Case No. CV-15-224

IN THE ARKANSAS SUPREME COURT

JOHNNY KEY, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE ARKANSAS DEPARTMENT OF EDUCATION, *et al.* **APPELLANTS**

v.

DIANE CURRY, *et al.* **APPELLEES**

ON APPEAL FROM THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS THE HONORABLE WENDELL LEE GRIFFEN, CIRCUIT JUDGE

APPELLANTS' BRIEF AND ADDENDUM

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INFORMATIONAL STATEMENT

I. ANY RELATED OR PRIOR APPEAL: None.

II. BASIS OF SUPREME COURT JURISDICTION (See Rule 1-2(a))

( ) Check here if no basis for Supreme Court Jurisdiction is being Asserted, or check below all applicable grounds on which Supreme Court Jurisdiction is asserted.

(1) X Construction of Constitution of Arkansas
(2) ___ Death penalty, life imprisonment
(3) ___ Extraordinary writs
(4) ___ Elections and election procedures
(5) ___ Discipline of attorneys
(6) ___ Discipline and disability of judges
(7) ___ Previous appeal in Supreme Court
(8) ___ Appeal to Supreme Court by law

III. NATURE OF APPEAL

(1) ___ Administrative or regulatory action
(2) ___ Rule 37
(3) ___ Rule on the Clerk
(4) X Interlocutory appeal
(5) ___ Usury
(6) ___ Products liability
(7) ___ Oil, gas, or mineral rights
(8) ___ Torts
(9) ___ Construction of deed or will
(10) __ Contract
(11) __ Criminal

This is an interlocutory appeal from the Circuit Court's order denying Appellants' motion to dismiss on the grounds of sovereign immunity under Article 5, Section 20, of the Arkansas Constitution. This appeal is taken pursuant to Rule 2(a)(10) of the Arkansas Rules of Appellate Procedure—Civil.

IV. IS THE ONLY ISSUE ON APPEAL WHETHER THE EVIDENCE IS SUFFICIENT TO SUPPORT THE JUDGMENT? No.

V. EXTRAORDINARY ISSUES. (Check if applicable, and discuss in PARAGRAPH 2 of the Jurisdictional Statement.)

(__) appeal presents issue of first impression,
(__) appeal involves issue upon which there is a perceived inconsistency in the decisions of the Court of Appeals or Supreme Court,
(__) appeal involves federal constitutional interpretation,
(X) appeal is of substantial public interest,
(__) appeal involves significant issue needing clarification or development of the law, or overruling of precedent,
(__) appeal involves significant issue concerning construction of statue, ordinance, rule, or regulation.

VI. CONFIDENTIAL INFORMATION

(1) Does this appeal involve confidential information as defined by Sections III(A)(11) and VII(A) of Administrative Order 19?

___Yes _X_ No

(2) If the answer is "yes," then does this brief comply with Rule 4-1(d)?

___ Yes ___ No (Not applicable)

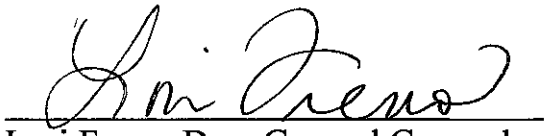
JURSIDICTIONAL STATEMENT

1. The Amended Complaint below named as defendants (appellants herein) the Arkansas Department of Education, as well as the Commissioner of Education and each of the Arkansas State Board of Education (State Board) members in their official capacities. This case arises from the State Board's exercise of its authority under the State's academic distress laws, Ark. Code Ann. § 6-15-428 *et seq.*, following the classification of six schools in the Little Rock School District (LRSD) as being in academic distress. Following a public meeting, the State Board voted to remove all members of the LRSD board of directors, to direct the Commissioner of Education to assume all authority of the board of directors as may be necessary for the day-to-day governance of the school district in the absence of the board of directors, and to retain the LRSD superintendent on an interim basis. Appellees contend that the State Board misapplied the State's academic distress laws, that the academic distress laws violate Article 14, Section 3 of the Arkansas Constitution, and that the State Board's conduct otherwise justifies an exception to the sovereign immunity bar set forth in Article 5, Section 20, of the Arkansas Constitution.

Appellants filed a Motion to Dismiss on the basis of sovereign immunity, which the Circuit Court denied. The issue on appeal is whether the Circuit Court erred in denying the Appellants' Motion to Dismiss. This is an interlocutory

appeal taken pursuant to Rule 2(a)(10) of the Arkansas Rules of Appellate Procedure—Civil, which authorizes an appeal to this Court from an order denying a motion to dismiss based on sovereign immunity.

2. I express a belief, based on a reasoned and studied professional judgment, that this appeal raises the following question of legal significance for jurisdictional purposes: whether sovereign immunity bars appellees' present claims, in which they seek to force the State Board of Education to reverse its decision to assume authority over the LRSD. This is an issue of substantial public interest, *see* Ark.S.Ct.R. 1-2(b)(4).



Lori Freno, Dep. General Counsel
Arkansas Department of Education

Attorney for Appellants

POINT ON APPEAL AND PRINCIPAL AUTHORITIES

The Circuit Court erred in denying appellants' Motion to Dismiss the appellees' claims because those claims are barred by sovereign immunity.

Ark. Const. Art. 5, § 20

Arkansas Tech. Univ. v. Link, 341 Ark. 495, 17 S.W.3d 809 (2000)

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STATEMENT OF THE CASE

In May of 2014, the Arkansas Department of Education notified the Little Rock School District that six schools within the District met the criteria for being classified in academic distress after more than half of the students attending those schools scored below proficient levels on state-mandated assessments. **Addendum ("Add") 37, 80-81.** The District did not appeal the notification, which it could have done under Ark. Code Ann. § 6-15-428 to the Arkansas State Board of Education and subsequently to the Pulaski County Circuit Court. **Add 80-81.** On July 10, 2014, the State Board classified the six schools as being in academic distress. **Add 37, 46, 64-66, 80-81.**

The State's academic distress laws are contained in Ark. Code Ann. § 6-15-428 *et seq.* Once a public school is classified as being in academic distress, Ark. Code Ann. § 6-15-430 gives the State Board discretion to take a variety of actions that "the [S]tate [B]oard determines [are] needed to assist and address a public school classified as being in academic distress." Ark. Code Ann. § 6-15-430(b)(11). These include:

- "Remove permanently, reassign, or suspend on a temporary basis the superintendent of the school district in which the public school is located";

- "Require the school district to operate without a board of directors under the supervision of the superintendent or an individual or panel appointed by the Commissioner of Education";
- "In the absence of a board of directors, direct the [Commissioner of Education] to assume all authority of the board of directors as may be necessary for the day-to-day governance of the school district."

Ark. Code Ann. §§ 6-15-430(b)(8)(A), 6-15-430(a)(3), 6-15-430(a)(6). *See also* Ark. Code Ann. § 6-15-430(b)(9)(authorizes State Board to take "one . . . or more actions under subsection (a) of [§ 6-15-430] concerning the public school district where the school is located").

On January 28, 2015, the State Board held a public meeting to consider whether to take any of the actions authorized by Ark. Code Ann. § 6-15-430. **Add 42, 50, 80-81.** At the conclusion of the meeting, a majority of State Board members voted to retain the current LRSD superintendent on an interim basis, to remove all members of the District's board of directors effective immediately, and to direct the Commissioner of Education[1] to

[1] On March 26, 2015, Johnny Key replaced Tony Wood as the Commissioner of Education. Pursuant to Arkansas Rule of Civil Procedure

assume the authority of the board of directors for the day-to-day governance of the LRSD. **Add 42, 50, 80-81.**

Appellees filed an Amended Complaint under the Declaratory Judgment Act, Ark. Code Ann. § 16-111-104, in which they also sought writs of prohibition and mandamus. **Add 27-28.** In their Amended Complaint, appellees (comprised of three removed LRSD board of directors members, voters, and a parent of a LRSD students, **Add 36, 37, 56**) alleged that appellants violated the State's academic distress laws by assuming authority over the LRSD when six schools in the District (as opposed to the entire District) were in academic distress. **Add 54**. They also alleged that the academic distress law is unconstitutional under Article 14, Section 3 of the Arkansas Constitution, which tasks a school district's board of directors with certain taxation and budgeting functions. **Add 50-51.** In addition to alleging that the State Board's decision was *ultra vires* and unconstitutional for the above reasons, appellees alleged that the decision also was arbitrary and capricious, in bad faith, and wantonly injurious. **Add 28, 42.** As relief,

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25(d), when a public officer is a party to an action in his official capacity and during its pendency leaves office, the action does not abate and his successor automatically is substituted as a party. *See Fisher v. Chavers,* 351 Ark. 318, 319 at n.1, 92 S.W.3d 30, 31 at n.1 (2002).

appellees sought to force the State Board to reverse its decision to assume authority over the LRSD, urging the Circuit Court to order the immediate reinstatement of the LRSD board of directors and to enjoin appellants "from operating the LRSD." **Add 57.**

On March 16, 2015, appellants filed a Motion to Dismiss the Amended Complaint in which they raised their entitlement to sovereign immunity under Article 5, Section 20 of the Arkansas Constitution. **Add 76-81.** On March 17, 2015, the Circuit Court entered an order denying appellants' Motion to Dismiss. On that same date, appellants filed a timely interlocutory appeal. **Add 108-117, 118-121.**

ARGUMENT

I. STANDARD OF REVIEW

In *Gentry v. Robinson,* this Court held that "the issue of whether a party is immune from suit is purely a question of law . . . and is reviewed *de novo*." 2009 Ark. 634, at 9, 361 S.W.3d 788, 793-94 (citations omitted). Because the Circuit Court denied appellants' Motion to Dismiss this case on the basis of sovereign immunity, the standard of review is *de novo. See also Wal-Mart Stores, Inc, v. D.A.N. Joint Venture III, L.P.,* 374 Ark. 489, 490, 288 S.W.3d 627, 629 (2008)(*de novo* standard of review applies to statutory interpretation because it is for this Court to determine what a statute means)(citation omitted); *Forrester v. Daniels,* 2010 Ark. 397, at 7, 373 S.W.3d 871, 875 (questions of constitutional construction are reviewed by this Court *de novo*).

Sovereign immunity is jurisdictional immunity from suit, not just liability, *Arkansas Tech Univ. v. Link,* 341 Ark. 495, 501, 17 S.W.3d 809, 813 (2000), and jurisdiction must be determined entirely from the pleadings. *LandsnPulaski, LLC v. Arkansas Dep't of Correction,* 372 Ark. 40, 42, 269 S.W.3d 793, 795 (2007). A complaint must state facts—not mere conclusions—showing the presence of subject matter jurisdiction and a plausible claim for relief. *Link,* 341 Ark. at 503-07, 17 S.W.3d at 814-16

(holding that "a complaint alleging illegal and unconstitutional acts by the State as an exception to the sovereign immunity doctrine is not exempt from complying with our rules that require fact pleading"). *See also Fitzgiven v. Dorey,* 2013 Ark. 346, at 11, 429 S.W.3d 234, 241 (in reviewing a motion to dismiss alleging an exception to sovereign immunity, this Court treats "only facts alleged in a complaint as true, but not a party's theories, speculation, or statutory interpretation") (citation omitted).

II. THE CIRCUIT COURT ERRED IN DENYING APPELLANTS' MOTION TO DISMISS BECAUSE APPELLANTS ARE ENTITLED TO SOVEREIGN IMMUNITY FROM SUIT UNDER ARTICLE 5, SECTION 20 OF THE ARKANSAS CONSTITUTION.

A. Appellants Are Entitled To Sovereign Immunity From Suit Because The Relief Appellees Seek Would Operate To Control The Action Of The State.

Article 5, Section 20 of the Arkansas Constitution provides that "[t]he State of Arkansas shall never be made a defendant in any of her courts." Ark. Const. art. 5, § 20. Pursuant to the doctrine of sovereign immunity, "neither the State nor its agencies [can] be named as defendants in its courts." *Hanley v. Arkansas State Claims Comm'n,* 333 Ark. 159, 165-66, 970 S.W.2d 198, 201 (1998). Sovereign immunity is jurisdictional immunity from suit, and jurisdiction must be determined entirely from the pleadings. *LandsnPulaski,* 372 Ark. at 42, 269 S.W.3d at 795.

For purposes of sovereign immunity, a suit naming a public official in his or her official capacity is essentially a suit against that official's agency. *Smith v. Daniel,* 2014 Ark. 519, at 6, 452 S.W.3d 575, 578. This Court has recognized that official-capacity suits generally represent a way of pleading a cause of action against the entity of which the officer is an agent. *Id.* Thus, ADE and the official-capacity defendants (Commissioner Key and State Board members) "are essentially the same defendant for purposes of [the] sovereign immunity analysis." *Arkansas Dep't of Human Svs. v. Fort Smith School District,* 2015 Ark. 81, at 6, __ S.W.3d __ (ADHS and agency director named in his official capacity entitled to sovereign immunity from suit). *See also Arkansas Tech Univ. v. Link,* 341 Ark. 495, 502, 17 S.W.3d 809, 813 (2000)(suit against State university and its board of trustees is barred by doctrine of sovereign immunity).

In determining whether the doctrine of sovereign immunity applies, a court must determine whether judgment for the plaintiff will operate to control the action of the State or subject it to liability. *LandsnPulaski,* 372 Ark. at 42, 269 S.W.3d at 795. If so, the suit is one against the State and is barred by the doctrine of sovereign immunity. *Id.*

This Court explained the broad reach of this immunity in *Arkansas Dep't of Env. Quality et al. v. Shawki Al-Madhoun,* 374 Ark. 28, 285 S.W.3d

654 (2008). In *Al-Madhoun,* a plaintiff brought an action against the ADEQ and several of its employees alleging *inter alia* unlawful retaliation and violation of his constitutional due process and equal protection rights. Finding the State defendants immune from suit, this Court explained:

> In determining whether the doctrine of sovereign immunity applies, the court should determine if a judgment for the plaintiff will operate to control the action of the State or subject it to liability. If so, the suit is one against the State and is barred by the doctrine of sovereign immunity.

374 Ark. at 32, 285 S.W.3d at 658 (citations omitted). The Court applied this same standard to the plaintiff's request for injunctive relief, explaining:

> These requests for injunctive relief made in [the] complaint and subsequent amended complaints clearly seek to control the actions of the ADEQ. *Our well-established case law states that if a judgment will operate to control the action of the State, the suit is one against the State and is barred by the doctrine of sovereign immunity* . . . [t]herefore, [plaintiffs'] suit is barred by the sovereign-immunity doctrine unless . . . sovereign immunity has been waived.

Id. at 33, 659 (2008)(emphasis added).

In the Amended Complaint, appellees' request for relief undoubtedly seeks to control the action of the State. Specifically, they seek to force the State Board of Education to reverse its decision to assume authority over the LRSD, having urged the Circuit Court to order the immediate reinstatement of the LRSD board of directors and to enjoin appellants "from operating the LRSD." **Add 57.** Because a judgment for the appellants undoubtedly

would operate to control the actions of the State, and because there has been no waiver of immunity (and plaintiffs have not pled otherwise), the present suit is one against the State and is barred by the doctrine of sovereign immunity.

B. No Exception To The Sovereign Immunity Doctrine Applies In The Present Case.

This Court has noted there could be exceptions to sovereign immunity if a state defendant's actions are outside of its authority, ultra vires, in bad faith, arbitrary, capricious, or wantonly injurious. *Fitzgiven v. Dorey,* 2013 Ark. 346, at 13, 429 S.W.3d 234, 241 (citation omitted). This Court has been cautious in applying exceptions to overcome sovereign immunity, however, and has allowed an exception to overcome the well-established rule only infrequently. Such a guarded application makes perfect sense, for a broad application of such exceptions effectively would eviscerate sovereign immunity, forcing the State to litigate cases in order to show that its conduct did not fall within an exception. *See Simons v. Marshall*, 369 Ark. 447, 450, 255 S.W.3d 838, 841 (2007)(the right to immunity is effectively lost if the case is permitted to go to trial).

Furthermore, in *Arkansas Tech v. Link,* this Court cautioned that a complaint alleging an exception to sovereign immunity "is not exempt from

complying with [Arkansas's] rules that require fact pleading." 341 Ark. at 504, 17 S.W.3d at 814. This Court later explained in *Arkansas Dep't of Environmental Quality v. Brighton Corp.*:

> Our rules require fact pleading, and a complaint must state facts, not mere conclusions, in order to entitle the pleader to relief. . . Ark. R. Civ. P. 8(a). . . We look to the underlying facts supporting an alleged cause of action to determine whether the matter has been sufficiently pled. . . Arkansas's rules of civil procedure make it clear that a pleading which sets forth a claim for relief 'shall contain . . . a statement in ordinary and concise language of *facts showing that the . . . pleader is entitled to relief*[.] Ark. R. Civ. P. 8(a). . . Rule 12(b)(6) provides for the dismissal of a complaint for 'failure to state facts upon which relief can be granted.' This court has stated many times that these two rules must be read together in testing the sufficiency of the complaint; we have stated with equal frequency that facts, not mere conclusions, must be alleged.

352 Ark. 396, 403, 102 S.W.3d 458, 462-63 (2003)(citations omitted; Court's emphasis). This Court also has "specifically and deliberately rejected the theory of notice pleading." *Id. See also Fitzgiven,* 2013 Ark. 346, at 14, 429 S.W.3d at 242 ("[f]or purposes of a motion to dismiss, we treat only the facts alleged in a complaint as true, but not a party's theories, speculation, or statutory interpretation")(citation omitted).

In the present case, appellees' Amended Complaint is fatally lacking the necessary factual support to establish a sovereign immunity exception.[2] In denying appellants' Motion to Dismiss, the Circuit Court appears to have erroneously adopted a plethora of non-factual allegations as fact. *See* **Add 112, 113, 114.** Although the Amended Complaint contains many opinions, theories, conclusory allegations, and speculation, none of these carry any weight in the sovereign immunity analysis—because they are not *facts*. Furthermore, appellees' cannot rely upon their erroneous legal interpretation of the academic distress laws and the Arkansas Constitution to invoke an exception to and circumvent sovereign immunity. It is for this Court to determine *de novo* what a statute or constitutional provision means. *Wal-*

[2] It appears the Circuit Court attempted to shift this burden to appellants, writing that "defendants [appellants] cite no case that holds the kind of allegations asserted by Plaintiffs [appellees] to be legally insufficient." **Add 115.** As the cases above note, the burden is upon the *pleader* [appellees] to plead *facts* showing entitlement to relief. Furthermore, appellants *did* cite cases in which this Court held that it will consider only *facts* alleged in a complaint as true, not mere conclusory allegations, or a party's theories, speculation, or statutory interpretation. *See e.g., Fitzgiven and Brighton Corp., supra* at Arg 6.

Mart Stores, Inc, v. D.A.N. Joint Venture III, L.P., 374 Ark. 489, 490, 288 S.W.3d 627, 629 (2008)(citation omitted); *Forrester v. Daniels,* 2010 Ark. 397, at 7, 373 S.W.3d 871, 875.

1. Appellants Acted Well Within Their Legal Authority.

This case arises under the State's academic distress laws, Ark. Code Ann. § 6-15-428 *et seq.*, which were enacted to ensure that the State meets its obligation under the Arkansas Constitution to "maintain a general, suitable, and efficient system of free public schools." Ark. Const. art. 14, § 1. In *Lake View School Dist. v. Huckabee,* this Court left no doubt that the Arkansas Constitution places on the State a "paramount" and "absolute" duty to provide the school children of Arkansas with an "adequate education"; thus "[i]f local government fails, the state government must compel it to act, and if the local government cannot carry the burden, the state must itself meet its continuing obligation." 351 Ark. 31, 66-67, 74, 91 S.W.3d 472, 492, 497 (2002) (citation omitted). *See also Crenshaw v. Eudora School Dist.,* 362 Ark. 288, 295, 208 S.W.3d 206, 211 (2005) ("public education [is] a state responsibility and . . . deference to local control [is] not a rational basis for . . . inequality of education afforded to Arkansas school children")(*citing Lake View, supra,* and *DuPree v. Alma*

School Dist. No. 30, 279 Ark. 340, 651 S.W.2d 90 (1983)). Specifically addressing student proficiency, this Court instructed:

> It is the State's responsibility, first and foremost, to develop forthwith what constitutes an adequate education. It is, next, the State's responsibility to assess, evaluate, and monitor, not only the lower elementary grades for English and math proficiency, but the entire spectrum of public education across the state to determine whether equal opportunity for an adequate education is being substantially afforded to Arkansas'[s] children.

Lake View, 351 Ark. at 79, 91 S.W.3d at 500.

Appellees erroneously contend that the appellants' actions taken under the academic distress law were *ultra vires*. "For an act to be ultra vires, it must be 'beyond the agency's or the officer's legal power or authority.'" *Fitzgiven,* 2013 Ark. 346, at 13, 429 S.W.3d at 424 (citation omitted). Appellees' appear to make a two-fold argument to support this contention: (1) the State Board exceeded the authority granted to it by the General Assembly under the academic distress laws, and (2) the academic distress laws violate Article 14, Section 3 of the Arkansas Constitution, which tasks a school district's board of directors with certain taxation and budgeting functions, insofar as the law allows the State Board to direct the Commissioner of Education to assume authority of the LRSD board of directors. Appellants will address these arguments in turn.

a. Appellants Did Not Exceed Their Authority Under The Academic Distress Laws.

As discussed above, the Arkansas Department of Education notified the LRSD in May of 2014 that six of its schools met the criteria for being classified in academic distress. The LRSD did not did not appeal the notification,[3] and in July of 2014, the State Board classified the six schools as being in academic distress pursuant to Ark. Code Ann. § 6-15-428. In this lawsuit, appellees contend that the State Board had no legal authority to remove the LRSD board of directors and assume its authority when only six schools within the District—rather than the entire District—were classified

[3] In its order, the Circuit Court erroneously stated that appellants argued "no appeal was taken from the January 28, 2015 decision," which raised an exhaustion of remedies issue. **Add 116.** Appellants did not make this argument. Rather, they pointed out that the LRSD did not appeal the May 2014 notification by the Arkansas Department of Education that six schools met the criteria for being classified in academic distress to the State Board. **Add 84-85.** *See also supra* at SOC 1. The State Board then classified the six schools as being in academic distress in July of 2014. **Add 85.** A classification of academic distress triggers available State Board action under Ark. Code Ann. § 6-15-430 to address the academic distress.

in academic distress. This argument is without merit, and is contrary to the plain and unambiguous language of Ark Code Ann. § 6-15-430.

The General Assembly has given the State Board broad authority to address school districts and public schools classified in academic distress. Section 6-15-430(b), which sets forth actions the State Board may take when a public school is classified as being in academic distress, authorizes the precise actions taken by the State Board in the present case.

First, appellees contention that the State Board may not take the actions it did when only six schools in the LRSD are in academic distress is contrary to law. The plain language of Ark. Code Ann. § 6-15-430(b)(9) expressly authorizes the State Board to "[t]ake one or more of the actions under subsection (a) of [§ 6-15-430] concerning the public school district where the school [in academic distress] is located." Pursuant to this authority, the State Board "[r]equire[d] the [LRSD] to operate without a board of directors" (*see* § 6-15-430(a)(3)), and "[i]n the absence of a board of directors, direct[ed] the commissioner to assume all authority of the board of directors as may be necessary for the day-to-day governance of the school district" (*see* § 6-15-430(a)(6)). Although appellees allege that the State Board only may take actions "necessary to remedy schools in academic distress," **Add 43,** ¶ 86, such limiting language does not appear in law. This

Court will not "read limiting language into [a] statute that is simply not there." *Fitzgiven,* 2013 Ark. 346 at 14, 429 S.W.3d at 242.

Next, appellees' argument that subsection § 6-15-430(b)(11) limits the State Board's authority likewise is misplaced. **App 49.** To the contrary, that provision *expands* the State Board's authority, granting it discretion "to take any other appropriate action allowed by the law *that the state board determines is needed* to assist and address a public school classified as being in academic distress." *Id.* (emphasis added). Interpreting nearly identical language contained in State's the fiscal distress laws, this Court held in *Fitzgiven v. Dorey* that the provision demonstrated a *broadened* grant of authority. 2013 Ark. 346 at 14, 429 S.W.3d at 242. In *Fitzgiven,* rejecting the argument that the ADE exceeded its authority by terminating collective bargaining contracts, this Court reasoned:

> [plaintiffs] would have us read limiting language into the statute that is simply not there. This we will not do . . . Moreover, Ark. Code Ann. § 6-20-1909(a)(6) (Repl. 2007) demonstrates just how broad ADE's authority is when dealing with fiscally distressed districts, wherein the General Assembly saw fit to allow ADE to '[t]ake any other action allowed by law that is deemed necessary to assist a school district in removing criteria of fiscal distress.'

Id. This reasoning applies with like force to the present case. Because it is within the State Board's broad discretion to determine what action "is

needed to assist and address a public school classified as being in academic distress," appellees' opinion that the State Board went too far of no moment.

Also noteworthy is the dispositive language in Ark. Code Ann. § 6-15-430(f), which provides that "[n]othing in [§ 6-15-430] shall be construed to prevent the department or the state board from taking any of the actions listed in this section at any time to address public schools and school districts in academic distress." This again represents the General Assembly's broad grant of authority and discretion to the State Board to address public schools classified as being in academic distress as it deems fit.

