbate white flight problems in the county's residential growth").

The Defendants appealed Judge Woods' 1984 ruling to the Eighth Circuit, which heard the case *en banc*. *LRSD 1985*, 778 F.2d 404 (8th Cir. 1985). The Eighth Circuit affirmed Judge Woods' finding of liability, but reversed Judge Woods' holding that the interdistrict effects he found were of such a nature that consolidation was required. *Id.* Instead of remanding the case for further proceedings in the district court, however, the Eighth Circuit took the unusual step of

[3] Following the acceptance by the Court of the 1989 Settlement Agreement, the State of Arkansas and the Arkansas Department of Education were released and dismissed as parties to this case. DE 1418; *LRSD 2002*, 237 F.Supp.2d 988, 1005 (E.D. Ark. 2002).

mandating a remedy for the interdistrict violations found by Judge Woods. *Id.* at 433-436.[4] The Court's remedy required the parties to take specific actions in the following areas: 1) the districts were to remain independent (i.e. not consolidated); 2) the boundary lines of the districts were required to be changed; 3) majority to minority transfers of students, paid for by the State, were to be "encouraged;" 4) a number of magnet schools administered by a Magnet Review Committee were to be established; 5) funding requirements for the magnet schools were ordered; and 6) sharing among the three districts of resources and liabilities for supporting the interdistrict transfers was strongly recommended. *Id.* The principal purpose of this remedy was to address what the district court and the Eighth Circuit perceived as a growing racial imbalance among the three school districts.

In 1989, the parties entered into a settlement agreement which set out the parties' plans for compliance with the remedy mandated by the Eighth Circuit. *LRSD 1990*, 921 F.2d 1371 (8th Cir. 1990)(approving the 1989 settlement agreement and reversing the District Court's refusal to do so). As noted above, the purpose and goal of the 1989 Settlement Agreement is set out in its first paragraph: "achieving unitary school systems in these three districts which are free from the vestiges of racial discrimination." 1989 Settlement Agreement p. 1.

The 1989 Settlement Agreement set out the obligations the State would undertake to support the interdistrict relief mandated by the Eighth Circuit. The agreement also required dismissal of the State as a party and release of all claims against the State by the other parties. 1989 Settlement Agreement p. 18-19. The release of the State and the effectiveness of the Settlement Agreement in 1989 were not made contingent in any way on a prior finding of unitary

[4] A remedy Judge Richard Arnold described "as spring[ing] full-grown from the brow of this Court, a decree that will, I dare say, startle all the parties to this case, including even those (if there are any) who like what they see." *LRSD*, 778 F.2d at 437 (R. Arnold, J. concurring).

status for the districts. 1989 Settlement Agreement p. 18-19. The individual districts' ongoing obligations were contained in their separate desegregation plans. The LRSD and PCSSD desegregation plans were revised in 1998 and 2000, respectively. NLRSD's original desegregation plan predated the 1989 Settlement Agreement.

The goal of the 1989 Settlement Agreement has largely been achieved with the unitary status declarations of LRSD, NLRSD, and partial unitary status declaration of PCSSD. The primary goal of assisting the districts in maintaining racial balance of the schools has been achieved; each of the districts are unitary in that area and each school district assigns students to schools on a desegregated basis.

3. *The State of Arkansas has Complied with the 1989 Settlement Agreement and Subsequent Court Orders*

a. Payment Obligations

As the decisions of Judge Woods and the Eighth Circuit make clear, the State's primary obligation in this case was to provide funding for the interdistrict remedies. Indeed, the 1989 Settlement Agreement is the only agreement or plan in this case to which the State is a signatory. The State was not a party to the Interdistrict Desegregation Agreement or the Districts' separate desegregation plans. The State's obligation was to provide funding; the Districts' obligations were to achieve unitary status.

