IN THE 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 PCSSD'S RESPONSE TO STATE'S MOTION FOR RELEASE FROM 1989 SETTLEMENT AGREEMENT

Introduction, Executive Summary, and Proposal

For multiple reasons set out herein, the 1989 Settlement Agreement should be currently preserved as written, subject only to the modification order herein proposed. In support of its response PCSSD states:

1. The PCSSD has yet to attain unitary status in at least nine race-based subject areas. Thus, the State's contention that the purpose of the 1989 Settlement Agreement was to attain unitary status for all three Pulaski Districts has not yet been achieved.

2. The State has set forth no facts whatsoever demonstrating any change in circumstances regarding payments received for teacher retirement and health insurance.

3. Contrary to the current assertions of the State, the sums received by the PCSSD designated as teacher retirement and health insurance were and remain simply payments to maintain parity with the other school districts in the State.

4. Because the State has assumed responsibility for the achievement of complete unitary status by the PCSSD, any doubts about the continuing vitality and utility of the 1989 Settlement Agreement in any and all of its dimensions should be resolved in favor of the PCSSD.

5. Also, the 1989 Settlement Agreement should be continued and perhaps adjusted to more directly assist the PCSSD in attaining unitary status regarding facilities since the current State assistance program for facilities pays the PCSSD almost nothing.

6. Further, additional assistance from the State regarding facilities should be considered by the Court. The proliferation of State approved charter schools contributes to the declining enrollment in the PCSSD. Under the existing State program for assisting districts with facilities, declining enrollment and fixed or increasing local wealth further diminishes the State's contribution for District facilities.

7. The District proposes that the Court approve the creation of a separate Jacksonville area school district. Its creation would not have a segregative impact in either a new Jacksonville School District, or in PCSSD *sans* Jacksonville. Its creation would be popular among the patrons of Jacksonville and the residual PCSSD. Popular support remains a critical element in attaining unitary status. Facilities in Jacksonville are in need of improvement/replacement. A new Jacksonville district could, under the existing State program for assisting districts with facilities improvement/construction, immediately pursue new facilities in Jacksonville; and do it with greater State assistance than that to which PCCSD is entitled. Not only would this be positive for the citizens of Jacksonville, it would promote the ability of PCSSD *sans* Jacksonville to attain full unitary status by limiting the facilities projects it must accomplish.

8. The PCSSD agrees with the State that it is time to end this protracted litigation.

To that end PCSSD proposes to the Court that it enter an order modifying the 1989 Settlement Agreement in the following particulars: [A] That PCSSD and the State be given three years to bring its nine race-based subject areas into unitary status; [B] that PCSSD and the State be directed to present to the Court forthwith a plan for bringing PCSSD facilities into unitary status within a reasonable length of time; [C] that PCSSD present forthwith for the Court's consideration a non-segregative plan for the detachment of Jacksonville that is both financially and educationally sound; [D] that the Court order the combined payments made annually by the State to PCCSD, commonly identified as desegregation payments and including those sums mentioned in paragraph 2 and 3 on pages one and two above, be maintained at their present level in 2012-13, and thereafter reduced *pro rata* over eight years so that the final desegregation payment will be in 2019-20 and will be 80% of the amount paid to PCSSD in 2012-13; [E] that PCSSD, LRSD, and NLRSD be directed to present forthwith to the Court a plan for phasing out State and district financial support for stipulation magnet schools and M to M transfers over no more than seven years; [F] that the Court continue in effect the State's non-retaliation obligation and sovereignty provisions respecting PCSSD; [G] that the Court establish a unitary status and reporting order for PCSSD and the State separate, apart, and unrelated to LRSD and NLRSD; and, [H] that the Court include in its modification order now and by future supplementation all such reasonable, proper, and equitable provisions necessary to end this litigation insofar as it involves PCSSD.

The Relief Sought By The State Is Simply Too Broad And Far Reaching.

The State essentially argues for a complete obliteration of the 1989 Settlement Agreement. However, while the agreement might warrant the substantial changes proposed above by PCSSD, it has not yet reached the point where it should be jettisoned wholesale. In particular and as

proposed, much of the agreement should remain in place, or even enhanced (*e.g.,* facilities), until the PCSSD is declared unitary in all respects.

