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

LITTLE ROCK SCHOOL DISTRICT PLAINTIFF

v. 4:82-CV-0866-DPM

PULASKI COUNTY SPECIAL SCHOOL DISTRICT NO. 1, ET AL DEFENDANTS

MRS. LORENE JOSHUA, ET AL INTERVENORS

KATHERINE KNIGHT, ET AL INTERVENORS

LITTLE ROCK SCHOOL DISTRICT'S RESPONSE TO
ADE'S MOTION FOR RELEASE FROM 1989 SETTLEMENT AGREEMENT

The Little Rock School District ("LRSD") for its Response to ADE's Motion for Release from 1989 Settlement Agreement states:

1. LRSD admits that the M-to-M and magnet stipulations were in their twenty-fourth year of operation when ADE filed its motion. The M-to-M and magnet stipulations were approved by the Court on 27 February 1987 for implementation beginning the 1987-88 school year. *DN 739. See Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.*, 659 F.Supp. 363 (E.D. Ark. 1987). The 1989 Settlement Agreement was approved by the Court on 18 January 1991. *DN 1418.*

2. LRSD admits that LRSD and the North Little Rock School District ("NLRSD") complied in good faith with their intradistrict desegregation plans, eliminated the vestiges of their past discrimination to the extent practicable and have been released from their intradistrict desegregation obligations. LRSD admits that the Pulaski County Special School District ("PCSSD") complied with its intradistrict desegregation plan, eliminated the vestiges of its past

discrimination to the extent practicable and has been released from its intradistrict desegregation obligations in the areas of interdistrict schools, multicultural education and school resources. *DN 4507*.

3. LRSD admits that it complied in good faith with its intradistrict desegregation plan, eliminated the vestiges of its past discrimination to the extent practicable and was released from all intradistrict desegregation obligations in 2007. *DN 4103*.

4. LRSD admits that it complied in good faith with its intradistrict desegregation plan, eliminated the vestiges of its past discrimination to the extent practicable and was released from its intradistrict desegregation obligations, with the exception of program evaluation, in 2002. *See Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.*, 237 F.Supp.2d 988 (E.D. Ark. 2002).

5. LRSD admits that NLRSD complied in good faith with its intradistrict desegregation plan, eliminated the vestiges of its past discrimination to the extent practicable and was released from all intradistrict desegregation obligations in 2011. *Little Rock Sch. District v. State of Arkansas*, 664 F.3d 738 (8th Cir. 2011).

6. LRSD admits that the Court stated in a footnote in 2002 that "for the last few years, it appears NLRSD has been unitary," in *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.*, 237 F.Supp.2d at 1016 n.58.

7. LRSD admits that PCSSD complied with its intradistrict desegregation plan, eliminated the vestiges of its past discrimination to the extent practicable and has been released from its intradistrict desegregation obligations in the areas of interdistrict schools, multicultural education and school resources. *DN 4507*.

8. LRSD denies that PCSSD is unitary with regard to student assignment. LRSD affirmatively asserts that the Court of Appeals for the Eighth Circuit affirmed denial of unitary status for PCSSD in the area of student assignment. *Little Rock Sch. District v. State of Arkansas*, 664 F.3d at 750. *See Freeman v. Pitts*, 503 U.S. 467, 491 (1992) ("Among the factors which must inform the sound discretion of the court in ordering partial withdrawal are the following: whether there has been full and satisfactory compliance with the decree in those aspects of the system where supervision is to be withdrawn; whether retention of judicial control is necessary or practicable to achieve compliance with the decree in other facets of the school system; and whether the school district has demonstrated, 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 and to those provisions of the law and the Constitution that were the predicate for judicial intervention in the first instance.").

9. LRSD admits that over the last two decades the Arkansas General Assembly has enacted legislation in response to state court findings that Arkansas' education system violated the Arkansas Constitution, article 14, section 1 and article 2, sections 2, 3 and 18.

a. LRSD affirmatively asserts that Arkansas' education system violated the Arkansas Constitution, article 14, section 1 and article 2, sections 2, 3 and 18, the entire time LRSD and the defendant districts were receiving payments for compensatory education programs designed to remediate the racial achievement disparity. *DN4440, LRSD Ex. 3, 1989 Settlement Agreement, § II, ¶ N. See Lake View Sch. Dist. v. Huckabee*, 363 Ark. 520, 210 S.W.3d 28, 29-30 (2005) ("This Court's determination that Arkansas' public school funding system does not pass constitutional muster dates back twenty-two years. *See DuPree v. Alma Sch. Dist. No. 30*, 279 Ark. 340, 651 S.W.2d 90 (1983).").

b. LRSD affirmatively asserts that Arkansas' education system again violates the Arkansas Constitution, article 14, section 1 and article 2, sections 2, 3 and 18, because the General Assembly has failed to prepare an adequacy report as required by Arkansas law, has made changes to the funding system that have no rational basis, and has failed to make adjustments necessary to maintain constitutionality. Claim preclusion does not apply because the acts and/or omissions that underlie LRSD's affirmative defense did not occur until after the Supreme Court issued its mandate in *Lake View IV*. The Supreme Court issued its mandate in *Lake View IV* following the 2006 Adequacy Report, the 2006 Recalibration Report by Lawrence O. Picus and Associates ("Picus") and actions taken by the General Assembly through the 2007 regular session. *Lake View Sch. Dist. v. Huckabee*, 370 Ark. 139, 141-43, 257 S.W.3d 879, 881 (2007) ("*Lake View IV*").[1] Since that decision, there have been three adequacy reports (2008, 2010 and 2012) and two regular sessions (2009 and 2011). The 2013 regular session began on 14 January 2013. Each legislative cycle gives rise to two categories of issues: (1) Whether the General Assembly conducted an adequacy study in compliance with Act 57 of the Second Extraordinary Session of 2003 ("Act 57"), *Lake View Sch. Dist. No. v. Huckabee*, 364 Ark. 398, 415, 220 S.W.3d 645, 657 (2005)("*Lake View III"*) ("To argue that inaction under Act 57 may equate to adequacy, as the State seems to maintain, does not thread the needle of either logic or common sense."); and (2) Whether the evidence in the adequacy study required adjustments to maintain constitutionality. *Lake View IV*, 370 Ark. at 146, 257 S.W.3d at 883 ("[T]he job for an adequate education system is 'continuous' and that there has to be 'continued vigilance' for constitutionality to be maintained."). If the General Assembly makes adjustments to the funding system, a third category of issues arise: Whether, at a minimum, the adjustments have an actual