The inescapable fact that the General Assembly afforded the State Board the authority to take the steps that it did ends the statutory inquiry.[4]

[4] Appellants also allege under the *ultra vires* section of their Amended Complaint that "[u]pon information and belief," the Commissioner did not provide in accordance with Ark. Code Ann. § 6-13-112(a) a clear statement of the reasons the LRSD was placed under state authority and the steps necessary for the LRSD to be removed from state authority. **Add 52,** ¶¶ 141-144. Shortly after service of the Amended Complaint, appellees requested and received a copy of this notification from appellants, which notification had been provided (via email) to all statutorily-required persons

Because the General Assembly's intent was expressed in clear and unambiguous terms in the law itself, this Court need not, and should not, resort to rules of statutory interpretation or construction to determine legislative intent. *Knowlton v. Ward,* 318 Ark. 867, 874, 889 S.W.2d 721, 725-26 (1994). In any event, the General Assembly left no doubt of its intention to ensure that the State meet its ongoing duty to provide Constitutional adequacy in the emergency clause of Act 600 of 2013, the Act that added both subsections (b)[5] and (f) to § 6-15-430:

> It is found and determined by the General Assembly of the State of Arkansas that it is the state's constitutional obligation to provide a general, suitable, and efficient free system of public schools in the state; that state oversight and intervention into distressed school districts is critical to the delivery of a constitutionally adequate education; and that the changes made

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on January 29, 2015, the day after the State assumed authority over the LRSD. In any event, assuming *arguendo* non-compliance with § 6-13-112(a), it would in no way effect or nullify the State Board's January 28 decision.

[5] Prior to Act 600 of 2013, the law authorized State Board action only when a *school district* was classified as being in academic distress. Expanding the State Board's authority, Act 600 likewise authorized State Board action if "a *public school* is classified as being in academic distress."

in this act are immediately necessary for the state to meet this constitutional obligation.

Ark. Act 600 of 2013, § 24 (emergency clause).

Because the State Board acted well within its lawful authority, the *ultra vires* exception to sovereign immunity is inapplicable.

b. Academic Distress Law Does Not Run Afoul of Article 14, Section 3(c)(1) of the Arkansas Constitution.

At bottom, appellees argue that any law (including Ark. Code Ann. § 6-15-430) authorizing the removal or replacement of a local school district's board of directors violates Article 14, Section 3(c)(1) of the Arkansas Constitution, which provides that "[t]he Board of Directors of each school district" must perform taxation and budgeting functions prior to the annual school election. Ark. Const. art. 14, § 3(c)(1). The appellees' argument suffers two fatal flaws. First, school district boards of directors (like school districts themselves) are *statutory* entities created by the General Assembly. They are not Constitutional entities. The mere mention of a "Board of Directors" in Article 14, Section 3(c)(1) and the tasking of certain duties to it does not convert this statutory entity into a Constitutional board or commission. Rather, the duties tasked to the school district board of directors must be performed by whomever the General Assembly authorizes to act in the capacity of the board of directors. Second, interpreting Article

14, Section 3(c)(1) as appellees urge would lead to an untenable and absurd Constitutional result, as it would divest the State of its ability to meet its "paramount" and "absolute" Constitutional obligation to provide an adequate education to students throughout the State in those situations where the removal of a board of directors is deemed necessary to meet that end. Also, appellees' interpretation directly conflicts with Article 14, Section 4 of the Constitution, which vests with the General Assembly the authority to determine and execute laws regulating which "officers" will supervise the public schools. Ark. Const. art. 14, § 4.

"Statutes are presumed constitutional, and the burden of providing otherwise is on the challenger of the statute." *Reinert v. State,* 348 Ark. 1, 4, 71 S.W.3d 52, 53-54 (2002)(*citing Bunch v. State,* 344 Ark. 730, 43 S.W.3d 132 (2001); *Ford v. Keith,* 338 Ark. 487, 996 S.W.2d 20 (1999)). "If it is possible to construe a statute as constitutional [this Court] must do so." *Id.* (*citing Jones v. State,* 333 Ark. 208, 969 S.W.2d 618 (1998)). "Because statutes are presumed to be framed in accordance with the Constitution, they should not be held invalid for repugnance thereto unless such conflict is clear and unmistakable." *Id.* (*citing Kellar v. Fayetteville Police Dep't,* 339 Ark. 274, 5 S.W.3d 402 (1999)). In interpreting the Constitution, it "must be considered as a whole, and every provision must be read in light of other

provisions relating to the same subject matter." *Forrester v. Daniels,* 2010 Ark. 397 at 7, 373 S.W.3d 871 at 875 (*citing Gatzke v. Weiss,* 375 Ark. 207, 289 S.W.3d 455 (2008)).

According to Article 14, Section 3(a) of the Arkansas Constitution, "[t]he General Assembly shall provide for the support of common schools by general law." Article 14, Section 4 of the Constitution, entitled "Supervision of schools," provides:

> The supervision of public schools, and the execution of laws regulating the same, shall be vested in and confided to, such officers as may be provided for by the General Assembly.

Pursuant to this authority, the General Assembly established school district boards of directors in Title 6, Chapter 13, Subchapter 6. *See e.g.,* Ark. Code Ann. § 6-13-608 (length of directors' terms); § 6-13-616 (director eligibility); § 6-13-620 (powers and duties); § 6-13-634 (size). *See also* **Add 32,** ¶ 20 ('[t]o manage the school district, the Arkansas General Assembly created the offices of the School District Board of Director"). Thus, like school districts, boards of directors are creatures of statute. *See Krause v. Thompson,* 138 Ark. 571, 211 S.W. 925, 926 (1919)("[w]e have frequently held that the legislative control over the organization of school districts and changes therein is supreme"); *Saline Cty. Bd. Of Ed. v. Hot Springs Cty. Bd. Of Ed.,* 270 Ark. 136, 138, 603 S.W.2d 413, 414 (1980)("[w]e have long

recognized, in matters of education, that our constitution . . . vests in the legislature the duty and authority to make provisions for the establishment, maintenance, and support of a common school system in our state"); *Crenshaw v. Eudora Sch. Dist.,* 362 Ark. 288, 292, 208 S.W.3d 206, 209 (2005)(citation omitted)(recognizing school districts are "created by the General Assembly").

As appellees correctly note in their Amended Complaint, "[t]he Legislature has absolute control over all statutory offices, and may abolish them at pleasure; and in doing so no vested right is being invaded." **Add 33,** ¶ 24 (*citing Robinson v. White,* 26 Ark. 139, 140-141 (1870)). In *Robinson,* an assessor urged that because he was elected, he held some vested right to his office. *Id.* at 140. Rejecting plaintiff's argument, the Arkansas Supreme Court explained:

> The counsel for the appellant seem to be influenced or impressed with the idea, that Robinson had some kind of vested right to the office of assessor, because he was elected by the people. The Legislature has absolute control over all statutory offices, and may abolish them at pleasure; and in doing so no vested right is being invaded.

Id. at 140-41 (citations omitted).

Because school district boards of directors are statutory entities, and because Article 14, Section 4 of the Arkansas Constitution vests with the General Assembly the authority to determine and execute laws regulating

which "officers" will supervise the public schools, the General Assembly did not run afoul of the Constitution in granting to the State Board the discretion to remove a board of directors and direct the Commissioner of Education to assume its authority in the event of an academic distress classification.[6]

Appellees erroneously (and without supporting authority) contend that "School Districts and School Board of Directors are constitutional entities recognized in Article 14, Section 3 of the Arkansas Constitution." **Add 32,** ¶ 21. Appellees reason that because Article 14, Section 3(c)(1) assigns budgeting and taxation duties to a school district and its board of directors, a school board holds a special Constitutional status; thus, any law authorizing a school district to operate without a board of directors, or that allows the Commissioner to assume the duties of the local board of directors, is unconstitutional. **Add 33, 50; ¶¶** 25-26, 133. This argument—which

[6] The General Assembly also authorized the removal of a school district board of directors and assumption of its authority by the Commissioner of Education in matters of fiscal distress, *see* Ark. Code Ann. § 6-20-1901 *et seq.*, facilities distress, *see* Ark. Code Ann. § 6-21-811 *et seq.*, and for violations of standards for accreditation, *see* Ark. Code Ann. § 6-15-207, all of which further the State's "paramount" and "absolute" duty to provide students an adequate education as recognized by this Court in *Lake View*.

ignores the General's Assembly's Constitutional authority to legislate which officers will supervise the State's public schools—is wholly without merit.

Furthermore, when the framers intended to create a Constitutional board or commission, they made their intention perfectly clear. Specifically, in Amendment 33 of the Arkansas Constitution, the framers created Constitutional boards and commissions "charged with the management or control of all charitable, penal or correctional institutions and institutions of higher learning of the State of Arkansas." Ark. Const. amend. 33, § 1. The Amendment sets the duration of office, prohibits the increase or decrease of officers on each board or commission, sets forth a procedure for removing an officer "for cause," and provides for filling vacancies. Amend. 33, §§ 1, 3, 4, 5. Perhaps most instructive to the present inquiry is Section 2 of Amendment 33, which reads in pertinent part:

> **Abolition or transfer of the powers of board or commission – Restrictions.** The board or commission of any institution, governed by this amendment, shall not be abolished nor shall the powers vested in any such board or commission be transferred, unless the institution is abolished or consolidated with some other State institution.

Ark. Const. amend 33, § 2. In sharp contrast to the Amendment 33 boards and commissions, public school districts and their board of directors are created by statute pursuant to the Constitutional authority vested in the General Assembly under Article 14, Section 3.

Furthermore, the plain and unambiguous language of Article 14, Section 3(c)(1) merely provides that "[t]he Board of Directors of each school district" must perform taxation and budgeting functions prior to the annual school election. Because school districts and their boards of directors are statutory entities, the question of what is a board of directors is not a Constitutional one, but rather a statutory one. In the same way that the General Assembly created boards of directors, it also provided for the removal of those boards and the assumption of the boards' authority by the Commissioner of Education following a classification of academic distress. Consequently, once the Commissioner of Education assumes the duties of a school district board of directors under academic distress law, the Commissioner must perform the taxation and budgeting duties set forth in Article 14, Section 3(c)(1). Because there is no "clear and unmistakable" conflict between the academic distress law and Article 14, Section 3(c)(1), "it is possible to construe [academic distress law] as constitutional," and this Court "must do so." *See supra* at Arg 16-17.

Appellees also argue that a school district board of directors must be elected because "[o]nly an elected Board of Directors can perform this responsibility," (i.e., those set forth in Article 14, Section 3). **Add 50-51, ¶¶** 134, 136, 137. *Nowhere* does Article 14, Section 3(c)(1) refer to an

"elected" board of directors.[7] This Court's admonition in *Fitzgiven* that it would not read language into a statute "that simply is not there" applies with like force to a Constitutional provision. 2013 Ark. 346, at 14, 429 S.W.3d at 242. *See also Knowlton,* 318 Ark. at 874, 889 S.W.2d at 725 (in construing constitutional provisions, apply same rules governing construction of statutes).

Additionally, the interpretation of Article 14, Section 3(c)(1) urged by the appellees would lead to an untenable and absurd Constitutional result, as it would divest the State of the means to meet its Constitutional obligation to provide an adequate education to all students—a "paramount" and "absolute" duty—in those cases where a local control has failed. *Lake View,* 351 Ark. at 66-67, 91 S.W.2d at 492. Appellees' interpretation would

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[7] Appellees also argue that unless there is an elected board of directors, there can be no school *board* election. **Add 51**, ¶ 135, 138 (emphasis added). This argument is based on a misreading of the Constitution and faulty logic. Article 14, Section 3(c)(1) mandates that there be an *annual school election* (not school board election) for the purpose of considering taxation issues. Nothing in Article 14, Section 3(c)(1) mentions the election of school board members; rather, provisions regarding the election of these statutory officers are set forth in the Arkansas Code. *See* Title 6, Chapter 13, Subchapter 6.

prohibit the State from removing a local board of directors under any circumstances, which is antithetical to the State's Constitutional duty to provide an adequate education to all of the State's schoolchildren. "Just as [this Court] will not interpret a statutory provision so as to reach an absurd result, neither will we interpret a constitutional provision in such a manner." *Gray v. Mitchell,* 373 Ark. 560, 567, 285 S.W.3d 222, 229 (2008). *See also Weiss v. Central Flying Serv., Inc.,* 326 Ark. 685, 690, 934 S.W.2d 211, 214 (1996)(this Court is "duty bound to reject any interpretation of a statute that results in an absurdity or injustice, leads to contradiction, or defeats the plain purpose of the law").

Finally, as mentioned earlier, appellees' interpretation of Article 14, Section 3(c)(1) conflicts with Article 14, Section 4, which vests with the General Assembly the authority to determine who will supervise the public schools:

> **Supervision of schools.** The supervision of public schools, and the execution of the laws regulating the same, shall be vested in and confided to, such officers as may be provided for by the General Assembly.

Ark. Const. art. 14, § 4. *See also* Article 14, Section 3(a)("[t]he General Assembly shall provide for the support of common schools by general law"). Reading these provisions "relating to the same subject matter" in

light of each other, and considering them "as a whole" reveals that appellees' interpretation of Article 14, Section 3(c)(1) is mistaken.

For the foregoing reasons, appellees failed to meet their burden of overcoming the presumption that Arkansas's academic distress law is unconstitutional. Consequently, their Constitutional argument provides no support for an *utra vires* exception to sovereign immunity.

2. Appellees Have Not Pled Facts Sufficient To Establish Any Other Sovereign Immunity Exception.

Appellees failed to plead sufficient facts to establish entitlement to a sovereign immunity exception for arbitrary and capricious, bad faith, or wantonly injurious conduct. The definitions of these terms are dispositive. "Bad faith" consists of "dishonest, malicious or oppressive conduct with a state of mind characterized by hatred, ill will or a spirit of revenge." *Conway Corp. v. Construction Engineers, Inc.*, 300 Ark. 225, 231-32, 782 S.W.2d 36, 39 (1989). Although this Court has not defined "wanton" conduct, Arkansas Model Jury Instruction 1101 defines "*Willful or Wanton Conduct*" as "a course of action which shows an actual or deliberate intention to harm or which, if not intentional, shows an indifference to or conscious disregard for the safety of others." AMI 1101, *Willful or Wanton Conduct Defined.* This Court defined "arbitrary and capricious" as follows:

> Administrative action may be regarded as arbitrary and capricious where it is not supportable on any rational basis. . . To have an administrative action set aside as arbitrary and capricious, the party challenging the action must prove that it was willful and unreasoning action, without consideration and with a disregard of the facts or circumstances of the case. . . An action is not arbitrary and capricious simply because the reviewing court would act differently.

Arkansas Contractors Licensing Bd. v. Pegasus Renovation Co., 347 Ark. 320, 332, 64 S.W.3d 241, 248 (2001).

At bottom, the facts pled in the *Amended Complaint* reflect appellees' strong disagreement with the decisions made by the State Board. Primarily, appellees disagree with the State Board's removal of the LRSD's board of directors, its directing the Commissioner of Education to assume the authority of the board of directors necessary for the day-to-day governance of the District, and also with its decision to assume authority over the LRSD when only six schools in the District were classified as being in academic distress, opining that assuming control over the District was not necessary to remedy the problems in the six academically-distressed schools. Although plaintiffs admit that "much more remains to be done" related to academic performance, *see* **Add 39-40,** ¶ 66, they feel improvement could best be accomplished by reinstating the board of directors. Appellees also note that the State Board has not assumed authority over other districts where there rate of academically-distressed schools is greater than the LRSD or where

the entire district was found to be in academic distress (without pleading facts to establish that the situations in those districts are in any way comparable to those in the LRSD). Appellees also find fault that there was no improvement plan put in place by the ADE as of February 12, 2015, less than two weeks after the State Board assumed authority over the LRSD, and that ADE school improvement staff already had been working with the District for some time. Appellees also feel that the State Board should not have appointed an individual to direct a committee to look into LRSD's financial issues.

Again, appellees' Amended Complaint undoubtedly reflects a strong disagreement over the best course to take to improve learning opportunities for the students of the LRSD. The majority of allegations contained within it, however, are not factual allegations but rather mere opinions, theories, speculation, and the appellees' own legal interpretations, none of which carry any weight in the sovereign immunity analysis. *See Fitzgiven,* 2013 Ark. 346, at 14, 429 S.W.3d at 242 ("[f]or purposes of a motion to dismiss, we treat only the facts alleged in a complaint as true, but not a party's theories, speculation, or statutory interpretation"). The facts pled, however, come nowhere near approaching the extremely high threshold for

establishing a sovereign immunity exception for arbitrary and capricious, bad faith, or wantonly injurious conduct.

C. Appellees' Request For Writs Of Mandamus And Prohibition Likewise Are Barred By Sovereign Immunity.

Finally, appellees request issuance of a writ of mandamus or prohibition to force the State Board to reinstate the LRSD board of directors and to reverse its decision to direct the Commissioner of Education to assume the authority of the LRSD board of directors in its absence. For reasons discussed throughout this Brief, such a request for relief is barred by sovereign immunity. Furthermore, plaintiffs would not be entitled to a writ even if sovereign immunity were not a bar.

A writ of mandamus is issued only to compel an official or judge to take some action. *Manila School Dist. No. 15 v. Wagner,* 357 Ark. 20, 26, 159 S.W.3d 285, 290 (2004)(*citing Arkansas Democrat-Gazette v. Zimmerman,* 341 Ark. 771, 20 S.W.3d 301 (2000)). When requesting a writ of mandamus, a petitioner must show a clear and certain right to the relief sought. *Id.* Moreover, "a writ of mandamus will not lie to control or review matters of discretion." *Id.* Likewise, a writ of prohibition will not lie to control discretion, *Id.* at 26-27, 291; will not be issued for "for something that has already been done," *Holmes v. Lessenberry,* 297 Ark. 23, 23, 759

S.W.2d 37, 37 (1988); and will issue "only when the trial court is wholly without jurisdiction." *Pike v. Benton Circuit Court,* 340 Ark. 311, 314, 10 S.W.3d 447, 448 (2000)(citations omitted).

For reasons stated throughout this Brief, the General Assembly vested in the State Board discretion to determine what steps are necessary to address public schools in academic distress. Because appellees' request for writs of prohibition and mandamus clearly seeks to control the discretion of the State Board, a writ will not lie. Nor does the Amended Complaint establish that appellees have a "clear and certain right" to the relief they seek. Regarding a writ of prohibition, it likewise cannot lie because the State Board had jurisdiction to take the actions it did, and also because the action that appellees seek to prohibit—the removal of the District's school board and assignment of its duties to Commissioner of Education—already has occurred.

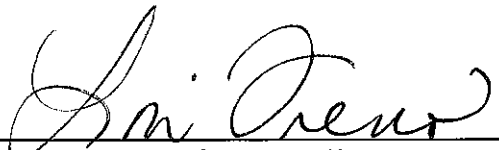
CONCLUSION

The Circuit Court erred in denying appellants' Motion to Dismiss, in which appellants raised their entitlement to sovereign immunity from suit. Consequently, the appellants respectfully request that this court reverse the Circuit Court's ruling and dismiss the present case against them as barred by

the doctrine of sovereign immunity, and for all other relief that is just and proper.

Respectfully submitted,

Lori Freno (97042)
Jeremy Lasiter (2001205)
Kendra Clay (2008197)
ARKANSAS DEPARTMENT OF EDUCATION

By 
Attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that I served the Appellants' Brief and Addendum by mailing a copy of it to the following on this 27th day of April, 2015:

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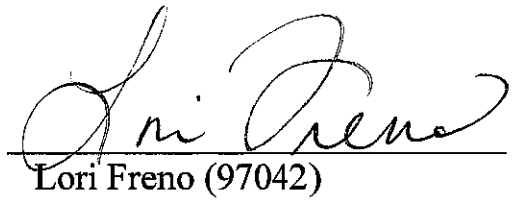
The Honorable Wendell Lee Griffen
Circuit Judge, Fifth Division
Pulaski County Courthouse
401 West Markham, Room 410
Little Rock, AR 72201



Lori Freno (97042)

Case Name:	Johnny Key, In His Official Capacity as Commissioner the Arkansas Department Of Education, *et al.* v. Diane Curry, *et al.*
Docket Number:	CV-15-224
Title of Brief:	Appellants' Brief and Addendum

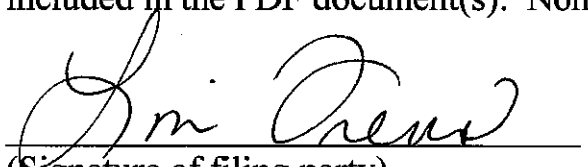
CERTIFICATE OF COMPLIANCE

Certification: I hereby certify that:

I have submitted and served on opposing counsel (except for incarcerated pro se litigants) an unredacted and, if required, a redacted PDF document(s) that comply with the Rules of the Supreme Court and Court of Appeals. The PDF document(s) are identical to the corresponding parts of the paper document(s) from which they were created as filed with the court. To the best of my knowledge, information, and belief formed after scanning the PDF documents for viruses with an antivirus program, the PDF documents are free of computer viruses. A copy of this certificate has been submitted with the paper copies filed with the court and has been served on all opposing parties.

Identification of paper documents not in PDF format:

The following original paper documents are not in PDF format and are not included in the PDF document(s): None.



(Signature of filing party)

Lori Freno
(Printed name)

Arkansas Department of Education
(Firm)

April 27, 2015
Date

ADDENDUM

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
_____ DIVISION, CIVIL DIVISION

DIANE CURRY, C.E. MCADOO
JIM ROSS, DORIS L. PENDLETON PLAINTIFFS

VS. 60CV-15-

TONY WOOD, in his official capacity as COMMISSIONER of the ARKANSAS DEPARTMENT OF EDUCATION; ARKANSAS DEPARTMENT OF EDUCATION; SAMUEL LEDBETTER, in his official capacity as CHAIRMAN, ARKANSAS STATE BOARD OF EDUCATION; TOYCE NEWTON, in her official capacity as VICE-CHAIRMAN, ARKANSAS STATE BOARD OF EDUCATION; JOE BLACK, in his official capacity as a MEMBER, ARKANSAS STATE BOARD OF EDUCATION; ALICE WILLIAMS MAHONY, in her official capacity as a MEMBER, ARKANSAS STATE BOARD OF EDUCATION; MIREYA REITH, in her official capacity as a MEMBER, ARKANSAS STATE BOARD OF EDUCATION; VICKI SAVIERS, in her official capacity as a MEMBER, ARKANSAS STATE BOARD OF EDUCATION; JAY BARTH, in his official capacity as a MEMBER, ARKANSAS STATE BOARD OF EDUCATION; DIANE ZOOK, in her official capacity as a MEMBER ARKANSAS STATE BOARD OF EDUCATION; KIM DAVIS, in his official capacity as a MEMBER, ARKANSAS STATE BOARD OF EDUCATION DEFENDANTS

COMPLAINT FOR DECLARATORY JUDGMENT, WRIT OF MANDAMUS, WRIT OF PROHIBITION, AND INJUNCTIVE RELIEF

Come now the Plaintiffs, by and through their attorneys, Marion A. Humphrey, Rickey H. Hicks, and Willard Proctor, Jr., and for their Complaint, state:

JURISDICTION AND VENUE

1. This cause of action is filed pursuant to Ark. Code Ann. § 16-111-104, part of the Declaratory Judgment Act, jurisdiction and venue is therefore proper in this Court. This cause of action also seeks the issuance of a writ of mandamus and a writ of prohibition.

Under Ark. Code Ann. §16-115-102, jurisdiction lies in circuit court for petitions for a writ of mandamus and prohibition directed at "inferior courts, tribunals, and officers in their respective jurisdictions." This cause also seeks to reverse and stay arbitrary, capricious, bad faith, wanton and ultra vires actions taken by the Arkansas State Board of Education and therefore venue and jurisdiction is proper in this Court. This cause is also filed seeking injunctive relief pursuant to Arkansas Rule of Civil Procedure, Rule 65 based on activity that has occurred and is continuing to occur in Little Rock, Pulaski County, Arkansas and therefore jurisdiction and venue is proper in this Court.

PARTIES

2. Plaintiff, Diane Curry, is a person of the full age of majority and a resident of Little Rock, Pulaski County, Arkansas. Plaintiff, C.E. McAdoo, is a person of the full age of majority and a resident of Little Rock, Pulaski County, Arkansas. Plaintiff, Jim Ross, is a person of the full age of majority and a resident of Little Rock, Pulaski County, Arkansas. Plaintiff, Doris L. Pendelton, is a person of the full age of majority and a resident of Little Rock, Pulaski County, Arkansas.

3. Mr. Tony Wood is the Commission of the Arkansas Department of Education (herein after also referred to as "ADE"). The Arkansas Department of Education is a department of the State of Arkansas.

4. Mr. Samuel Ledbetter is the Chairman of the Arkansas State

Board of Education and is a person of the full age of majority and is believed to be a resident of Little Rock, Pulaski County, Arkansas.

5. Ms. Toyce Newton is the Vice-Chairman of the Arkansas State Board of Education and is a person of the full age of majority and is believed to be a resident of Crossett, Ashley County Arkansas.

6. Mr. Joe Black is a Member of the Arkansas State Board of Education and is a person of the full age of majority and is believed to be a resident of Newport, Jackson County Arkansas.

7. Ms. Alice Williams Mahony is a Member of the Arkansas State Board of Education and is a person of the full age of majority and is believed to be a resident of El Dorado, Union County Arkansas.

8. Ms. Mireya Reith is a Member of the Arkansas State Board of Education and is a person of the full age of majority and is believed to be a resident of Fayetteville, Washington County Arkansas.

9. Ms. Vicki Saviers is a Member of the Arkansas State Board of Education and is a person of the full age of majority and is believed to be a resident of Little Rock, Pulaski County Arkansas.

10. Mr. Jay Barth is a Member of the Arkansas State Board of Education and is a person of the full age of majority and is believed to be a resident of Little Rock, Pulaski County Arkansas.

11. Ms. Diane Zook is a Member of the Arkansas State Board of Education and is a person of the full age of majority and is believed to be a resident of Melbourne, Izard County Arkansas.

12. Mr. Kim Davis is a Member of the Arkansas State Board of Education and is a person of the full age of majority and is believed to be a resident of Fayetteville, Washington County Arkansas.

FACTS

13. Article 14, Section 4 of the Arkansas Constitution provides that "the supervision of public schools, and the execution of the laws regulating the same, shall be vested in and confided to, such officers as may be provided for by the General Assembly."

