No. 11-2130

In the

United States Court of Appeals

for the

Eighth Circuit

Little Rock School District, Plaintiff-Appellant

v.

State of Arkansas, *et al.*, Defendants-Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
CASE NO. 4:82-CV-00866
Honorable Brian S. Miller, District Judge

APPELLANT'S OPENING BRIEF AND ADDENDUM

Christopher Heller
FRIDAY, ELDREDGE & CLARK, LLP
400 W. Capitol, Suite 2000
Little Rock, AR 72201-3522
(501) 370-1506
(501) 376-2147 (fax)

Clay Fendley
JOHN C. FENDLEY, JR. P.A.
51 Wingate Drive
Little Rock, AR 72205-2537
(501) 907-9797
(501) 907-9798 (fax)

SUMMARY AND REQUEST FOR ORAL ARGUMENT

This case is composed of three intradistrict desegregation cases and one interdistrict case which were consolidated in 1987 and resolved in 1989 by a Settlement Agreement which later took the form of a consent decree. Among other things, the consent decree required each of the three Pulaski County school districts to implement intradistrict desegregation plans, and the State of Arkansas ("State") to help fund an interdistrict remedy which includes magnet schools.

Following unitary status hearings concerning the North Little Rock School District (NLRSD") and the Pulaski County Special School District ("PCSSD") during which no evidence was presented about the efficacy of the interdistrict remedy, the district court modified the consent decree by immediately terminating the State's funding obligations for magnet schools and for past violations of the consent decree. The modification, which was done without a hearing and finds no support in the facts or the law, should be vacated.

LRSD respectfully requests oral argument of 30 minutes per side, separate from the time allocated for arguments on unitary status issues in the companion cases, because of the complex issues and substantial public interest in this case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

.

Statutes and Rules

JURISDICTIONAL STATEMENT

LRSD filed this interdistrict desegregation case in 1982, invoking the district court's jurisdiction under 28 U.S.C. §§ 1331(a), 1343(3) and (4), 2201, and 2202. In 1987, the district court consolidated pending intradistrict desegregation cases against the three Pulaski County school districts into this interdistrict case for purposes of implementing a comprehensive remedy. The interdistrict case was designated as the lead case. **[App. 79-80].**

This Court approved in 1990 a comprehensive settlement agreement which included both an interdistrict remedy and an intradistrict desegregation plan for each district. *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.*, 921 F.2d 1371, 1376 (8th Cir. 1990). A consent decree embodying the settlement agreement was entered on April 29, 1992. *Knight v. Pulaski County Special Sch. Dist.*, 112 F.3d 953, 954 (8th Cir. 1997). The district court retained ancillary jurisdiction to enforce the consent decree. *See Little Rock Sch. Dist. v. North Little Rock Sch. Dist.*, 131 F.3d 1255, 1257-58 (8th Cir. 1997).

On May 19, 2011, the district court modified the consent decree by terminating most of the States' funding obligations. **[Add. 108]**. LRSD filed a timely appeal on May 20, 2011. **[App. 627-629].** This Court's jurisdiction is based on 28 U.S.C. § 1292(a)(1), which provides for jurisdiction of interlocutory orders modifying injunctions.

STATEMENT OF ISSUES

I. THE DISTRICT COURT ERRED IN MODIFYING THE CONSENT DECREE *SUA SPONTE* WITHOUT AN EVIDENTIARY HEARING.

Jenkins v. Missouri, 216 F.3d 720 (8th Cir. 1991)

Heath v. DeCourcy, 992 F.2d 630 (6th Cir. 1993)

II. THE DISTRICT COURT ERRED IN FINDING THAT STATE FUNDING OF THE INTERDISTRICT REMEDY MOTIVATED THE DISTRICTS TO AVOID UNITARY STATUS.

United States v. Bd. of School Comm'rs of the City of Indianapolis, 128 F.3d 507 (7th Cir. 1997)

Heath v. DeCourcy, 992 F.2d 630 (6th Cir. 1993)

Cody v. Hillard, 139 F.3d 1197 (8th Cir. 1998)

Youngblood v. Dalzell, 925 F.2d 954 (6th Cir. 1991)

III. THE DISTRICT COURT ABUSED ITS DISCRETION IN TERMINATING THE STATE'S FUNDING OBLIGATIONS WHERE AN IMMEDIATE CESSATION OF FUNDING WILL SUBSTANTIALLY DISRUPT THE EDUCATION OF PULASKI COUNTY STUDENTS.

Freeman v. Pitts, 503 U.S. 467 (1992)

Berry v. Sch. Dist. of the City of Benton Harbor, 195 F.Supp.2d 971 (W.D. Mich. 2002)

STATEMENT OF THE CASE

This case is actually four consolidated cases. The interdistrict desegregation case, *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist., et al*, LR-C-82-866 ("*LRSD v. PCSSD*"), is designated as the lead case. The other consolidated cases are three intradistrict desegregation cases: *Clark v. Bd. of Educ. of the LRSD*, LR-C-64-155 ("*Clark*"); *Davis v. Bd. of Educ. of the NLRSD*, LR-C-68-151 ("*Davis*"); and, *Zinnamon v. Bd. of Educ. of the PCSSD*, LR-C-68-154 ("*Zinnamon*"). **[App. 79-80]**. All four cases were resolved by the 1989 Settlement Agreement approved by this Court in 1990. **[App. 708-722]**; *LRSD v. PCSSD*, 921 F.2d at 1376.