The State Erroneously Contends That The PCSSD Was Declared Unitary In Student Assignment

At page 1 of its brief, the State maintains that: "PCSSD is partially unitary; in particular, it is unitary with respect to student assignments to schools." The PCSSD wishes this were so. However, as explained by the Court of Appeals in its December 28, 2011 decision:

> Under the circumstances, the release of judicial control over the sub-area of assignment of students to schools would not be conductive to achieving compliance with at least one other facet of the decree, the sub-area of reporting on single-race classrooms. See Freeman, 503 U.S. at 491. In addition, PCSSD's dismissive approach to the one-race reporting requirement has done nothing to "demonstrate[], to the public and to the parents and students of the once disfavored race, its good-faith commitment to the whole of the court's decree." Id. As a result, we deny PCSSD's request to declare PCSSD unitary in the sub-area of assignment of students to schools.
>
> Accordingly, we affirm the denial of unitary status for PCSSD in the area of student assignment.

Teacher Retirement and Health Insurance

Further, that portion of settlement sums paid from and because of the judgment against the State regarding teacher retirement and health insurance benefits should be retained for an indefinite period of time (unless modified as requested by PCSSD above), both because it represents a separate judgment not mentioned in the 1989 Settlement Agreement and because it is an award made pursuant to the anti-retaliation provisions of the Agreement. Importantly, the State has made no allegations of any change in circumstances regarding this award and judgment (see State brief at page 27). Indeed, the State devotes less than 2/3 of a page for its entire discussion concerning teacher retirement and health insurance. *Id*. Also, the State erroneously contends in that short argument that: "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. [emphasis supplied]

The Court of Appeals was careful to make it clear that the award to the PCSSD and the other Pulaski districts was simply to return them to parity with the other districts in the state. *Little Rock School District v. Pulaski County Special School District*, 148 F.3d 956, ¶23. Stated another way, had the State handled the changeover from teacher retirement and health insurance fairly to begin with, the districts in Pulaski County would have received this money all these years as have the other districts in the State. Thus, it is plainly wrong for the State to contend that these districts are receiving money that no other districts in the State are receiving. In short, the Pulaski districts receive the same proportion of these sums as all other districts.

The State's Reliance On *Horne v. Flores* Is Misguided As The Court Of Appeals Has Rejected Horne As Controlling In This Case.

At page 5, the State contends that the United States Supreme Court decision of *Horne v. Flores*, 129 S.Ct. 2579, forgives plan compliance and that "plan compliance is not the touchstone of consent decree release decisions." Unfortunately, both the State and the PCSSD made this argument to the Eighth Circuit in respect of the unitary issues found against the PCSSD. In short, the Court of Appeals squarely held that the *Horne* principles did not displace the "good faith" principles explained in *Freeman v. Pitts* and that despite the fact that the PCSSD had good substantial outcomes, and outcomes better than other districts which had been declared unitary, this did not excuse the PCSSD from demonstrating good faith compliance with the entirety of its plan. (Opinion at 13, 11-2130, 12/28/11)

There is no reason to believe that the Court of Appeals will reverse this December 2011 holding and make an exception for the State's attempt to recycle *Horne* in the context of the 1989 Settlement Agreement.

Specifically in *Horne*, Arizona argued that the Supreme Court should "look away from Arizona's attempt to comply [with the prior decrees] . . . 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." (State brief at page 5) These same circumstances apply in Arkansas. Again, there is no reason to predict that the Court of Appeals would see the issue raised in the State's brief any differently than it did four months ago in the PCSSD's unsuccessful efforts to establish unitary status under the *Horne* rationale.

The State Reads The Purposes Of The 1989 Settlement Too Narrowly.

The State correctly quotes the first paragraph of the 1989 Settlement Agreement, to wit: "Achieving unitary school systems in these three districts which are free from the vestiges of racial discrimination." *Id* at 6. The State then proceeds to misconstrue and wrongfully cabin this goal relegating it solely to student assignment to schools. *Id*. However, all of the other issues for which the PCSSD failed to attain unitary status have substantial racial dimensions. Indeed, Joshua successfully contended that the District's practices in advanced placement, gifted and talented and honors programs, discipline, school facilities, scholarships, special education, staff, and student achievement all failed one or more race-based tests or measures. Accordingly, the whole of the decree, in this case Plan 2000, is a race-based plan and the 1989 Settlement Agreement must be read to embrace all of these components, not simply student assignment to schools.

Significantly, Plan 2000 does not distinguish among resident students and transfer students as respects the issues of one-race classrooms, advanced placement, gifted and talented and honors programs, discipline, school facilities, scholarships, special education, staff, and student achievement. Accordingly, the fact must be that unless or until a court agrees that the PCSSD has eliminated the vestiges of racial discrimination in these myriad programs as regards transfer students, it is simply not enough that PCSSD appears to have satisfied racial balancing in the buildings themselves.