[1] By identifying this case as "*Lake View IV*", LRSD is following the lead of Justice Robert L. Brown in *Kimbrell v. McCleskey*, 2012 Ark. 443, at 27 n.1.

rational basis. *Lake View Sch. Dist. No. 25 v. Huckabee*, 351 Ark. 31, 78, 91 S.W.3d 472, 499 (2002) ("*Lake View I*") ("We hold, once again, that requiring the State to show a compelling interest to support the classification is unnecessary in this case, because the State fails to justify the classification even under the more modest rational-basis standard."). All of LRSD allegations fall into one of these three categories.

c. LRSD affirmatively asserts that that the following post-*Lake View IV* acts and/or omissions violated Act 57 and/or article 14, section and article 2, sections 2, 3 and 18 of the Arkansas Constitution:

(1) The education-related acts passed during the 2009 and 2011 regular sessions are unfunded mandates;

(2) The failure to evaluate programs as a part of the 2008, 2010 and 2012 adequacy reports violates the constitution and Act 57;

(3) The cost-of-living adjustments ("COLAs") in 2008, 2010 and 2012 were determined "based upon what funds were available – not by what was needed," *Lake View III*, 364 Ark. at 413, 220 S.W.3d at 655-56;

(4) The inclusion of transportation funding in the 2007-08 funding matrix was intended to be *temporary* while "the state creates a more standards- and research-based transportation funding formula" that "more accurately reflect the realities of individual school districts." *DN 4440, LRSD Ex.72, pp. 61 and 79*; that the Bureau of Legislative Research ("BLR") developed a transportation funding formula based on route miles that was 98 percent accurate in predicting school districts actual transportation cost, *DN 4704, LRSD Ex. 83*, but that the General Assembly failed to adopt BLR's funding formula (or any other rational transportation funding formula) during the 2008 and 2010 legislative sessions and failed to

recommend the adoption of a rational transportation funding formula in the 2012 Adequacy Report; and,

(5) The 2008, 2010 and 2012 adequacy reports ignored the 2006 recommendation that funding for teacher retirement and health insurance be studied further, and the State has failed to make required adjustments to maintain constitutionality.

d. The Arkansas Supreme Court did not issue its mandate in 2007 because the education system was mission accomplished. The Court issued its mandate with full knowledge that "some measures, and specifically funding measures and those relating to facilities and equipment, have not been brought to fruition." *Lake View Sch. Dist. No. 25 v. Huckabee*, 358 Ark. 137, 160, 189 S.W.3d 1, 16 (2004) ("*Lake View II*"). The Arkansas Supreme Court issued its mandate because it presumed "government officials will do what they say they will do." *Lake View II*, 358 Ark. at 160, 189 S.W.3d at 16. Since 2007, Arkansas government officials have not done what they said they would do to maintain the constitutionality of education funding system.

10. As to paragraph 10(a) of ADE's motion, LRSD admits that the State has implemented the Arkansas Comprehensive Testing, Assessment, and Accountability Program ("ACTAAP") which requires school districts to adopt curriculum consistent with State standards, to administer State developed tests, and to prepare an academic improvement plan for students who are not identified as "proficient" on the State developed tests. LRSD affirmatively asserts that the effectiveness of ACTAAP has been undermined (1) by ADE's manipulation of test results so that more students score proficient, and (2) by ADE's failure to evaluate programs and interventions to determine whether they are effective as implemented by Arkansas school districts.

a. Every two years a sample of Arkansas 4th and 8th graders participate in the National Assessment of Educational Progress ("NAEP"), also known as "The Nations Report Card."[2] The "changed circumstances" cited by the State were largely put in place beginning the 2004-05 school year so 2003 NAEP provides an appropriate baseline for measuring improvement. From 2003 to 2011, the percentage of 4th grade students scoring proficient or advanced in reading increased from 22 to 24 percent; the percentage of 4th grade students scoring proficient or advanced in math increased from 24 to 33 percent; the percentage of 8th grade students scoring proficient or advanced in reading increased from 26 to 29 percent; and the percentage of 8th grade students scoring proficient or advanced in math increased from 16 to 26 percent.

b. A large number of students who would not score proficient or advanced on the NAEP are nevertheless determined to be proficient or advanced based on the state developed and administered "Benchmark" exams. In 2011, ADE reported[3] that 82 percent of 4th graders were proficient or advanced in literacy, compared with 24 percent on NAEP – a 58 percent discrepancy; ADE reported that 82 percent of 4th graders were proficient or advanced in math, compared with 33 percent on NAEP – a 49 percent discrepancy; ADE reported that 77 percent of 8th graders were proficient or advanced in literacy, compared with 29 percent on NAEP – a 34 percent discrepancy; ADE reported that 63 percent of 8th graders were proficient or advanced in math, compared with 26 percent on NAEP – a 37 percent discrepancy. Moreover, while there was no statistically significant increase in NAEP 4th and 8th grade reading scores and 4th grade math scores from 2005 to 2011, Benchmark scores improved dramatically. The percentage of

[2] State Snapshot reports are available online at http://nces.ed.gov/nationsreportcard/states/.
[3] *See* "Statewide Benchmark Comparison 2005-2011, available online at http://www.arkansased.org/divisions/learning-services/student-assessment/test-scores/year?y=2011

students scoring proficient or advanced on the benchmark increased 31 percentage points for 4th grade literacy, 20 percentage points for 8th grade literacy and 32 percentage points for 4th grade math.

c. Arkansas is a member of the Southern Regional Education Board ("SREB"), a nonprofit compact that includes Arkansas and 15 other member states that works to improve education. The SREB 2012 Arkansas Progress Report acknowledged that the percentage of students scoring proficient on the Benchmark should be within *five* percentage points of NAEP. *SREB 2012 Arkansas Progress Report, pp. 7, 10.*[4] The wide gap (*from 34 to 58 percentage points*) between the Benchmark and NAEP indicates that the Benchmark "standards were likely too low." *SREB 2012 Arkansas Progress Report, pp. 7, 10.* The report further noted, "If state standards are too low, they do not challenge students sufficiently. They leave too many students unprepared for the next grade level and for high school and beyond." *SREB 2012 Arkansas Progress Report, pp. 7, 10.*

d. The NAEP results more accurately reflect Arkansas student achievement because, upon information and belief, the State has manufactured increased student achievement by manipulating Benchmark "scale" scores. Gayle Potter, then Director of Student Assessment for ADE, told Arkansas Online that the State uses a subjective process to convert a student's raw score to a "scale" score in determining proficiency. *Arkansas Online, "State tests' slide by the year," 2012-04-23, p. 1.* The State has used this subjective process to show continuing improvement on the Benchmark, even though there has been little progress on objective measures such as NAEP.