14. Article 14, Section 3 of the Arkansas Constitution assigns certain constitutional responsibilities to School Board of Directors.

15. Article 14, Section 3 (a) of the Arkansas Constitution provides that "the General Assembly shall provide for the support of common schools by general law. In order to provide quality education, it is the goal of this state to provide a fair system for the distribution of funds. It is recognized that, in providing such a system, some funding variations may be necessary. The primary reason for allowing such variations is to allow school districts, to the extent permissible, to raise additional funds to enhance the educational system within the school district. It is further recognized that funding variations or restrictions thereon may be necessary in order to comply with, or due to, other provisions of this Constitution, the United States Constitution, state or federal laws, or court orders."

16. Article 14, Section 3 (c)(1) of the Arkansas Constitution

provides that "in addition to the uniform rate of tax provided in subsection (b), school districts are authorized to levy, by a vote of the qualified electors respectively thereof, an annual ad valorem property tax on the assessed value of taxable real, personal, and utility property for the maintenance and operation of schools and the retirement of indebtedness. The Board of Directors of each school district shall prepare, approve and make public not less than sixty (60) days in advance of the annual school election a proposed budget of expenditures deemed necessary to provide for the foregoing purposes, together with a rate of tax levy sufficient to provide the funds therefor, including the rate under any continuing levy for the retirement of indebtedness. The Board of Directors shall submit the tax at the annual school election or at such other time as may be provided by law. If a majority of the qualified voters in the school district voting in the school election approve the rate of tax proposed by the Board of Directors, then the tax at the rate approved shall be collected as provided by law. In the event a majority of the qualified electors voting in the school election disapprove the proposed rate of tax, then the tax shall be collected at the rate approved in the last preceding school election. However, if the rate last approved has been modified pursuant to subsection (b) or (c)(2) of this section, then the tax shall be collected at the modified rate until another rate is approved."

17. The Arkansas General Assembly vested and confided in the

Arkansas State Board of Education (hereinafter referred to as the "SBE") the general supervision of the public schools of the state. Ark. Code Ann. §6-11-105

18. Apart from the responsibilities imposed by the Arkansas Constitution, the Arkansas General Assembly vested and confided in the School District Board of Directors the powers to provide a general, suitable, and efficient system of free public education. Ark. Code Ann. §6-13-620.

19. To manage the school district, the Arkansas General Assembly created the offices of school district board of director. *See* Ark. Code Ann. §6-13-634.

20. School Districts and School Board of Directors we constitutional entities recognized in Article 14, Section 3 of the Arkansas Constitution.

21. The school boards operate the schools in their respective districts, purchase the required property, hold title to the property for the district, and have complete charge of maintenance. *Crenshaw v. Eudora School Dist.*, 208 S.W.3d 206, 362 Ark. 288 (Ark., 2005)

22. The Arkansas General Assembly has also required that each school district have a school superintendent. Ark. Code Ann. §6-13-109.

23. The Legislature has absolute control over all statutory offices, and may abolish them at pleasure; and in doing so no vested right is being invaded. *Robinson v. White*, 26 Ark. 139, 141 (1870)

24. The Board of Directors of the State's School Districts are assigned constitutional responsibilities and therefore, it may not be dissolved as such dissolution would violate Article 14, Section 3 of the Arkansas Constitution.

25. Given the constitutional responsibilities assigned to School Districts and Board of Directors under Article 14, Section 3, it would be unconstitutional for a school district to operate without a Board of Directors.

26. Article 5, section 20 of the Arkansas Constitution provides that "[t]he State of Arkansas shall never be made defendant in any of her courts."

27. A state agency may be enjoined if it can be shown that the agency's action is ultra vires or outside of the authority of the agency. *Fitzgiven, et al v. Dorey, et al, 2013 Ark 346, 429 S.W. 3d 234, citing Arkansas Dep't of Envtl. Quality v. Oil Producers of Arkansas*, 2009 Ark. 297, 318 S.W.3d 570.

28. A state agency may also be enjoined from acting arbitrarily, capriciously, in bad faith or in a wantonly injurious manner. *Fitzgiven, et al v. Dorey, et al, 2013 Ark 346, 429 S.W. 3d 234, citing Arkansas Dep't of Envtl. Quality v. Oil Producers of Arkansas*, 2009 Ark. 297, 318 S.W.3d 570.

29. The Little Rock School District School Board (hereinafter referred to as "LRSD") consists of seven members, all of whom are elected to three-year terms. All board members represent a specific

geographical area or zone. Board member terms are staggered so that at least two members, but no more than three, are to be elected each year on the third Tuesday in September.

30. School board candidates had to file with the Pulaski County Elections Commission during the filing period from July 1, 2014, to July 8, 2014. Voters had to register by August 17, 2014 to vote in the election on September 16, 2014. Voters could apply for absentee voting starting on July 18, 2014. Requests submitted online or by mail had to be received by September 9, 2014, while in-person applications could be made until September 15, 2014. Early voting ran from September 9, 2014, to September 15, 2014.

31. Two of the seats on the seven member LRSD School Board were up for general election on September 16, 2014. Incumbents for Zones 1 and 5 seats were up for election.

32. Zone 1 incumbent Norma Jean Johnson was defeated by challenger Joy C. Springer. Jim Ross unseated two-term incumbent Jody Carreiro as the Zone 5 representative.

33. Much of the discourse surrounding the election focused on the upcoming loss of $37 million in special state funding. The funding came from a settlement agreement reached following a desegregation lawsuit in the county which began in 1982.

34. In 1982, LRSD sued Pulaski County Special District, North Little Rock School District and the state to create a countywide school district. The school district, which was primarily African-

American, saw the case as a way to end racial segregation between their district and the primarily white districts. The case was resolved by redrawing the Little Rock School District boundary lines to match its city limits, which resulted in a loss of almost 8,000 students and 14 schools from the Pulaski County Special School District. In addition to the boundary changes, a settlement agreement was reached that required the state to pay approximately $129.75 million over 10 years to the three districts.

35. Despite these events, the controversy was not quickly resolved. A desegregation plan was approved in 1998 which was designed to release the Little Rock district from federal court monitoring in 2001. However, it was not released until 2002, and even then one provision was kept under court monitoring: the effectiveness in raising the achievement levels of African American students. This last piece of monitoring was removed in 2007. While this decision was appealed by Joshua Interveners, it was ultimately upheld.

36. In 2011, a court order relived the state of most of its monetary obligation from the earlier settlement agreement. State aid for majority-to-minority inter-district student transfers was still required. The LRSD appealed this decision.

37. A decision on January 13, 2014, approved the final phasing out of state payments to the three school districts. The payments are set to end after the 2017-2018 school year.

38. While debate about whether or not the payments achieved

their desegregation goals continues, the loss of these funds will affect more than just desegregation efforts. The majority of the funds were dedicated to the desegregation projects, but they have also been used for teacher retirement and health insurance costs. Both Johnson and Carreiro discussed the impacts this loss of funding will have on the district at a forum held by the Coalition of Greater Little Rock Neighborhoods. Both acknowledged that the district will likely have job losses and that other budgetary changes will have to be made in light of this change.

39. Doris L. Pendleton is a registered voter in Zone 1 of the Little Rock School District.

40. On September 16, 2014, Ms. Pendleton joined the other 485 registered voters who voted for Joy Springer. (See, Exhibit 1: Pulaski County School Election Results).

41. On September 16, 2014, 379 registered voters in Zone 5 voted for Jim Ross to replace the incumbent Jody Carreiro. (See, Exhibit 1: Pulaski County School Election Results).

42. The Arkansas General Assembly has given the State Board of Education the authority over a public school or school district in academic distress. Ark. Code Ann. §6-15-430

43. The LRSD has forty-eight (48) schools.

44. In 2014, six (6) of the LRSD's schools were identified as being in academic distress after fewer than half of the students attending them scored at proficient levels on achievement.

45. Three of the six (6) schools are high schools, two (2) are middle schools and one (1) is elementary school. Baseline Elementary, Cloverdale Middle, Henderson Middle, J.A. Fair High, and McClellan High.

46. The great majority of the LRSD schools are not in academic distress.

47. Central High School consistently leads the state in national merit semi-finalists.

48. Forest Park, Roberts, Williams, Pulaski Heights Middle and Central High were recognized with *Outstanding Educational Performance Awards* by the Office for Education Policy at the University of Arkansas.

49. Pre-AP and AP enrollment has been steadily increasing. Students took more ACT tests in 2014 than in 2013 and their scores were higher on every subject tested.

50. Wilson Elementary School was one of nine schools in the state to receive the "Exemplary School" designation for the 2013-14 school year, an achievement made more impressive considering that Wilson was a "priority" school the year before.

51. The Little Rock School District is not a school district in academic distress.

52. The State Board of Education Academic Distress Office did not find the entire school district in academic distress, just the six individual schools. (See Exhibit 2)

53. LRSD has been willing to make big changes in schools to improve their performance and to expand the range of options available to students in our community.

54. Chicot, for example, was converted to a K-2 school. Fair Park became an early childhood center. More recently, Forest Heights was converted into a STEM school and Geyer Springs became a gifted and talented academy.

55. LRSD had also begun a planning process to redesign and reconfigure Hall for the 2016-17 school year.

56. LRSD's Board of Directors clearly stated that Baseline, Cloverdale, Henderson, Hall, Fair and McClellan were its top priority and that the Board would do "whatever it takes" to improve teaching and learning at those schools. That commitment was evident when, on January 20, 2014, Dr. Suggs suggested that it might be necessary to "reconstitute" all six schools and Board members expressed their strong support for doing that if that's what it will take to fix those schools.

57. LRSD has worked together with the ADE for years to improve academic performance at the six schools which have now been classified as being in academic distress.

58. ADE school improvement specialists have been working in each of the schools since before they were declared to be in academic distress.

59. For years, ADE has approved the improvement plans (ACSIP)

for the six schools.

60. Five of the six schools were previously "state directed" schools, which gave ADE significant authority over their improvement efforts.

61. ADE had the authority, for example, to replace school staff, reallocate resources, provide professional development, consolidate or close the schools or convert them to charters, or appoint a School Improvement Director to oversee all aspects of the learning environment.

62. Some significant progress has been made in these schools. While much more remains to be done, it would be wrong to say there has been no improvement.

63. The percentage of proficient students has increased significantly in every school and in every subject area except math at Baseline which declined slightly. Examples include increases at Baseline (from 24% to 42% proficiency in Math); Cloverdale (25% to 42% in Literacy and 6% to 35% in Math); Henderson (15% to 39% in Math); J.A. Fair (18% to 47% in Algebra 1); and McClellan (19% to 40% in Literacy, 12% to 45% in Algebra], and 16% to 42% in Geometry).

64. The ADE rules governing academic distress require that ADE send a team of educators to evaluate schools in academic distress and make written recommendations to the school district.

65. On September 29, 2014, ADE sent Dr. Suggs a letter with written recommendations for each of LRSD's six academically

distressed schools. Soon thereafter, LRSD submitted to ADE and the SBE Subcommittee for Academically Distressed Schools LRSD's "Academic Improvement Plan for Schools in Academic Distress".

66. The executive summary to LRSD's plan notes that "the district appreciates the invaluable insight and recommendations made by the ADE Evaluation Teams" and states that LRSD will act on those recommendations. Both of these documents were discussed at the October 14,2014 SBE subcommittee meeting with LRSD.

67. ADE and LRSD both submitted progress reports to the SBE subcommittee in advance of the January 7, 2015 subcommittee meeting.

68. The ADE report (dated January 2, 2015) makes the following observation about the October 2014 subcommittee meeting: "Further, it was clear to the casual observer that both substantial progress in the implementation of the plan presented by LRSD administrators (inclusive of ADE recommendations), as well as substantial improvement in 'teamsmanship' within and between district administrators and the local school board was expected."

69. The ADE report goes on to summarize ADE's September 2014 findings and recommendations and concludes with a "Progress Report". The LRSD "Progress Report" was submitted on January 7, 2014. It provides a one-page summary of LRSD's accomplishments and planned "next steps", followed by a more detailed description of the progress to date.

70. While there are some areas of disagreement between the two

reports, Dr. Wilde of the ADE school improvement team reported to the SBE on January 7, 2015 that LRSD was implementing the right kinds of research-based programs at the six academically distressed schools and was doing so with an appropriate sense of urgency, but was probably trying to make too many changes at once.

71. ADE and LRSD school improvement specialists met at LRSD's request on January 14, 2015, to discuss the differences between the two reports, the progress to date and the priorities for the remainder of the school year. As a result of this meeting, LRSD is submitted to ADE an update on the efforts of the six schools to narrow their focus to two or three significant innovations in accordance with ADE's recommendation.

72. LRSD's Board expected that the plans developed at each of the six schools to increase student achievement (inclusive of ADE's recommendations) would be faithfully followed and stood ready to take whatever further steps may be necessary to improve the performance of those schools.

ARBITRARINESS, CAPRICIOUSNESS, BAD FAITH AND WANTONNESS

73. Plaintiffs incorporate and re-allege each allegation in paragraphs 1 - 72 of this complaint as set forth word for word.

74. On January 28, 2015, in a 5 - 4 decision at a specially called meeting, the Arkansas State Board of Education voted to takeover the Little Rock School District.

75. The Arkansas State Board of Education voted to immediately

remove the seven-member Little Rock School District Board.

76. The Superintendent, Dexter Suggs, was allowed to remain on an interim basis and report to the State Department of Education Commissioner.

77. The decision of the Arkansas State Board of Education was arbitrary, capricious, in bad faith and will cause wanton injury if it is allowed to stand.

78. The decision of the Arkansas State Board of Education is succinctly stated in a widely reported statement from State Senator Joyce Elliott, "If I break my arm, you don't put my whole body in a cast. That's kind of where we are with six schools; it's not the entire district."

79. The Little Rock School Board of Directors made it clear that it would take all steps necessary to fix the problem in the schools.

80. The Little Rock School Board of Directors had taken steps to fix problems in the school.

81. The standards established in Arkansas law do not allow SBE to take control of a school district which is not in academic distress when that action is not necessary to remedy schools in academic distress.

82. The Arkansas State Board of Education had not taken over other districts in the state where the rate of academically-distressed schools is greater than in Little Rock.

83. The SBE had only taken control of one district because of academic distress (Lee County) prior to its decision to takeover the LRSD. In the case of Lee County, the entire district was in academic distress. The problems in Lee County included having no curriculum beyond textbooks and having 42 of 67 high school seniors who were not on track to graduate.

84. The Strong-Huttig school district has also been classified as being in district-wide academic distress, but the state has not moved to take control of that district.

85. The Dollarway School District was placed in state control for failing to meet state Standards for Accreditation, but was returned to local control even though Dollarway High School was in academic distress.

86. The SBE has had control of the Pulaski County Special School District for four years, but three of he 26 schools in Arkansas currently in academic distress are in the Pulaski County Special School District.

87. The ADE staff has said that LRSD is implementing the right kinds of innovations in the six schools with a sense of urgency, and no one has said that the LRSD Board has done anything to impede that effort.

88. There are no established criteria for taking over a district in which the great majority of the schools are not in academic distress, and it has never been done before.

89. It does not appear that ADE has developed any plan which would significantly change the improvement efforts currently underway in the six schools.

90. The question of "teamsmanship" is itself highly subjective. One thing school boards should do is support their superintendents whenever possible.

91. Another thing school boards must do is to hold their superintendents accountable for improving student performance in the schools. The first may look like collegiality and the second may look like a lack of "teamsmanship", but they are both necessary

92. Five of the six troubled schools are already "state-directed" meaning the state already had the authority to take steps including replacing the entire staff or closing them.

93. As of February 12, 2015, Arkansas Education Department leaders reported that "there is no plan yet for improving the Little Rock School District's academically troubled schools." Howell, Cynthia, 2015, February 13, *No course set yet for LR district, state says, Arkansas Democrat Gazette*, page 1.

94. The Arkansas State Board of Education did not give the newly elected Board Members enough time to correct problems.

95. The Arkansas State Board of Education's actions are arbitrary, capricious, in bad faith and wanton.

ULTRA VIRES

96. A state agency may be enjoined if it can be shown that the

agency's action is ultra vires or outside of the authority of the agency. *Fitzgiven, et al v. Dorey, et al, 2013 Ark 346, 429 S.W. 3d 234, citing Arkansas Dep't of Envtl. Quality v. Oil Producers of Arkansas*, 2009 Ark. 297, 318 S.W.3d 570.

97. ASB's actions are ultra vires and outside of its authority in that they are in direct violation of the Arkansas Constitution.

98. To the extent Ark. Code Ann. § 6-15-430(b) purportedly allows SBE to take over a school district which is not in academic distress and remove its board of directors simply because a school or schools within the district are in academic distress, it violates the Arkansas Constitution.

99. Because Arkansas voters approved Amendment 74 in 1997, Article 14 section 3 of the Arkansas Constitution now assigns certain constitutional responsibilities to school boards.

100. For the SBE to require a school district to operate without a school board (especially for reasons unrelated to the improvement of academically distressed schools) would be unconstitutional.

101. Further, SBE's action is ultra vires because it is in excess of the authority given to it by Ark. Code Ann. § 6-15-401 et. seq.

102. Arkansas law (ACA § 6-15-401 et. seq.) provides for the identification by ADE and the classification by SBE of a public school or a public school district in "academic distress".

103. Arkansas law (ACA § 6-15-401 et. seq.) provides for the

identification by ADE and the classification by SBE of a public school or a public school district in "academic distress".

104. Ark. Code Ann. §6-15-430 describes "State Board of Education authority over a school or school district in academic distress." Subsection (a) sets out a range of remedies for **a school district** in academic distress. (emphasis added)

105. This subsection does not apply to LRSD because the Little Rock School District is not in academic distress. (See, Exhibit 2).

106. Subsection (b) sets out a range of remedies for a public school in academic distress. This section authorizes SBE to take action necessary to improve the performance of one or more schools within a district and must be read in that context.

107. Subsection (b) sets out a number of school specific remedies such as reorganizing or closing the school, removing its principal and reassigning its staff, and then says in (b)(9) that SBE may also "[t]ake one (1) or more of the actions under subsection (a) of this section concerning the public school district where the school is located".

108. The rules of statutory construction dictate that ACA § 6-15-430(b)(9) incorporates the subsection (a) remedies only to the extent necessary to remedy the academic distress of the school(s) so classified.

109. This is true for several reasons. First, subsection (a) and subsection (b)come from separate laws passed at different times by

the Arkansas General Assembly. Subsection (a) was part of the original Omnibus Quality Education Act passed in 2003. Subsection (b) was added 10 years later by Act 600 of 2013. Since SBE already had the authority to remedy school districts in academic distress at the time subsection (b) was passed, the logical purpose of subsection (b) was to provide a remedy when only schools and not school districts were in academic distress.

110. More importantly, subsection (b) itself makes its purpose clear and provides a standard for SBE action. Ark. Code Ann. §6-15-430(b)(11), for example, authorizes SBE to "[t]ake any other appropriate action allowed by law that the state board determines is ***needed to assist and address the public school classified as being in academic distress.***" Ark Code Ann §6-15-430(b)(11) (emphasis added). In the same vein, Ark Code Ann § 6-15-430(b)(10) authorizes SBE to return a district to elected representatives when "***the public school has corrected all issues*** that led to the classification of academic distress". ACA § 6-15-430(b)(10)(emphasis added).

111. The standard established in subsection (b) is that the SBE may take only such actions as are "needed to assist and address the public school" and assure that "the public school has corrected all issues" that led to academic distress.

112. The SBE is authorized to completely restructure the six LRSD schools in academic distress and to assume full control of them. See, e.g. ACA § 6-15-430(b)(1)- (7).

113. Nothing more would be "needed" to address the academic distress issues at Baseline, Cloverdale, Henderson, Hall, Fair and McClellan.

114. However, the SBE acted outside of its authority in assuming full control of the entire LRSD.

MANDAMUS AND PROHIBITION

115. Plaintiffs incorporate and re-allege each allegation in paragraphs 1 - 113 of this complaint as set forth word for word.

116. A writ of mandamus is a remedy to be used on occasions where the law has established no specific remedy and justice requires it. *State v. Vittitow,* 358 Ark. 98, 186 S.W.3d 237 (2004).

117. Mandamus is not a writ of right but is within the judicial discretion of the court to issue or withhold. *Robertson v. Norris,* 360 Ark. 591, 203 S.W.3d 82 (2005).

118. The purpose of the writ is to enforce an established right or to enforce the performance of a duty. *Manila School District No. 15 v. Wagner, 357* Ark. 20, 159 S.W.3d 285 (2004).

119. The Court should either enter an ordering the defendants to rescind it order taking over the entire LRSD.

INJUNCTIVE RELIEF

120. Plaintiffs incorporate and re-allege each allegation in paragraphs 1 - 113 of this complaint as set forth word for word.

121. Tony Woods, who is now serving as the Little Rock School Board, has indicated that there will be no School Board meetings.

122. Consequently, there will be no means for parents or interested parties to address issues or concerns with the school board. Without a means to have input, there is no openness in the process.

123. In accordance with Ark. R. Civ. P. 65, this Court should immediately issue a temporary restraining order or preliminary injunction directing the Defendants to cease and desist from taking over the Little Rock School District.

124. Irreparable injury will occur if this court does not intervene.

125. Plaintiffs have no adequate remedy at law.

WHEREFORE, Plaintiffs pray that this Court enter an order declaring that the acts of the Arkansas State Board of Education to be arbitrary, capricious, in bad faith, wanton, and ultra vires, issue the writ of prohibition, issue the writ of mandamus, and order the Defendants to return control of the LRSD to the duly elected Board of Directors of the LRSD, award Plaintiff attorney fees and cost of this action, together with all other just and proper relief to which they are entitled.

Respectfully submitted,

/s/Marion A. Humphrey
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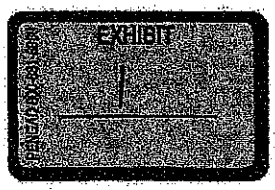
Christopher Heller

From: Jeremy Lasiter (ADE) <Jeremy.Lasiter@arkansas.gov>
Sent: Tuesday, December 23, 2014 10:14 AM
To: Christopher Heller
Subject: RE: LRSD Academic Distress



Chris:

Thanks, Chris. Good to hear from you. I spoke with the academic distress office about your question. The entire district has not been found in academic distress, just individual schools.

WD Hamilton (ALE)
Accelerated Learning (ALE)
Hall
Cloverdale
McClellan
JA Fair
Henderson
Baseline
Forest Heights (This school has only been recently identified by the ADE as being in academic distress. It has not been found by the State Board to be in academic distress.)

Last year, several school districts with ALEs on the list appealed. I do not think that the two ALEs above were ever placed in academic distress by the State Board. It is also my understanding that the two ALEs have been closed by LRSD.

I hope this helps.