Indeed, when the Court of Appeals initially enumerated those areas from which "no retreat" would be tolerated, it specifically listed the intradistrict "desegregation of the PCSSD according to the agreed timetable." *Little Rock School District v. Pulaski County Special School District*, 949 F.2d 253, 255. The Eighth Circuit did not limit desegregation to assignment to schools in this context or in this statement. *Id*. at 255-6.

Because The State Has Assumed Responsibility For The PCSSD Achieving Unitary Status, All Doubts Concerning The Interpretation And Enforceability Of The 1989 Settlement Agreement Should Be Resolved In Favor Of The PCSSD.

Further, it is entirely fair to the State for this Court to accept this interpretation. The State of Arkansas now functions as the Board of Directors for the PCSSD, and the State has publicly stated that it is guiding and assisting the PCSSD to achieve unitary status. As the State explains at page 8: "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 as to whether the State remains bound to the 1989 Settlement Agreement." Thus, having assumed the task, it is fair that the State continue to help fund the PCSSD until it is completely unitary. These funds are used not just to transport inter-district children to schools;

they are also used to pay teachers, administrators and other staff members who are necessarily involved in administering advanced placement, gifted and talented and honors programs, discipline, responsibility for school facilities, special education, and student achievement.

The Fact That The State Has Made Significant Improvements In Education Generally, In Arkansas Does Not Translate Into A Reason To Jettison The 1989 Settlement Agreement.

The PCSSD does not generally quarrel with the accomplishments claimed by the State beginning at page 8 and continuing through page 16. However, the short answer to the State's efforts and improvements is this: They did not, by themselves, translate into unitary status for the PCSSD in nine areas, including facilities. Much that the State traces and highlights stems directly or indirectly from the *Lakeview* litigation, State court litigation in which the PCSSD was an active intervenor and participant in all respects before the Supreme Court appointed special masters, including the briefing to the Supreme Court, which extended over several years.

At Least One Of The *Lakeview* "Reforms" Serves To Retard Attainment Of Unitary Status By The PCSSD.

There was one area that gave pause to the PCSSD before agreeing to acquiesce to the end of the Lakeview litigation, and that was the means and manner in which the "partnership share" for participation in State facilities was to be calculated. It is this area which intersects with the PCSSD requirement to attain unitary status in the area of facilities.

PCSSD's reservations have proved to be true. While the funding of facilities originated as a state court and state constitutional issue, it has now assumed Amendment XIV dimension in the area of facilities and impacts the ability of the PCSSD to achieve full unitary status.

The State put in place, in the aftermath of Lakeview, what is known as the facilities partnership program. Each year, the State makes a determination as to what portion of a school district's building program will be eligible for State participation. For the poorest districts, the

State's share can range as high as 85.622%. For the so-called wealthy districts, the share can be less than 1.000%. The State's current share for PCSSD is 2.993%.

The problem is the way in which "wealth" is calculated by the State. It takes a district's enrollment, divides it into its local tax collections and calculates the local wealth per student. If that is sufficiently high, then a district does not qualify for partnership aid, thus restricting if not eliminating its ability to fund building programs. Accordingly, the State has created a new program which negatively affects the ability of the PCSSD to desegregate, at least in the area of facilities.

As stated, currently this calculation results in the PCSSD, at least on paper, appearing to be wealthy and earning a 2.993% partnership share. But this outcome is the direct result of a continuously declining enrollment coupled with a growing tax base. Yet because a school district cannot reduce expenditures commensurate with or nearly as rapidly as its enrollment declines , expenses continue to surge ahead of revenues leaving less room to devote revenue to building funds. So is it just tough luck? In this county, the answer is no.

The State's Action In Permitting A Proliferation Of Charter Schools Also Constrains The Ability Of The PCSSD To Attain Unitary Status.

The State's action in proliferating charter schools exacerbates the enrollment decline in the PCSSD. Thus, the State-created formula results in but a 3% partnership share influenced by calculated State actions for a district deemed simultaneously by the State as both "wealthy" and in double fiscal distress. Equity dictates that so long as such circumstances prevail, revenue should continue to flow to the PCSSD so that it can eventually attain unitary status, particularly in school facilities.

Significantly, Nowhere In Its Brief Or Motion Does The State Describe Any "Change In Circumstances" Which Would Warrant A Termination Of Funding Awarded For Teacher Retirement And Health Insurance Claims.