[4] The report may be viewed online at http://publications.sreb.org/2012/AR_progress_report.pdf.

e. Benchmark results may also be inflated due to excessive test preparation -- "teaching the test." *See Diane Ravitch, The Death and Life of the Great American School System, p. 159 (2010).* This improves test scores on the test taught but does not translate to other tests, such as NAEP, or to performance in real life. *Ravitch, p. 160.*

f. Both the 2008 and 2010 Adequacy Reports documented ADE's failure to evaluate programs. The 2008 Adequacy Report stated, "It is essential to determine which of multiple interventions used by schools (such as one-to-one tutoring versus a professional development program) are providing results and which need to be dropped or modified." *DN 4440, LRSD Ex. 71, p. 19.* It acknowledged that the present practice of conducting "scholastic audits" provides "no data on the effectiveness of interventions." *DN 4440, LRSD Ex. 71, p. 19.* The report concluded that without program evaluations "it is not possible to determine which strategies work and which do not." *DN 4440, LRSD Ex. 71, p. 19.* The 2010 Adequacy Report again noted that no program evaluations were being done. *DN 4704, LRSD Ex.84, p. 20.* It stated, "ADE acknowledged that currently there are no systemic efforts in place to assess the effectiveness of scholastic audits in schools or school districts. ADE does not have the fiscal and human resources to successfully evaluate the effectiveness of all programs and interventions, but the department said it will continue to publish status and gain results in the annual performance reports, so that school performance can be evaluated." *DN 4704, Ex.84, p. 20.* In other words, programs are not being evaluated as required by Act 57, and ADE has no plans to do so. The 2012 Adequacy Report continued to ignore the need for program evaluations and makes no recommendations related thereto. *2012 Adequacy Report, p. 80.*[5]

[5] The 2012 Adequacy Report is available online at http://www.arkleg.state.ar.us/education/K12/AdequacyReportYears/2012%20Adequacy%20Report%20Volume%20I,%2012-024,%20Nov.%201,%202012.pdf.

11. As to paragraph 10(b) of ADE's motion, LRSD admits that all schools and school districts must prepare and submit to ADE Arkansas Consolidated School Improvement Plans ("ACSIPs") wherein school districts identify the programs and interventions to be implemented to help struggling students. LRSD affirmatively asserts that ADE does not evaluate the effectiveness of programs and interventions as implemented by Arkansas school districts. *DN 4704, LRSD Ex.84, p. 20.* As a result, nobody knows whether programs and interventions are actually being properly implemented in schools, and if so, whether they help struggling students and/or remediate the racial achievement disparity.

12. As to paragraph 10(c) of ADE's motion, LRSD admits that the State has in place the Arkansas Public School Computer Network ("APSCN") and that it makes data available to educators. LRSD affirmatively asserts that the funding system does not include funding for personnel necessary to formally evaluate programs and interventions using data available on APSCN.

13. As to paragraph 10(d) of ADE's motion, LRSD admits that ACTAAP was adopted, in part, to comply with the federal No Child Left Behind Act ("NCLB"). LRSD affirmatively asserts that NCLB/ACTAAP's accountability provisions have not improved student learning because they are not a substitute for formal evaluations of programs and interventions and high-quality professional development. Rather, NCLB/ACTAAP's accountability provisions have unfairly stigmatized high-poverty schools which are identified as failing schools under those statutes.

14. As to paragraph 10(e) of ADE's motion, LRSD admits that the State adopted a new funding model for the 2004-05 school year. LRSD also admits that in 2004-2005 the State increased the amount of general revenue in the public school fund. LRSD affirmatively asserts

that the general revenue as a percentage of the public school fund has decreased since that time because of increased ad valorem tax collections.

15. As to paragraph 10(f) of ADE's motion, LRSD admits that school districts have received "categorical funds" since 2004-05. LRSD affirmatively asserts that the State has not increased categorical funding each biennium to keep pace with inflation and that the State has not "smoothed" the current NSLA categorical formula as recommended. *DN 4440, LRSD Ex. 72, p. 50.*

16. As to paragraph 10(g) of ADE's motion, LRSD denies that many other changes have occurred in the last 24 years that have enhanced the educational opportunities available to all students in the State and Pulaski County.

17. LRSD denies the allegations contained paragraph 10 of ADE's motion not specifically admitted herein.

18. As to paragraph 11 of ADE's motion, LRSD admits that LRSD and NLRSD complied in good faith with their intradistrict desegregation plans, eliminated the vestiges of their past discrimination to the extent practicable and have been released from their intradistrict desegregation obligations. LRSD admits that PCSSD complied with its intradistrict desegregation plan, eliminated the vestiges of its past discrimination to the extent practicable and was released from its intradistrict desegregation obligations in the areas of interdistrict schools, multicultural education and school resources. *DN 4507*. LRSD denies that PCSSD has been released from its intradistrict desegregation obligations in the area of student assignment. LRSD denies that the Districts' release from their intradistrict desegregation obligations means the State should be released from its interdistrict desegregation obligations voluntarily agreed to in the 1989 Settlement Agreement. The State was adjudicated a constitutional violator, in part, because

of its role in creating and maintaining residential segregation in Pulaski County. *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.*, 584 F.Supp. 328, 353 (E.D. Ark. 1984). Thus, residential segregation is a vestige of the State's past discrimination that must be eliminated to the extent practicable before the State may be released from its interdistrict desegregation obligations. The State's reliance on the districts' unitary status is unavailing for another reason. The parties anticipated the districts' unitary status at the time of the 1989 Settlement Agreement. The districts' unitary status, therefore, does not constitute a changed circumstance justifying termination of the M-to-M and magnet stipulations. *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 385 (1992) ("[M]odification should not be granted where a party relies upon events that actually were anticipated at the time it entered into a decree."); *White v. National Football League*, 585 F.3d 1129, 1138 (8th Cir. 2009) ("When, as here, changed conditions have been anticipated from the inception of a consent decree, they will not provide a basis for modification . . . .").