Jeremy

From: Christopher Heller [mailto:Heller@fridayfirm.com]
Sent: Tuesday, December 23, 2014 9:31 AM
To: Jeremy Lasiter (ADE)
Subject: LRSD Academic Distress

Jeremy – I know that LRSD has six schools in academic distress. Has the district itself also been found to be in academic distress? If so, could you send me a copy of any letter to that effect? Everyone at LRSD is out for winter break so I won't be able to get an answer there any time soon. Thanks and Merry Christmas. CH

CHRISTOPHER HELLER | ATTORNEY

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SUMMARY REPT-GROUP DETAIL

PULASKI COUNTY, ARKANSAS
2014 ANNUAL SCHOOL ELECTION
SEPTEMBER 16, 2014

Official Results

RUN DATE:09/26/14 09:40 AM

EXHIBIT 2

	TOTAL VOTES	%	M100 Election IVO Election		Early Vote	Absentee	Provisional
PRECINCTS COUNTED (OF 135)	60	44.44					
REGISTERED VOTERS - TOTAL	239,237						
BALLOTS CAST - TOTAL	6,655		4,628	55	1,598	367	7
BALLOTS CAST - BLANK	2	.03	2	0	0	0	0
VOTER TURNOUT - TOTAL		2.78					
VOTER TURNOUT - BLANK							
Little Rock School District Board of Dir							
LITTLE ROCK SCHOOL DISTRICT ZONE 1							
Vote for One 1							
NORMA JEAN JOHNSON	228	31.98	201	0	10	16	1
JOY C. SPRINGER	485	68.02	366	0	94	23	2
Over Votes	0		0	0	0	0	0
Under Votes	3		2	0	1	0	0
Little Rock School District Board of Dir							
LITTLE ROCK SCHOOL DISTRICT ZONE 5							
Vote for One 1							
JODY CARREIRO	221	36.83	197	0	13	11	0
JIM ROSS.	379	63.17	350	0	14	15	0
Over Votes	0		0	0	0	0	0
Under Votes	3		3	0	0	0	0
North Little Rock School District Board							
NORTH LITTLE ROCK SCHOOL DISTRICT ZONE 5							
Vote for One 1							
SCOTT TEAGUE	185	53.31	154	0	24	7	0
PATRICK LANDER.	162	46.69	128	0	28	6	0
Over Votes	0		0	0	0	0	0
Under Votes	4		3	0	1	0	0
North Little Rock School District Board							
NORTH LITTLE ROCK SCHOOL DISTRICT ZONE 6							
Vote for One 1							
SANDRA (SANDI) CAMPBELL.	333	53.28	265	22	34	11	1
J.T. ZAKRZEWSKI	292	46.72	218	33	38	3	0
Over Votes	0		0	0	0	0	0
Under Votes	4		0	0	1	3	0
LRSD Millage LITTLE ROCK SCHOOL DISTRICT							
Vote for One 1							
FOR	1,036	71.89	783	0	128	123	2
AGAINST	405	28.11	278	0	54	72	1
Over Votes	1		1	0	0	0	0
Under Votes	66		57	0	5	3	1
NLRSD Millage NORTH LITTLE ROCK SCHOOL DISTRICT							
Vote for One 1							
FOR	661	65.00	481	32	107	40	1
AGAINST	356	35.00	258	23	45	30	0
Over Votes	0		0	0	0	0	0
Under Votes	36		29	0	7	0	0
Detachment from PCSSD							
PROPOSED JACKSONVILLE SCHOOL DISTRICT							
Vote for One 1							
FOR	3,769	94.53	2,579	0	1,163	25	2
AGAINST	218	5.47	153	0	63	2	0
Over Votes	0		0	0	0	0	0
Under Votes	10		9	0	0	1	0
PCSSD Millage PULASKI COUNTY SCHOOL DISTRICT							
Vote for One 1							
FOR	2,713	68.37	1,801	0	858	53	1
AGAINST	1,255	31.63	852	0	355	48	0
Over Votes	0		0	0	0	0	0
Under Votes	128		88	0	39	0	1

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
FIFTH DIVISION, CIVIL DIVISION

DIANE CURRY, C.E. MCADOO, JIM ROSS,
DORIS L. PENDLETON, BARCLAY KEY PLAINTIFFS

VS. 60CV-15-654

TONY WOOD, in his official capacity as COMMISSIONER of the ARKANSAS DEPARTMENT OF EDUCATION; ARKANSAS DEPARTMENT OF EDUCATION; SAMUEL LEDBETTER, in his official capacity as CHAIRMAN, ARKANSAS STATE BOARD OF EDUCATION; TOYCE NEWTON, in her official capacity as VICE-CHAIRMAN, ARKANSAS STATE BOARD OF EDUCATION; JOE BLACK, in his official capacity as a MEMBER, ARKANSAS STATE BOARD OF EDUCATION; ALICE WILLIAMS MAHONY, in her official capacity as a MEMBER, ARKANSAS STATE BOARD OF EDUCATION; MIREYA REITH, in her official capacity as a MEMBER, ARKANSAS STATE BOARD OF EDUCATION; VICKI SAVIERS, in her official capacity as a MEMBER, ARKANSAS STATE BOARD OF EDUCATION; JAY BARTH, in his official capacity as a MEMBER, ARKANSAS STATE BOARD OF EDUCATION; DIANE ZOOK, in her official capacity as a MEMBER ARKANSAS STATE BOARD OF EDUCATION; KIM DAVIS, in his official capacity as a MEMBER, ARKANSAS STATE BOARD OF EDUCATION; BAKER KURRUS, in his official capacity as CHAIRMAN of COMMITTEE ON LITTLE ROCK SCHOOL DISTRICT FINANCES DEFENDANTS

FIRST AMENDED AND SUBSTITUTED VERIFIED COMPLAINT FOR DECLARATORY JUDGMENT, WRIT OF MANDAMUS, WRIT OF PROHIBITION, AND INJUNCTIVE RELIEF

Come now the Plaintiffs, by and through their attorneys, Marion A. Humphrey, Rickey H. Hicks, and Willard Proctor, Jr., and for their Complaint, state:

JURISDICTION AND VENUE

1. This cause of action is filed pursuant to Ark. Code Ann. § 16-111-104, part of the Declaratory Judgment Act, jurisdiction and

venue is therefore proper in this Court. This cause of action also seeks the issuance of a writ of mandamus and a writ of prohibition. Under Ark. Code Ann. §16-115-102, jurisdiction lies in circuit court for petitions for a writ of mandamus and prohibition directed at "inferior courts, tribunals, and officers in their respective jurisdictions." This cause also seeks to reverse and stay arbitrary, capricious, bad faith, wanton and ultra vires actions taken by the Arkansas State Board of Education and therefore venue and jurisdiction are proper in this Court. This cause is also filed seeking injunctive relief pursuant to Arkansas Rule of Civil Procedure, Rule 65 based on activity that has occurred and is continuing to occur in Little Rock, Pulaski County, Arkansas and therefore jurisdiction and venue is proper in this Court.

PARTIES

2. Plaintiff, Diane Curry, is a person of the full age of majority and a resident of Little Rock, Pulaski County, Arkansas. Plaintiff, C.E. McAdoo, is a person of the full age of majority and a resident of Little Rock, Pulaski County, Arkansas. Plaintiff, Jim Ross, is a person of the full age of majority and a resident of Little Rock, Pulaski County, Arkansas. Plaintiff, Doris L. Pendleton, is a person of the full age of majority and a resident of Little Rock, Pulaski County, Arkansas. Plaintiff, Barclay Key, is a person of the full age of majority and a resident of Little Rock, Pulaski County, Arkansas.

3. Mr. Tony Wood is the Commissioner of the Arkansas Department of Education (herein after also referred to as "ADE"). The Arkansas Department of Education is a department of the State of Arkansas.

4. Mr. Samuel Ledbetter is the Chairman of the Arkansas State Board of Education and is a person of the full age of majority and is believed to be a resident of Little Rock, Pulaski County, Arkansas.

5. Ms. Toyce Newton is the Vice-Chairman of the Arkansas State Board of Education and is a person of the full age of majority and is believed to be a resident of Crossett, Ashley County, Arkansas.

6. Mr. Joe Black is a Member of the Arkansas State Board of Education and is a person of the full age of majority and is believed to be a resident of Newport, Jackson County, Arkansas.

7. Ms. Alice Williams Mahony is a Member of the Arkansas State Board of Education and is a person of the full age of majority and is believed to be a resident of El Dorado, Union County, Arkansas.

8. Ms. Mireya Reith is a Member of the Arkansas State Board of Education and is a person of the full age of majority and is believed to be a resident of Fayetteville, Washington County, Arkansas.

9. Ms. Vicki Saviers is a Member of the Arkansas State Board of Education and is a person of the full age of majority and is believed to be a resident of Little Rock, Pulaski County, Arkansas.

10. Mr. Jay Barth is a Member of the Arkansas State Board of

Education and is a person of the full age of majority and is believed to be a resident of Little Rock, Pulaski County, Arkansas.

11. Ms. Diane Zook is a Member of the Arkansas State Board of Education and is a person of the full age of majority and is believed to be a resident of Melbourne, Izard County, Arkansas.

12. Mr. Kim Davis is a Member of the Arkansas State Board of Education and is a person of the full age of majority and is believed to be a resident of Fayetteville, Washington County, Arkansas.

13. Mr. Baker Kurrus is the Chairman of a Committee on Little Rock School District Finances and is a person of the full age of majority and believed to be a resident of Pulaski County, Arkansas.

FACTS

14. Article 14, Section 4 of the Arkansas Constitution provides that "the supervision of public schools, and the execution of the laws regulating the same, shall be vested in and confided to, such officers as may be provided for by the General Assembly."

15. Article 14, Section 3 of the Arkansas Constitution assigns certain constitutional responsibilities to School Board of Directors.

16. Article 14, Section 3 (a) of the Arkansas Constitution provides that "the General Assembly shall provide for the support of common schools by general law. In order to provide quality education, it is the goal of this state to provide a fair system for the distribution of funds. It is recognized that, in providing such a system, some funding variations may be necessary. The primary reason

for allowing such variations is to allow school districts, to the extent permissible, to raise additional funds to enhance the educational system within the school district. It is further recognized that funding variations or restrictions thereon may be necessary in order to comply with, or due to, other provisions of this Constitution, the United States Constitution, state or federal laws, or court orders."

17. Article 14, Section 3 (c)(1) of the Arkansas Constitution provides that "in addition to the uniform rate of tax provided in subsection (b), school districts are authorized to levy, by a vote of the qualified electors respectively thereof, an annual ad valorem property tax on the assessed value of taxable real, personal, and utility property for the maintenance and operation of schools and the retirement of indebtedness. The Board of Directors of each school district shall prepare, approve and make public not less than sixty (60) days in advance of the annual school election a proposed budget of expenditures deemed necessary to provide for the foregoing purposes, together with a rate of tax levy sufficient to provide the funds therefor, including the rate under any continuing levy for the retirement of indebtedness. The Board of Directors shall submit the tax at the annual school election or at such other time as may be provided by law. If a majority of the qualified voters in the school district voting in the school election approve the rate of tax proposed by the Board of Directors, then the tax at the rate approved

shall be collected as provided by law. In the event a majority of the qualified electors voting in the school election disapprove the proposed rate of tax, then the tax shall be collected at the rate approved in the last preceding school election. However, if the rate last approved has been modified pursuant to subsection (b) or (c)(2) of this section, then the tax shall be collected at the modified rate until another rate is approved."

18. The Arkansas General Assembly vested and confided in the Arkansas State Board of Education (hereinafter referred to as the "SBE") the general supervision of the public schools of the state. Ark. Code Ann. §6-11-105

19. Apart from the responsibilities imposed by the Arkansas Constitution, the Arkansas General Assembly vested and confided in the School District Board of Directors the powers to provide a general, suitable, and efficient system of free public education. Ark. Code Ann. §6-13-620.

20. To manage the school district, the Arkansas General Assembly created the offices of School District Board of Director. *See* Ark. Code Ann. §6-13-634.

21. School Districts and School Board of Directors are constitutional entities recognized in Article 14, Section 3 of the Arkansas Constitution.

22. The school boards operate the schools in their respective districts, purchase the required property, hold title to the property

for the district, and have complete charge of maintenance. *Crenshaw v. Eudora School Dist.*, 208 S.W.3d 206, 362 Ark. 288 (Ark., 2005)

23. The Arkansas General Assembly has also required that each school district have a school superintendent. Ark. Code Ann. §6-13-109.

24. The Legislature has absolute control over all statutory offices, and may abolish them at pleasure; and in doing so no vested right is being invaded. *Robinson v. White*, 26 Ark. 139, 141 (1870)

25. The Board of Directors of the State's School Districts are assigned constitutional responsibilities and therefore, it may not be dissolved as such dissolution would violate Article 14, Section 3 of the Arkansas Constitution.

26. Given the constitutional responsibilities assigned to School Districts and Board of Directors under Article 14, Section 3, it would be unconstitutional for a school district to operate without a Board of Directors.

27. Article 5, Section 20 of the Arkansas Constitution provides that "[t]he State of Arkansas shall never be made defendant in any of her courts."

28. A state agency may be enjoined if it can be shown that the agency's action is ultra vires or outside of the authority of the agency. *Fitzgiven, et al v. Dorey, et al, 2013 Ark 346, 429 S.W. 3d 234 (2013) citing Arkansas Dep't of Envtl. Quality v. Oil Producers of Arkansas*, 2009 Ark. 297, 318 S.W.3d 570 (2009).

29. A state agency may also be enjoined from acting arbitrarily, capriciously, in bad faith or in a wantonly injurious manner. *Fitzgiven, et al v. Dorey, et al, 2013 Ark 346, 429 S.W. 3d 234 (2013), citing Arkansas Dep't of Envtl. Quality v. Oil Producers of Arkansas*, 2009 Ark. 297, 318 S.W.3d 570 (2009).

30. The Little Rock School District School Board (hereinafter referred to as "LRSD") consists of seven members, all of whom are elected to three-year terms. All board members represent a specific geographical area or zone. Board member terms are staggered so that at least two members, but no more than three, are to be elected each year on the third Tuesday ~~in September.~~

31. School board candidates had to file with the Pulaski County Elections Commission during the filing period from July 1, 2014, to July 8, 2014. Voters had to register by August 17, 2014, to vote in the election on September 16, 2014. Voters could apply for absentee voting starting on July 18, 2014. Requests submitted online or by mail had to be received by September 9, 2014, while in-person applications could be made until September 15, 2014. Early voting ran from September 9, 2014, to September 15, 2014.

32. Two of the seats on the seven member LRSD School Board were up for general election on September 16, 2014. Incumbents for Zones 1 and 5 seats were up for election.

33. Zone 1 incumbent Norma Jean Johnson was defeated by challenger Joy C. Springer. Jim Ross unseated two-term incumbent Jody

Carreiro as the Zone 5 representative.

34. Much of the discourse surrounding the election focused on the upcoming loss of $37 million in special state funding. The funding came from a settlement agreement reached following a desegregation lawsuit in the county which began in 1982.

35. In 1982, LRSD sued Pulaski County Special District, North Little Rock School District and the state to create a countywide school district. The school district, which was primarily African-American, saw the case as a way to end racial segregation between its district and the primarily white districts. The case was resolved by redrawing the Little Rock School District boundary lines to match its city limits, which resulted in a loss of almost 8,000 students and 14 schools from the Pulaski County Special School District. In addition to the boundary changes, a settlement agreement was reached that required the state to pay approximately $129.75 million over 10 years to the three districts.

36. Despite these events, the controversy was not quickly resolved. A desegregation plan was approved in 1998 which was designed to release the Little Rock district from federal court monitoring in 2001. However, it was not released until 2002, and even then one provision was kept under court monitoring: the effectiveness in raising the achievement levels of African American students. This last piece of monitoring was removed in 2007. While this decision was appealed by Joshua Interveners, it was ultimately upheld.

37. In 2011, a court order relieved the state of most of its monetary obligation from the earlier settlement agreement. State aid for majority-to-minority inter-district student transfers was still required. The LRSD appealed this decision.

38. A decision on January 13, 2014, approved the final phasing out of state payments to the three school districts. The payments are set to end after the 2017-2018 school year.

39. While debate about whether or not the payments achieved their desegregation goals continues, the loss of these funds will affect more than just desegregation efforts. The majority of the funds were dedicated to the desegregation projects, but they have also been used for teacher retirement and health insurance costs. Both Johnson and Carreiro discussed the impacts this loss of funding will have on the district at a forum held by the Coalition of Greater Little Rock Neighborhoods. Both acknowledged that the district will likely have job losses and that other budgetary changes will have to be made in light of this change.

40. Doris L. Pendleton is a registered voter in Zone 1 of the Little Rock School District.

41. On September 16, 2014, Ms. Pendleton joined the other 485 registered voters who voted for Joy Springer. (See, Exhibit 2: Pulaski County School Election Results).

42. On September 16, 2014, 379 registered voters in Zone 5 voted for Jim Ross to replace the incumbent Jody Carreiro. (See,

Exhibit 2: Pulaski County School Election Results).

43. The Arkansas General Assembly has given the State Board of Education the authority over a public school or school district in academic distress. Ark. Code Ann. §6-15-430

44. The LRSD has forty-eight (48) schools.

45. Plaintiff, Barclay Key, is a parent of children that are presently enrolled in the LRSD.

46. By letter dated July 14, 2014, the LRSD was notified that six (6) of the LRSD's schools were identified as being in academic distress after fewer than half of the students attending them scored at proficient levels on achievement. (See, Exhibit 3, Letter to Dr. Dexter Suggs)

47. Three of the six (6) schools are high schools, two (2) are middle schools and one (1) is an elementary school, namely, Baseline Elementary, Cloverdale Middle, Henderson Middle, J.A. Fair High, and McClellan High.

48. The great majority of the LRSD schools are not in academic distress.

49. Central High School consistently leads the state in National Merit semi-finalists.

50. Forest Park, Roberts, Williams, Pulaski Heights Middle and Central High were recognized with *Outstanding Educational Performance Awards* by the Office for Education Policy at the University of Arkansas.

51. Pre-AP and AP enrollment has been steadily increasing. Students took more ACT tests in 2014 than in 2013 and their scores were higher on every subject tested.

52. Wilson Elementary School was one of nine schools in the state to receive the "Exemplary School" designation for the 2013-14 school year, an achievement made more impressive considering that Wilson was a "priority" school the year before this.

53. The Little Rock School District is not a school district in academic distress. (See, Exhibit 1, E-mail to Christopher Heller)

54. The State Board of Education Academic Distress Office did not find the entire school district in academic distress, just the six individual schools. (See Exhibit 1)

55. LRSD Board of Directors has been willing to make big changes in schools to improve their performance and to expand the range of options available to students in our community.

56. Chicot, for example, was converted to a K-2 school. Fair Park became an early childhood center. More recently, Forest Heights was converted into a STEM school and Geyer Springs became a gifted and talented academy.

57. Under the direction and leadership of the LRSD Board of Directors, the LRSD had also begun a planning process to redesign and reconfigure Hall for the 2016-17 school year.

58. LRSD's Board of Directors clearly stated that Baseline, Cloverdale, Henderson, Hall, Fair and McClellan were its top priority

and that the Board would do "whatever it takes" to improve teaching and learning at those schools.

59. That commitment was evident when, on January 20, 2015, Dr. Suggs suggested that it might be necessary to "reconstitute" all six schools and Board members expressed their strong support for doing that if it was necessary to fix those schools.

60. LRSD has worked together with the ADE for years to improve academic performance at the six (6) schools which have now been classified as being in academic distress.

61. ADE school improvement specialists have been working in each of the schools since before they were declared to be in academic distress.

62. For years, ADE has approved the improvement plans (ACSIP) for the six (6) schools.

63. Five (5) of the six (6) schools were previously "state directed" schools, which gave ADE significant authority over their improvement efforts.

64. ADE had the authority, for example, to replace school staff, reallocate resources, provide professional development, consolidate or close the schools or convert them to charters, or appoint a School Improvement Director to oversee all aspects of the learning environment.

65. Some significant progress has been made in these schools.

66. While much more remains to be done, it would be wrong to

say there has been no improvement.

67. The percentage of proficient students has increased significantly in every school and in every subject area except math at Baseline which declined slightly. Examples include increases at Baseline (from 24% to 42% proficiency in Math); Cloverdale (25% to 42% in Literacy and 6% to 35% in Math); Henderson (15% to 39% in Math); J.A. Fair (18% to 47% in Algebra 1); and McClellan (19% to 40% in Literacy, 12% to 45% in Algebra, and 16% to 42% in Geometry).

68. The ADE rules governing academic distress require that ADE send a team of educators to evaluate schools in academic distress and make written recommendations to the school district.

69. On September 29, 2014, ADE sent Dr. Suggs a letter with written recommendations for each of LRSD's six academically distressed schools. Soon thereafter, LRSD submitted to ADE and the SBE Subcommittee for Academically Distressed Schools LRSD's "Academic Improvement Plan for Schools in Academic Distress".

70. The executive summary to LRSD's plan notes that "the district appreciates the invaluable insight and recommendations made by the ADE Evaluation Teams" and states that LRSD will act on those recommendations. Both of these documents were discussed at the October 14,2014, SBE subcommittee meeting with LRSD.

71. ADE and LRSD both submitted progress reports to the SBE subcommittee in advance of the January 7, 2015, subcommittee meeting. (Exhibit 4)

72. The ADE report (dated January 2, 2015) makes the following observation about the October 2014 subcommittee meeting: "Further, it was clear to the casual observer that both substantial progress in the implementation of the plan presented by LRSD administrators (inclusive of ADE recommendations), as well as substantial improvement in 'teamsmanship' within and between district administrators and the local school board was expected."

73. The ADE report goes on to summarize ADE's September 2014 findings and recommendations and concludes with a "Progress Report". The LRSD "Progress Report" was submitted on January 7, 2015. It provides a one-page summary of LRSD's accomplishments and planned "next steps", followed by a more detailed description of the progress to date.

74. While there are some areas of disagreement between the two reports, Dr. Wilde of the ADE school improvement team reported to the SBE on January 7, 2015, that LRSD was implementing the right kinds of research-based programs at the six academically distressed schools and was doing so with an appropriate sense of urgency, but was probably trying to make too many changes at once.

75. ADE and LRSD school improvement specialists met at LRSD's request on January 14, 2015, to discuss the differences between the two reports, the progress to date and the priorities for the remainder of the school year. As a result of this meeting, LRSD submitted to ADE an update on the efforts of the six schools to

narrow their focus to two or three significant innovations in accordance with ADE's recommendation.

76. LRSD's Board expected that the plans developed at each of the six schools to increase student achievement (inclusive of ADE's recommendations) would be faithfully followed and stood ready to take whatever further steps may be necessary to improve the performance of those schools.

77. Plaintiffs Pendleton and Key want the control of the public education system to be in the hands of the School Board of Directors that are democratically elected.

ARBITRARINESS, CAPRICIOUSNESS, BAD FAITH AND WANTONNESS

78. Plaintiffs incorporate and re-allege each allegation in the preceding paragraphs of this complaint as set forth word for word.

79. On January 28, 2015, in a 5 - 4 decision at a specially called meeting, the Arkansas State Board of Education voted to take over the Little Rock School District.

80. The Arkansas State Board of Education voted to immediately remove the seven-member Little Rock School District Board.

81. The Superintendent, Dexter Suggs, was allowed to remain on an interim basis and report to the State Department of Education Commissioner.

82. The decision of the Arkansas State Board of Education was arbitrary, capricious, in bad faith and will cause wanton injury if it is allowed to stand.

83. The decision of the Arkansas State Board of Education is succinctly stated in a widely reported statement from State Senator Joyce Elliott, "If I break my arm, you don't put my whole body in a cast. That's kind of where we are with six schools; it's not the entire district."

84. The Little Rock School Board of Directors made it clear that it would take all steps necessary to fix the problems in the schools.

85. The Little Rock School Board of Directors had taken steps to fix problems in the schools.

86. The standards established in Arkansas law do not allow SBE to take control of a school district which is not in academic distress when that action is not necessary to remedy schools in academic distress.

87. Based on the January 14, 2015, meeting with the SBE, there was nothing identified that the Little Rock School Board of Directors was not doing or had not committed to do. It was following the recommendations of the SBE.

88. Taking over the entire school district was not necessary to remedy the problems that existed in the six (6) schools.

89. The Arkansas State Board of Education had not taken over other districts in the state where the rate of academically-distressed schools is greater than in Little Rock.

90. The SBE had only taken control of one district because of

academic distress (Lee County) prior to its decision to take over the LRSD. In the case of Lee County, the entire district was in academic distress. The problems in Lee County included having no curriculum beyond textbooks and having 42 of 67 high school seniors who were not on track to graduate.

91. The Strong-Huttig school district has also been classified as being in district-wide academic distress, but the state has not moved to take control of that district.

92. The Dollarway School District was placed in state control for failing to meet state Standards for Accreditation, but was returned to local control even though Dollarway High School was in academic distress.

93. The SBE has had control of the Pulaski County Special School District for four years, but three of the 26 schools in Arkansas currently in academic distress are in the Pulaski County Special School District.

94. The ADE staff has said that LRSD is implementing the right kinds of innovations in the six schools with a sense of urgency, and no one has said that the LRSD Board has done anything to impede that effort.

95. There are no established criteria for taking over a district in which the great majority of the schools are not in academic distress, and it has never been done before.

96. It does not appear that ADE has developed any plan which

would significantly change the improvement efforts currently underway in the six schools.

97. As of February 12, 2015, Arkansas Education Department leaders reported that "there is no plan yet for improving the Little Rock School District's academically troubled schools." Howell, Cynthia, 2015, February 13, *No course set yet for LR district, state says, Arkansas Democrat Gazette*, page 1.

98. The SBE has made no public statement as to what steps it will are necessary for the LRSD to remove itself from the authority of the SBE.

99. The fact that the SBE's decision to take over the LRSD was arbitrary, capricious and wanton is evidenced by its appointment of Dr. Dexter Suggs to continue to administer the LRSD.

100. If control of the entire LRSD was actually necessary to correct the six (6) schools in academic distress, Dr. Suggs should not have been left in place. Dr. Suggs was directly responsible for developing and implementing plans to bring the schools out of academic distress.

101. SBE officials had identified "teamsmanship" as an issue in its reports. The question of "teamsmanship" is itself highly subjective.

102. One thing school boards should do is support their superintendents whenever possible. Another thing school boards must do is to hold their superintendents accountable for improving student

performance in the schools. The first may look like collegiality and the second may look like a lack of "teamsmanship", but they are both necessary.

103. Five of the six troubled schools are already "state-directed" meaning the state already had the authority to take steps including replacing the entire staff or closing them.

104. It was not necessary for the SBE to take over the entire school district to take care of the problems with these schools.

105. The SBE had the authority to control and direct Dr. Suggs as it is now doing to take whatever actions necessary to bring the schools out of academic distress.

106. The Arkansas State Board of Education did not give the citizens an opportunity to fix the problems.

107. The designation of academic distress was made on July 10, 2014.

108. On September 16, 2014, the people elected two (2) new School Board Members replacing two (2) incumbents.

109. Having been in office for a little over three (3) months, Ms. Springer and Mr. Ross worked to correct problems. However, three (3) months were not enough time to remedy the problems.

110. Plaintiff and other citizens of the Little Rock were deprived the opportunity to have their representatives fix the problems.

111. The Arkansas State Board of Education's actions are

arbitrary, capricious, in bad faith and wanton.

ULTRA VIRES

112. Plaintiffs incorporate and re-allege each allegation in the preceding paragraphs of this complaint as set forth word for word.

113. A state agency may be enjoined if it can be shown that the agency's action is ultra vires or outside of the authority of the agency. *Fitzgiven, et al v. Dorey, et al, 2013 Ark 346, 429 S.W. 3d 234 9(2013), citing Arkansas Dep't of Envtl. Quality v. Oil Producers of Arkansas*, 2009 Ark. 297, 318 S.W.3d 570 (2009).

114. SBE's actions are ultra vires and outside of its authority in that they are in direct violation of the Arkansas Constitution.

115. To the extent Ark. Code Ann. § 6-15-430(b) purportedly allows SBE to take over a school district which is not in academic distress and remove its board of directors simply because a school or schools within the district are in academic distress, it violates the Arkansas Constitution.

116. Because Arkansas voters approved Amendment 74 in 1997, Article 14 section 3 of the Arkansas Constitution now assigns certain constitutional responsibilities to school boards.

117. For the SBE to require a school district to operate without a school board (especially for reasons unrelated to the improvement of academically distressed schools) would be unconstitutional.

118. Further, SBE's action is ultra vires because it is in

excess of the authority given to it by Ark. Code Ann. § 6-15-401 et. seq.

119. Arkansas law (ACA § 6-15-401 et. seq.) provides for the identification by ADE and the classification by SBE of a public school or a public school district in "academic distress".