The 1989 Settlement Agreement resolved numerous funding issues related to the interdistrict remedy, magnet schools and the majority-to-minority ("M-to-M") transfer program, and incorporated by reference intradistrict desegregation plans for LRSD, NLRSD and PCSSD. **[App. 670]**. In 2007, the district court found that LRSD had complied in good faith with its intradistrict desegregation plan and declared LRSD unitary. **[App. 245-293]**. *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.*, 2007 WL 624054 (E.D. Ark.), *aff'd Little Rock Sch. Dist. v. North Little Rock Sch. Dist*, 561 F.3d 746 (8th Cir. 2009). Later in 2007, NLRSD and PCSSD moved for unitary status, arguing that they had complied in good faith with their intradistrict desegregation plans. **[App. 294-296; App. 297-309]**.

On May 19, 2010, LRSD filed a Motion to Enforce 1989 Settlement Agreement, supported by 73 exhibits, alleging a number of violations of the consent decree by the State and the Arkansas State Board of Education ("State Board"). First, LRSD alleged that the State Board violated the consent decree by unconditionally authorizing open-enrollment charter schools in Pulaski County that attract students who might otherwise attend magnet schools or elect M-to-M transfers. **[App. 419-476, ¶ 29-151]**. Second, LRSD alleged that the State violated the consent decree by failing to monitor compensatory education programs, failing to identify or develop programs to remediate the racial achievement disparity, and failing to adequately fund education generally as required by the Constitution of Arkansas. **[App 479-495, ¶¶ 158-187]**. Finally, LRSD pointed out that the consent decree included racial preferences in student assignment and requested a "periodic review" to determine whether a race-neutral student assignment system could achieve the goals of the decree. **[App. 495, ¶ 188]**. The State responded to LRSD's motion to enforce on June 18, 2010. **[App. 514-516]**. No hearing has been scheduled on LRSD's Motion to Enforce.

The district court conducted separate hearings on NLRSD and PCSSD's motions for unitary status in early 2010. Before the hearings, the district court issued a detailed scheduling order outlining the order of proof. It provided:

> The hearing on the North Little Rock School District's ("NLRSD") petition for declaration of unitary status and release from court

> supervision (Doc. No. 4141) is set for January 25, 2010. To ensure an orderly hearing, the NLRSD is ordered to present evidence regarding the requirements of its desegregation plan in the following order: (1) staff recruitment; (2) special education; (3) compensatory education; (4) compensatory programs aimed at dropout prevention; (5) extracurricular activities; (6) discipline, suspensions and expulsions; (7) secondary gifted and talented education; (8) school construction and facilities; and (9) desegregation monitoring.
>
> The hearing on the Pulaski County Special School District's ("PCSSD") motion for a declaration of unitary status (Doc. No. 4159) is set for February 22, 2010. To ensure an orderly hearing, the PCSSD is ordered to present evidence regarding the requirements of Plan 2000 in the following order: (1) assignment of students; (2) advanced placement, gifted and talented, and honors programs; (3) student assignment: interdistrict schools; (4) discipline; (5) multicultural education; (6) school facilities; (7) scholarships; (8) school resources; (9) special education; (10) staff; (11) student achievement; (12) monitoring; and (13) continuing jurisdiction.

[App. 374-375]. With minor exceptions, NLRSD and PCSSD presented their proof as ordered by the district court. No evidence was presented regarding the efficacy of the interdistrict remedy (magnet schools and the M-to-M transfer program) or the State's compliance with the consent decree.

On May 19, 2011, the district court issued its order granting in part and denying in part the districts' motions for unitary status. **[Add. 1-110]**. LRSD does not appeal the district court's decisions on the districts' motions for unitary status.

In addition to ruling on the districts' motions for unitary status, the district court *sua sponte* modified the consent decree by immediately terminating the State's funding obligations for "any and all" of the districts' "desegregation efforts,

except those associated with M-to-M transfers." The effect of the order is to immediately eliminate settlement funding for magnet schools and for past violations of the 1989 Settlement Agreement.

The district court further ordered LRSD and the defendant districts to show cause why the State should not also be ordered to stop funding M-to-M transfers, but the court has not yet ruled on that issue. LRSD appeals that portion of the district court's order which modified the consent decree by immediately relieving the State from its funding obligations under the Magnet Stipulation and for past violations of the 1989 Settlement Agreement, and by requiring LRSD to show cause why the State should not be ordered to stop funding M-to-M transfers. On June 21, 2011, this Court granted LRSD's motion to stay the district court's order[1] pending appeal.