19. As to paragraph 12 of ADE's motion, LRSD denies that the State has substantially complied with its obligations under the 1989 Settlement Agreement and prior and subsequent orders of the Court.

a. LRSD affirmatively asserts that the State has consistently interpreted the agreement to the detriment of LRSD and the defendant districts forcing the districts to pursue remedies through litigation. *See DN 1442, p. 3-4 (ODM funding), DN 2337, p. 9-10 (Workers Compensation), DN 2930, p. 11 (Teacher Retirement), DN 2967 (Health Insurance), DN 3792 (Jacksonville Splinter District).*

b. LRSD affirmatively asserts that the State has violated and continues to violate the 1989 Settlement Agreement and prior and subsequent orders of the Court by

unconditionally authorizing open-enrollment charter schools in Pulaski County without Court approval and allowing open-enrollment charter schools in Pulaski County to operate in a manner that has a negative impact on the interdistrict remedy.

c. LRSD affirmatively asserts that the State has violated and continues to violate the 1989 Settlement Agreement and prior and subsequent orders of the Court by failing to identify or develop programs to remediate the racial achievement disparity.

(1) In the 1989 Settlement Agreement, the State agreed that "[t]here should be a remediation of the racial academic achievement disparities for Arkansas students." *DN 4440, Ex. 3, § III, ¶F*. To that end, the State promised:

> The ADE, with the assistance of the Court's desegregation expert(s), will develop and will search for programs to remediate achievement disparities between black and white students. If necessary to develop such programs, the ADE will employ appropriately trained and experienced consultants in the field of remediation of racial achievement disparities and/or hire as staff members persons with such training and experience. The remediation of racial achievement disparities shall remain a high priority with the ADE.

*DN 4440, Ex. 3, § III, ¶ G.* In 1991, the Eighth Circuit considered modifications to the consent decree agreed to by the parties but rejected by this Court. In so doing, the Eighth Circuit identified "crucial" elements of the decree "with respect to which no retreat should be approved." *Appeal of LRSD*, 949 F.2d 253, 256 (8th Cir. 1991). Among those crucial elements was "the agreed effort to eliminate achievement disparities between the races." *Id*.

(2) There is no dispute that the State has not identified or developed programs to remediate the racial achievement disparity. The State's current position is that there is nothing the State can do to remediate the racial achievement disparity, *see LRSD MTE MSJ Ex. 78, Armor Ach. Rpt., p. 2,* and accordingly, Dr. Tom Kimbrell, Commission of Education, admitted that ADE has no programs in place specifically designed to remediate the racial

achievement disparity in Pulaski County. *LRSD MTE MSJ Ex. 79, Kimbrell Dep., p. 12*. Instead, the State argues that everything it has done since 1989 to improve education will benefit African-American students (as well as all students), and therefore, these efforts satisfy its obligation to remediate the racial achievement disparity. *LRSD MTE MSJ Ex. 79, Kimbrell Dep., pp. 12-13.* This argument cannot be distinguished from the argument made by PCSSD and rejected by the Eighth Circuit in *Little Rock Sch. Dist. v. State of Arkansas*, 664 F.3d 738 (8th Cir. 2011). As with PCSSD, the State's failure to identify or develop programs to remediate the racial achievement disparity cannot be excused because, according to the State, they would not have worked. *Id.* at 756-57 ("PCSSD does not challenge these findings, contending instead that it should be excused from its obligations because of a previous finding that "socioeconomic factors are the root cause for most, if not all, of the achievement gap." *See Little Rock Sch. Dist.*, 237 F.Supp.2d at 1074. Regardless of whether the specific intervention programs required by Plan 2000 eventually bear fruit, however, PCSSD cannot disavow its agreed-upon obligation to make a good-faith effort."). The State agreed to make the effort, and only after the State makes a good-faith effort may the State argue that the consent decree should be modified to relieve it of its commitment to remediate that racial achievement disparity. *See Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367, 384 (1992) ("If it is clear that a party anticipated changing conditions that would make performance of the decree more onerous but nevertheless agreed to the decree, that party would have to satisfy a heavy burden to convince a court that it agreed to the decree in good faith, made a reasonable effort to comply with the decree, and should be relieved of the undertaking under Rule 60(b)."). Moreover, this argument should be rejected as a matter of law because they render the State's commitment to remediate the racial achievement disparity superfluous. *See Southway Corp.v.Metropolitan Realty and Development Co., LLC*, 206 S.W.3d

250, 254 (Ark. App. 2005) ("A construction which neutralizes any provision of a contract should never be adopted if the contract can be construed to give effect to all provisions."); *Fryer v. Boyett*, 978 S.W.2d 304, 306 (Ark. App. 1998) ("Different clauses of a contract must be read together and the contract construed so that all of its parts harmonize, if that is at all possible.").

d. LRSD affirmatively asserts that the State has violated and continues to violate the 1989 Settlement Agreement and prior and subsequent orders of the Court by abandoning its monitoring responsibilities.

(1) Section III, paragraph A of the 1989 Settlement Agreement provides:

> The State shall be required (as a non-party) to monitor, through the 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 provide 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 remediating achievement disparities.* Any recommendations made by ADE shall not form the basis of any additional funding responsibilities 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.

*DN 4440, Ex. 3, § 3, ¶ A (emphasis supplied).* On May 31, 1989, the State submitted to the parties and the Court a monitoring plan, commonly referred to as the "Allen Letter" after its author, H. William Allen. *LRSD Ex. 80, Allen Letter*. ADE has never been released from its obligations under the Allen Letter. On 18 December 1998, the Court relieved ADE "from its obligation to file a February 1999 Semiannual Monitoring Report" for the purpose of developing proposed changes to ADE's monitoring and reporting responsibilities." *DN 3230, p. 2.* ADE was later also relieved of its obligation to file the July 1999 Semiannual Monitoring Report. *See DN*

*3277*. Rather than filing its February 2000 Semiannual Monitoring Report, ADE moved the Court to approve its proposed revised monitoring plan on 1 February 2000. *DN 3327.* That motion was denied on 12 May 2000. *DN 3360.*

(2) The State failed to monitor and produce reports as required by the Allen Letter. In 1997, the Office of Desegregation Monitoring ("ODM") issued a report critical of the State's monitoring pursuant to the Allen Letter. *DN 3097, Report on the Arkansas Department of Education's Monitoring of the School Districts in Pulaski County*. With regard to the State's monitoring reports, ODM reported:

> In particular, the staff of all three districts found ADE's voluminous report to be collections of data that, without the benefit of analysis, summaries, conclusion, or recommendations, were essentially and ultimately useless, because the reports did not help them develop strategies for quality desegregated education. None of the staff members was able to recall a single incident in which the schools and districts have used the reports for educational purposes.