120. Ark. Code Ann. §6-15-430 describes "State Board of Education authority over a school or school district in academic distress." Subsection (a) sets out a range of remedies for **a school district** in academic distress. (emphasis added)

121. This subsection does not apply to LRSD because the Little Rock School District is not in academic distress. (See Exhibit 1).

122. Subsection (b) sets out a range of remedies for a public school in academic distress. This section authorizes SBE to take action necessary to improve the performance of one or more schools within a district and must be read in that context.

123. Subsection (b) sets out a number of school specific remedies such as reorganizing or closing the school, removing its principal and reassigning its staff, and then states in (b)(9) that SBE may also "[t]ake one (1) or more of the actions under subsection (a) of this section concerning the public school district where the school is located".

124. The rules of statutory construction dictate that ACA § 6-15-430(b)(9) incorporates the subsection (a) remedies only to the extent necessary to remedy the academic distress of the school(s) so

classified.

125. This is true for several reasons. First, subsection (a) and subsection (b) come from separate laws passed at different times by the Arkansas General Assembly. Subsection (a) was part of the original Omnibus Quality Education Act passed in 2003. Subsection (b) was added 10 years later by Act 600 of 2013. Since SBE already had the authority to remedy school districts in academic distress at the time subsection (b) was passed, the logical purpose of subsection (b) was to provide a remedy when only schools and not school districts were in academic distress.

126. More importantly, subsection (b) itself makes its purpose clear and provides a standard for SBE action. Ark. Code Ann. §6-15-430(b)(11), for example, authorizes SBE to "[t]ake any other appropriate action allowed by law that the state board determines is ***needed to assist and address the public school classified as being in academic distress.***" Ark Code Ann §6-15-430(b)(11) (emphasis added). In the same vein, Ark Code Ann § 6-15-430(b)(10) authorizes SBE to return a district to elected representatives when "***the public school has corrected all issues*** that led to the classification of academic distress". ACA § 6-15-430(b)(10)(emphasis added).

127. The standard established in subsection (b) is that the SBE may take only such actions as are "needed to assist and address the public school" and assure that "the public school has corrected all issues" that led to academic distress.

128. The SBE is authorized to completely restructure the six LRSD schools in academic distress and to assume full control of them. See, e.g. ACA § 6-15-430(b)(1)- (7).

129. Nothing more would be "needed" to address the academic distress issues at Baseline, Cloverdale, Henderson, Hall, Fair and McClellan.

130. However, the SBE acted outside of its authority in assuming full control of the entire LRSD.

131. The SBE has made Tony Wood the Little Rock School District Board of Directors.

132. It is a violation of Article 14, Section 3 of the Arkansas Constitution for Tony Wood to sit as School District Board of Directors.

133. It is a violation of Article 14, Section 3 (c)(1) of the Arkansas Constitution for the SBE to remove the School Board of Directors and designate their constitutional responsibility of taxation to Tony Wood.

134. Under Article 14, Section 3 (c)(1) of the Arkansas Constitution, the Board of Directors of each school district is charged with the constitutional responsibility to prepare, approve and make public not less than sixty (60) days in advance of the annual school election a proposed budget of expenditures deemed necessary to provide for the foregoing purposes, together with a rate of tax levy sufficient to provide the funds therefor, including the

rate under any continuing levy for the retirement of indebtedness.

135. Without a School Board that is elected by the people, there can be no school board election.

136. Only an elected Board of Directors can perform this responsibility.

137. Under Article 14, Section 3 (c)(1) of the Arkansas Constitution, the Board of Directors shall submit the tax at the annual school election or at such other time as may be provided by law. If a majority of the qualified voters in the school district voting in the school election approve the rate of tax proposed by the Board of Directors, then the tax at the rate approved shall be collected as provided by law. In the event a majority of the qualified electors voting in the school election disapprove the proposed rate of tax, then the tax shall be collected at the rate approved in the last preceding school election. However, if the rate last approved has been modified pursuant to subsection (b) or (c)(2) of this section, then the tax shall be collected at the modified rate until another rate is approved.

138. Without a School Board that is elected by the people, there can be no election.

139. Only an elected Board of Directors can perform this responsibility.

140. The SBE violated the Arkansas Constitution when it dissolved the Little Rock School Board of Directors and acted outside

of its authority.

141. Ark. Code Ann. §6-13-112(a), provides that "within ten (10) days of the meeting of the State Board of Education at which the state board assumes authority of a school district or within ten (10) days of the date upon which the Commissioner of Education assumes authority of a school district, the commissioner shall provide the following information to the chairs of the House Committee on Education and the Senate Committee on Education: (1) A clear statement of the reasons the district has been placed under the authority of the state board or the commissioner; and (2) A clear statement of the steps necessary for the school district to remove itself from the authority of the state board or the commissioner.

142. Upon information and belief, neither defendant Wood nor the SBE provided a clear statement of the reasons the LRSD was placed under state control to the chairs of the House Committee on Education and the Senate Committee on Education within ten (10) days of the January 28, 2015, takeover.

143. Upon information and belief, neither defendant Wood nor the SBE provided a clear statement of the steps necessary for the LRSD to remove itself from the authority of the state to the chairs of the House Committee on Education and the Senate Committee on Education within ten (10) days of the January 28, 2015, takeover.

144. The SBE has failed to comply with the requirements of Ark. Code Ann. §6-13-112(a).

MANDAMUS AND PROHIBITION

145. Plaintiffs incorporate and re-allege each allegation in the preceding paragraphs of this complaint as set forth word for word.

146. A writ of mandamus is a remedy to be used on occasions where the law has established no specific remedy and justice requires it. *State v. Vittitow*, 358 Ark. 98, 186 S.W.3d 237 (2004).

147. Mandamus is not a writ of right but is within the judicial discretion of the court to issue or withhold. *Robertson v. Norris*, 360 Ark. 591, 203 S.W.3d 82 (2005).

148. The purpose of the writ is to enforce an established right or to enforce the performance of a duty. *Manila School District No. 15 v. Wagner*, 357 Ark. 20, 159 S.W.3d 285 (2004).

149. The Court should order that the SBE immediately reinstate the Little Rock School Board of Directors. Further, the Court should order the SBE and all other defendants to cease and desist from any actions that would remove the constitutional responsibility of the officers.

INJUNCTIVE RELIEF

150. Plaintiffs incorporate and re-allege each allegation in the preceding paragraphs of this complaint as set forth word for word.

151. As set forth in more detail and particularity in the

preceding paragraphs of this complaint, it is likely that the plaintiffs will succeed on the merits.

152. Plaintiffs are likely to succeed on the merits because Article 14, Section 3(c) of the Arkansas Constitution has assigned certain constitutional responsibilities to School Board of Directors. School Boards of Directors are recognized in the Arkansas Constitution and charged with responsibilities related to raising funds to enhance the educational system of the school district. The SBE has no authority to assign this responsibility to anyone. The SBE has violated the Arkansas Constitution by removing the LRSD School Board of Directors.

153. Plaintiffs are also likely to succeed on the merits because the SBE did not have the authority to take over the entire LRSD when only six (6) of its 48 schools were in academic distress. It is clear that Tony Wood, who is now serving as the Little Rock School Board, has indicated that there will be no School Board meetings. Ark. Code Ann. §6-15-430 (a) describes "State Board of Education authority over a school or school district in academic distress." This subsection does not apply to LRSD because the Little Rock School District is not in academic distress. Ark. Code Ann. §6-15-430(b) sets out a range of remedies for a public school in academic distress. This section authorizes SBE to take action necessary to improve the performance of one or more schools within a district only to the extent necessary to remedy the academic distress

of the school(s) so classified. Taking over the entire LRSD was not necessary to remedy the academic distress of the six schools

154. Plaintiffs are likely to succeed on the merits because the SBE acted arbitrarily, capriciously and wantonly. The SBE approved plans submitted by the LRSD Board of Directors for improving the six schools in academic distress. Yet, the SBE took over the school district. The SBE has no plan for improving performance at the six schools.

155. Plaintiffs are likely to succeed on the merits because Dr. Dexter Suggs has been appointed to operate the LRSD while under SBE control. If taking control of the LRSD was actually necessary to bring the six (6) schools out of academic distress, Dr. Suggs would not have been allowed to remain.

156. The SBE has no plan for the schools in academic distress. The SBE has not provided any information as to the steps necessary to return control of the LRSD back to the School District.

157. Plaintiffs have been, and are continuing to be, irreparably harmed because there has been no clear statement as to why the school district was taken over and what steps are necessary to return control to the school district.

158. Tony Wood is the LRSD Board of Directors. He has indicated that the LRSD will not hold meetings. Consequently, there will be no means for parents or interested parties to address issues or concerns with the school board. Without a means to have input,

there is no openness in the process. Plaintiffs are being irreparably harmed by the lack of access and openness in the decisions being made.

159. The SBE is operating the Little Rock School District Board of Directors in direct violation of the Arkansas Constitution. As previously stated, defendant Wood has no authority to make or perform the constitutional responsibilities assigned to an elected School Board of Directors.

160. The SBE has appointed Baker Kurrus to direct a committee to deal with financial issues of the LRSD.

161. There is no provision for Mr. Kurrus, Mr. Wood or any of the other defendants to raise additional funds to enhance the educational system within the school district.

162. Mr. Kurrus, Mr. Wood and the other defendants have no authority to make recommendations or decisions regarding the finances of the LRSD since it is the responsibility of the elected Members of the LRSD Board of Directors.

163. Plaintiffs Curry, McAdoo and Ross are being irreparably harmed by being denied their right to perform the constitutional responsibilities which they were assigned as duly elected Members of the Little Rock School Board of Directors.

164. The defendants should be enjoined and restrained from taking any actions regarding the LRSD's finances as they violate the Arkansas Constitution.

165. The defendants should be enjoined and restrained from taking any actions regarding the LRSD as they violate the Arkansas Constitution, are ultra vires, and are arbitrary, capricious and wanton.

166. In accordance with Ark. R. Civ. P. 65, this Court should immediately issue a temporary restraining order or preliminary injunction directing the Defendants to cease and desist from operating the Little Rock School District.

167. Irreparable injury will occur if this court does not intervene.

168. Plaintiffs have no adequate remedy at law.

WHEREFORE, Plaintiffs pray that this Court enter an order declaring that the acts of the Arkansas State Board of Education to be arbitrary, capricious, in bad faith, wanton, ultra vires, and unconstitutional, issue a writ of prohibition and a writ of mandamus ordering the Defendants to return control of the LRSD to the duly elected Board of Directors of the LRSD, grant a TRO or preliminary injunction enjoining the Defendants from operating the LRSD, in the event immediate control is not returned to the LRSD Board, ordering the Defendants to provide a clear statement of the reasons for the takeover and the steps necessary to return control, award Plaintiffs attorney fees and costs of this action, together with all other just and proper relief to which they are entitled.

Respectfully submitted,

/s/Marion A. Humphrey
Marion A. Humphrey
Attorney for Plaintiffs
108 South Rodney Parham Rd
Little Rock, AR 72205
(501) 801-7612
Arkansas Bar No.: 80066
marionhumphreysr@gmail.com

/s/Rickey Hicks
Rickey H. Hicks
Attorney for Plaintiffs
415 Main Street
Little Rock, AR 72201
(501) 374-2574
Arkansas Bar No.: 89235
hickslawoffice@yahoo.com

/s/Willard Proctor, Jr.
Willard Proctor, Jr.
Attorney for Plaintiffs
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Little Rock, AR 72202-6258
(501) 378-7720
Arkansas Bar No.: 87136
willard@wpjrlaw.com

VERIFICATION

STATE OF ARKANSAS)
)ss.
COUNTY OF PULASKI)

I do hereby state that I have read the above and foregoing pleading and that the facts are true and correct to the best of my information, knowledge and belief.

Diane Curry

Diane Curry

SWORN TO AND SUBSCRIBED BEFORE ME, A NOTARY PUBLIC, ON THIS 20th DAY OF FEBRUARY, 2015.

11-7-2021
My Commission Expires

Notary Public

KYESHA RAULSTON
Notary Public-Arkansas
Pulaski County
My Commission Expires 11-07-2021
Commission # 12384954

VERIFICATION

STATE OF ARKANSAS)
)ss.
COUNT OF PULASKI)

I do hereby state that I have read the above and foregoing pleading and that the facts are true and correct to the best of my information, knowledge and belief.

Doris L. Pendleton

Doris L. Pendleton

11-7-2021
My Commission Expires

Kyesha Raulston
Notary Public

KYESHA RAULSTON
Notary Public-Arkansas
Pulaski County
My Commission Expires 11-07-2021
Commission # 12384954

VERIFICATION

STATE OF ARKANSAS)
)ss.
COUNTY OF PULASKI)

I do hereby state that I have read the above and foregoing pleading and that the facts are true and correct to the best of my information, knowledge and belief.

C.E. Meacon

SWORN TO AND SUBSCRIBED BEFORE ME, A NOTARY PUBLIC, ON THIS 2nd DAY OF FEBRUARY, 2015.

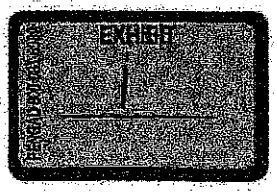
11-7-2021
My Commission Expires

Notary Public

KYESHA RAULSTON
Notary Public-Arkansas
Pulaski County
My Commission Expires 11-07-2021
Commission # 12364954

Christopher Heller

From: Jeremy Lasiter (ADE) <Jeremy.Lasiter@arkansas.gov>
Sent: Tuesday, December 23, 2014 10:14 AM
To: Christopher Heller
Subject: RE: LRSD Academic Distress



Chris:

Thanks, Chris. Good to hear from you. I spoke with the academic distress office about your question. The entire district has not been found in academic distress, just individual schools.

WD Hamilton (ALE)
Accelerated Learning (ALE)
Hall
Cloverdale
McClellan
JA Fair
Henderson
Baseline
Forest Heights (This school has only been recently identified by the ADE as being in academic distress. It has not been found by the State Board to be in academic distress.)

Last year, several school districts with ALEs on the list appealed. I do not think that the two ALEs above were ever placed in academic distress by the State Board. It is also my understanding that the two ALEs have been closed by LRSD.

I hope this helps.

Jeremy

From: Christopher Heller [mailto:Heller@fridayfirm.com]
Sent: Tuesday, December 23, 2014 9:31 AM
To: Jeremy Lasiter (ADE)
Subject: LRSD Academic Distress

Jeremy – I know that LRSD has six schools in academic distress. Has the district itself also been found to be in academic distress? If so, could you send me a copy of any letter to that effect? Everyone at LRSD is out for winter break so I won't be able to get an answer there any time soon. Thanks and Merry Christmas. CH

CHRISTOPHER HELLER | ATTORNEY

FRIDAY | ELDREDGE & CLARK LLP
Client focused every day

Heller@fridayfirm.com | Direct (501) 370-1506 | Fax (501) 244-5344
400 West Capitol Avenue, Suite 2000
Little Rock, Arkansas 72201-3522 | www.FridayFirm.com

SUMMARY REPT-GROUP DETAIL

PULASKI COUNTY, ARKANSAS
2014 ANNUAL SCHOOL ELECTION
SEPTEMBER 16, 2014

Official Results

Exhibit 2

RUN DATE:09/26/14 09:40 AM

	TOTAL VOTES	%	M100 Election	IVO Election	Early Vote	Absentee	Provisional
PRECINCTS COUNTED (OF 135)	60	44.44					
REGISTERED VOTERS - TOTAL	239,237						
BALLOTS CAST - TOTAL	6,655		4,628	55	1,598	367	7
BALLOTS CAST - BLANK	2	.03	2	0	0	0	0
VOTER TURNOUT - TOTAL		2.78					
VOTER TURNOUT - BLANK							
Little Rock School District Board of Dir							
LITTLE ROCK SCHOOL DISTRICT ZONE 1							
Vote for One 1							
NORMA JEAN JOHNSON	228	31.98	201	0	10	16	1
JOY C. SPRINGER	485	68.02	366	0	94	23	2
Over Votes	0		0	0	0	0	0
Under Votes	3		2	0	1	0	0
Little Rock School District Board of Dir							
LITTLE ROCK SCHOOL DISTRICT ZONE 5							
Vote for One 1							
JODY CARREIRO	221	36.83	197	0	13	11	0
JIM ROSS	379	63.17	350	0	14	15	0
Over Votes	0		0	0	0	0	0
Under Votes	3		3	0	0	0	0
North Little Rock School District Board							
NORTH LITTLE ROCK SCHOOL DISTRICT ZONE 5							
Vote for One 1							
SCOTT TEAGUE	185	53.31	154	0	24	7	0
PATRICK LANDER	162	46.69	128	0	28	6	0
Over Votes	0		0	0	0	0	0
Under Votes	4		3	0	1	0	0
North Little Rock School District Board							
NORTH LITTLE ROCK SCHOOL DISTRICT ZONE 6							
Vote for One 1							
SANDRA (SANDI) CAMPBELL	333	53.28	265	22	34	11	1
J.T. ZAKRZEWSKI	292	46.72	218	33	38	3	0
Over Votes	0		0	0	0	0	0
Under Votes	4		0	0	1	3	0
LRSD Millage LITTLE ROCK SCHOOL DISTRICT							
Vote for One 1							
FOR	1,036	71.89	783	0	128	123	2
AGAINST	405	28.11	278	0	54	72	1
Over Votes	1		1	0	0	0	0
Under Votes	66		57	0	5	3	1
NLRSD Millage NORTH LITTLE ROCK SCHOOL DISTRICT							
Vote for One 1							
FOR	661	65.00	481	32	107	40	1
AGAINST	356	35.00	258	23	45	30	0
Over Votes	0		0	0	0	0	0
Under Votes	36		29	0	7	0	0
Detachment from PCSSD							
PROPOSED JACKSONVILLE SCHOOL DISTRICT							
Vote for One 1							
FOR	3,769	94.53	2,579	0	1,163	25	2
AGAINST	218	5.47	153	0	63	2	0
Over Votes	0		0	0	0	0	0
Under Votes	10		9	0	0	1	0
PCSSD Millage PULASKI COUNTY SCHOOL DISTRICT							
Vote for One 1							
FOR	2,713	68.37	1,801	0	858	53	1
AGAINST	1,255	31.63	852	0	355	48	0
Over Votes	0		0	0	0	0	0
Under Votes	128		88	0	39	0	1

ARKANSAS DEPARTMENT OF EDUCATION

Exhibit 3

July 14, 2014

Dexter Suggs, Superintendent
Little Rock School District
810 W. Markham St.
Little Rock, AR 72201

COPY

Dear Superintendent Suggs:

On July 10, 2014, the State Board of Education (SBE) classified the following school(s) as being in academic distress:

Baseline Elementary	6001052	48.251%
Cloverdale Aerospace Tech Charter	6001702	41.470%
Hall High School	6001002	40.642%
Henderson Middle School	6001013	46.049%
J.A. Fair High School	6001063	43.304%
McClellan Magnet High School	6001064	40.748%

Ark. Code Ann. § 6-18-227 enables any student to transfer from a public school or school district classified by the SBE as a public school or school district in academic distress to another public school or school district that is not in academic distress.

Pursuant to Ark. Code Ann. § 6-18-227, for each student enrolled in or assigned to a public school or school district that has been classified by the SBE as a public school or school district in academic distress, a school district shall:

(1) Timely notify the parent, guardian, or the student, if the student is over eighteen (18) years of age, as soon as practicable after the designation is made, of all options available under Ark. Code Ann. § 6-18-227;

(2) Offer the parent, guardian, or the student, if the student is over eighteen (18) years of age, an opportunity to enroll the student in any public school or school district that has not been classified by the SBE as a public school or school district in academic distress. The opportunity to continue attending the public school or school district that is not classified as a public school or school district in academic distress shall remain in force until the student graduates from high school; and

Four Capitol Mall
Little Rock, AR
72201-1019
(501) 682-4475
ArkansasEd.org

(3) Request public service announcements to be made over the broadcast media and in the print media at such times and in such a manner as to inform parents or guardians of students in adjoining districts of the availability of the program, the application deadline, and the requirements and procedure for nonresident students to participate in the program.

The parent, guardian, or the student, if the student is over eighteen (18) years of age, must notify the Arkansas Department of Education (ADE) and both the sending and receiving school districts of the request for a transfer no later than July 30 of the first year in which the student intends to transfer. The School Choice application is attached to the Arkansas Department of Education Rules Governing the Arkansas Opportunity Public School Choice Act, which can be found on the ADE's website at the following link: http://www.arkansased.org/public/userfiles/rules/Current/Opportunity_School_Choice_Rules_Final_September_2013.pdf

The receiving public school or school district may transport students to and from the transferring public school or school district, and the cost of transporting students shall be the responsibility of the transferring public school or school district. A transferring public school or school district shall not be required to spend more than four hundred dollars ($400) per student per school year for transportation.

Upon the transferring public school's or school district's removal from classification as a public school or school district in academic distress, the transportation costs shall no longer be the responsibility of the transferring public school or school district, and the student's transportation and the costs of the transportation shall be the responsibility of the parent or guardian or of the receiving public school or school district if the receiving public school or school district agrees to bear the transportation costs.

Section 10.07 of the Emergency Rules Governing the Arkansas Comprehensive Testing, Assessment and Accountability Program (ACTAAP) and the Academic Distress Program requires the ADE to review and annually report to the SBE the academic conditions existing in each academically distressed public school or public school district. A public school or public school district in academic distress shall be removed from academic distress only upon a vote of a majority of the quorum present of the SBE and only after the ADE has certified in writing to the SBE that the school district has corrected all criteria for being classified in academic distress.

This letter only serves as a summary of a public school or school district's responsibilities concerning academic distress. We recommend that school district administrators carefully review the laws and rules related to academic distress and opportunity school choice, including without limitation, Ark. Code Ann. § 6-15-428 through 6-15-431; Ark. Code Ann. § 6-18-227; the ACTAAP rules and the Opportunity Public School Choice rules.

Questions concerning Opportunity School Choice should be directed to the ADE's Equity Assistance Unit at 501-682-4245. The ACTAAP rules referred to in this letter may be found at the following link:
http://www.arkansased.org/public/userfiles/rules/Current/ACTAAP_Emergency_Adoption_Revised_April_10_Website.pdf

For questions concerning academic distress, please contact Louis Ferren at 501-682-7339.

Sincerely,

M. Annette Barnes
Assistant Commissioner, Division of Public School Accountability
Arkansas Department of Education

cc: Tony Wood, Commissioner of Education
Jeremy C. Lasiter, General Counsel
State Board Office

Little Rock School District

Progress Report

Presented to SBE Subcommittee for Academically Distressed Schools

January 7, 2015

Progress Report for the Little Rock School District Schools on Academic Distress
January 7, 2015

What has been accomplished as of 01/07/2015:

- Training was provided to building administrators, instructional facilitators and teachers on rituals and routines, lesson planning, and classroom observation with feedback.
- Expectation was shared by the superintendent for all teachers to construct daily lesson plans with 8 required components.
- Expectation was shared by the superintendent for all principals to monitor daily lesson plans and to make observing instruction and giving quality feedback to teachers a high priority.
- Data on classroom observations and evidence-based feedback has been and continues to be collected. Senior district administrators who supervise the principals sent memos of concern/warning to principals who were not sufficiently implementing the observations with feedback.
- District assigned a curriculum staff member to serve as a school improvement specialist in each school on academic distress; the SISs send weekly reports to ADE that include barriers/concerns, progress made and next steps.
- Scholastic Math Inventory (SMI) and Scholastic Reading Inventory (SRI) were purchased for all AD schools.
- Training (SREB module) was provided to building administrators on leadership team structure and function.
- Academically distressed schools restructured their leadership teams; training was and continues to be provided to the leadership team members.
- Scantron® was selected as a provider of CCSS test bank questions for grades 6-12; it is being used for interim assessments and is also an option for pre/post assessments at the secondary level.
- Data from pre/post tests and interim assessments are being used to plan Tier 1, Tier 2, and Tier 3 (RtI) interventions.
- Board holds monthly work sessions to monitor activities and data related to academically distressed schools. Board asked for and received an update on how distressed schools are responding to barriers/concerns identified by SISs.
- District identified Curriculum Management Systems, Inc. to audit the alignment of the district's curriculum to CCSS.
- District SISs were trained on Indistar® and have helped schools to utilize the tool.
- AD Schools identified their plan for addressing ADE Evaluation Team recommendations; the schools also identified the 2-3 major research-based strategies/innovations that they will focus on this year. The IMOs are being realigned to address these strategies/innovations.
- Seventeen staff members from the district, including the principals at the AD schools, took a full-day visit to the Springdale School District to learn about their ESL program.
- The district is in the planning stages of reconstituting Hall High School to improve programming and outcomes for students. (The final plan will be presented to the LRSD Board for consideration.)

Next Steps:

- Leadership team training will continue. Additional training will occur on Jan 15, Feb 17, Mar 17, April 7 and May 7.
- Curriculum alignment audit will start in January; curriculum maps will be revised once the recommendations are received.
- Training in Using Data/Getting Results will be provided to the leadership teams, who will provide training for the staff.
- Observation Tool data will continue to be monitored by senior administrators at the district level and used to improve leader performance in observing instruction and providing high quality feedback to teachers.
- Additional training and support will be provided to AD schools in using the Indistar® system as a tool to guide their work.
- LRSD Board will continue their monthly work sessions to monitor AD school activities and progress.
- Pre/post unit tests will be used by all math and literacy teachers at the AD schools.
- The second interim assessment developed by TLI (elementary) and from Scantron® (secondary) will be given.
- Scholastic Math Inventory (SMI) and Scholastic Reading Inventory (SRI) will continue to be used to track student growth on the continuum toward college and career readiness (initial assessments have already been given).
- LRSD Board will consider the plan to reconstitute Hall High School.