[1] On June 24, 2011, the Honorable Brian S. Miller recused because of his "deeply held personal opinions as to the reasons for and timing of the [State's] takeover of the Helena-West Helena School District," and this case was reassigned to the Honorable D. Price Marshall. **[App. 630-631]**

STATEMENT OF FACTS

A. The Defendants' Constitutional Violations.

In 1984, the district court (the Honorable Henry Woods presiding) found the defendants guilty of interdistrict constitutional violations, including acting in concert for the purpose of creating and preserving residential segregation. *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.*, 584 F.Supp. 328, 353 (E.D. Ark. 1984). The district court made the following findings of fact:

> 41. The goal of preserving residential segregation has been successful. The southern and eastern parts of the Little Rock School District remain heavily black to this day. The black population of the city has expanded to the west to some extent, but the far western portions of the city remain white today. Northern and northwestern parts of the city, including the area where the black West Rock clearance area was formerly located, remain virtually all-white today. Similarly in North Little Rock, the residential areas near the housing projects, that is, those lying south of Interstate 40, have become substantially black. The area north of Interstate 40 has remained overwhelmingly white.
>
> 42. The existence and location of the housing projects, the location of other government-subsidized housing units, the failure to build projects within the geographic boundaries of the county district, and the private and public steering and redlining practices are major contributing factors to the residential segregation in Pulaski County which exists today.

LRSD v. PCSSD, 584 F.Supp. at 343 (citations to exhibits omitted).

Consistent with these findings of fact, the district court reached the following conclusions of law:

> 6. The predominantly segregated residential patterns of Pulaski County have been caused in a significant degree by the actions of many governmental bodies, acting in concert with each other, with the defendants, and with private interests, and are not solely attributable to a series of individualized private housing choices. *Hills v. Gautreaux*, 425 U.S. 284, 96 S.Ct. 1538, 47 L.Ed.2d 792 (1975); *Swann v. Charlotte Mecklenburg Board of Education, supra.*
>
> 7. The governmental actions affecting housing patterns in Pulaski County have had a significant interdistrict effect on the schools in Pulaski County, which has resulted in the great disparity in the racial composition of the student bodies of the Little Rock district and the two defendant districts. *Swann v. Charlotte Mecklenburg Board of Education, supra*.

LRSD v. PCSSD, 584 F.Supp. at 352-53.

In addition to finding that the State acted in concert with the defendant districts to create and preserve residential segregation, the district court made specific liability findings against the State Board and reaffirmed the State Board's remedial responsibilities in *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.*, 597 F.Supp. 1220, 1227-28 (E.D. Ark. 1984). *See Little Rock Sch. Dist. v Pulaski County Special Sch. Dist.*, 778 F.2d 404, 409 (8th Cir. 1985).

The State appealed the district court's finding of interdistrict liability and the imposition of remedial responsibilities on the State through the State Board. This Court affirmed stating:

> The district court made detailed and extensive findings regarding the existence of segregated housing in the Little Rock metropolitan area and regarding the causal role of the State of Arkansas and PCSSD in creating and perpetuating this condition. After reviewing these

> findings for clear error, we find none, and conclude that the record amply supports the district court's determination.

Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist., 778 F.2d at 423. The Court also affirmed the imposition of remedial responsibilities on the State through the State Board. *LRSD v. PCSSD*, 778 F.2d at 411-12 n.4. The Court considered the issue of whether it was proper for the district court to order an interdistrict remedy based, in part, on residential segregation. After reviewing precedent from the Supreme Court and two courts of appeal, the Court affirmed "imposition of remedial liability upon the State of Arkansas." *Id.* at 426. In so doing, the Court distinguished cases relied upon by the State because they did not involve "state-imposed residential segregation." *Id.* at 428-29.

To remedy the defendants' constitutional violations, the district court ordered consolidation of LRSD, NLRSD and PCSSD, but this Court reversed, finding consolidation "exceeds the scope of the violations." 778 F.2d at 434. The Court ordered the district court to modify its remedy consistent with the certain principles, two of which laid the foundation for the magnet and M-to-M stipulations. The Court directed that the remedy should encourage "[v]oluntary intra- or interdistrict majority-to-minority transfers" with the State being required to pay the cost of transportation and pay both the sending and receiving district a financial incentive, and that the district court may require "a limited number of magnet schools" with the State being required to pay one-half the cost of educating

magnet students, to pay customary state aid to the student's home district, and to pay the full cost of transporting magnet students. *Id.* at 435-36.

B. The Consent Decree.

1. M-to-M Stipulation.

Consistent with the remedial principles outlined by the Court, the parties submitted the Stipulation for Proposed Order on Voluntary Majority to Minority Transfers ("M-to-M Stipulation") to the district court on August 26, 1986. **[App. 71-78]**. "Beginning in the 1987-88 school year and continuing thereafter," the M-to-M Stipulation requires LRSD, PCSSD and NLRSD to "permit and encourage voluntary majority-to-minority interdistrict transfers." **[App. 71, ¶ 1]**. The M-to-M Stipulation allows students in the racial majority at their school and district to transfer to a school and district where they would be in the racial minority. **[App. 71-72, ¶ 2.]** LRSD and NLRSD are majority black, and PCSSD is majority non-black. Thus, the M-to-M stipulation allows black LRSD and NLRSD students to transfer to majority non-black PCSSD schools, and non-black PCSSD students to transfer to LRSD and NLRSD schools that are majority black. The M-to-M Stipulation states that, "Students who have elected to transfer shall remain students of the host district until they choose to return to the district where they reside." **[App. 73, ¶ 7].**