The State has performed its funding obligations well beyond all expectations that were held in 1989. *LRSD 1990*, 921 F.2d 1371, 1376 (8th Cir. 1990)(noting that the parties "also submitted a separate but related document, called the 'settlement agreement,' settling the financial liability of the State of Arkansas for something over one hundred million dollars."). As of the end of the 2010-11 school year, the State of Arkansas had paid the districts

$1,051,191,539, over ten times the expected payments to be made under the agreement. The 2011-12 school year is the twenty-fourth year of State payments under the 1989 Settlement Agreement. This year the State's payments will exceed $1.1 billion. State funding was the primary term of the consent decree and there can be no dispute that the taxpayers of the State of Arkansas have paid significantly more to the three school districts than envisioned by the 1989 Settlement Agreement.

While other obligations are contained in the 1989 Settlement Agreement, the compensatory education funding, the stipulation magnet school funding, and the majority-to-minority transfer funding constitute the bulk of the State's obligations. *LRSD 1984*, 597 F.Supp. 1220, 1228 (E.D. Ark. 1984)("The State Board [of Education] therefore has remedial responsibilities with respect to this case. The precise nature of these financial and oversight responsibilities must await further refinement of the consolidation plan and development of a budget for such consolidated district.") The State's total payments as of the end of the 2010-11 school year for these programs were as follows:

Compensatory Education: $75,853, 061[5]
Loan to LRSD: $20,000,000 ($15 million of which was forgiven in 2001)[6]
In lieu of/Hold Harmless: $29,870,114[7]
Magnet School Funding $247,413,001[8]
Magnet Buses: $17,792,755
Magnet and M to M Transportation: $290,913,484[9]
Total Magnet and M to M Payments: $687,118,123

Court orders entered after the 1989 Settlement Agreement have required additional payments by the State; all of which have been made.

[5] 1989 Settlement Agreement, section VI. A.(1). (LRSD), VII.A.2.(a) (PCSSD), VIII.B. (NLRSD).
[6] 1989 Settlement Agreement, section VI.B; 2001 Settlement Agreement.
[7] 1989 Settlement Agreement, section VI.A.(2). (LRSD), VII.A.2.(b) (PCSSD), VIII.
[8] 1989 Settlement Agreement, section II.E.(1).
[9] 1989 Settlement Agreement, section II.E.(4), (5).

*Office of Desegregation Monitoring*: The 1989 Settlement Agreement provided that the Pulaski County Education Service Cooperative would cease to exist and that ADE would reallocate the funds for that agency to the Metropolitan Supervisor, an office created by an earlier order of Judge Henry Woods. 1989 Settlement Agreement sec. III.E. p. 14-15. "Should these funds no longer be required by the Metropolitan Supervisor," the funds were to be used for other purposes by ADE. Id. When the Eighth Circuit ordered the Settlement Agreement to be adopted, it discontinued the Metropolitan Supervisor and ordered the creation of the Office of Desegregation Monitoring. *LRSD 1990*, 921 F.2d 1371, 1388 (8th Cir. 1990). At the time, ADE understood this to mean that the funds were released back to ADE because the Metropolitan Supervisor had ceased to exist. Judge Susan Webber Wright, however, disagreed with ADE's reading of the 1989 Settlement Agreement and ordered this funding to be provided to ODM. DE 1442; *see also LRSD v. PCSSD*, 237 F.Supp.2d 988, 1005-1006. Since that time the State has paid $200,000 each year for operation of ODM. The total funding provided by the State to ODM by the end of the 2010-11 school year was $4,433,333.

*Worker's Compensation*: In 1994, the State changed how workers' compensation programs for school districts were funded. *LRSD 1996,* 83 F.3d 1013 (8th Cir. 1996). As part of this change, the State distributed "seed money" to school districts for the 1994-95 school year. *Id.* at 1016. The Pulaski County school districts brought an action in this case challenging both the distribution of the "seed money" and the change in how worker's compensation funding was handled. The Court found for the State on the overall funding of worker's compensation, and found for the districts on the distribution of the "seed money." *Id.* at 1018. As a result, the State was required to pay additional "seed money" to the Pulaski County districts. The State paid $2,053,645. No other money was required.