Progress Report for the Little Rock School District Schools on Academic Distress

January 7, 2015

Introduction

The Little Rock School District (District) presented an improvement plan for schools in academic distress (AD) to the State Board of Education (SBE) in advance of a meeting before the SBE subcommittee on academically distressed schools that was held on October 14. In that plan the District identified five goals and related objectives that incorporated feedback from the ADE Evaluation Teams. The district plan addresses the key components of the familiar curriculum, instruction, and assessment triangle (Figure 1). In order for an aligned curriculum, instruction, and assessment program to work, a governance structure for decision making and action taking in the school is essential. This structure is the school leadership team. In addition students must have a safe and orderly environment within which learning can occur.

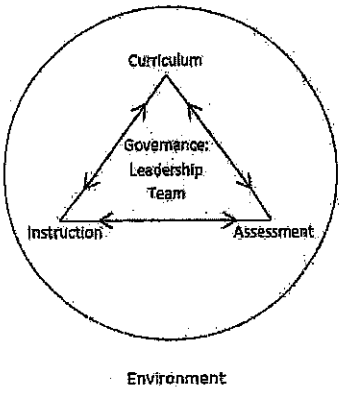


Figure 1: Curriculum, Instruction, and Assessment Triangle

Major district initiatives related to each component of the triangle:

- Curriculum – External curriculum audit will be conducted beginning in January, 2015 (Goal 4)
- Instruction – Lesson plan requirement and classroom observations with feedback (Goal 2)
- Assessment – Interim assessments and Pre/Post unit assessments
- Leadership Team – Restructuring and training for leadership teams (Goal 3)
- Environment – Establishment and enforcement of school-wide rituals and routines (Goal 5)

Progress Report

Progress toward each of the five goals and associated objectives is listed below in abbreviated form. Goal 1, an overarching goal, is for the six academically distressed schools to meet the criteria to be removed from that designation within three years. The other goals are listed as headings for the progress report.

Goal 2: The principal at each school on academic distress will become the instructional leader of a faculty that plans and implements quality, rigorous lessons that engage students and lead to improved student achievement.

Objectives (paraphrased) for this goal are for all teachers to develop lesson plans that are aligned with the district's curriculum, for the lesson plans to include eight required components, for principals to hold teachers accountable for producing and implementing the lesson plans, and for principals to observe instruction and give teachers multiple levels of high quality feedback. Principals are expected to place teachers who do not meet expectations for lesson planning and quality instruction on an improvement plan.

Progress toward goal 2: Administrators at the academically distressed schools conducted classroom observations for the purpose of giving teachers high quality feedback on their instruction (Figure 2). Although all schools had the same training, the academically distressed school administrators made drop-in observations in classrooms and gave feedback at a higher rate than six comparison schools (King, Dunbar, Mann, Pulaski Heights Middle, Central and Parkview).

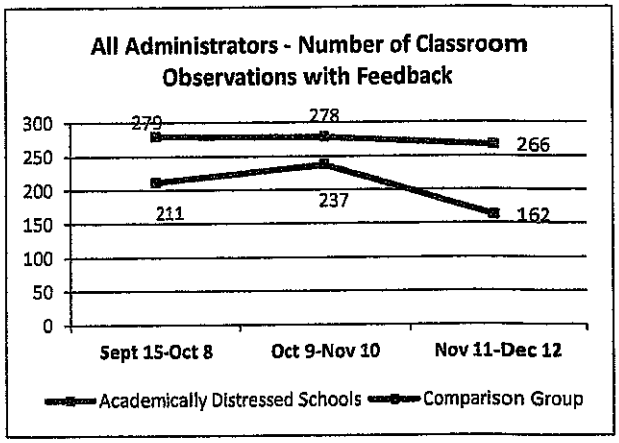


Figure 2: Classroom observations with feedback completed by administrators in academically distressed schools with an equal number of comparison schools.

The decreasing number of observations over the three time intervals was expected because the time per observation went up (Figure 3). The academically distressed school administrators, as a group, were in classrooms giving feedback to teachers 153 minutes/day more than the administrators at the comparison schools.

The third variable in the improvement initiative concerning classroom observations with feedback is the quality of the feedback. The district's Curriculum and Instruction department scored randomly selected feedback provided to teachers at the academically distressed schools during three time periods during the fall semester. The scorers used a rubric with three scales: basic, proficient and distinguished. Each set of feedback was scored by two raters, and a third rater was used if the first two didn't agree on a score. The results for the quality of the feedback are displayed in Table 1.

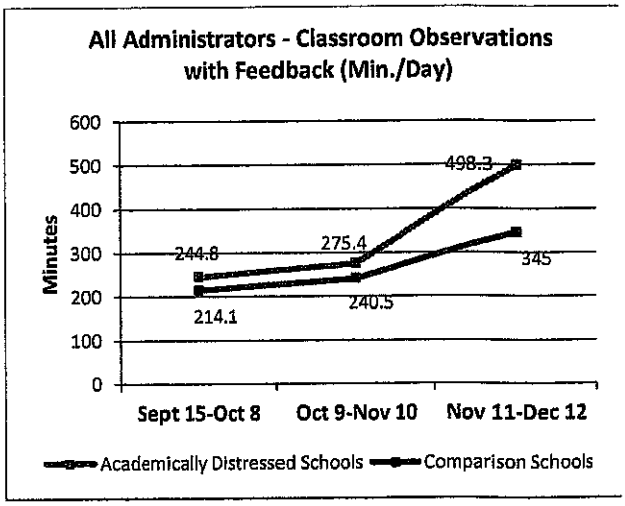


Figure 3: Average time spent per day observing instruction and giving feedback (includes an equal size group of comparison schools.)

Table 1: Assessing Quality of Leader Feedback*

	August 20 - September 31				October 1 - November 4				November 5 - December 12				
	# of Tchrs	Basic	Prof	Dist	# of Tchrs	Basic	Prof	Dist	# of Tchrs (# Scored)	Basic	Prof	Dist	No current observation
Baseline	5	60%	40%		5	60%	40%		10	70%	30%		
Cloverdale	10	100%			9	89%	11%		21 (13)	46%	54%		8
Henderson	9	89%	11%		8	50%	50%		18 (14)	57%	43%		4
Hall	19	84%	16%		18	78%	17%	6%	20 (13)	38%	31%	31%	7
J. A. Fair	15	80%	13%	7%	15	73%	20%	7%	21	29%	24%	48%	
McClellan	12	83%	17%		9	100%			19 (17)	77%	24%		2

*Feedback was scored using a three point rubric with possible ratings of basic, proficient, and distinguished.

Goal 3: The schools on academic distress will establish and/or maintain a team structure that includes effective leadership teams that share in decisions of real substance pertaining to school improvement and professional development needs. (Note – this was a key recommendation from ADE Evaluation Teams.)

Objectives (paraphrased) for this goal are for schools on academic distress to have a leadership team that consists of the principal, teachers that are reflective of the various grades and/or subject areas, and other key professional personnel; that meets at least twice monthly for an hour or more; and that uses school performance data and aggregated classroom observation data to develop innovations/strategies to improve teaching and learning.

Progress toward Goal 3: Training was provided to the principals and assistant principals at the AD schools on October 28 and November 6 for a total of 6 hours on "Building Effective Leadership Teams that Make a Difference", an SREB training module that was led by district leaders, Dr. Lloyd Sain and Ms. Shouteil Richardson. Following that, the principals restructured their leadership teams to conform to the models provided by SREB and *Wise Ways* from Indistar®. The newly formed leadership teams were trained on December 2 for 3 hours with additional training dates scheduled for January 15, February 17, March 17, April 7 and May 7.

The principals in the schools on academic distress have taken or will take advantage of Leadership Training provided by the Arkansas Leadership Academy (ALA) (Table 2). Frank Williams, principal at Henderson, and Larry Schleicher, principal at Hall, have registered for the Arkansas Leadership Academy (ALA) Master Principals Program that will begin summer, 2015. Jeremy Owoh, principal at Fair, Katina Ray, principal at Baseline, and Wanda Ruffins, principal at Cloverdale, all completed phase I during summer, 2014. Henry Anderson, principal at McClellan, has completed phases I and II of the Master Principals Program and has an assistant principal who attended the ALA Assistant Principals Institute.

Table 2: Participation of Principals of Academically Distressed Schools in ALA Master Principal Program

Building Leader	Phase of Arkansas Leadership Academy's Master Principal Program Completed
Katina Ray, Principal at Baseline Elementary	Completed phase I
Wanda Ruffins, Principal at Cloverdale Middle	Completed phase I
*Frank Williams, Principal at Henderson Middle	Has registered for training during summer, 2015
*Larry Schleicher, Principal at Hall High	Has registered for training during summer, 2015
Jeremy Owoh, Principal at J. A. Fair High	Completed phase I
Henry Anderson, Principal at McClellan High	Completed phases I and II

*Mr. Williams is new to Henderson this year and Mr. Schleicher became principal at Hall too late last year to enroll in the Program

Goal 4: The district-approved curricula (literacy and math) for grades K-12 will be fully aligned with the Common Core State Standards both in content and rigor.

Objectives (paraphrased) for this goal are to contract with an external provider to conduct an alignment audit of our grades K-12 math curriculum and 6-12 literacy curricula. Note—The Council of Great City Schools conducted an audit of our K-5 literacy curriculum a few years ago. Recommendations from the audit will be used to revise the curricula during the summer of 2015. The District's Testing and Evaluation Department will develop a tool for checking instructional alignment and assessment alignment with the revised curricula during the 2015-16 school year.

Progress toward Goal 4: Nine providers of curriculum alignment audits responded to the District's Request for Qualifications: American Institute for Research, McREL, CORE, Houghton-Mifflin, Curriculum Management Systems, Pearson, Evans Newton, Educational Policy Improvement Center, and Barnes Technologies. Their responses were scored using a rubric. Three providers, American Institute for Research, McREL, and Curriculum Management Systems, were finalists. The finalists were asked to provide more detailed information and to submit their best and final offer. The provider that was ranked first by the review committee was Curriculum Management Systems. Approval by the board is pending.

Work on the audit will begin in January and will be finished in May, 2015, if not before. The mathematics and literacy staff members, working with teams of teachers, will use the recommendations from the auditors to revise the written curriculum over the summer to be ready for the beginning of the 2015-16 school year. Training will be provided to building administrators and teachers on the revised curriculum during the pre-school conference.

Goal 5: A safe, orderly and academically productive environment will exist in each classroom and the school as a whole through establishing and enforcing rituals and routines throughout the school.

Objectives (paraphrased) for Goal 5 are that the district-assigned school improvement specialists and the principals at the AD schools will report that all classrooms have established and enforced rituals and routines.

Progress toward Goal 5: District central office staff had an extensive oral interview with the principals about their school. One question was about rituals and routines (Table 3).

Table 3: Principals Comments about Development and Implementation of Rituals and Routines*

School	Response to Question: How has the school implemented school-wide and classroom-level rituals and routines?
Baseline	The rituals and routines were established by our school climate committee. The school climate committee created the school climate handbook which outlines our school-wide rituals and routines. The school climate team included various stakeholders (i.e. classroom teachers, specialists, mental health providers, etc). Teachers have the autonomy to address their own individual classroom rituals and routines. This includes class meetings, student behavior plans, incentives and rewards.
Cloverdale	Some teachers have implemented rituals and routines with complete fidelity; this has been observed by administrators during classroom observations and campus walks. High implementation is evidenced by teachers who are standing at their doors during transitions, are visible in the hallways, have do-nows and objectives posted and students adhere to expectations. Universal rituals and routines were established by grade-level teams, as an off-shoot of classroom rules. Professional development regarding rituals and routines is on-going. Beginning with the first teachers PD day and every discipline conversation. Teachers have latitude to develop classroom rituals and routines, as long as they are in alignment with Cloverdale's Universal Rituals and Routines.
Henderson	The focus of whole school at beginning of school was ritual and routines. Administrators visited and focused on inspecting these. The administrative staff worked out the basics, and the staff contributed to the school wide rules. Then teachers developed their own classroom rituals and routines. Students seem more aware of expectations in halls with behavior and dress code and tardies. Most teachers are visible in halls during transitions. Administrative team is always present and visible and focused on rules.
Fair	Each teacher created and posted their rituals and routines. The 9th grade academy developed rituals and routines they all will follow . We have school-wide rituals and routines for being in the halls, cafeteria, and outside at lunch.
Hall	The school-wide rituals and routines are related to a school-wide tardy policy (and scanning technique) that has reduced the number of tardies for the year. Teachers develop rituals and routines for their own classrooms. For the most part, the use of rituals and routines has been very good.
McClellan	Teachers have not been implementing rituals and routines consistently at McClellan? The school leadership team met on October 28, 2014 and addressed this issue. New rituals and routines have been established with input from all departments for the entire school.

*Rituals and routines was one of several questions on an oral interview with the principal during the first semester.

Also, the district-assigned school improvement specialists have provided information on the school-wide and classroom level rituals and routines for the school to which they are assigned. Generally, the SISs report that school-wide rituals and routines are in place and are working well. Orderliness in common parts of the building are in place the vast majority of the time. Most classrooms have good management and instructional rituals and routines; however, there are exceptions. The exceptions are areas where the building administrators must provide training and support for teachers to maintain good classroom-level rituals and routines.

Student Outcomes:

Unit Pre/Post Assessments

One of the key recommendations from the ADE Evaluation Teams was for teachers to jointly plan instructional units that last 2-4 weeks and develop pre/post tests to determine if students are making adequate progress. If progress is not sufficient, teachers can use the pre/post test data to differentiate instruction to reteach components that students did not master. The pre/post test data can also inform certified staff that provide tier 2 and tier 3 interventions.

Progress toward unit development with pre/post-tests: All the schools on academic distress are using unit pre/post-tests. The implementation of this recommendation has been recent enough that the district has not collected pre/post results from individual teachers on a large scale at this time. By the end of January data on pre/post test results will have been collected at the district level and can be shared.

Interim Assessments

The district is using The Learning Institute (TLI) as the interim assessment provider for math and literacy at the elementary level. A new platform for interim assessments was adopted for grades 6-12. After evaluating various providers, Scantron® was selected to provide a test bank for our use and to provide many levels of data disaggregation and display. Scantron® assessment results will not be available in literacy until mid-January.

Progress measured using TLI interim assessment given in grades 2-5 math and 3-5 literacy and the Scantron® assessment for secondary mathematics are provided below (Table 4). The scores of traditionally high performing schools are included for comparison purposes. The scores reported are raw percent scores. Since the PARCC Assessment has not been given yet, the district doesn't have a valid method of determining what raw percentage score would represent proficiency.

Table 4: Module 1 Interim Assessment Results (average percent correct)

School	Assessment	School Avg.	District Avg.	For Comparison—High Performing School:	For Comparison—High Performing School:
Cloverdale Middle School	6th Grade Math	46.5	52.6	52.7 (Mann)	61.0 (PHMS)
	7th Grade Math	38.3	38.4	35.0 (Mann)	43.6 (PHMS)
	8th Grade Math	39.0	37.2	38.7 (Mann)	37.5 (PHMS)
Henderson Middle School	6th Grade Math	46.6	52.6	52.7 (Mann)	61.0 (PHMS)
	7th Grade Math	37.7	38.4	35.0 (Mann)	43.6 (PHMS)
	8th Grade Math	31.5	37.2	38.7 (Mann)	37.5 (PHMS)

	7th Accel	51.9	55.4	51.4 (Mann)	67.6 (PHMS)
	8th Alg 1	46.9	60.0	60.6 (Mann)	64.1 (PHMS)
Hall High School	Algebra I	28.6	40.8	49.9 (Parkview)	47.1 (Central)
	Algebra II	42.5	47.9	53.9 (Parkview)	51.6 (Central)
	Geometry	32.6	42.0	46.0 (Parkview)	47.6 (Central)
J. A. Fair High School	Algebra I	39.6	40.8	49.9 (Parkview)	47.1 (Central)
	Algebra II	33.0	47.9	53.9 (Parkview)	51.6 (Central)
	Geometry	39.7	42.0	46.0 (Parkview)	47.6 (Central)
McClellan High School	Algebra I	36.5	40.8	49.9 (Parkview)	47.1 (Central)
	Algebra II	39.0	47.9	53.9 (Parkview)	51.6 (Central)
	Geometry	34.1	42.0	46.0 (Parkview)	47.6 (Central)
Baseline Elementary	Grade 2 Math	70.3	74.8	81.0 (Terry)	79.9 (Forest Pk.)
	Grade 3 Math	61.1	65.3	68.0 (Terry)	88.5 (Forest Pk.)
	Grade 3 Reading	38.7	45.5	43.9 (Terry)	65.4 (Forest Pk.)
	Grade 4 Math	50.2	49.7	52.7 (Terry)	67.2 (Forest Pk.)
	Grade 4 Reading	36.5	52.8	53.5 (Terry)	65.6 (Forest Pk.)
	Grade 5 Math	45.2	49.0	54.3 (Terry)	65.2 (Forest Pk.)
	Grade 5 Reading	38.8	51.4	55.2 (Terry)	64.8 (Forest Pk.)

Baseline Elementary also administered the Scholastic Math Inventory (SMI) two times during the fall semester to grades K-5. The results show that students are making progress in mathematics (Table 5), especially at the early grades.

Table 5: Growth in Math Proficiency from SMI for Baseline Elementary (in percent of students at each level)

Grade	Below Basic – 1st Time Period	Below Basic – 2nd Time Period	Basic – 1st Time Period	Basic – 2nd Time Period	Proficient – 1st Time Period	Proficient – 2nd Time Period	Advanced – 1st Time Period	Advanced – 2nd Time Period
Kindergarten	76	29	18	40	4	29	2	2
First	93	51	5	40	2	9	0	0
Second	70	33	30	65	0	3	0	0
Third	95	73	5	27	0	0	0	0
Fourth	98	89	2	9	0	2	0	0
Fifth	98	82	2	18	0	0	0	0

Conclusions

Progress has been made toward all five goals that the district set for improving the schools on academic distress. The most effort to date from the district has gone into supporting the AD schools on goals 2 and 3 related to lesson planning, classroom observations with quality feedback, and leadership team development. Substantial progress has been made toward these goals. Building administrators are in the

classrooms observing instruction more than ever before. High standards exist for the feedback that they give to teachers, and the administrators are making the adjustment to giving meaningful, evidence-based feedback. Much training and guidance has been provided to AD schools related to leadership team structure and function. Support from the Arkansas Leadership Academy has been used and will continue to be a valuable resource for leadership training. The school leadership teams have been restructured recently at the AD schools, and additional support from the district will be needed to help the principals change them into decision-making bodies that lead the school improvement effort.

Training for goal 5 on rituals and routines was provided by the district, but implementation of this is essentially a building-level obligation. Feedback from district observers in the schools is that rituals and routines have been established and have improved the learning environment in the AD schools. We will continue to monitor implementation of school-level rituals and routines.

A curriculum auditor (goal 4) will be approved by the board in early January and work on the audit will begin immediately thereafter. Much of the focus on district central office administrators in the spring and summer will concentrate on the curriculum audit process. Ensuring a fully aligned curriculum that is available to all students is a key factor in improving student outcomes. The district believes that an aligned curriculum will help produce test scores that will help the AD schools make sufficient progress to be removed from the academic distress list in just a few years.

The district got a late start on pre/post unit testing and was delayed on interim testing at the secondary level while providers were evaluated. Scantron® was selected as a provider, and the district will use the Scantron® test item bank to produce interim assessments. Teachers at the secondary level can also use a separate item bank for the creation of short pre/post assessments or they can create their own pre/post assessments. These resources will support the AD distressed schools in getting "close to real-time" data for use in making instructional decisions.

Although much progress has been made, the district is fully aware that our role in supporting the AD schools is a top priority. We will continue to work with the administrators and teachers in these schools to get the improvement that must happen.

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
FIFTH DIVISION

DIANE CURRY, *et al* PLAINTIFFS

v. Case No. 60CV-15-654

TONY WOOD, in his official capacity
As Commissioner of the Arkansas
Department of Education, *et al.* DEFENDANTS

DEFENDANTS' MOTION TO DISMISS

For their Motion to Dismiss, official-capacity defendants Tony Wood, Sam Ledbetter, Toyce Newton, Joe Black, Alice Mahony, Mireya Reith, Vicki Saviers, Jay Barth, Diane Zook, and Kim Davis, as well as the Arkansas Department of Education, ("defendants") set forth the following.

1. Plaintiffs' claim under the Declaratory Judgment Act, as well as their requests for a writ of mandamus and writ of prohibition, are barred by sovereign immunity under Article 5, § 20 of the Arkansas Constitution.

2. Plaintiffs did not plead sufficient facts to establish that any exception to sovereign immunity applies.

3. Defendants did not act ultra vires or outside of the authority afforded them by the State's Academic Distress laws, Ark. Code Ann. § 6-15-424 *et seq.*, and plaintiffs have failed to plead sufficient facts to the establish the contrary.

4. The State's Academic Distress laws, Ark. Code Ann. § 6-15-424 *et seq.*, do not run afoul of the Arkansas Constitution.

5. Defendants did not act in an arbitrary and capricious, bad faith, or wantonly injurious manner, and plaintiffs have failed to plead sufficient facts to establish the contrary.

6. In addition to being barred by sovereign immunity, plaintiffs' requests for a writ of mandamus and writ of prohibition must fail because: (1) such writs will not lie to control discretion, and defendants' conduct of which plaintiffs complain was discretionary; and (2) plaintiffs have not established a "clear and certain right" to the relief they seek. Regarding a writ of prohibition, plaintiffs' request also must fail because first, defendants had jurisdiction to make the decisions that it did, and second, because a writ of prohibition will not lie to stop an action that already has taken place.

For the foregoing reasons, defendants are entitled to sovereign immunity under Article 5, § 20 of the Arkansas Constitution. Consequently, defendants respectfully request that this Court dismiss the current action against them in its entirety, and for all other relief that is just and proper.

Respectfully submitted

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Deputy General Counsel
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CERTIFICATE OF SERVICE

I, Lori Freno, hereby certify that a copy of the foregoing has been served on the following on this 16th day of March, 2015, via the e-flex filing notification system and via e-mail:

Mr. Rickey Hicks
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Mr. Willard Proctor, Jr.
willard@wpjrlaw.com

Mr. Marion Humphrey
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/s/ Lori Freno

ARKANSAS DEPARTMENT OF EDUCATION

January 28, 2015

Dr. Dexter Suggs, Superintendent
Little Rock School District
810 West Markham
Little Rock, AR 72201

Mr. Greg Adams, President
Little Rock School District Board
2413 Gristmill Road
Little Rock, AR 72227

Mr. C.E. McAdoo, Secretary
Little Rock School District Board
8700 Labette Drive
Little Rock, AR 72204

Ms. Dianne Curry, Board Member
Little Rock School District Board
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Little Rock, AR 72210

Ms. Leslie Fisken, Board Member
Little Rock School District Board
5223 Sherwood Road
Little Rock, AR 72207

Mr. Jim Ross, Board Member
Little Rock School District Board
9 Breeds Hill Ct.
Little Rock, AR 72211

Ms. Tara Shephard, Board Member
Little Rock School District Board
P.O. Box 56468
Little Rock, AR 72215

Ms. Joy Springer, Board Member
Little Rock School District Board
2208 Rice Street
Little Rock, AR 72202

Re: Notice of State Board of Education Action
VIA ELECTRONIC MAIL, REGULAR MAIL, AND CERTIFIED MAIL

Dear Superintendent Suggs and Little Rock School District Board Members:

On May 1, 2014, the Arkansas Department of Education (ADE) notified the Little Rock School District that the following schools within the school district met the criteria for being classified in academic distress:

Baseline Elementary
Cloverdale Middle School
Henderson Middle School
Hall High School
J.A. Fair High School
McClellan High School

Four Capitol Mall
Little Rock, AR
72201-1019
(501) 682-4475
ArkansasEd.org

The Little Rock School District did not appeal that notification. On July 10, 2014, the State Board of Education (State Board) classified the above-listed schools as being in academic distress. Ark. Code Ann. § 6-15-430 allows the State Board to take several actions with regard to schools or school districts in academic distress.

EXHIBIT
tabbies
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This afternoon, the State Board of Education held a special meeting to discuss whether to invoke any of the actions listed in Ark. Code Ann. § 6-15-430. The State Board conducted the meeting under the legal authority and jurisdiction of Ark. Code Ann. §§ 6-15-429, 6-15-430, and the Arkansas Department of Education Rules Governing the Arkansas Comprehensive Testing, Assessment and Accountability Program (ACTAAP) and the Academic Distress Program.

At the conclusion of the meeting, pursuant to Ark. Code Ann. § 6-15-430, a majority of the State Board voted to remove all of the current board of directors of the Little Rock School District, effective immediately. In the absence of the board of directors, the Commissioner of Education is to assume all authority of the board of directors as may be necessary for the day-to-day governance of the school district. The current superintendent of the Little Rock School District will remain in place on an interim basis and continue to work under the authority and supervision of the Commissioner of Education.

Please be advised that the foregoing actions took effect immediately upon the vote of the State Board.

Sincerely,

Samuel Ledbetter
Chair, State Board of Education

Tony Wood
Commissioner of Education

cc (w/encls): State Board of Education Members

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
FIFTH DIVISION

DIANE CURRY, *et al* **PLAINTIFFS**

v. **Case No. 60CV-15-654**

TONY WOOD, in his official capacity As Commissioner of the Arkansas Department of Education, *et al.* **DEFENDANTS**

DEFENDANTS' BRIEF IN SUPPORT OF MOTION TO DISMISS

For their Brief in Support, official-capacity defendants Tony Wood, Sam Ledbetter, Toyce Newton, Joe Black, Alice Mahony, Mireya Reith, Vicki Saviers, Jay Barth, Diane Zook, and Kim Davis, as well as the Arkansas Department of Education ("defendants"), set forth the following.