*DN 3097, p. 38*. Following ODM's 1997 report on ADE monitoring, ADE, LRSD and PCSSD agreed that the State's monitoring plan should be modified and jointly moved to *temporarily* relieve the ADE from its obligations under the Allen Letter so that a new monitoring plan could be developed. *DN 3220 and 3230*. ADE moved for approval of a new monitoring plan on 1 February 2000. *DN 3327*. Joshua and LRSD objected to the new plan, although both agreed that changed circumstances justified modification. *DN 3334 and 3340.* LRSD argued that ADE's "role should shift from one of monitoring to one of active participation in the district's effort to eliminate the achievement disparity between African-American and other students." *DN 3340, p.* 3. The Court (the Honorable Susan Webber Wright) denied ADE's motion to modify the Allen Letter stating, "The Court acknowledges that changed circumstances may warrant revision of ADE's monitoring plan but finds that ADE has failed to demonstrate that [the proposed revised monitoring plan] is tailored to address the changed circumstances." *DN 3360*. Despite

universal agreement that its monitoring plan should be modified, ADE never proposed another monitoring plan and continues to be bound by the Allen Letter. *See DN 3360, p. 2* ("Thus, the Allen [L]etter contains substantive terms of a consent decree, which relate to the vindication of constitutional rights.").

(3) As far as LRSD can determine, ADE has not produced a monitoring report as required by the Allen Letter since 2 February 1998 (*DN 3119*), although the Allen Letter required ADE to "provide a written report to the parties and the Court on a semiannual schedule . . . on February 1 (or nearest workday) and July 15 (or nearest workday)." *LRSD Ex. 80, Allen Letter, p. 8.* ADE does still file a monthly "project management tool" ("PMT") intended to "enable ADE to stay on track as it sets in motion both the development phase and the subsequent action steps that constitute the implementation phase." *DN 2045, p. 5*.7 The PMT is not a monitoring report. *See LRSD Ex. 81, Morris Dep., p.34.* Even so, the 1 September 2011 PMT documents ADE's failure to follow-through on developing a revised monitoring plan. It includes the following entry:

> ***XVIII. Work with the Parties and ODM to Develop Proposed Revisions to ADE's Monitoring and Reporting Obligations***
> * * *
> A court decision regarding the LRSD Unitary Status is expected soon. . . . The next meeting about the Desegregation Monitoring and Assistance Plan will be held in August, 2002, after school starts.

*DN 4615, p.355*. The 1 September 2011 PMT documents the fact that the August 2002 meeting never occurred and that ADE took no additional steps to develop a monitoring plan to replace the Allen Letter.

(4) Willie Morris, ADE Director of Desegregation, has been responsible for desegregation monitoring at ADE since 2001. *See LRSD Ex. 81, Morris Dep., pp.6, 10 and 26.* Morris testified that he has never monitored the Pulaski County districts as

required by the Allen Letter. Morris explained that he thought ADE was relieved of its obligations under the Allen Letter, and he was unaware that the Court denied ADE's motion to modify the Allen Letter in 2000. *See LRSD Ex. 81, Morris Dep., pp.26, 35 and 60.*

e. LRSD affirmatively asserts that the State has violated and continues to violate the 1989 Settlement Agreement and prior and subsequent orders of the Court by adopting a new system of transportation funding that funds the Pulaski County districts to a lesser degree than other districts in the state.

(1) At the time of the 1989 Settlement Agreement, the State funded student transportation as a separate grant based on the number of students transported. *DN 4440, Ex. 69, p. 3.* In 1997, the State adopted a more complex formula for calculating transportation aid but that formula continued to be based on the number of students transported with adjustments for population density and other factors. *DN 4440, Ex. 69, p. 3; see Act 1133 of 1997.* Effective July 1, 2005, the State included transportation aid as a component of foundation funding distributed based on the number of students -- average daily membership ("ADM"). *DN 4440, Ex. 69, p. 3; LRSD Ex. 72, pp. 61, 72 and 79; see Act 2138 of 2005.* The State's decision to distribute transportation aid based on ADM rather the number of students transported violates section II, paragraphs E and L of the 1989 Settlement Agreement, as interpreted by the Eighth Circuit. *See Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.*, 148 F.3d 956 (8th Cir. 1998); *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.*, 83 F.3d 1013 (8th Cir. 1996).

(2) The relevant part of section II, paragraph E provides:

> In addition to any payment described elsewhere in this agreement, the State will continue to pay the following costs:
> * * * * * *
> (6) The State's share of any and all programs for which the Districts now receive State funding.

*DN 4440, Ex. 3, p. 4-5.* Section II, paragraph L provides:

> The State shall take no action (including the enactment of legislation) for the purpose of retaliating against the Districts (including retaliatory failure to increase State aid and retaliatory reduction in State aid) because of this Litigation or this settlement. The State will enact no legislation which has a substantial adverse impact on the ability of the Districts to desegregate. Fair and rational adjustments to the funding formula which have general applicability but which reduce the proportion of State aid to any of the Districts shall not be considered to have an adverse impact on the desegregation of the Districts.

*DN 4440, Ex. 3, p.10.* The Eighth Circuit has read these two sections together as "an anti-retaliation clause" that prohibits the State from adjusting funding programs so that they fund "the Pulaski County districts to a lesser degree than other districts in the state." *LRSD v. PCSSD,* 83 F.3d 1013 at 1018.

(3) At the time of the 1989 Settlement Agreement, transportation aid was a "program" for purposes of section II, paragraphs E and L. This Court (the Honorable Susan Webber Wright) has in the past identified transportation aid as a "program." *DN 2967, p. 2* ("In addition, the State funded other programs such as Transportation Aid and At-Risk Grants by formulas or based on need."). *See DN 2930, p. 8* ("The Court agrees that this explanation strongly suggests the recognition that the sums which would have been paid under the old formula through MFPA as teacher retirement and health insurance matching, transportation aid and at-risk grants are now distributed as State equalization funds."). In finding workers' compensation to be a "program" as defined by section II, paragraph E, the Eighth Circuit explained:

> While the State is correct in its assertion that workers' compensation funding is not a direct educational program, it is still an expense that districts must bear. Assuming finite funds, workers' compensation payments will decrease the funds available for more direct educational programs. Moreover, State payments for workers' compensation costs were a source of funds for school districts when the parties entered into the Settlement Agreement. Thus, funding of workers'

> compensation by the State is a "program" for purposes of the Settlement Agreement.