*Loss Funding Adjustment*: At the same time the districts challenged the change to worker's compensation funding, they also challenged a change in how the State treated M-to-M transfer students in a program that provided funds for the loss of students (i.e. "loss funding"). *Id.* at 1018-19. The Court ordered the State to change how M-to-M students were addressed in the loss funding calculation. This resulted in an additional payment from the State for these students of $1,043,216. No other challenges have been raised by the districts in this case to the now abandoned "loss funding" or to the current "declining enrollment funding" utilized by the State. Ark. Code Ann. § 6-20-2305(a)(3).

*Teacher Retirement and Health Insurance*: In 1995, the State changed how it funded contributions for teacher retirement payments and health insurance premiums. *LRSD 1998*, 148 F.3d 956 (8th Cir. 1998). The reasons for the change, the effect of the change (or lack thereof) on these districts, and the manner of calculating the subsequent payments are complicated. In short, the Court ordered the State to pay extra money each year to the Pulaski County districts that no other school districts in the State have received since 1998. The reason the Court ordered this excess funding was that the three Pulaski County districts are "employee heavy" (or at least were, in the Court's eyes) "at least partly because of special desegregation obligations imposed on the districts by the settlement agreement." *Id.* at 964. The Court, thus, ordered additional payments from the State. This funding category has been significant for the districts. By the end of the 2010-11 school year, the State has paid $221,651,809 to the districts under this order.

The State has fully complied with the funding obligations of the 1989 Settlement Agreement and the subsequent court orders interpreting and expanding on that agreement.

b. Monitoring Obligations

LRSD only very recently raised an issue with the State's monitoring of the districts under the 1989 Settlement Agreement and what is known as the "Allen Letter." The reality is that three districts did not want State monitoring. In 1998, the State filed a motion, supported by the school districts and Joshua, to stay the State's monitoring obligation while a new monitoring plan was developed. The Court granted the motion, but the parties could not reach agreement on the new monitoring plan.

Under Section III.A. of the Settlement Agreement, the State, through the ADE, agreed to monitor the implementation of compensatory education programs by LRSD, NLRSD, and PCSSD, and to provide regular written monitoring reports to the parties and to the Court.[10] On May 31, 1989, after a version of the Settlement Agreement had been executed, but before the Agreement was finally amended and revised on September 28, 1989, attorney H. William Allen, then-counsel for the State Board of Education, sent a letter to the parties describing a monitoring plan. This letter and the enclosed monitoring plan have become known as the "Allen Letter." On December 10, 1993, this Court found that the Allen Letter constituted ADE's monitoring plan under Section III.A. of the Settlement Agreement and directed ADE to monitor according to the

[10] Specifically, Section III.A. states:

> Monitoring compensatory education: The State shall be required (as a non-party) to monitor, through ADE, the implementation of compensatory education programs by the Districts. If necessary as a last resort, ADE may petition the court for modification or changes in such programs being implemented by the Districts (but not for a reduction in the agreed level of State funding). If such petitions are filed, the undersigned parties will not object based upon lack of standing. ADE shall provided regular written monitoring reports to the parties and the court.
>
> Monitoring by the State shall be independent of that of the other parties. It is being done to ensure that the State will have a continuing role in satisfactorily mediating achievement disparities. Any recommendations made by ADE shall not form the basis of any additional funding responsibilities other of the State.
>
> A State plan for monitoring implementation of compensatory education will be submitted to the parties within 60 days following execution of the settlement agreement.

Allen Letter's terms.[11] The Court also ordered ADE to file semi-annual monitoring reports and a monthly Project Management Tool.[12]

On March 15 and April 11, 1994, ADE filed an amended monitoring implementation plan.[13] ADE filed semi-annual monitoring plans in July 1994, February 1995, July 1996, February 1996, July 1996, February 1997, July 1997, and February 1998.[14] On May 5, 1998, ADE moved the Court for relief from its obligation to file a July 1998 semi-annual monitoring report.[15] On May 18, 1998, the Court granted ADE's motion for relief from filing the July 1998 semi-annual monitoring report.[16] On November 17, 1998, ADE, LRSD, NLRSD, and PCSSD, jointly moved the Court to relieve ADE of its obligation to file a February 1999 semi-annual report.[17] On December 18, 1998, the Court granted the joint motion for relief from filing a February 1999 semi-annual monitoring report.[18] On June 28, 1999, ADE moved the Court to relieve it from its obligation to file a July 1999 semi-annual monitoring report.[19] On July 13, 1999, the Court granted ADE's motion for relief from filing a July 1999 semi-annual monitoring report.[20]

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[11] Docket No. 2045 at 2.