I. INTRODUCTION

This case arises under the State's Academic Distress laws, Ark. Code Ann. § 6-15-424 *et seq.*, which were enacted to ensure that the State meets its obligation under the Arkansas Constitution to "maintain a general, suitable, and efficient system of free public schools." Ark. Const. art. 14, § 1. In *Lake View School Dist. v. Huckabee,* the Arkansas Supreme Court left no doubt that the Constitution places on the State a "paramount" and "absolute" duty to provide the school children of Arkansas with an "adequate education"; thus "[i]f local government fails, the state government must compel it to act, and if

the local government cannot carry the burden, the state must itself meet its continuing obligation." 351 Ark. 31, 66-67, 74, 91 S.W.3d 472, 492, 497 (2002) (citations omitted). Under the Academic Distress laws, when a school district or a school(s) within a district are found to be in academic distress, the General Assembly grants to the Arkansas State Board of Education (State Board) sweeping authority to take various actions, including, as in the present case, removal of a local school. Ark. Code Ann. § 6-15-430(a)-(b).

In May of 2014, the Arkansas Department of Education (ADE) notified the Little Rock School District (LRSD or District) that six schools in the District met the criteria for being classified in academic distress. The District did not appeal this finding, and on July 10, 2014, the Arkansas State Board of Education (State Board) classified the six schools as being in academic distress. Once schools are classified as being in academic distress, the law authorizes the State Board the discretion to take a broad range of actions "to assist and address a public school classified as being in academic distress." On January 28, 2015, the State Board removed the LRSD's Board of Directors (LRSD Board), directed Commissioner of Education Tony Wood to assume all authority of the LRSD Board, and retained the District's Superintendent on an interim basis to work under Commissioner Wood's supervision. All of these actions were well within the broad authority granted to the State Board to assist and address schools in academic distress. *See* Ark. Code Ann. § 6-15-430(b), (f).

Plaintiffs' contention that any law authorizing the replacement of a school district board of directors is constitutionally infirm is without merit. Although Article 14, § 3(c)(1) of the Constitution tasks a school district's board of directors with certain taxation and budgeting functions, it does not as plaintiffs allege vest special Constitutional status on that local board. To the contrary, local boards of directors, like school districts, are statutory entities created by the General Assembly. As such, the General Assembly may authorize (as it did in Ark. Code Ann. § 6-15-430) the State Board to remove a school district's board of directors and direct the Commissioner of Education to assume all authority of the local board. In any event, plaintiffs' argument wholly ignores Article 15, § 4 of the Arkansas Constitution, which vests in the General Assembly the authority to determine which officers will supervise the public schools.

Because the defendants acted wholly within their legal authority, and the Amended Complaint sets forth no facts establishing that they acted in an arbitrary, capricious, bad faith, or wantonly injurious manner, the defendants are entitled to sovereign immunity from suit under Article 5, § 20 of the Arkansas Constitution. Consequently, the present lawsuit must be dismissed.

II. STATEMENT OF FACTS AND LAW

In May of 2014, the ADE notified the Little Rock School District that six schools within its District met the criteria for being classified in academic

distress. *Motion to Dismiss,* Ex. 1.[1] The District did not appeal the notification. *Id.*[2] On July 10, 2014, the State Board classified the six schools as being in academic distress after more than half of the students attending those schools scored below proficient levels on state-mandated assessments. *Amended Complaint* at ¶ 46, 107 and Ex. 3; *Motion to Dismiss,* Ex. 1.

Once a public school is classified as being in academic distress, Ark. Code Ann. § 6-15-430 provides the State Board with a broad discretion to take a variety of actions that "the [S]tate [B]oard determines [are] needed to assist and address a public school classified as being in academic distress." Ark. Code Ann. § 6-15-430(b)(11). These include:

- "Remove permanently, reassign, or suspend on a temporary basis the superintendent of the school district in which the public school is located";
- "Require the school district to operate without a board of directors under the supervision of the superintendent or an

---

[1] Pursuant to Arkansas Rule of Civil Procedure 10(d) entitled *Required Exhibits,* "[a] copy of any written instrument or document upon which a claim or defense is based shall be attached as an exhibit to the pleading in which such claim or defense is averred unless good cause is shown for its absence in such pleading." Plaintiffs' claim is based upon the State Board's action taken on January 28, 2015, but they failed to attach a copy of the document reflecting the State Board's finding. Consequently, it is attached to defendants' Motion to Dismiss as "*Motion to Dismiss,* Ex. 1."

[2] Under Ark. Code Ann. § 6-15-428(a)-(d), a school district or public school identified by ADE as being in academic distress may appeal to the State Board, and subsequently to the Pulaski County Circuit Court under the Administrative Procedure Act, Ark. Code Ann. § 25-15-201 *et seq.*

individual or panel appointed by the Commissioner of Education";

- "In the absence of a board of directors, direct the [Commissioner of Education] to assume all authority of the board of directors as may be necessary for the day-to-day governance of the school district."

Ark. Code Ann. §§ 6-15-430(b)(8)(A), 6-15-430(a)(3), 6-15-430(a)(6).[3]

On January 28, 2015, the State Board held a public meeting to discuss whether to take any of the actions authorized by Ark. Code Ann. § 6-15-430. *Amended Complaint* at ¶ 79-81; *Motion to Dismiss,* Ex. 1. At the conclusion of the meeting, a majority of the State Board voted to retain the current LRSD superintendent on an interim basis, to remove all members of the District's board of directors effective immediately, and to direct the Commissioner of Education to assume all authority of the District's board of directors. *Id.*

In this lawsuit, plaintiffs seek a declaration that the actions taken by the ADE and State Board were "arbitrary, capricious, [in] bad faith, wanton and ultra vires," and seek to enjoin the defendants from assuming authority

[3] Ark. Code Ann. § 6-15-430(a) refers to "a school district" classified in academic distress; § 6-15-430(b) refers to "a public school" classified in academic distress. The actions authorized in subsection (a), however, are incorporated verbatim into subsection (b). *See* Ark. Code Ann. § 6-15-430(b)(9)("If a public school is classified as being in academic distress, the [S]tate [B]oard may . . . Take one (1) or more of the actions under subsection (a) of this section concerning the public school district where the school is located."

over District and reinstate the District board of directors. *Amended Complaint* at ¶ 1 (*citing* Ark. Code Ann. § 16-111-104); ¶ 169 (prayer for relief). The plaintiffs also seek writs of mandamus and prohibition to compel defendants to reinstate the District school Board and "cease and desist from any actions that would remove the constitutional responsibility of the [District school board] members." *Amended Complaint* at ¶ 149.

III. ARGUMENT

PLAINTIFFS' CLAIMS ARE BARRED BY SOVEREIGN IMMUNITY

Article 5, § 20 of the Arkansas Constitution provides that "[t]he State of Arkansas shall never be made a defendant in any of her courts." Ark. Const. art. 5, § 20. Pursuant to the doctrine of sovereign immunity, "neither the State nor its agencies [can] be named as defendants in its courts." *Hanley v. Arkansas State Claims Comm'n.*, 333 Ark. 159, 165-66, 970 S.W.2d 198, 201 (1998). Sovereign immunity is jurisdictional immunity from suit, and jurisdiction must be determined entirely from the pleadings. *LandsnPulaski, LLC v. Arkansas Dep't of Correction,* 372 Ark. 40, 42, 269 S.W.3d 793, 795 (2007).

For purposes of sovereign immunity, a suit naming a public official in his or her official capacity is essentially a suit against that official's agency. *Smith v. Daniel,* 2014 Ark. 519, at 6, __ S.W.3d __, __. The Arkansas Supreme Court has held that official-capacity suits generally represent a way

of pleading a cause of action against the entity of which the officer is an agent. *Id.* Thus, ADE and the official-capacity defendants (Commissioner Wood and State Board members) "are essentially the same defendant for purposes of [the] sovereign immunity analysis." *Arkansas Dep't of Human Svs. v. Fort Smith School District,* 2015 Ark. 81, at ___, __ S.W.3d __, __ (ADHS and agency director named in his official capacity entitled to sovereign immunity from suit). *See also Arkansas Tech Univ. v. Link,* 341 Ark. 495, 502 17 S.W.3d 809, 813 (2000)(suit against State university and its board of trustees is barred by doctrine of sovereign immunity).

In determining whether the doctrine of sovereign immunity applies, the court should determine if judgment for the plaintiff will operate to control the action of the State or subject it to liability. *LandsnPulaski,* 372 Ark. at 42, 269 S.W.3d at 795. If so, the suit is one against the State and is barred by the doctrine of sovereign immunity. *Id.*

In the Amended Complaint, the plaintiffs request a declaration that actions of defendants were "arbitrary, capricious, [in] bad faith, wanton and ultra vires," seek to force the reinstatement of the LRSD board of directors, and seek to enjoin the Commissioner of Education from assuming the authority of the District's board. Because a judgment for the plaintiffs undoubtedly would operate to control the actions of the State, the suit is one against the State and is barred by the doctrine of sovereign immunity unless an exception to the doctrine applies.

The Supreme Court has noted there could be exceptions to sovereign immunity if a state defendant's actions are outside of its authority, ultra vires, in bad faith, arbitrary, capricious, or wantonly injurious. *Fitzgiven v. Dorey,* 2013 Ark. 346, at 13, 429 S.W.3d at 241 (citation omitted). In *Arkansas Tech v. Link,* however, the Supreme Court cautioned that a complaint alleging that an exception to sovereign immunity applies "is not exempt from complying with our rules that require fact pleading." 341 Ark. at 504, 17 S.W.3d at 814. It later explained in *Arkansas Dep't of Environmental Quality v. Brighton Corp.*:

> Our rules require fact pleading, and a complaint must state facts, not mere conclusions, in order to entitle the pleader to relief. . . Ark. R. Civ. P. 8(a). . . We look to the underlying facts supporting an alleged cause of action to determine whether the matter has been sufficiently pled. . . Arkansas's rules of civil procedure make it clear that a pleading which sets forth a claim for relief 'shall contain . . . a statement in ordinary and concise language of *facts showing that the . . . pleader is entitled to relief*[.] Ark. R. Civ. P. 8(a). . . Rule 12(b)(6) provides for the dismissal of a complaint for 'failure to state facts upon which relief can be granted.' This court has stated many times that these two rules must be read together in testing the sufficiency of the complaint; we have stated with equal frequency that facts, not mere conclusions, must be alleged.

352 Ark. 396, 403, 102 S.W.2d 458, 462-63 (2003)(citations omitted; Court's emphasis). The Court also emphasized that it had "specifically and deliberately rejected the theory of notice pleading." *Id. See also Fitzgiven,* 2013 Ark. 346, at 14, 429 S.W.3d at 242 ("[f]or purposes of a motion to dismiss, we treat only the facts alleged in a complaint as true, but not a party's theories, speculation, or statutory interpretation")(citation omitted).

Because plaintiffs failed to meet this pleading burden, the defendants are entitled to sovereign immunity from suit.

Definitions of the "exceptions" are dispositive. "For an act to be ultra vires, it must be 'beyond the agency's or the officer's legal power or authority.'" *Fitzgiven,* 2013 Ark. 346, at 13, 429 S.W.3d at 424 (citation omitted). "Bad faith" consists of "dishonest, malicious or oppressive conduct with a state of mind characterized by hatred, ill will or a spirit of revenge." *Conway Corp. v. Construction Engineers, Inc.,* 300 Ark. 225, 231-32, 782 S.W.2d 36, 39 (1989). According to Arkansas Model Jury Instructions – Civil, "wanton" conduct means "a course of action which shows an actual or deliberate intention to harm or which, if not intentional, shows an indifference to or conscious disregard for the safety of others." AMI 1101, *Willful or Wanton Conduct Defined.* Finally, the Arkansas Supreme Court has defined "arbitrary and capricious" as follows:

> Administrative action may be regarded as arbitrary and capricious where it is not supportable on any rational basis. . . To have an administrative action set aside as arbitrary and capricious, the party challenging the action must prove that it was willful and unreasoning action, without consideration and with a disregard of the facts or circumstances of the case. . .An action is not arbitrary and capricious simply because the reviewing court would act differently.

Arkansas Contractors Licensing Bd v. Pegasus Renovation Co., 347 Ark. 320, 332, 64 S.W.3d 241, 248 (2001). For the reasons detailed below, plaintiffs failed to plead sufficient facts to establish entitlement to an exemption.

A. The State Board Acted Within Its Legal Authority

In *Lake View School Dist. v. Huckabee*, the Arkansas Supreme Court held that it is the State's duty to provide an adequate education to each student, and that "[i]f local government fails, the state government must compel it to act, and if the local government cannot carry the burden, the state must itself meet its continuing obligation." 351 Ark. 71, 74, 91 S.W.3d 495, 497 (citations omitted). *See also Crenshaw v. Eudora School Dist.*, 362 Ark. 288, 295, 208 S.W.3d 206, 211 (2005)("public education [is] a state responsibility and . . . deference to local control [is] not a rational basis for . . . inequality of education afforded to Arkansas school children")(*citing Lake View, supra,* and *DuPree v. Alma School Dist. No. 30,* 279 Ark. 340, 651 S.W.2d 90 (1983)). Specifically addressing student proficiency, the Court instructed:

> It is the State's responsibility, first and foremost, to develop forthwith what constitutes an adequate education. It is, next, the State's responsibility to assess, evaluate, and monitor, not only the lower elementary grades for English and math proficiency, but the entire spectrum of public education across the state to determine whether equal opportunity for an adequate education is being substantially afforded to Arkansas'[s] children.

Lake View, 351 Ark. at 79, 91 S.W.3d at 500. The Arkansas General Assembly enacted the State's academic distress laws (among others) to comply with this responsibility. *See* Ark. Code Ann. § 6-15-428 *et seq.*

As discussed above, the ADE notified the LRSD that six of its schools met the criteria for being classified in academic distress. When the District

did not appeal the notification, the State Board classified the six schools as being in academic distress pursuant to Ark. Code Ann. § 6-15-428. In this lawsuit, the plaintiffs contend that the State Board had no legal authority to remove the District board of directors and assume its authority when only six schools within the District—rather than the entire District—were classified in academic distress. This argument is contrary to the plain and unambiguous language of Ark. Code Ann. § 6-15-430.

The General Assembly gave the State Board broad, sweeping authority in addressing school districts and public schools classified in academic distress. Section 6-15-430(b), which sets forth actions that the State Board, in its discretion, may take when a public school is classified as being in academic distress authorizes the precise actions taken by the State Board in the present case.

Arkansas Code Annotated § 6-15-430(b)(9) authorizes the State Board to "[t]ake one or more of the actions under subsection (a) of [§ 6-15-430] concerning the public school district where the school is located." Pursuant to this authority, the State Board "[r]equire[d] the [LRSD] to operate without a board of directors" (*see* § 6-15-430(a)(3)), and "[i]n the absence of a board of directors, direct[ed] the commissioner to assume all authority of the board of directors" (*see* § 6-15-430(a)(6)). Although plaintiffs urge that the State Board only may take those actions "necessary to remedy schools in academic distress," *see e.g., Amended Complaint* at ¶ 86, this limiting language does

not appear in law. The Arkansas Supreme Court is clear that it will not "read limiting language into [a] statute that is simply not there." *Fitzgiven,* 2013 Ark. 346, at 14, 429 S.W.3d at 242.

Plaintiffs' argument that subsection § 6-15-430(b)(11) limits the State Board likewise is misplaced. *Amended* Complaint at ¶ 126. To the contrary, that provision *expands* the State Board's authority, providing it with the discretion "to take any other appropriate action allowed by the law *that the state board determines is needed* to assist and address a public school classified as being in academic distress." (emphasis added). In *Fitzgiven v. Dorey,* the Arkansas Supreme Court interpreted nearly identical language in State fiscal distress law to demonstrate a *broadened* grant of authority to the ADE. 2013 Ark. 346, at 14, 429 S.W.3d at 242. In rejecting the plaintiffs' argument that the ADE exceeded its authority by terminating collective bargaining contracts, the Supreme Court reasoned:

> Appellants [plaintiffs] would have us read limiting language into the statute that is simply not there. This we will not do . . . Moreover, Ark. Code Ann. § 6-20-1909(a)(6) (Repl. 2007) demonstrates just how broad ADE's authority is when dealing with fiscally distressed districts, wherein the General Assembly saw fit to all ADE to '[t]ake any other action allowed by law that is deemed necessary to assist a school district in removing criteria of fiscal distress.'

Id. This reasoning applies with like force to the present case. Because it is wholly within the State Board's broad discretion to determine what action "is needed to assist and address a public school classified as being in academic

distress," plaintiffs' opinion that the State Board went too far of no moment to the statutory scheme.

Also noteworthy is the dispositive language in § 6-15-430(f), which provides that "[n]othing in [§ 6-15-430] shall be construed to prevent the department or the state board from taking any of the actions listed in this section at any time to address public schools and school districts in academic distress." This again represents the General Assembly's broad, wide-ranging grant of authority and discretion to the State Board to address public schools classified as being in fiscal distress.

The fact that the General Assembly indisputably afforded the State Board the authority to take the steps that it did ends the statutory inquiry. Because the General Assembly's intent was expressed in clear and unambiguous terms in Ark. Code Ann. § 6-15-430, this Court need not, and should not, resort to rules of statutory interpretation or construction to determine legislative intent. *Knowlton v. Ward,* 318 Ark. 867, 874, 889 S.W.2d 721, 725-26 (1994). In any event, the General Assembly left no doubt of its intention to ensure that the State meet its ongoing duty to provide Constitutional adequacy in the emergency clause of Act 600 of 2013, the Act that added both subsections (b) and (f) to § 6-15-430:

> It is found and determined by the General Assembly of the State of Arkansas that it is the state's constitutional obligation to provide a general, suitable, and efficient free system of public schools in the state; that state oversight and intervention into distressed school districts is critical to the delivery of a constitutionally adequate education; and that the changes made

in this act are immediately necessary for the state to meet this constitutional obligation.

Ark. Act 600 of 2013, § 24 (emergency clause).

For these reasons, the State Board acted well within its legal authority, and the Amended Complaint fails to set forth facts sufficient to invoke the ultra vires exception to sovereign immunity.

B. The Academic Distress Statutes Are Constitutional

At bottom, plaintiffs allege that any law (including Ark. Code Ann. § 6-15-430) that authorizes the removal or replacement of a local school district's board of directors violates Article 14, § 3(c)(1) of the Arkansas Constitution. The plaintiffs' argument suffers from two fatal flaws. First, school district boards of directors (like school districts themselves) are statutory entities created by the General Assembly. The mere mention of a "Board of Directors" and the tasking of duties to it in Article 14, § 13(c)(1) of the Constitution does not convert this statutory entity into a Constitutional board or commission. Rather, the duties tasked to the school district board of directors may be performed by whomever the General Assembly authorizes to act in that capacity. Second, interpreting Article 14, § 3(c)(1) as the plaintiffs seek would lead to an untenable and absurd Constitutional result, as it would divest the State of its ability to meet its "paramount" and "absolute" Constitutional obligation to provide an adequate education to students throughout the State in those situations where the removal of a board of

directors is necessary to meet that end. Also, the plaintiffs' interpretation would directly conflict with Article 14, § 4 of the Constitution, which vests with the General Assembly the authority to determine who will supervise the public schools.

Article 14, § 3(a) of the Arkansas Constitution states: "[t]he General Assembly shall provide for the support of common schools by general law." Article 14, § 4 of the Constitution, entitled "Supervision of schools," provides:

> The supervision of public schools, and the execution of laws regulating the same, shall be vested in and confided to, such officers as may be provided for by the General Assembly.

Pursuant to this authority, the General Assembly established school district boards of directors in Title 6, Chapter 13, Subchapter 6. *See e.g.,* Ark. Code Ann. § 6-13-608 (length of directors' terms); § 6-13-616 (director eligibility); § 6-13-620 (powers and duties); § 6-13-634 (size). *See also* Amended Complaint *at* ¶ 20 ('[t]o manage the school district, the Arkansas General Assembly created the offices of the School District Board of Director"). Thus, like school districts, boards of directors are creatures of statute. *See Krause v. Thompson,* 138 Ark. 571, 211 S.W. 925, 926 (1919)("[w]e have frequently held that the legislative control over the organization of school districts and changes therein is supreme"); *Saline Cty. Bd. Of Ed. v. Hot Springs Cty. Bd. Of Ed.,* 270 Ark. 136, 138, 603 S.W.2d 413, 414 (1980)("[w]e have long recognized, in matters of education, that our constitution . . . vests in the legislature the duty and authority to make provisions for the establishment,

maintenance, and support of a common school system in our state"); *Crenshaw v. Eudora Sch. Dist.*, 362 Ark. at 292, 208 S.W.3d at 209 (recognizing school districts are "created by the General Assembly")(citation omitted).

As plaintiffs correctly recognize in the Amended Complaint, "[t]he Legislature has absolute control over all statutory offices, and may abolish them at pleasure; and in doing so no vested right is being invaded." *Amended Compliant* at ¶ 24 (*citing Robinson v. White*, 26 Ark. 139, 140-141 (1870). In *Robinson*, an assessor urged that because he was elected, he held some vested right to his office. *Id.* at 140. Rejecting plaintiff's argument, the Arkansas Supreme Court explained:

> The counsel for the appellant seem to be influenced or impressed with the idea, that Robinson had some kind of vested right to the office of assessor, because he was elected by the people. The Legislature has absolute control over all statutory offices, and may abolish them at pleasure; and in doing so no vested right is being invaded.

Id. at 140-41 (citations omitted).

Because school district boards of directors are statutory entities, the General Assembly did not run afoul of the Constitution in granting to the State Board the discretion to remove a board of directors and direct the Commissioner of Education to assume its authority in matters of academic distress.[4]

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[4] The General Assembly also authorized the removal of a school district board of directors in matters of fiscal distress, *see* Ark. Code Ann. § 6-20-1901,

Plaintiffs erroneously (and without citing supporting authority) contend that "School Districts and School Board of Directors are constitutional entities recognized in Article 14, Section 3 of the Arkansas Constitution." *Amended Complaint* at ¶ 21. At bottom, plaintiffs argue that because Article 13, §3(c)(1) assigns responsibilities to a school district and its board of directors, the board holds a special Constitutional status; thus, any law authorizing a school district to operate without a board of directors, or that assigns the board's duties to the Commissioner of Education, is unconstitutional *See Amended Complaint* at ¶26, 132. This argument is without merit.

When the framers intended to create a Constitutional board or commission, they made their intention perfectly clear. Specifically, Amendment 33 of the Arkansas Constitution creates Constitutional boards and commission "charged with the management or control of all charitable, penal or correctional institutions and institutions of higher learning of the State of Arkansas." Amend. 33, § 1. The Amendment sets the duration of office, prohibits the increase or decrease of officers on each board or commission, sets forth a procedure for removing an officer "for cause," and provides for filling vacancies. Amend. 33, §§ 1, 3, 4, 5. Perhaps most instructive to the present inquiry is § 2 of Amendment 33, which reads in pertinent part:

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facilities distress, *see* Ark. Code Ann. § 6-21-811, and for violations of standards for accreditation, *see* Ark. Code Ann. § 6-15-207.

> **Abolition or transfer of the powers of board or commission – Restrictions.** The board or commission of any institution, governed by this amendment, shall not be abolished nor shall the powers vested in any such board or commission be transferred, unless the institution is abolished or consolidated with some other State institution.

Amend. 33, § 2. To the contrary, school district boards of directors are created by statute and not the Constitution, and thus the General Assembly "may abolish them at pleasure."

Furthermore, the plain and unambiguous language of Article 14, § 13(c)(1) merely provides that "[t]he Board of Directors of each school district" must perform taxation and budgeting functions prior to the annual school election. The General Assembly, which created school districts and their boards through statute, provided in Ark. Code Ann. § 6-15-430 that a school board may be removed and its duties may be assumed by the Commissioner of Education. *See also* Ark. Code Ann. § 6-11-105(a)(12). As the plaintiffs correctly recognize, Commissioner Wood has assumed the duties of the District's board of directors, *see e.g., Amended Complaint* at ¶ 158; thus, he now must fulfill these duties of the board.

Plaintiffs also argue that a school district board of directors must be elected, although Article 14, § 3(c)(1) nowhere refer to an "elected" board of directors.[5] The *Fitzgiven* Court's admonition that it would not read language

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[5] Plaintiffs argue that unless there is an elected board of directors, there can be no school *board* election. *See e.g., Amended Complaint* at ¶ 135 (emphasis added). This argument is wrong. Article 14, § 3(c)(1) mandates that there be an *annual school election* (not school board election) for the purpose of

into a statute "that simply is not there" applies with like force to a Constitutional provision. 2013 Ark. 346, at 14, 429 S.W.3d at 242. *See also Knowlton,* 318 Ark. at 874, 889 S.W.2d at 725 (in construing constitutional provisions, apply same rules governing construction of statutes).

Additionally, the interpretation of Article 14, § 3(c)(1) urged by the plaintiffs would lead to an untenable and absurd Constitutional result, as it would divest the State of the means to meet its Constitutional obligation to provide an adequate education to all students—a "paramount" and "absolute" duty—in those cases where a local control has failed. *Lake View,* 351 Ark. at 66-67, 91 S.W.2d at 492; *Id.* at 74, 497 ("[i]f local government fails, the state government must compel it to act, and if the local government cannot carry the burden, the state must itself meet its continuing obligation")(citations omitted). Plaintiffs' interpretation would prohibit State removal of a local board of directors even in the face of abject failure, which is antithetical to the State's Constitutional duty of adequacy. "Just as we will not interpret a statutory provision so as to reach an absurd result, neither will we interpret a constitutional provision in such a manner." *Gray v. Mitchell,* 373 Ark. 560, 567, 285 S.W.3d 222, 229 (2008).

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considering taxation issues. Nothing in this Article 14, § 3(c)(1) discusses election of school board members. Rather that is set forth in Ark. Code Ann. Title 6, Chapter 13, Subchapter 6.

Finally, plaintiffs' interpretation conflicts with Article 14, § 4, which vests with the General Assembly absolute authority to determine who will supervise the public schools:

> **Supervision of schools.** The supervision of public schools, and the execution of the laws regulating the same, shall be vested in and confided to, such officers as may be provided for by the General Assembly.