*LRSD v. PCSSD*, 83 F.3d at 1018. Similarly, transportation is an expense that districts must bear. *DN 4440, Ex. 71, p. 56* ("The Education Committees have determined that state-funded transportation for public education may be a necessary component to providing students with an equitable opportunity for an adequate education to the extent that a student would not otherwise be able to realize this opportunity but for such transportation being provided by the state."); *LRSD Ex. 79; Kimbrell Dep. pp. 128-29*. Assuming finite funds, transportation costs decrease the funds available for more direct educational programs. *See LRSD v. PCSSD*, 83 F.3d at 1018. State payments for transportation were a source of funds for school districts at the time the parties entered into the 1989 Settlement Agreement. *DN4440, Ex. 69, p. 2-3*. For these reasons, this Court should find as a matter of law that transportation was a "program" for purposes of section II, paragraphs E and L of the 1989 Settlement Agreement.

(4) A decision by the State's to end transportation funding for all school districts would not violate the consent decree because it would "affect[] all districts to the same degree." *See LRSD v. PCSSD*, 83 F.3d at 1018. The State violated the "anti-retaliation clause" by changing to a system that distributes transportation aid based on ADM. *DN 4440, Ex. 69, p. 3; LRSD Ex. 72,pp. 61, 72 and 79; see Act 2138 of 2005. See LRSD v. PCSSD*, 148 F.3d at 965. This change violated the consent decree because it results in the Pulaski County districts receiving proportionately less transportation aid than districts statewide. *See LRSD v. PCSSD*, 83 F.3d at 1018.

(5) The change in transportation aid is analogous to the change made by the State with regard to workers' compensation, teacher retirement and health insurance that have been found to violate section II, paragraphs E and L of the 1989 Settlement Agreement. *See*

*LRSD v. PCSSD*, 148 F.3d at 967; *LRSD v. PCSSD*, 83 F.3d at 1018. At the time of the settlement, the State distributed funds for these programs as a separate grant; after the settlement, the State stopped funding these programs separately and distributed funding for these programs based on ADM as a part of regular state aid. With regard to workers compensation funding, the State distributed "seed money" based on ADM for just one year. The Eighth Circuit explained why distributing the workers' compensation "seed money" based on ADM violated the "anti-retaliation clause":

> When the State disbursed "seed money" to help school districts make the transition to paying their own workers' compensation costs, it paid about one-half of the expense statewide. In the Pulaski County districts, it paid only about one-third of the expense. This disparity arose because the State's formula used enrollment rather than number of employees to determine how much money each district would receive. The Pulaski County districts are employee heavy compared to other districts, increasing their workers' compensation costs. This result is precisely what the anti-retaliation clause was meant to prevent. It funds the Pulaski County districts to a lesser degree than other districts in the state. It is of no moment that the State reached this result in a mathematically consistent manner. *The District Court correctly held that the State must disburse seed money to the Pulaski County districts in the same percentage as it does statewide.*

*LRSD v. PCSSD*, 83 F.3d at 1018 (emphasis supplied). *See LRSD v. PCSSD*, 148 F.3d at 966-67.

(6) Similarly, the State's current method of distributing transportation aid violates the anti-retaliation clause because it funds the Pulaski County districts to a lesser degree than other districts in the state. *LRSD v. PCSSD*, 83 F.3d at 1018; *LRSD v. PCSSD*, 148 F.3d at 966-67. Using ADE's 2009-10 Annual Statistical Report, school districts statewide received 73.82 percent of their actual transportation cost in transportation funding 2009-10 while LRSD received 54.61 percent, PCSSD received 42.48 percent and NLRSD received 41.50 percent. *LRSD Ex. 82, p. 5.* In 2009-10, the Pulaski County districts' actual transportation cost was $32,276,147.82, but the districts only received $14,073,641.15 in transportation aid. *LRSD Ex.82, p. 7; See Bill Goff Dep. p. 47* (PCSSD "obviously" spends millions more for student

transportation than it receives from the State.). If Pulaski County districts received the same percentage of their transportation cost as districts statewide, they would have received $23,827,114.28 in transportation funding for the 2009-10 school year -- $9,753,473.13 more than they actually received. *LRSD Ex. 82, p. 5.*

(7) Therefore, this Court should rule as a matter of law that transportation aid was a "program" at the time of the settlement; that transportation aid used to be paid as a separate grant based on the number of students transported; that in 2005 the State changed its method of distributing transportation aid and began distributing transportation aid based on ADM; that the current system for distributing transportation aid funds the Pulaski County districts to a lesser degree than other districts in the State; and as a result, the current system for distributing transportation aid violates Section II, paragraphs E and L as interpreted by the Eighth Circuit. *LRSD v. PCSSD*, 83 F.3d at 1018; *LRSD v. PCSSD*, 148 F.3d at 966-67. Finally, the Court should award LRSD damages measured in a manner analogous to the methodology employed with regard to workers compensation, teacher retirement and health insurance.

f. LRSD affirmatively asserts that the State has violated and continues to violate the 1989 Settlement Agreement and prior and subsequent orders of the Court by retaliating against the Pulaski County districts by failing to adopt a standards-based formula for the distribution of transportation aid; failing to reimburse LRSD for its attorneys' fees incurred in obtaining unitary status; and, passing Act 701 of 2011 and subjecting the Pulaski County districts to "forensic audits" purportedly to ensure that settlement funds are being spent on "desegregation."

(1) After the Arkansas Supreme Court recalled its *Lake View* mandate in 2005, the State retained Lawrence O. Picus and Associates ("Picus") "to recalibrate the existing school funding model and provide estimates of the amount of money needed to fund the system for the 2007-08 school year." *DN4440, Ex. 72, p. 1.* In their August 30, 2006 "Recalibration Report," Picus noted its recommendation that transportation aid be removed from foundation funding; that districts receive transportation aid "as separate grant" and that transportation aid should remain in foundation funding only "until the state creates a more standards- and research-based transportation funding formula." *DN4440, Ex. 72,p. 79.* Picus based this recommendation on the need to "find a way to allocate transportation funds that more accurately reflects the realities of individual school districts." *DN4440, Ex. 72, p. 61*. Picus anticipated "proposing a method of funding transportation costs that will vary by district depending on district characteristics (i.e. population density, road condition, distances and number of students transported, etc.)." *DN4440, Ex. 72, p. 61*. The State, by all indications, accepted Picus' recommendation. *DN 4440, Ex. 69, p. 6, citing Ex. 72, p. 80.* (noting Picus' recommendation that transportation aid be included in foundation funding for 2007-08 "AND to be replaced by a standards-based formula in the future." (emphasis in original)). However, the 2007, 2009 and 2011 regular legislative sessions passed without the State adopting a standards-based transportation funding formula, although representations were made that the Bureau of Legislative Research ("BLR") was working on a standards-based formula. *See DN 4440, Ex. 71, p. 56.*