The M-to-M Stipulation requires the State Board to "pay the full cost of transporting students opting for interdistrict transfers." **[App. 75, ¶ 12]**. The State also pays a financial incentive to both the sending and receiving district. **[App. 75-77, ¶ 13; App. 675, ¶ E(2)]**. The financial incentive serves to compensate the districts for recruiting and encouraging voluntary interdistrict transfers – an obligation unique to the Pulaski County districts and not otherwise funded by the State. *See LRSD v. PCSSD*, 778 F.2d at 436 (ordering the State "to pay benefits to the sending and receiving schools for the interdistrict transfers . . ."); *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.*, 934 F.Supp. 299, 301 (E.D. Ark. 1996) (interpreting the 1989 Settlement Agreement "in a manner that will promote voluntary interdistrict transfers, particularly to interdistrict schools."), *aff'd, Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.*, 109 F.3d 514 (8th Cir. 1997). **[App. 490-491, ¶ 180]**.

2. Magnet Stipulation.

The parties submitted the Stipulation for Recommendations Regarding Magnet Schools ("Magnet Stipulation") to the district court in open court on February 17, 1987. The Magnet Stipulation created six interdistrict magnet schools consisting of four elementary schools (Carver, Williams, Booker, Gibbs), one middle school (Mann) and one high school (Parkview). **[App. 723]** The Magnet Stipulation requires the magnet schools to have a student population

"which is fifty-percent (50%) black and fifty percent (50%) non-black" and prescribes a method for allocating magnet seats among the three districts. **[App. 727]**. It requires the State Board to pay the actual cost of transporting magnet students and one-half of the cost of educating magnet students. **[App. 725; App. 675, ¶¶ E(1) and (4)]**. In addition, each district's magnet students are included in the district's average daily membership for the purpose of determining the district's regular state education funding. **[App. 672, § II, ¶ A]**. The purpose of the Stipulation Magnet schools was to encourage voluntary interdistrict transfers, which improve racial balance, and to provide academic benefits through special programs. *See Liddell v. State of Missouri*, 731 F.2d 1294, 1310 (8th Cir. 1984) ("Before reviewing the State's specific arguments, we observe that the utility and propriety of magnets as a desegregation remedy is beyond dispute.").

3. The 1989 Settlement Agreement.

The 1989 Settlement Agreement, among other things, incorporated the M-to-M Stipulation and the Magnet Stipulation and resolved numerous funding issues related to those agreements. **[App. 672-676, § II, ¶¶ A, B, C, D and E].** It also incorporated by reference each district's intradistrict desegregation plan and the Interdistrict Desegregation Plan ("Interdistrict Plan"), collectively referred to as, "the Plans." While the 1989 Settlement Agreement noted that the Plans "hold excellent promise for achieving unitary school systems," the purpose of the 1989

Settlement Agreement was to avoid "[c]ontinued litigation regarding funding and other issues" that may "make more difficult and further delay effective implementation of the constitutional obligations of the State of Arkansas and the three Pulaski County school districts." **[App. 670]**. Consistent with this purpose, the 1989 Settlement Agreement deals almost exclusively with funding issues, and the Plans are only mentioned incidentally. **[App. 670, 672, 678, 683, 689]**.

The 1989 Settlement Agreement does not include any provision pertaining to termination of funding received by the districts pursuant to the M-to-M Stipulation or the Magnet Stipulation. All parties, including the State, participated in the drafting of the 1989 Settlement Agreement, and no party sought to include such a provision. In contrast, the parties did agree to a payment schedule fixing the State's liability for compensatory and remedial education programs. The State agreed to make payments to the districts totaling $129,750,000.00 with the last payment due January 1, 1999. **[App. 681, ¶ N and App. 693, (A)(1)]**.

In addition to funding compensatory and remedial education programs, the 1989 Settlement Agreement required the Arkansas Department of Education ("ADE") to monitor implementation of compensatory education programs by the districts. It provides:

> The State shall be required (as a non-party) to monitor, through ADE, the implementation of compensatory education programs by the Districts. If necessary as a last resort, ADE may petition the court for modification or changes in such programs being implemented by the

> Districts (but not for a reduction in the agreed level of State funding). . . . ADE shall provide regular written monitoring reports to the parties and the court.
>
> Monitoring by the State shall be independent of that of the other parties. It is being done to ensure that the State will have a continuing role in satisfactorily remediating the achievement disparities. Any recommendations made by ADE shall not form the basis of any additional funding responsibilities of the State.

[App. 683, ¶ A].