Beginning at page 14, the State describes the changes it has made in school funding since 1989. Missing from that narrative is any hint that the State has modified its payment of teacher retirement and health insurance funds to school districts. This Court awarded judgment to the three Pulaski districts in 1999 because the State discriminates against them by the way it reimburses all other districts for teacher retirement and health insurance. Thus, even if this Court were tempted to lend some credence to the State's arguments that changed circumstances warrant a reexamination of the M to M and Magnet School programs, the State has advanced no such facts and, indeed, has not argued directly that change in circumstances warrants any change in the current revenue stream to these districts for teacher retirement and health insurance. Again, these sums were to place the three Pulaski districts on a par with the other school districts in the State. It is in no shape, form or fashion a windfall to these districts nor does it represent sums they received that other districts do not receive or sums they receive at the expense of other Arkansas schools. Stated another way, the $221,651,809 the State claims was "extra money" to the Pulaski districts is simply money they should have been paid since 1998 as regular State aid.

This Court Should Seriously Consider Modifying The Consent Decree To Refocus It On Achieving Unitarity Status For PCSSD.

Again, at page 6 of its brief, the State maintains: "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'." Speaking for itself, it is painfully obvious that the PCSSD has not achieved unitary status in 9 of the 12 areas embraced in Plan 2000. All of these areas have race dimensions and were obviously put in place as a response to previous findings of racial discrimination. That is, after all, what this case is still about.

PCSSD has proposed a modification of the decree in this brief. The proposed modifications, we respectfully submit, will preserve desegregation funding for a reasonable length of time while creating the time and mechanisms for redirecting resources to those areas in which the PCSSD has yet to attain unitary status, particularly facilities. That would be an efficient and prudent use of resources to attain the State's goal of having "constitutionally desegregated public school systems" in Pulaski County. *Id*. at 6.

The PCSSD has previously presented to this Court an ambitious plan to attain unitary status in the area of facilities. Indeed, before its financial circumstances were fully revealed and discovered after the State takeover, the PCSSD specifically asked this Court to approve "Vision 2020," the District's plan for spending approximately $104 million to renovate and build new schools to attain unitary status. The Court at that time declined to address the Vision 2020 motion, an imminently wise decision it now appears. Vision 2020 is no longer the blueprint for the PCSSD facilities program.

But now, for instance, if this Court concludes that the Majority to Minority transfer program has essentially served its purpose, or that a reasoned phase-out of the program is justified, then this Court has the flexibility to redirect some or all of those funds to a brick and mortar building program in the PCSSD to assist the PCSSD in attaining unitary status for facilities.

Judge Arnold previously instructed regarding modifying a consent decree:

> The court need only identify a defect or deficiency in its original decree which impedes achieving its goal, either because experience has proven it less effective [or] disadvantageous, or because circumstances and conditions have changed which warrant fine-tuning the decree. A modification will be upheld if it furthers the original purpose of the decree in a more efficient way, without upsetting the basic agreement between the parties.

Little Rock School District v. Pulaski County Special School District, 949 F.2d 253, 257.

Here, the State maintains that the original purpose of the 1989 Settlement Agreement was to attain unitary status for the three districts in Pulaski County. Indeed, Little Rock School District and North Little Rock School District are unitary. PCSSD is not. The State now has assumed the role of shepherding the PCSSD to complete unitary status.

It is respectfully submitted that facilities will prove the biggest obstacle, because of the enormous dollar cost, to the attainment by PCSSD of total and complete unitary status and therefore release from court supervision. Indeed, it makes sense, if the court is inclined to modify the consent decree, to redirect sums to building programs, Ownership of those facilities by the State or their lease to PCSSD upon favorable terms should not be obstacles to such an endeavor. Modification of the consent decree, as herein above proposed, would narrow the Court's attention to PCSSD, the State, and the intervenors, those parties directly involved with PCSSD unitary status. We submit it would also be a significant first step in the direction of terminating this litigation.

A Separate Jacksonville School District

The Board of Directors of the PCSSD voted on July 29, 2009 to establish boundaries for a separate Jacksonville School District. A motion was made and passed to suspend negotiations for the creation of a separate Jacksonville School District until the PCSSD was granted unitary status by the District Court. By then the District's motion to be released from Court supervision had been pending for almost two years.