[12] Id. at 5-8.

[13] *See* Docket Nos. 2128 and 2156 respectively.

[14] *See* Docket Nos. 2240, 2346, 2242, 2691, 2710, 2921, 3032, and 3119 respectively.

[15] *See* Docket No. 3152.

[16] *See* Docket No. 3155.

[17] Docket No. 3220.

[18] Docket No. 3230.

[19] Docket No. 3272.

[20] Docket No. 3277.

On February 1, 2000, ADE filed a motion for the approval of a revised monitoring plan (hereinafter "DMAP") in lieu of filing a semi-annual monitoring report.[21] All of the parties had input in the development of the DMAP. LRSD filed a response to this motion objecting to continued monitoring by the State.[22] On May 12, 2000, the Court denied ADE's motion for the approval of DMAP due to objections raised by LRSD and Joshua.[23] On March 15, 2001, LRSD filed its Revised Desegregation and Education Plan Compliance Report (hereinafter "Compliance Report") in which LRSD requested a declaration of unitary status.[24] On June 25, 2001, Joshua filed its opposition response to LRSD's Compliance Report.[25]

In its order of May 12, 2000, which denied ADE's motion for approval of the DMAP, the Court made the following observation: "The Court acknowledges that changed circumstances may warrant revision of ADE's monitoring plan but finds that ADE has failed to demonstrate that the DMAP is tailored to address the changed circumstances."[26] Moreover the Court concluded the order stating:

> As for requiring ADE to negotiate with LRSD, this Court strongly encourages the parties to proceed diligently with negotiations regarding ADE's monitoring obligations, but declines ordering such negotiations at this time. If the parties are unable to reach an agreement regarding the State's monitoring role, upon proper motion, the Court will hold hearings on the matter and take action necessary to ensure the State's monitoring obligations are carried out efficiently and effectively.[27]

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[21] Docket No. 3327.

[22] Docket No. 3340

[23] Docket No. 3360.

[24] Docket No. 3410.

[25] Docket No. 3447.

[26] *See* Docket No. 3360 at 4.

[27] Id at 6.

Although not ordered to do so, ADE conducted negotiations as to its monitoring obligations with all parties from the summer of 2002 to August of 2002. At the time negotiations ended, LRSD's request for unitary status had been at issue for a year. On September 13, 2002, this Court granted unitary status to LRSD in all aspects of its operations save one. *LRSD 2002*, 237 F.Supp.2d 988 (E.D.Ark. 2002). Many factors influenced the failure of the negotiations on monitoring including changes in administrative personnel at the school districts and, most importantly, the unitary status activities of the LRSD. *See LRSD 2002*, 237 F.Supp.2d 988, 1016 fn 58 (stating "even though the more streamlined obligations of [LRSD's] Revised Plan approved in early 1998 would seem to have required less monitoring of LRSD's implementation of those obligations. Similarly, for the last few years, it appears NLRSD has been unitary and has required very little in the way of monitoring by the ODM.")

LRSD's current position is a reversal of its position from 2000. LRSD's position in opposition to the DMAP was as follows:

> ADE's monitoring no longer needs to be "independent" of LRSD. ODM provides independent monitoring of LRSD. . . . Moreover, ADE monitoring of LRSD does not make sense given the status of the parties. LRSD is the plaintiff in this case. ADE represents the "remedial vehicle" for constitutional violations committed by the State of Arkansas and other governmental bodies.
>
> ADE's monitoring was part of the State's "continuing role in satisfactorily remediating achievement disparities." The other part was State funding of compensatory education programs. Based on this State funding, ADE's monitoring served to ensure "fiscal accountability to the tax payers of Arkansas." However, LRSD no longer receives State funding for compensatory education programs through the Settlement Agreement. Thus, the State's interest in seeing that LRSD spends the State's money in a fiscally responsible manner is substantially reduced.
>
> The facts and circumstances set forth above justify modification of ADE's monitoring obligations. As noted above, the Settlement Agreement recognized that ADE was to have a "continuing role in satisfactorily remediating achievement disparities." At least with regard to LRSD, that role should shift from one of monitoring to one of active participation in the district's efforts to