State funding and monitoring of compensatory education programs were only part of the required State effort. The State Board also "committed" to certain principles, including: "There should be remediation of the racial academic achievement disparities for Arkansas students." **[App. 685, ¶ F]**. Consistent with that commitment, the 1989 Settlement Agreement provides:

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

[App. 685-686, ¶ G]. ADE has never developed or identified "programs to remediate achievement disparities between black and white students." **[App. 685-686, ¶ G].**

In reaching the 1989 Settlement Agreement, the districts were concerned that the State would retaliate or otherwise discriminate against them because of the funding received pursuant to the agreement. The Special Master had already found that the State had intentionally attempted to limit its magnet funding "liability by a strained interpretation of the plain language of the Order of the Eighth Circuit Court of Appeals." **[App. 92-93]** To address this concern, the 1989 Settlement Agreement included the following provisions:

> In addition to any payment described elsewhere in this agreement, the State will continue to pay . . . the State's share of any and all programs for which the Districts now receive State funding. The funds paid by the State under this agreement are not intended to supplant any existing or future funding which is ordinarily the responsibility of the State of Arkansas. **[App. 674-676, ¶ E]**.
>
> * * *
>
> The State shall take no action (including the enactment of legislation) for the purpose of retaliating against the Districts (including retaliatory failure to increase State aid and retaliatory reduction in State aid) because of this Litigation or this Settlement. The State will enact no legislation which has a substantial adverse impact on the ability of the Districts to desegregate. **[App. 680, ¶ L]**.

C. <u>The State's Past Violations of the Consent Decree</u>.

1. <u>ODM Funding</u>.

In 1991, the State unilaterally decided that it had no obligation to fund the Office of Desegregation Monitoring ("ODM") based on a strict reading of the 1989 Settlement Agreement and orders of the district court and this Court. The district

court (the Honorable Susan Webber Wright presiding) rejected the State's interpretation in favor of an interpretation consistent with the purpose of the agreement. The district court stated:

> Thus, while its name has been changed and the scope of its function narrowed to monitoring the parties' compliance with the settlement plans, the office still exists to assist the Court, as well as the parties, in achieving the mutual goal of constitutionally desegregated public school systems. . . . To construe this provision otherwise would exalt form over substance and permit the State to escape an obligation from which it was nowhere expressly released by the Eighth Circuit.

[App. 101-102].

2. Workers Compensation.

In 1993, the State shifted responsibility for workers' compensation from the State to school districts. LRSD claimed that workers' compensation was a program under Section II, Paragraph E of the 1989 Settlement Agreement and that the shift of responsibility for workers' compensation to the District had an adverse financial impact. The district court agreed with LRSD and explained:

> When the parties were negotiating the Settlement Agreement, the Districts and Intervenors were concerned that the State would attempt to recoup the monies being used to fund the Settlement Agreement by reducing funds that were otherwise available to the Districts. Also, the parties knew that their ability to carry out their obligations under the Settlement Agreement was directly tied to their belief that the settlement funds, when added to the funds received in the ordinary course of business, would be sufficient to fund their desegregation obligations. The State's decision not to fund workers' compensation claims is an example of an unexpected obligation that the Districts were seeking to avoid in the Settlement Agreement.

[App. 118]. The district court concluded:

> [T]he State must fund the same proportion of the cost of each of the three Pulaski County school districts' workers' compensation insurance as it pays for all the other school districts in the state beginning with the 1994-95 school year. By requiring the State to assist the Pulaski County school districts to the same degree that it is assisting others, the Districts will not be "singled out" for less favorable treatment than the other districts.

[App. 120]. The district court's decision was affirmed by this Court in *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.*, 83 F.3d 1013 (8th Cir. 1996).

3. Loss Funding.

Also in 1993, the State amended the funding for districts with declining enrollment known as "loss funding." LRSD and PCSSD alleged that the manner in which the State treated M-to-M transfer students in calculating loss funding violated the 1989 Settlement Agreement. **[App. 120]**. The district court agreed stating:

> [T]he State is deliberately discriminating against the Districts with respect to the provision of loss funding for a decline in enrollment related to the loss of M-to-M students.

[App. 122]. The district court further explained:

> The State's application of loss funding and growth funding encourages the PCSSD to lose students to neighboring predominantly white districts, not to the LRSD. This is contrary to the Eighth Circuit's intent to encourage voluntary majority-to-minority transfers between the Districts and to require the state to pay for such transfers. It is clear that the decision of the ADE is not consistent with the actual language of the stipulation. A party may not unilaterally change the

> implementation or language of an agreement or order without the prior approval of the Court and/or the consent of the parties. If the ADE believed that the literal application of the language of the stipulation and the Settlement Agreement was inconsistent with the original intent of the parties and would work an injustice with respect to loss funding, the ADE should have approached the parties and petitioned the Court for a modification.

[App. 123]. The district court concluded:

> The State of Arkansas needs to focus on its obligation in the settlement to give the Pulaski County school districts *special* consideration to enable these districts to meet their numerous and burdensome obligations under the settlement. The Court reminds the state of the Eighth Circuit's specific findings about the state's complicated and lengthy history of promotion of unconstitutional racial segregation which has led to this interminable litigation. The swiftest and surest way out of the federal court is to abide by the terms and spirit of this Settlement Agreement, and this includes following proper procedures for modification of the settlement.