(2) Before the 2011 Legislative Session, the BLR developed a standards-based formula based on route miles that was 98 percent accurate in predicting districts' actual transportation cost. *LRSD Ex. 83,* p. 12. BLR presented the formula to the House and

Senate Interim Committees on Education ("Joint Committee") on December 1, 2010. *LRSD Ex. 83 (email from Wilson).* BLR's presentation made it clear that the Pulaski County districts, and LRSD in particular, would benefit the most from the State adopting BLR's route miles formula. *LRSD Ex. 83, p. 11.* In explaining LRSD Ex. 83 to the Joint Committee, BLR identified the three districts furthest above the line representing current funding (i.e. most underfunded) as the Pulaski County districts. BLR's Statewide Summary showed that, under the current formula for 2011-12, approximately $137 million would be included in the funding matrix for transportation; however, the 2010 actual transportation cost for Arkansas school districts was approximately $176 million – a difference of approximately $40 million. *LRSD Ex. 83, p. 11.* Of that additional $40 million in transportation funding that would be paid if the State adopted BLR's formula and fully funded transportation, approximately $9 million would go to LRSD. *LRSD Ex. 83, p. 11.*

(3) Ignoring Picus' recommendation, the Joint Committee recommended that only the two percent cost of living adjustment ("COLA") for transportation funding be distributed pursuant to BLR's formula. *LRSD Ex. 84, p.66.* The General Assembly rejected this recommendation and adopted instead of Act 1075 of 2011. *LRSD Ex. 85, Act 1075 of 2011.* Section 32 of Act 1075 appropriates $500,000.00 for "supplemental education funding" to be distributed to school districts based on the extent to which districts' transportation costs exceed the transportation component of foundation funding. *LRSD Ex. 86, ADE Rules, §§ 3 and 4.*

(4) This Court should find as a matter of law that the State's decision to ignore Picus' recommendation and to reject BLR's transportation aid formula violated section II, paragraph L of the 1989 Settlement Agreement. Paragraph L prohibits that State from retaliating against the Pulaski County districts "including retaliatory failure to increase State aid .

. . ." *DN4440, Ex. 3, p. 10.* No rational basis supports the State's decision to reject BLR's standards-based funding formula for transportation which would have accurately (*LRSD Ex. 84, Goff, pp. 49-50*) and fairly funded student transportation costs in Arkansas.

(5) School districts have widely varying transportation costs. In 2006, Picus found that per student (ADM) transportation cost varied "from a low of $67 to a high of $695." *DN 4440, Ex. 69, p. 4, citing Ex. 72, p. 72.* In 2008-09, the State paid $286 per student for transportation; the statewide average transportation cost per student was $369; and LRSD spent $646 per student. *DN 4440, Ex. 73, p. 5.* Assuming finite funds, every dollar spent on transportation is a dollar that cannot be spent on direct educational programs needed to remediate the racial achievement disparity. *See LRSD v. PCSSD,* 83 F.3d at 1018. Because no rational basis supports the State's failure to adopt BLR's formula for distributing transportation aid, the Court should find as a matter of law that the failure constitutes a "retaliatory failure to increase State aid" and a violation of section II, paragraph L of the 1989 Settlement Agreement.

(6) This Court should also find as a matter of law that the State violated section II, paragraph L by failing to reimburse LRSD for its attorneys' fees incurred in obtaining unitary status and by subjecting the Pulaski County districts to "forensic audits" purportedly to ensure they are spending their settlement funding "on desegregation purposes." *LRSD Ex. 87, AG News Release 21 April 2011.* First, ADE has failed to reimburse LRSD for its attorneys' fees incurred to achieve unitary status as authorized by Ark. Code Ann. § 6-20-416(c). LRSD first demanded payment on or about 23 December 2008 and most recently 29 July 2011. *LRSD Ex. 89, pp. 1 and 5.* Neither ADE nor the AG has offered any legitimate reason for refusing to reimburse LRSD its attorneys' fees as authorized by Ark. Code Ann. § 6-20-416(c). *LRSD Ex. 89.* Second, the State adopted Act 701 of 2011 forcing the three Pulaski County

district to submit to "forensic audits" of their desegregation funding under threat of being identified by State as in "fiscal distress" and subject to State takeover. *LRSD Ex. 88, Act 701 of 2011*. This singling out of the Pulaski County districts for additional oversight simply because they are parties to the 1989 Settlement Agreement violates section II, paragraph L of the consent decree. ADE did not request this additional oversight and had no evidence that additional oversight was needed. *LRSD Ex. 79, Kimbrell Dep., p. 130; LRSD Ex. 96, Goff Dep., p. 62*. Act 701 was part of the Attorney General's legislative package, and it was understood that it would only apply to the Pulaski County districts. *LRSD Ex. 87, AG News Release 21 April 2011*. The AG released the audit reports of NLRSD and PCSSD and criticized the districts for not spending settlement funding "on desegregation purposes," *see LRSD Ex. 87, AG News Release 21 April 2011*, even though the districts have no obligation to spend settlement funding on "desegregation."[6] *See LRSD v. PCSSD*, 921 F.2d at 1390. Under this false pretense, the State used state law to unilaterally modify the parties' agreement. *See DN 2337, p. 10* ("A party may not unilaterally change the implementation or language of an agreement or order without the prior approval of the Court and/or consent of the parties . . . ADE should have approached the parties and petitioned the Court for a modification."). This was a violation of section II, paragraph L of the consent decree.

20. As to paragraph 13 of ADE's motion, LRSD denies that the State's primary obligation under the 1989 Settlement Agreement was the payment of money. The various obligations assumed by the State under the 1989 Settlement Agreement and especially the remediation of the racial achievement disparity by evaluating programs and interventions so that

[6] The State now acknowledges that "[t]hese funds are unrestricted and may be used by the Districts for any purpose." Brief in Support of Motion for Release from 1989 Settlement Agreement (DN 4724), p. 8.

successful programs/interventions could be identified or developed, are all important parts of the State's remedial obligation. *See DN 4440, LRSD Ex. 3, § III, ¶¶ F and G; Appeal of LRSD,* 949 F.2d 253, 256 (8th Cir. 1991).