> eliminate the achievement disparity between African-American and other students. The Court should order ADE to meet with LRSD and, if possible, reach an agreement as to how ADE can best assist LRSD in achieving this goal. ADE should be required to provide LRSD resources, in the form of either personnel or funding, at least equivalent to the resources which ADE planned to devote toward monitoring of LRSD.

DE 3340, LRSD's Response to ADE's Motion for Approval of Monitoring Plan, filed March 6, 2000. (Joshua responded to the State's motion with a similar argument against monitoring.) In other words, when ADE requested a change to its monitoring obligations to better assist the districts' desegregation efforts, LRSD said it did not want additional monitoring, it just wanted additional money. Although the Court suggested that any party could request enforcement of the State's monitoring obligations, none of the parties accepted this invitation. This is most likely because none of the parties wanted ADE to monitor, and because the nature of this case changed significantly with LRSD's unitary status in 2002.

It should be noted as well that in 2007, LRSD was released from any monitoring by ODM and any requirement to pay for any activities of ODM. DE 4138, Amended Order filed August 1, 2007; see also DE 4131, Response to Joshua Intervenor's Arguments Concerning Funding of ODM, filed July 11, 2007. ODM has not provided any monitoring reports on LRSD in eight years. DE 3854, Notice by claimant ODM of filing the LRSD'S Implementation of the Court's Compliance Remedy, filed March 30, 2004.

Further, it should be noted that no party has requested any relief from the Court since March 2000 regarding monitoring by the State. If the parties felt that State monitoring was necessary, they should have engaged in the negotiation process in 2000-2002 and established a monitoring plan with ADE. However, since August 2002, no party has raised any request for renewed State monitoring.

Be that as it may, the State monitors the districts extensively as part of the ACTAAP, the ACSIP planning process, the Scholastic Audit process, special education oversight, and other areas. Moreover, the monthly (and much maligned) Project Management Tool has been filed with the Court at the end of every month since 1993. It documents many (but not all) of the actions the State has taken to assist the school districts in their unitary status efforts and in providing quality, equitable education to the students in the County. In fact, both NLRSD and PCSSD relied on State monitoring in presenting their petition for unitary status before this Court.

If the parties had felt that additional State monitoring was necessary for desegregation purposes they should have spoken up before now. The only school district that remains under court supervision is PCSSD. After the Court's order was handed down in May of 2011, the ADE developed a revised, focused monitoring process for PCSSD. The ADE regularly engages with PCSSD to ensure that the District is working toward plan compliance and that it has the technical support it needs from the ADE to comply with Plan 2000. ADE will continue to monitor PCSSD for compliance with Plan 2000 until it attains full unitary status.

c. Remediation of Disparities in Academic Achievement

As demonstrated above, the State has taken extensive steps to improve the performance of all students in the State and in Pulaski County. The 1989 Settlement Agreement did not require the State Board or the ADE to adopt any particular program and did not require ADE to implement programs solely for the benefit of the Pulaski County school districts. As demonstrated by Dr. Armor's report on academic achievement (DE 4704-4, LRSD Ex. 78 to LRSD's Motion for Summary Judgment) and the findings of this Court in 2002 (at the behest of LRSD) there is no particular program that will close the achievement gap between white and black students.