[App. 129-130 (emphasis in original)]. This Court affirmed the district court's decision in *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.*, 83 F.3d 1013 (8th Cir. 1996).

4. Teacher Retirement and Health Insurance.

In 1995, the Arkansas General Assembly enacted a new school funding formula under which school districts no longer received funding for teacher retirement or health insurance based on the number of district employees. Instead, the money previously earmarked for teacher retirement and health insurance was distributed on a per student basis. The districts argued that this violated the 1989 Settlement Agreement, Section II, Paragraph E, which required that the State

continue to pay the "[t]he State's share of any and all programs for which the Districts now receive State funding." The State responded that the 1989 Settlement Agreement, Section II, Paragraph L, authorized "fair and rational adjustments to the funding formula which have general applicability but which reduce the proportion of State aid to any of the Districts" and that such adjustments "shall not be considered to have an adverse impact on the desegregation of the Districts."

The district court found that the new funding formula was not "fair and rational" because it failed to consider the number of employees in distributing aid for teacher retirement and health insurance. **[App. 144-145].** It found the new funding formula was not "of general applicability" and violated of the anti-retaliation provision of the 1989 Settlement Agreement because other school districts received a greater proportion of their teacher retirement and health insurance costs than did the three Pulaski County districts. **[App. 144-145]**.

The district court recognized that a violation of the anti-retaliation provision did not require an intent to retaliate. "This result is precisely what the anti-retaliation clause was meant to prevent. It funds the Pulaski County districts to a lesser degree than other districts in the state. It is of no moment that the State reached this result in a mathematically consistent manner." [**App. 137-138**, *quoting LRSD v. PCSSD*, 83 F.3d at 1018]. The district court noted that "the State has not petitioned the Court for any modifications in the Agreement and the Court

is bound to enforce the terms of the Agreement." [**App. 144]**.[2] This Court affirmed the district court in *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.*, 148 F.3d 956 (8th Cir. 1998).

5. State Monitoring.

The State's failure to meet its monitoring obligations is well documented by ODM in its "Report on ADE's Monitoring of the School Districts in Pulaski County," filed December 18, 1997. **[App. 154-203]**. ***See*** **App. 104-113** ("ADE never followed the provisions of the settlement agreement or monitoring plan in any substantial way and, therefore, is in violation of its obligations."). ODM found "ADE's voluminous reports to be collections of data that, without benefit of analysis, summaries, conclusions, or recommendations, were essentially meaningless and ultimately useless, because the reports did not help [the districts] develop strategies for quality desegregated education." **[App. 193].** Over two years after ODM reported that the State's monitoring reports were "useless," the State moved to modify its monitoring obligations under the 1989 Settlement Agreement. [**App. 204-207 and App. 208-213]**. The district court denied the State's motion, finding that the Stated failed to demonstrate how the revised monitoring plan was tailored to changed circumstances. **[App. 217]**. Rather than

[2]The district court's decision on health insurance adopted the reasoning of its opinion on teacher retirement without further discussion. **[App. 146-153]**.

making a new effort to develop an effective monitoring plan, the State essentially gave up on monitoring and continues to file "useless" monitoring reports on the first of each month.

6. Jacksonville Splinter District.

In 2003, the State Board authorized an election to create a "splinter" district by detaching the Jacksonville area from the PCSSD. *See, e.g., Lee v. Chambers County Bd. of Educ.*, 849 F.Supp. 1474 (M.D. Ala. 1994)(using the term "splinter school district" to describe a new school district created by detaching territory from an existing school district). On the motion of PCSSD, the district court directed the State Board to rescind its order authorizing the election. The district court (the Honorable Billy Roy Wilson presiding) found that the proposed Jacksonville splinter district violated the 1989 Settlement Agreement and this Court's orders in *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.*, 805 F.2d 815 (8th Cir. 1986) and *LRSD v. PCSSD*, 778 F.2d 404 (8th Cir. 1985). [**App. 222-226; App. 227-244]**. In ruling from the bench, the district court quoted from an opinion letter written on behalf of Arkansas Governor Mike Beebe, then Arkansas' Attorney General, stating:

> As a general matter, the settlement agreement and the Pulaski County Special School District's existing desegregation plan were written in the context of the Pulaski County Special School District having control over the schools in the proposed detachment area, having the benefit of the local revenue derived from taxes on property within the proposed detachment area, and having available the students residing

> in the proposed detachment area who might, through M-to-M transfers and other reassignment, be available to lessen racial disparities in individual schools in the Pulaski County Special School District, the Little Rock School District, and North Little Rock School District. In light of this, any detachment of a significant amount of territory from the Pulaski County School District would almost certainly be expected to have an impact on the Pulaski County Special School District's ability to comply with its desegregation plan and have an impact on the operation of the settlement agreement, including the agreement's provisions concerning M-to-M students and the magnet schools in the Little Rock School District.

[App. 230-231]. The district court concluded, "Obviously, the proposal to create a new school district in northeast Pulaski County will have an undeniable, in my opinion, profound effect on the ability of the Pulaski County Special School District to comply with those two orders, not to mention the many other desegregation obligations outlined in Plan 2000." [**App. 237]**.