See also Article 14, § 3(a)("[t]he General Assembly shall provide for the support of common schools by general law").

Because Arkansas's Academic Distress law does not run afoul of the Constitution, and because (for the reasons discussed above) that law authorizes the State Board to take the steps that it did, the Amended Complaint fails to set forth facts sufficient to invoke the ultra vires exception to sovereign immunity.

C. Plaintiffs Have Not Pled Facts Sufficient To Establish Any Other Sovereign Immunity Exception

Plaintiffs likewise failed to plead sufficient facts to establish entitlement to a sovereign immunity exception for arbitrary and capricious, bad faith, or wantonly injurious conduct. As noted above, "bad faith" consists of "dishonest, malicious or oppressive conduct with a state of mind characterized by hatred, ill will or a spirit of revenge." *Conway Corp. v. Construction Engineers, Inc.*, 300 Ark. 225, 231-32, 782 S.W.2d 36, 39 (1989). "Wanton" conduct means "a course of action which shows an actual or deliberate intention to harm or which, if not intentional, shows an

indifference to or conscious disregard for the safety of others." AMI 1101, *Willful or Wanton Conduct Defined.* The Arkansas Supreme Court has defined "arbitrary and capricious" as follows:

> Administrative action may be regarded as arbitrary and capricious where it is not supportable on any rational basis. . . To have an administrative action set aside as arbitrary and capricious, the party challenging the action must prove that it was willful and unreasoning action, without consideration and with a disregard of the facts or circumstances of the case. . . An action is not arbitrary and capricious simply because the reviewing court would act differently.

Arkansas Contractors Licensing Bd. v. Pegasus Renovation Co., 347 Ark. 320, 332, 64 S.W.3d 241, 248 (2001).

At bottom, the facts pled in the *Amended Complaint* reflect plaintiffs' strong disagreement with the decisions made by the State Board. Primarily, plaintiffs disagree with the State Board's removal of the LRSD's elected school board, and also with its decision to assume authority over the LRSD when only six schools in the District were classified as being in academic distress, opining that assuming control over the District was not necessary to remedy the problems in the six academically-distressed schools. Although plaintiffs admit that "much more remains to be done" related to academic performance, *see Amended Complaint* at ¶ 66, they feel improvement could best be accomplished by reinstating the board of directors and giving them a chance. Plaintiffs also note that the State Board has not assumed authority over other districts where there rate of academically-distressed schools is greater than the LRSD or where the entire district was found to be in

academic distress (without pleading facts to establish the situations were in any way comparable). They also find fault that there was no improvement plan put in place by the ADE as of February 12, 2015, less than two weeks after State Board assumed authority over the LRSD, and that ADE school improvement staff already had been working with the District for some time. Plaintiffs also feel that the State Board should not have appointed an individual to direct a committee to look into LRSD financial issues.

Again, plaintiffs' Amended Complaint undoubtedly reflects a strong disagreement over the best course to take to improve learning opportunities for the students of the LRSD. Many of the allegations contained within it, however, are mere opinions, theories, speculation, and the plaintiffs' own statutory interpretation, none of which carry any weight in the sovereign immunity analysis. *See Fitzgiven,* 2013 Ark. 346, at 14, 429 S.W.3d at 242 ("[f]or purposes of a motion to dismiss, we treat only the facts alleged in a complaint as true, but not a party's theories, speculation, or statutory interpretation"). The facts pled, however, come nowhere near approaching the extremely high threshold for establishing any sovereign immunity exception.

D. Plaintiffs Are Not Entitled To Writs Of Mandamus Or Prohibition, Which Also Are Barred By Sovereign Immunity.

Finally, plaintiffs request issuance of a writ of mandamus or

prohibition to force the State Board[6] to reinstate the LRSD board of directors. For reasons stated throughout this brief, such a request for relief is barred by sovereign immunity. Furthermore, plaintiffs would not be entitled to a writ even if sovereign immunity were not a bar.

A writ of mandamus is issued only to compel an official or judge to take some action. *Manila School Dist. No. 15 v. Wagner,* 357 Ark. 20, 26, 159 S.W.3d 285, 290 (2004)(*citing Arkansas Democrat-Gazette v. Zimmerman,* 341 Ark. 771, 20 S.W.3d 301 (2000)). When requesting a writ of mandamus, a petitioner must show a clear and certain right to the relief sought. *Id.* Moreover, "a writ of mandamus will not lie to control or review matters of discretion." *Id.* Likewise, a writ of prohibition will not lie to control discretion, *Id.* at 26-27, 291; will not be issued for "for something that has already been done," *Holmes v. Lessenberry,* 297 Ark. 23, 23, 759 S.W.2d 37, 37 (1988); and will issue "only when the trial court is wholly without jurisdiction." *Pike v. Benton Circuit Court,* 340 Ark. 311, 314, 10 S.W.3d 447, 448 (2000)(citations omitted).

For reasons stated throughout this brief, the General Assembly vested in the State Board a broad authority to determine what steps are necessary to address public schools in academic distress. Because plaintiffs' request for a writ of prohibition and mandamus clearly seeks to control the discretion of the State Board, a writ will not lie. Nor does the Amended Complaint

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[6] It is unclear whether plaintiffs likewise seek a writ against Commissioner Wood. If so, the same arguments apply, including sovereign immunity.

establish that plaintiffs have a "clear and certain right" to the relief they seek. Regarding a writ of prohibition, it likewise cannot lie because the State Board had jurisdiction to take the actions it did, and also because the action that plaintiffs seek to prohibit—the removal of the District's school board and assignment of its duties to Commissioner Wood—already has occurred.

IV. CONCLUSION

For the foregoing reasons, defendants are entitled to sovereign immunity under Article 5, § 20 of the Arkansas Constitution. Consequently, defendants respectfully request that this Court dismiss the current action against them in its entirety, and for all other relief that is just and proper.

Respectfully submitted

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CERTIFICATE OF SERVICE

I, Lori Freno, hereby certify that a copy of the foregoing has been served on the following on this 16th day of March, 2015, via the e-flex filing notification system and via e-mail:

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/s/ Lori Freno

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
FIFTH DIVISION

DIANE CURRY, C.E. MCADOO
JIM ROSS, DORIS L. PENDLETON — PLAINTIFFS

VS. NO. CV-15-654

TONY WOOD, in his official capacity as
COMMISSIONER of the ARKANSAS DEPARTMENT OF EDUCATION;
ARKANSAS DEPARTMENT OF EDUCATION;
SAMUEL LEDBETTER, in his official capacity as
CHAIRMAN, ARKANSAS STATE BOARD OF EDUCATION;
TOYCE NEWTON, in her official capacity as
VICE-CHAIRMAN, ARKANSAS STATE BOARD OF EDUCATION;
JOE BLACK, in his official capacity as
MEMBER, ARKANSAS STATE BOARD OF EDUCATION;
ALICE WILLIAMS MAHONY, in her official capacity as
MEMBER, ARKANSAS STATE BOARD OF EDUCATION;
MIREYA REITH, in her official capacity as
MEMBER, ARKANSAS STATE BOARD OF EDUCATION;
VICKI SAVIERS, in her official capacity as
MEMBER, ARKANSAS STATE BOARD OF EDUCATION;
JAY BARTH, in his official capacity as
MEMBER, ARKANSAS STATE BOARD OF EDUCATION;
DIANE ZOOK, in her official capacity as
MEMBER, ARKANSAS STATE BOARD OF EDUCATION;
KIM DAVIS, in his official capacity as
MEMBER, ARKANSAS STATE BOARD OF EDUCATION — DEFENDANTS

ORDER DENYING DEFENDANTS' MOTION TO DISMISS

Defendants filed a motion to dismiss on March 16, 2015 in which they argue that Plaintiffs' claims for declaratory judgment and injunctive relief are barred by sovereign immunity pursuant to Article 5, Section 20 of the Arkansas Constitution. Defendants also argue that Plaintiffs failed to plead sufficient facts to create an exception to sovereign immunity. Article 5, Section 20 of the Constitution of Arkansas states: "The State of Arkansas shall never be made defendant in any of her courts."

Pleadings are to be liberally construed and are sufficient if they advise a party of its obligations and allege a breach of them. In order to properly dismiss a complaint, the trial court has to find that the complaining parties either (1) failed to state general facts upon which relief could have been granted or (2) failed to include specific facts pertaining to one or more of the elements of one of its claims after accepting all facts contained in the complaint as true and in the light most favorable to the non-moving party. *Bethel Baptist Church v. Church Mut. Ins. Co.*, 54 Ark. App. 262, 924 S.W.2d 494 (1996). In considering a motion for a judgment on the pleadings for failure to state facts upon which relief can be granted, the facts alleged in the complaint must be treated as true and viewed in the light most favorable to the party seeking relief. *Smith v. American Greetings Corp.*, 304 Ark. 596, 804 S.W.2d 683 (1991). In considering a motion to dismiss under subdivision (b) (6) of the Arkansas Rules of Civil Procedure, the facts alleged in the complaint are treated as true and viewed in the light most favorable to the party seeking relief, and it is improper for the trial court to look beyond the complaint to decide a motion to dismiss, unless it is treating the motion as one for summary judgment. *Deitsch v. Tillery,* 309 Ark. 401, 833 S.W.2d 760 (1992); *McAllister v. Forrest City St. Imp;.Dist. No. 11*, 274 Ark. 372, 626 S.W.2d 194 (1981). A complaint that alleges facts to support a cause of action under more than one theory is not demurrable if a cause of action on at least one theory is stated. *Williams v. J.W. Black Lumber Co.*, 275 Ark. 144, 628 S.W.2d 13 (1982).

A motion to dismiss challenges the legal sufficiency of pleadings, claims, or defenses. In reviewing a motion to dismiss, the trial court must examine the complaint to determine whether the complainants have alleged facts that set forth colorable claims

for relief. The court does not weigh the strength of those claims or the probative force of any factual allegations asserted in the complaint. Thus, Defendants' motion requires the Court to examine the complaint in this action to determine whether it alleges facts that establish a basis for relief in the face of the bar against suing the State that is found in the Arkansas Constitution.

The law of Arkansas and elsewhere has long recognized an exception to the bar against suing the state for claims that allege that the sovereign or an instrumentality of the sovereign has engaged in conduct that exceeds its lawful authority or is ultra vires. The Arkansas Supreme Court has also held that a state agency may be enjoined from acting arbitrarily, capriciously, in bad faith, or in a wantonly injurious manner. *Fitzgiven, et al. v. Dorey, et al.*, 2013 Ark. 345, 429 S.W.3d 234 (2013), *see also Arkansas Dep't of Environmental Quality v. Oil Producers of Arkansas*, 2009 Ark. 297, 318 S.W.3d 570 (2009).

Plaintiffs have alleged that Defendants engaged in ultra vires conduct, that Defendants engaged in arbitrary and capricious conduct, and that Defendants acted wantonly to cause what Plaintiffs allege to be irreparable injury when Defendants dissolved the Little Rock School Board on January 28, 2015. Paragraph 1 of the First Amended and Substituted Complaint, filed February 24, 2015, states, in part: "This cause also seeks to reverse and stay arbitrary, capricious, bad faith, wanton and ultra vires actions taken by the Arkansas State Board of Education and therefore venue and jurisdiction are proper in this Court. This cause is also filed seeking injunctive relief pursuant to Arkansas Rule of Civil Procedure, Rule 65 based on activity that has

occurred and is continuing to occur in Little Rock, Pulaski County, Arkansas and therefore jurisdiction and venue is proper in this Court."

Plaintiffs allege that the "Arkansas General Assembly has given the State Board of Education the authority over a public school or school district in academic distress. Ark. Code Ann. §65-430." (First Am. and Sub. Compl. ¶ 43). The Amended and Substituted Complaint alleges that Defendants by letter dated July 14, 2014 notified the Little Rock School District (hereafter "LRSD") that six schools within the LRSD were in academic distress after fewer than half of the students attending those schools scored at proficient levels on achievement tests (*Id.* at ¶ 46). Those schools are named at Paragraph 47 of the Amended and Substituted Complaint as follows: "Three of the six (6) schools are high schools, two (2) are middle schools and one (1) is an elementary school, namely, Baseline Elementary, Cloverdale Middle, Henderson Middle, J.A. Fair High, and McClellan High." (First Am. and Sub. Compl. Ex. 3).

Plaintiffs allege further that "the great majority of the LRSD schools are not in academic distress" (First Am. and Sub. Compl. ¶ 48). At Paragraph 53 of the Amended and Substituted Complaint Plaintiffs allege that the "Little Rock School District is not a school district in academic distress." Exhibit 1 to the Amended and Substituted Complaint is an electronic mail from Jeremy Lasiter, General Counsel to the Arkansas Department of Education, to Christopher Heller, an attorney for the Little Rock School District, and it states: "The entire district has not been found in academic distress, just individual schools."

Plaintiffs allege that the Arkansas State Board of Education voted on January 28, 2015 by a 5-4 decision during a specially called meeting to take over the Little Rock

School District (First Am. and Sub. Compl. ¶ 79) and voted to immediately remove the seven-member Little Rock School District Board (*Id.* at ¶ 80). Plaintiffs further allege that Defendants' decision was arbitrary, capricious, in bad faith, and will cause wanton injury for the following reasons:

1. "The standards established in Arkansas law do not allow SBE to take control of a school district which is not in academic distress when that action is not necessary to remedy schools in academic distress." (*Id.* at ¶ 86).

2. "There are no established criteria for taking over a district in which the great majority of the schools are not in academic distress, and it has never been done before." (*Id.* at ¶ 95).

3. "The ADE staff has said that LRSD is implementing the right kinds of innovations in the six schools with a sense of urgency, and no one has said that the LRSD Board has done anything to impede that effort." (*Id.* at ¶ 94).

4. "The fact that the SBE's decision to take over the LRSD was arbitrary, capricious and wanton is evidenced by its appointment of Dr. Dexter Suggs to continue to administer the LRSD. If control of the entire LRSD was actually necessary to correct the six (6) schools in academic distress, Dr. Suggs should not have been left in place. Dr. Suggs was directly responsible for developing and implementing plans to bring the schools out of academic distress." (*Id.* at ¶¶ 99 and 100).

5. "It does not appear that ADE has developed any plan which would significantly change the improvement efforts currently underway in the six schools. As of February 12, 2015, Arkansas Education Department leaders reported that 'there is no plan yet for improving the Little Rock School District's academically troubled schools." (*Id.* at ¶ 97).

At Paragraphs 114 and 115 of their First Amended and Substituted Complaint Plaintiffs allege that "SBE's actions are ultra vires and outside of its authority in that they are in direct violation of the Arkansas Constitution. To the extent Ark. Code Ann. §6-15-430(b) purportedly allows SBE to take over a school district which is not in academic distress and remove its board of directors simply because a school or schools within the

district are in academic distress, it violates the Arkansas Constitution." Paragraph 130 alleges that "the SBE acted outside of its authority in assuming full control of the entire LRSD." Paragraph 133 alleges that "[i]t is a violation of Article 14, Section 3(c)(1) of the Arkansas Constitution for the SBE to remove the School Board of Directors and designate their constitutional responsibility of taxation to Tony Wood.

Plaintiffs add to their claims allegations concerning ultra vires at Paragraphs 130-144 of the First Amended and Substituted Complaint as follows:

1. "However, the SBE acted outside of its authority in assuming full control of the entire LRSD." (*Id.* at ¶ 130).

2. "The SBE has made Tony Wood the Little Rock School District Board of Directors." (*Id.* at ¶ 131).

3. "It is a violation of Article 14, Section 3 of the Arkansas Constitution for Tony Wood to sit as School District Board of Directors." (*Id.* at ¶ 132).

4. "It is a violation of Article 14, Section 3(c) (1) of the Arkansas Constitution for the SBE to remove the School Board of Directors and designate their constitutional responsibility of taxation to Tony Wood." (*Id.* at ¶ 133).

5. "Under Article 14, Section 3(c)(1) of the Arkansas Constitution, the Board of Directors of each school district is charged with the constitutional responsibility to prepare, approve, and make public not less than sixty (60) days in advance of the annual school election a proposed budget of expenditures deemed necessary to provide for the foregoing purposes, together with a rate of tax levy sufficient to provide the funds therefor, including the rate under any continuing levy for the retirement of indebtedness." (*Id.* at ¶ 134).

6. "Without a School Board that is elected by the people, there can be no school board elections." (*Id.* at ¶ 135).

7. "Only an elected Board of Directors can perform this responsibility." (*Id.* at ¶ 136).

8. "Under Article 14, Section 3(c) (1) of the Arkansas Constitution, the Board of Directors shall submit the tax at the annual school election or at such other time as may be provided by law. If a majority of the qualified voters in the school district voting in the school election approve the rate of tax proposed by the Board of Directors, then the tax at the rate approved

shall be collected as provided by law. In the event a majority of the qualified electors voting in the school election disapprove the proposed rate of tax, then the tax shall be collected at the rate approved in the last preceding school election, However, if the rate last approved has been modified pursuant to subsection (b) or (c) (2) of this section, then the tax shall be collected at the modified rate until another rate is approved." (*Id.* at ¶ 137).

9. "Without a School Board that is elected by the people, there can be no election." (*Id.* at ¶ 138).

10. "Only an elected Board of Directors can perform this responsibility." (*Id.* at ¶ 139).

11. "The SBE violated the Arkansas Constitution when it dissolved the Little Rock School Board of Directors and acted outside of its authority." (*Id.* at ¶ 140)

12. "Ark. Code Ann. §6-3-112(a), provides that "within ten (10) days of the meeting of the State Board of Education at which the state board assumes authority of a school district or within ten (10) days of the date upon which the Commissioner of Education assumes authority of a school district, the commissioner shall provide the following information to the chairs of the House Committee on Education and the Senate Committee on Education: (1) A clear statement of the reasons the district has been placed under the authority of the state board or the commissioner; and (2) A clear statement of the steps necessary for the school district to remove itself for the authority of the state board or the commissioner." (*Id.* at ¶ 141)

13. "Upon information and belief, neither defendant Wood nor the SBE provided a clear statement of the reasons the LRSD was placed under state control to the chairs of the House Committee on Education and the Senate Committee on Education within ten (10) days of the January 28, 2015, takeover." (*Id.* at ¶ 142)

14. Upon information and belief, neither defendant Wood nor the SBE provided a clear statement of the steps necessary for the LRSD to remove itself from the authority of the state to the chairs of the House Committee on Education and the Senate Committee on Education within ten (10) days of the January 28, 2015, takeover." (*Id.* at ¶ 143)

15. "The SBE has failed to comply with the requirements of Ark. Code Ann. §6-13-112(a)." (*Id.* at ¶ 144)

Defendants argue that these and other allegations in the First Amended and Substituted Complaint are legally insufficient to assert a claim that their conduct was

ultra vires (meaning "beyond the agency's or the officer's legal authority," *Fitzgiven,* supra, 2013 Ark. 346, at 13, 429 S.W.3d at 424), taken in bad faith (meaning "dishonest, malicious or oppressive conduct with a state of mind characterized by hatred, ill will or a spirit of revenge," *Conway Corp. v. Construction Engineers, Inc.*, 300 Ark. 225, 231-32, 782 S.W.2d 36, 29 (1989)), or wanton (meaning "course of action which shows an actual or deliberate intention to harm or which, if not intentional, shows an indifference to or conscious disregard for the safety of others." Arkansas Model Jury Instruction 1101, Civil.) Defendants further argue that Plaintiffs have failed to plead facts sufficient to establish an arbitrary and capricious exception to sovereign immunity (meaning "willful and unreasoning action, without consideration and with a disregard of the facts or circumstances of the case." *Arkansas Contractors Licensing Bd. v. Pegasus Renovation Co.*, 347 Ark. 320, 332, 64 S.W.3d 241, 248 (2001).)

However, Defendants cite no case that holds the kind of allegations asserted by Plaintiffs to be legally insufficient to establish claims against the state or one of its agencies and instrumentalities for conduct that was ultra vires, arbitrary and capricious, wanton and in bad faith. Rather, Defendants dispute whether the facts alleged by Plaintiffs prove what Plaintiffs allege. Defendants' dismissal motion and supporting brief ignore the difference between a motion to dismiss and a motion for directed verdict. In reviewing a motion to dismiss, the trial court does not weigh the relative merits of factual allegations because it cannot do so. Factual allegations are not proof. They are simply assertions of what a litigant contends it will prove to establish entitlement to the relief it claims.

If a litigant is unable to allege facts sufficient to set forth the elements of a claim for relief, a motion to dismiss the complaint must be granted. But where a complaint sets out factual allegations that make a colorable claim, the complaint will survive a challenge to its legal sufficiency in a motion for dismissal.

Defendants' argument that no appeal was taken from the January 28, 2015 decision raises an exhaustion of administrative remedies issue. A party who contends that it is aggrieved by administrative conduct must exhaust administrative remedies before being entitled to judicial review and relief. *Cummings v. Big Mac Mobile Homes, Inc.* 335 Ark. 216, 980 S.W.2d 550 (1998). However, in this case, Plaintiffs allege that Defendants immediately removed the seven-member Little Rock School Board on January 28, 2015. (First Am. and Sub. Compl. ¶¶ 79-80). That allegation appears to be confirmed by the exhibit attached to Defendants' Motion to Dismiss (Mtn. to Dismiss Ex. 1).

Arkansas law provides that each school district in the state "shall be a body corporate, may contract and be contracted with, and may sue and be sued in its corporate name ..." Ark. Code. Ann. §6-13-102(a). Ark. Code Ann. § 6-13-623 provides that "the governing authority of any school district in the State of Arkansas is authorized to employ legal counsel to defend it, any member thereof, or any school official in any legal proceeding to which the board of directors, any member thereof, or any school official may be a defendant, which such proceeding is instituted against it, or agakinst any member thereof, by virtue of his actions in connection with his duties as such member." Plainly, a school district can only authorize legal actions, including actions to prosecute, defend, appeal, or otherwise engage in legal proceedings, through its board of directors. Where the board of directors has been removed, as the parties herein

appear to agree, it follows that no authority remained to direct an appeal from the January 28, 2015 action by Defendants.

It is well settled law that exhaustion of remedies is not required where an attempt to do so would be impossible or impracticable. 335 Ark. at 220, 980 S.W.2d at 552. The law does not require people to engage in futile acts. For that reason, Defendants cannot prevail on their motion to dismiss under the exhaustion of remedies principle.

The First Amended and Substituted Complaint contains numerous allegations of fact which assert grounds for relief on the claim that Defendants engaged in conduct that was arbitrary and capricious, exceeded its statutory authority, violated provisions of the Arkansas Constitution, and was taken in bad faith. Plaintiffs have alleged specific facts and circumstances in support of their allegations, not mere conclusory allegations. Under the long established principles of law governing motions to dismiss, the facts alleged in Plaintiffs' complaint are treated as true and are viewed in the light most favorable to the party seeking relief. *McAllister v. Forrest City St. Imp. Dist., No. 11*, supra.

Defendants' motion for dismissal is DENIED.

ORDERED THIS 17th day of March, 2015.

CIRCUIT JUDGE

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
FIFTH DIVISION

DIANE CURRY, et al. **PLAINTIFFS**

v. **Case No. 60-CV-15-654**

TONY WOOD, et al. **DEFENDANTS**

NOTICE OF INTERLOCUTORY APPEAL
AND DESIGNATION OF RECORD

Come now Mr. Tony Wood, Mr. Samuel Ledbetter, Ms. Toyce Newton, Mr. Joe Black, Ms. Alice Williams Mahony, Ms. Mireya Reith, Ms. Vicki Saviers, Dr. Jay Barth, Ms. Diane Zook, and Mr. Kim Davis, in their official capacities, and the Arkansas Department of Education (Defendants), and give notice that an interlocutory appeal is taken to the Arkansas Supreme Court from the Order Denying Defendants' Motion to Dismiss from the Circuit Court of Pulaski County, Fifth Division dated March 17, 2015.

1. Jurisdiction of the Arkansas Supreme Court over this appeal is based upon Rule 2(a)(10) of the Rules of Appellate Procedure and Rule 1-2(a)(1) of the Rules of Supreme Court.

2. Pursuant to Arkansas Rule of Appellate Procedure 3(g) because Defendants do not designate the entire record in this Court as the record on appeal, the points on which the Defendants intend to rely on appeal are as follows:

   a. The Defendants are entitled to sovereign immunity under Article 5, Section 20 of the Arkansas Constitution.

3. Pursuant to Arkansas Rule of Appellate Procedure 3(g) the Defendants

designate the following as contents of the record on appeal:

a. Complaint (filed by Plaintiffs on February 20, 2015);

b. Amended Complaint (filed by Plaintiffs on February 24, 2015);

c. Motion to Dismiss (filed by Defendants on March 16, 2015);

d. Brief in Support of Motion to Dismiss (filed by Defendants on March 16, 2015);

e. Motion for Continuance of Preliminary Injunction Hearing on Grounds of Sovereign Immunity, or in the Alternative, that the Court Rule on Defendants' Sovereign Immunity Claim (filed on March 16, 2015);

f. Brief in Support of Motion for Continuance of Preliminary Injunction Hearing on Grounds of Sovereign Immunity, or in the Alternative, that the Court Rule on Defendants' Sovereign Immunity Claim (filed on March 16, 2015);

g. Order Denying Motion to Dismiss (filed by the Court on March 17, 2015);

h. Order Denying Motion for Continuance (filed by the Court on March 17, 2015);

i. Notice of Appeal (filed by Defendants on March 17, 2015);

j. Motion to Stay Further Proceedings (Filed by Defendants on March 17, 2015); and

k. Brief in Support of Motion to Stay Further Proceedings (Filed by Defendants on March 17, 2015).

Respectfully submitted

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CERTIFICATE OF SERVICE

I, Kendra Clay, hereby certify that a copy of the foregoing has been served on the following on this 17th day of March, 2015, via the e-flex filing notification system and via e-mail:

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/s/ Kendra Clay