> Sociologists and educators have recognized for over a decade that there are a host of factors, completely unrelated to the effects of de jure segregation, that also are responsible for the minority student achievement gap. Some of these other factors include low birth weight, poverty, whether the student is raised by a single parent, parental interest and involvement, and peer influence. Complicating this issue still further is the fact that the achievement gap "exists across the country in prior segregated school districts and school districts that have not discriminated against minority students."
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> * * *
>
> In May of 1996, Judge Wright took testimony from three nationally recognized expert witnesses on various desegregation obligations contained in LRSD's 1990 Settlement Plan, as revised by its May 1992 Desegregation Plan. Each of those experts offered testimony on the issue of LRSD's obligation to eliminate the academic achievement gap. See Testimony of Herbert J. Walberg, Ph.D. (docket no. 2692 at 33-86); David J. Armor, Ph.D. (docket no. 2693 at 18-39); and Gary Orfield, Ph.D. (docket no. 2768 at 25-31). Together, the testimony of these experts made it clear that, regardless of the effort put forth by LRSD, it was unlikely this gap could be substantially narrowed, much less eliminated, within the foreseeable future.

*LRSD 2002*, 237 F.Supp.2d 988, 1037, 1040.

The laws, programs, and initiatives that the State has put in place since 1989 have established a system by which school districts provide a rigorous curriculum, assess each student's understanding of that curriculum, and then provide targeted assistance to all of those students who do not score at grade level on the assessments. The State's efforts to increase the achievement of all students, including low performing students, are substantial and have increased exponentially since 1989. The resources that have been committed to the task of improving student learning and achievement demonstrate that the State remains fully committed to remediating the achievement gap. There is simply no basis to find any constitutional violation by the State in this area.

*4. The State's Compliance has been in Good Faith*

The State's primary obligation under the 1989 Settlement Agreement was payment of money for compensatory education programs, the M-to-M program, and the stipulation magnet programs. The State has made all of the required payments under these programs and more. The State's payment of a billion dollars more than what it committed to spend in 1989 demonstrates substantial good faith. While disagreements have arisen as to the meaning and effect of certain provisions of the 1989 Settlement Agreement and changes in the State's education funding system, the Court has not found the State to have acted in bad faith. Moreover, after those disputes were settled, the State made all of the required payments. With regard to the other obligations in the 1989 Settlement Agreement, the State has complied with those provisions and orders of this Court. The State's monitoring, as explained above, was mutually abandoned by all of the parties to this case. Even so, the State is currently monitoring the PCSSD to ensure and assist with that district's compliance with Plan 2000. Monitoring of LRSD and NLRSD is unnecessary and unwarranted because those districts have been declared fully unitary.

Moreover, the State's commitment to quality, equitable educational opportunities for the children of this State, including African-American children in Pulaski County, has increased substantially over the last twenty years. As explained above, the State now provides opportunities for children from birth through high school. The ABC program focuses resources on low-income students to provide developmentally appropriate educational opportunities. As students progress through the K-12 education system in Arkansas they are continually monitored and assessed (as required by Arkansas law) to ensure that every child is provided a rigorous curriculum, their mastery of that curriculum is assessed, and that educators follow up with those students who do not demonstrate grade level proficiency so that each student has the opportunity

to learn. All of these changes have lead to greatly enhanced educational opportunities for students without regard to race and demonstrate the State's good faith commitment to the African-American students in Pulaski County and all of the students in the State.

*5. The Length of Time the Consent Decree Has Been in Effect*

Over twenty years – "a long time." *LRSD 1985*, 921 F.2d 1371, 1383 (8th Cir. 1985). The 1989 Settlement Agreement has been in place longer than originally intended by the parties. It has become much more than a "temporary" curtailment of the State's authority.

*6. Continuing Enforcement of the 1989 Settlement Agreement will not Contribute to the Resolution of the Remaining Desegregation Issues*

The changed circumstances discussed above and others have obviated any further need for the 1989 Settlement Agreement. The original purpose of this case related to a shift in the LRSD's racial balance towards African-American students. *LRSD 1985*, 778 F.2d 404, 438 (8th Cir. 1985)("one senses that the major impetus behind the District Court's decision to order consolidation is a determination not to permit LRSD to become all black, or virtually so."). The ODM enrollment reports filed with the Court demonstrate that LRSD's enrollment has not varied more than six percentage points from the 88-89 school year to now (from 63% African-American in 1988-89 to a high of 69% African-American in 2001-02). In fact, when LRSD was declared unitary as to student assignments, the District's percentage of African-American enrollment was at its high point. Since then, however, the district's percentage of African-American students has dropped to 67%; only four percentage points (4%) more than when the 1989 Settlement Agreement was signed.