The district court warned the State Board that "they cannot use state statutes as a shield to avoid complying with all Court orders and contractual agreements that govern and control the desegregation obligations of the parties in this case." [**App. 237]**. Moreover, the district court made clear that "it's the effect and impact rather than the intent which is the critical inquiry under these circumstances." [**App. 237].**

The State did not appeal the district court's decision interpreting the 1989 Settlement Agreement to prevent the State Board from removing students from the interdistrict student assignment system (magnet schools and the M-to-M transfer

program) ordered by this Court and agreed to by the parties. *See Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.*, 378 F.3d 774 (8th Cir. 2004). Thus, it is now the law of the case that it violates the 1989 Settlement Agreement to remove students " who might, through M-to-M transfers and other reassignment, be available to lessen racial disparities in individual schools in the Pulaski County Special School District, the Little Rock School District, and North Little Rock School District." [**App. 230-231]**. *See LRSD v. PCSSD*, 148 F.3d 956, 966 n.3 (1998)("We did not so interpret Sections II.E. and II.L. in our previous decision, however, and that decision has become the law of the case."); *LRSD v. PCSSD*, 237 F.Supp.2d 988 (E.D. Ark. 2002)("On April 10, 1998, Judge Wright entered an order (docket no. 3144) approving the Revised Plan which was *not* appealed as is now a *final consent decree that represents the law of the case*." (emphasis in original)).

D. <u>LRSD's Pending Motion to Enforce</u>

On May 19, 2010, LRSD filed a Motion to Enforce the 1989 Settlement Agreement which raises substantial issues concerning the State's compliance with the consent decree. These issues have not been scheduled for a hearing and remain unresolved. Two of the issues are described below.

1. Open-Enrollment Charter Schools.

The State Board's unconditional approval of open-enrollment charter schools in Pulaski County violates the 1989 Settlement Agreement by removing students "who might, through M-to-M transfers and other reassignment, be available to lessen racial disparities in individual schools in the Pulaski County Special School District, the Little Rock School District, and North Little Rock School District." [**App. 230-231]**. Ten[3] open-enrollment public charter schools currently operate in Pulaski County. In 2009-2010, open-enrollment charter schools in Pulaski County enrolled 3179 students. **[App. 400]**. In 2010-11, open-enrollment charter schools were authorized to enroll 4726 students. Even if no additional open-enrollment charter schools are approved, that number will increase in 2012-13 to 5442 – 10 percent of all students attending public schools in Pulaski County. **[App. 499]**.

2. Remediation of the Racial Achievement Disparity.

The State has not fulfilled its commitment to "remediation of the racial academic achievement disparities for Arkansas students." **[App. 685, ¶ F]**. Consistent with this commitment, the State agreed to "develop and . . . search for programs to remediate achievement disparities between black and white students.

[3]This number does not count the Arkansas Virtual Academy which is based in Little Rock but serves students statewide via the internet.

If necessary to develop such programs, the ADE will employ appropriately trained and experienced consultants in the field of remediation of racial achievement disparities and/or hire as staff members persons with such training and experience." **[App. 685-686, ¶ G]**. The racial achievement disparity persists, and the State has never developed or identified "programs to remediate achievement disparities between black and white students." **[App. 685-686, ¶ G].**

SUMMARY OF THE ARGUMENT

I. THE DISTRICT COURT ERRED IN MODIFYING THE CONSENT DECREE *SUA SPONTE* WITHOUT AN EVIDENTIARY HEARING.

The district court acted *sua sponte* in modifying the consent decree. Fed. R. Civ. P. 7(b)(1) states that "[a] request for a court order must be made by motion." There was no pending motion seeking modification of the decree. **[Arg 30].**

The present case cannot be distinguished from the district court's *sua sponte* decision declaring the Kansas City, Missouri School District unitary, which this Court reversed. Even if the State had filed a motion requesting modification of the consent decree, that motion could not have been decided without an evidentiary hearing to resolve disputed facts. **[Arg 30-31].** The district court abused its discretion in terminating the State's funding obligations under the Magnet Stipulation and for violations of the 1989 Settlement Agreement without a motion or a hearing. **[Arg 32].**

II. THE DISTRICT COURT ERRED IN FINDING THAT STATE FUNDING OF THE INTERDISTRICT REMEDY MOTIVATED THE DISTRICTS TO AVOID UNITARY STATUS.