Of course, after the unitary status trial and the unsuccessful appeal, the PCSSD remains non-unitary in many areas although it has been awarded unitary status in regards to inter-district student assignment. This is significant because Judge Wilson, in denying permission to hold an

election for a Jacksonville splinter district on August 18, 2003, reasoned that the PCSSD needed all of its schools to provide a pool of students to participate in the Magnet and M to M programs.

The PCSSD was also found to have satisfied the legal requirements for assigning students and achieving proper racial balance in its regular schools. However, unitary status was withheld until the District could demonstrate the capacity to properly address and document its efforts to minimize or eliminate one-race classrooms. The District believes that this reporting deficiency will not require it to re-prove its entitlement to unitary status in the overall area of student racial balance once the issues respecting one-race classrooms are corrected.

As a by-product of its fiscal distress recovery analysis, the PCSSD has determined several advantages to the formation of a separate Jacksonville school district:

1. The district's facilities partnership share is currently 2.993%. If Jacksonville is established as a separate district, the PCSSD estimates that its partnership share for facilities funding would remain about the same. The new Jacksonville district would be created with a partnership share greater than 50%. Those promoting the formation of a separate Jacksonville school district thus believe that they could move quickly to remedy the facilities deficiencies in the Jacksonville area schools by operating as their own district rather than awaiting the day when the PCSSD has the resources to fully accomplish the facilities task. In the meantime, the PCSSD remains non-unitary in the area of facilities.

2. The PCSSD believes it can accomplish all eight other unitary tasks as found by the courts prior to the effective date for forming a Jacksonville school district. However, it does not realistically believe it can accomplish the tasks apparently necessary to become unitary in facilities before that date. Accordingly, if a Jacksonville school

district is formed in the near future, it would likely be required to agree to obtain court approval for its formation and to assume whatever unitary tasks remain to be accomplished by the current PCSSD, especially as regards facilities.

3. Projections are that State aid per student would increase in such new district.

A memorandum dated July 29, 2009 to the PCSSD Board of Directors submitted before the Board voted to establish the boundaries is attached to the PCSSD Response as Exhibit 1. It sets out step-by-step the State law requirements to form a separate Jacksonville school district.

Accordingly as part of its Response to the State's Motion as a strategy to gain unitary status, the PCSSD believes it prudent to call upon the proponents of a separate Jacksonville school district to update their previous proposal and submit it to the State Board of Education subject, of course, to both preliminary and ultimate approval by this Court.

The PCSSD Continues To Prefer A Resolution Of All Issues By Settlement

In 2007 the Arkansas Legislature passed Act 365 which is now codified as Ark. Code Ann.§6-20-416. That legislation articulated a legislative preference to settle this litigation with a crafted phase-out of funding extending for up to seven years. The PCSSD remains willing to engage in serious discussions consistent with this legislative pronouncement which also authorized the formation of a new Jacksonville School District.

PCSSD respectfully submits that its proposed modification of the consent decree furnishes a basis for such a settlement. Specifically, it provides a blueprint, including court monitoring and State aid, for PCSSD achieving unitary status, while at the same time unitary LRSD and NLRSD live happily ever after in a land of no litigation. For success, however, two other matters must of course first occur: 1) All parties must be ready, willing and able to discuss a serious phase-out of funding; and, 2) no phase-out of funding can be accommodated unless the expense side of the

equation, including the M to M program, the Magnet school program, transportation of inter-district students, and teacher retirement and health insurance are addressed from the expense perspective.

Conclusion

For the reasons stated above the State's motion should be denied and PCSSD's alternative proposal for modification of the consent decree, or some variation thereof, should be adopted as the order of the Court. The Court should conclude that the 1989 Settlement Agreement has not completely fulfilled the purpose cited at the outset by the State of seeing three completely unitary Pulaski County school districts. The PCSSD anticipates that it has likely articulated a different point of view and different approaches to and resolutions of the State's motion than has the Little Rock School District. For instance, the PCSSD leaves to others the opportunity to fashion arguments such as the State's duty to demonstrate its own good faith compliance with the 1989 Settlement Agreement and to explore additional reasons why the Settlement Agreement should be maintained, or modified in different or additional ways than proposed by PCSSD.

The circumstances of the three districts remain different with the needs of the PCSSD unique to it. Nevertheless, this should not deter this Court in charting a path and resolution of the State's motion which advances and ultimately accomplishes the reasons articulated by the State for

the 1989 Settlement Agreement, i.e., attainment of complete unitary status for the PCSSD as well as the other districts.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2012, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which shall send notification of such filing to the following:

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