The major programs of the Settlement Agreement limit the opportunities of the very students this case was intended to serve. The magnet and M-to-M programs expressly limit the

ability of African-American students to enroll. In fact, because of the magnet stipulation and the 1989 Settlement Agreement, the six stipulation magnet schools are the only schools in the State that can deny entry to African-American students based solely on the color of their skin. This is precisely the danger the Eighth Circuit warned against in 1983.

Moreover, LRSD and NLRSD are unitary school districts, and all of the Districts are unitary in assignments of students to schools. With that recognition, the Districts may no longer deny students admission to schools or student assignment programs based exclusively on their race. *Parents Involved in Community Schools v. Seattle School District No. 1,* 551 U.S. 701, 127 S.Ct. 2738 (2007). However, this is exactly what is done at the stipulation magnet schools. The M-to-M program similarly requires that African-American students from PCSSD be denied the opportunity to attend LRSD schools and that non-black students from LRSD be denied the opportunity to attend PCSSD schools. Ostensibly, these programs exist to remedy harm that was once traceable to segregation. They have been in operation for nearly a quarter century. In that time, opportunities for all students, including African-American students, have expanded substantially. All of the programs outlined in the first part of this brief are available to every student and educator without regard to race. These programs focus resources on students who need assistance, often to the benefit of African-American students. In the quarter century that the 1989 Settlement Agreement has been in place, this Court has recognized that every school district in Pulaski County is unitary in the manner in which students are assigned to schools. "Since 1987, Arkansas law has prohibited transfers that would negatively affect the racial balance" of school districts. *Edgerson v. Clinton*, 86 F.3d 833, 837 (8th Cir. 1996). The magnet and M-to-M stipulations serve now to limit opportunities to students. They do not further any interests that are not adequately protected by State law.

As Judge Brian Miller, and every other Judge to have presided over this case, recognized, the money flowing through this case from the State to the districts has delayed constitutional compliance and at times impeded attainment of unitary status. See *LRSD v. PCSSD*, 740 F.Supp. 632, 635 (E.D. Ark. 1990) ("Lawyer fees paid by the three districts in this litigation have been grossly exorbitant."); *LRSD v. PCSSD*, 237 F.Supp.2d 988, 1016 fn. 58 (E.D.Ark. 2002)("I would have hoped this 'professional group' would have kept uppermost in their minds that every penny paid to them for their work in this case is one less penny available to help in the education of a child."). Last year, Judge Miller attempted to cut the Gordian Knot that this case has become by eliminating the State desegregation funding that these Districts receive. DE # 4507. The Eighth Circuit, while vacating that portion of the Court's Findings of Fact and Conclusions of Law, stated that "[t]he district court's frustration is understandable, and its conclusions regarding the perverse incentives created by the State's funding may well have some merit." *LRSD v. State of Arkansas*, 664 F.3d 738, 758 (8th Cir. 2011).

The magnet and M-to-M programs exist to assist in racially balancing the school districts. Every school district has been released from the obligation to racially balance their schools with the Court's recognition that none of the Pulaski County school districts assign students to schools based on race; i.e. they are unitary. PCSSD is the only school district with remaining desegregation obligations. Assisting with racial balancing of the schools continues to cost the State about $70 million each year. None of this money assists PCSSD with its remaining desegregation obligations. The 1989 Settlement Agreement only serves to perpetuate this litigation without remedying any of the remaining desegregation obligations. Accordingly, the State should be released from the 1989 Settlement Agreement because that document has outlived its usefulness to this case.

*7. A Line By Line Analysis of Compliance with the 1989 Settlement Agreement is Unnecessary and Unwarranted*

The analysis in this section of this brief looks at particular State obligations in the 1989 Settlement Agreement. However, Rule 60(b)(5) does not require the Court to engage in a line by line analysis of that agreement and the State's record of compliance. It is enough for the Court to find that circumstances have changed.