21. LRSD denies that the State's liability under the consent decree, including the M-to-M and magnet stipulations, was expected to be something around $100 million. The 1989 Settlement Agreement, M-to-M Stipulation and Magnet Stipulation contain no provision stating when the State's obligations end. *See DN 4724, Motion for Release Ex. 5, p. 1* ("WHEREAS, the 1989 Settlement Agreement imposes certain obligations on the State but contains no provision stating when those obligations end."). The Eighth Circuit's statement that the 1989 Settlement Agreement settled the State's financial liability for "something over 100 million dollars" primarily refers to the compensatory education and other payments to be made to the three districts pursuant to sections VI, VII and VIII of the 1989 Settlement Agreement and does not include the annual education and transportation costs of the M-to-M and magnet programs.

22. As to paragraph 15 of ADE's motion, LRSD admits that the State has disbursed over $1,100,000,000 as required by the 1989 Settlement Agreement and subsequent court orders, according to the State's compilation. The State's calculation of payments fails, however, to account for other funds the State would have paid the districts in the absence of the consent decree.

23. As to paragraph 16 of ADE's motion, LRSD denies that the State should be immediately released from its obligations under the 1989 Settlement Agreement and the Court's orders in this case. LRSD affirmatively asserts that the State of Arkansas violated the Constitution by, among other things, creating and perpetuating residential segregation in Pulaski County. *See LRSD v. PCSSD,* 584 F.Supp. at 343, 352-53, *aff'd Little Rock Sch. Dist. v Pulaski*

*County Special Sch. Dist.*, 778 F.2d 423-29 (8th Cir. 1985). The M-to-M and magnet programs are part of the remedy for the defendants' constitutional violations related to residential segregation. In *Little Rock Sch. District v. State of Arkansas*, 664 F.3d at 744, the Eighth Circuit stated:

> A constitutional violator seeking relief from a desegregation plan adopted as a consent decree must show that it "complied in good faith with the desegregation decree since it was entered" and that "the vestiges of past discrimination ha[ve] been eliminated to the extent practicable." *Freeman v. Pitts*, 503 U.S. 467, 492, 112S.Ct. 1430, 118 L.Ed.2d 108 (1992) *(quoting Bd. of Educ. of Okla. City Pub. Sch. v. Dowell*, 498 U.S. 237, 249–50, 111 S.Ct. 630, 112 L.Ed.2d 715 (1991)).

Thus, to be relieved of its obligations to fund M-to-M transfers and magnet schools, the State must plead and prove that it has eliminated the vestiges of residential segregation in Pulaski County to the extent practicable.

24. LRSD affirmatively asserts the ADE's motion does not allege that the State has eliminated the vestiges of residential segregation in Pulaski County to the extent practicable, or stated another way, that current residential segregation in Pulaski County "is not traceable, in a proximate way, to the prior violation." *Freeman*, 503 U.S. at 494 (1992). *See Jenkins v. Missouri*, 216 F.3d 720, 725 (8th Cir. 2000) ("[O]nce there has been a finding that a defendant established an unlawful dual system in the past, there is a presumption that current disparities . . . are the result of the defendant's unconstitutional conduct.").

25. LRSD affirmatively asserts that the parties anticipated the districts' unitary status at the time of the 1989 Settlement Agreement, and as a result, the districts' unitary status does not constitute a changed circumstance justifying termination of the M-to-M and magnet stipulations or the 1989 Settlement Agreement. *Rufo*, 502 U.S. at 385; *White*, 585 F.3d at 1138.

26. LRSD affirmatively asserts that a fundamental goal of the 1989 Settlement Agreement is remediation the racial achievement disparity. *See DN 4440, LRSD Ex. 3, § III, ¶ F.*

To be clear, LRSD does not contend that the State agreed to eliminate the racial achievement disparity. Instead, the State agreed to engage in a systematic effort to evaluate programs and interventions intended to remediate the racial achievement disparity until it found or developed something that works. *DN 4440, LRSD Ex. 3, § III, ¶¶ A and G.*

27. LRSD affirmatively asserts that to accomplish the goal of remediating the racial achievement disparity, the State agreed to provide a certain stream of compensatory education funding to the districts (*DN 4440, LRSD Ex. 3, §§ VI, VII and VIII*), to monitor the implementation of compensatory education programs by the districts (*DN 4440, LRSD Ex. 3, § III, ¶ A*), and to evaluate the compensatory education programs being implemented by the districts to find out if they work, and if not, to develop programs that do work (*DN 4440, LRSD Ex. 3, § III, ¶ G*). Rather than hire an expert to identify or develop programs to remediate the racial achievement disparity as required by section III, paragraph G of the 1989 Settlement Agreement, the State hired an expert to opine that "there is no known, existing program or policy that enables a school district or a state to close, or even substantially reduce, the achievement gap between African-American and white students." *DN 4704, LRSD Ex. 78, Armor Report, p. 2.* The State's failure to make a good-faith effort cannot be excused simply because it might have been unsuccessful. *See LRSD v. State,* 664 F.3d at 757 ("Regardless of whether the specific intervention programs required by Plan 2000 eventually bear fruit, however, PCSSD cannot disavow its agreed-upon obligation to make a good faith effort.").

WHEREFORE, LRSD prays that ADE's Motion for Release be denied and moves the Court to direct ADE to identify or develop programs, policies and/or procedures designed to remediate the racial achievement disparity in Pulaski County; to direct ADE to develop a revised plan for monitoring remediation of the racial achievement disparity including, but not limited to,

assisting the districts with the preparation of formal, written evaluations of the programs being implemented by them to remediate the racial achievement disparity; to direct ADE to pay LRSD, PCSSD and NLRSD the same percentage of their transportation costs that it paid to other Arkansas school districts from 2005-06 forward and until the state adopts and fully funds a standards-based system for transportation aid that accurately reflects the realities of individual school districts; to direct ADE to pay LRSD $250,000.00 as reimbursement for its attorneys' fees expended in attaining unitary status as contemplated by Ark. Code Ann. § 6-20-416(c); to enjoin ADE from enforcing Act 701 of 2011 against LRSD, PCSSD and NLRSD; and to enjoin ADE and the State Board from consolidating, annexing or reconstituting LRSD, PCSSD or NLRSD under state law except as authorized by this Court after notice and hearing at which the Districts or Joshua may challenge the State action as a violation of the provisions of the 1989 Settlement Agreement, including the retaliation provisions; to direct ADE to pay LRSD's costs and attorneys' fees expended herein; and, to grant LRSD all other just and proper relief to which it may be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 1, 2013, I have electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which shall send notification of such filing to the parties of record.

*/s/ Christopher Heller*