> For one thing, injunctions issued in [institutional reform] cases often remain in force for many years, and the passage of time frequently brings about changed circumstances-changes in the nature of the underlying problem, changes in governing law or its interpretation by the courts, and new policy insights-that warrant reexamination of the original judgment.

*Horne*, 129 S.Ct. 2579, 2593. The Supreme Court reversed the lower courts in *Horne* because those courts failed to apply a flexible standard under Rule 60 directed at returning control to state and local officials over the education system and "rather than inquiring broadly into whether changed conditions in [the school district] provided evidence of an ELL program that complied with [federal law], the Court of Appeals concerned itself only with determining whether increased ELL funding complied with the original declaratory judgment order." *Horne*, 129 S.Ct. at 2595. The Supreme Court went on to explain that the lower courts should not simply ask whether the terms of a decree have been followed, but should look more broadly at whether the state is operating in compliance with federal law, here the Fourteenth Amendment to the U.S. Constitution. *Id.*

The changed circumstances outlined above demonstrate that the State should be released from the 1989 Settlement Agreement. The State has in place an education system that provides, indeed requires, equal educational opportunities for all students regardless of race. State law requires this in all school districts and provides for sanctions against school districts that are not working towards increasing the academic achievement of low performing students.

### C. Because the Constitutional Violations that the 1989 Settlement Agreement Addresses have been Remedied, the State Should Be Immediately Released from the 1989 Settlement Agreement

As demonstrated above, both changed circumstances and the State's compliance with the 1989 Settlement Agreement provide independent, adequate grounds for the Court to immediately terminate the State's obligations under the 1989 Settlement Agreement. It is clear from LRSD's Motion to Enforce the 1989 Settlement Agreement and related filings that this case has become more about expanding the scope of the 1989 Settlement Agreement and continuing the flow of millions of additional state tax dollars into the three districts instead of returning control to the State and the school districts when unitary status is achieved. *But see Horne*, 129 S.Ct. 2579, 2593-2595. It should be for the people of Arkansas, through their designated representatives, to decide how this $70 million each year in State tax dollars should be used to address the problems of today. Continuing to provide that funding to these districts only serves to perpetuate this litigation, as Judge Miller ably recognized.

WHEREFORE, the State of Arkansas requests that the Court enter an order releasing the State from any and all obligations under the 1989 Settlement Agreement and all Court orders imposing obligations on the State in this case and for all other relief to which it is entitled.

Respectfully submitted,

DUSTIN McDANIEL
Attorney General

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

Email: scott.richardson@arkansasag.gov

ATTORNEYS FOR STATE OF ARKANSAS AND
ARKANSAS DEPARTMENT OF EDUCATION

**CERTIFICATE OF SERVICE**

I hereby certify that on March 26, 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:

Mr. Clayton R. Blackstock
cblackstock@mbbwi.com

Mr. John W. Walker
johnwalkeratty@aol.com

Mr. Mark Terry Burnette
mburnette@mbbwi.com

Mr. Stephen W. Jones
sjones@jlj.com

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

Ms. Deborah Linton
dlinton@jacknelsonjones.com

Mr. Christopher J. Heller
heller@fec.net

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

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

Mr. Allen P. Roberts
allen@aprobertslaw.com

Mr. Jess L. Askew, III
jaskew@williamsanderson.com

Mr. Jamie Fugitt
jfugitt@williamsanderson.com

Marie Bernarede Miller
mmiller@williamsanderson.com

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

I, Scott P. Richardson, Assistant Attorney General, do hereby certify that I have served the foregoing and a copy of the Notice of Electronic Filing by depositing a copy in the United States Mail, postage prepaid, on March 26, 2012, to the following non-CM/ECF participants:

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

Mr. Michael K. Wilson
Attorney at Law
602 Main St.
Jacksonville, AR 72076

/s/ Scott P. Richardson
SCOTT P. RICHARDSON