The district court seems to have erroneously presumed that state settlement funds assist the districts in implementing their intradistrict desegregation plans when, in fact, the state settlement funds pay for implementation the interdistrict remedy and compensate the districts for the State's past violations of the consent decree. **[Arg 38].** The districts no longer receive state funding to implement their

intradistrict desegregation plans. The State made its last payment for these programs in 1999. **[Arg 39-40].**

The district court described the state funding received by the districts to implement the interdistrict remedy (magnet schools and M-to-M transfers) and for the State's past violations of the decree (teacher retirement and health insurance funding) as "one of the problems with this case." **[Add. 107]**. The district court failed to consider the distinction between the interdistrict remedy and the districts' intradistrict desegregation plans. Where an interdistrict remedy is based on state-imposed residential segregation, as here, the interdistrict remedy does not end upon a school district remedying its intradistrict constitutional violations and attaining unitary status. **[Arg 40-42].**

The parties did not intend for the consent decree to end when all three districts are unitary. Nothing in the M-to-M Stipulation, the Magnet Stipulation, the 1989 Settlement Agreement, the orders of this Court or the district court, or the record in this case supports the position that the parties agreed or expected that the consent decree would end when the districts became unitary. **[Arg 43-44].**

The district court wrongly presumed that the districts are motivated to avoid unitary status by a belief that the interdistrict remedy ends when all three districts are unitary. LRSD has consistently argued that the interdistrict remedy should remain in place until the State pleads and proves that it has complied in good faith

with the consent decree and that any current racial disparity is not traceable, in a proximate way, to the prior violation. There was no evidence presented below that the districts sought to avoid unitary status. **[Arg 45-48].**

In 1984, the district court found that residential segregation was a key component of Arkansas' efforts to preserve racial segregation in education. This Court affirmed. The interdistrict remedy ordered by this Court included magnet schools and an M-to-M transfer program that remain necessary to address the interdistrict impact of residential segregation. **[Arg 48-50].**

The consent decree cannot be terminated unless and until the district court considers the factors outlined by this Court in *Cody v. Hillard*, 139 F.3d 1197 (8th Cir. 1998). Because factual disputes exist with regard to, for example, the State's good faith compliance and the continuing efficacy of a decree, the district court must conduct an evidentiary hearing before terminating the decree. **[Arg 50].**

III. THE DISTRICT COURT ABUSED ITS DISCRETION IN TERMINATING THE STATE'S FUNDING OBLIGATIONS WHERE AN IMMEDIATE CESSATION OF FUNDING WILL SUBSTANTIALLY DISRUPT THE EDUCATION OF PULASKI COUNTY STUDENTS.

The district court abused its discretion by failing to provide an orderly means for withdrawing the interdistrict remedy. State funding must be phased out rather than precipitously terminated where, as here, an immediate cessation of funding would substantially disrupt students' educations. **[Arg 53-54].**

STANDARD OF REVIEW

This Court reviews the district court's factual findings for clear error, its modification of a consent decree for an abuse of discretion, and its interpretations of the law and consent decree *de novo*. *Little Rock Sch. Dist. v. North Little Rock Sch.Dist.*, 451 F.3d 528, 531 (8th Cir. 2006).

ARGUMENT

I. THE DISTRICT COURT ERRED IN MODIFYING THE CONSENT DECREE *SUA SPONTE* WITHOUT AN EVIDENTIARY HEARING.

A. The District Court Acted *Sua Sponte*.

The district court acted *sua sponte* – on its own motion – in modifying the consent decree. No party has filed a motion seeking modification of the decree. The State concedes that it has filed no motion but argues that its September 15, 2009 Status Report "put at issue the question of the efficacy of continued desegregation payments" and put LRSD on notice "that termination of the desegregation funding had been requested in this case . . . ." [**App. 642-643]**. The State's argument fails because "[a] request for a court order must be made by motion." Fed. R. Civ. P. 7(b)(1).

The present case cannot be distinguished from the district court's *sua sponte* decision declaring the Kansas City, Missouri School District unitary. This Court reversed that decision stating:

> The *sua sponte* ruling declaring the district unitary and releasing the admitted constitutional violator from further court supervision, without giving notice either to the constitutional violator or the victims or permitting the parties to present evidence and argue these issues, was error.

Jenkins v. Missouri, 216 F.3d 720, 727 (8th Cir. 1991). Similarly, the district court abused its discretion in *sua sponte* relieving the State of Arkansas, the "primary constitutional violator," *LRSD v. PCSSD*, 778 F.2d at 427, from its funding

obligations under the Magnet Stipulation and for violations of the 1989 Settlement Agreement.

The State has argued that NLRSD's and PCSSD's unitary status hearings included the issue of modification of the consent decree. [**App. 633].** The facts do not support this argument. First, NLRSD and PCSSD moved for unitary status based on compliance with their intradistrict desegregation plans and made no request for modification of the Magnet Stipulation, the M-to-M Stipulation or the other components of the 1989 Settlement Agreement. [**App. 294-296; 297-309; 310-312]**. Second, the district court clearly limited the issues at the unitary status hearings to the districts' compliance with their intradistrict desegregation plans[4] when it entered a detailed scheduling order outlining the order of proof. **[App. 374-375]**. Third, the district court's order begins by explaining that the "hearings" were on NLRSD and PCSSD's motions for unitary status and then sets forth the court's opinion as to each area of the districts' intradistrict desegregation plans. [**Add. 1-2]**. Finally, there is no evidence in the record which supports, or even

[4] PCSSD's Plan 2000 incorporated limited obligations from the Interdistrict Plan related to interdistrict schools (reserving seats for LRSD students at PCSSD interdistrict schools) and superseded the Interdistrict Plan. While the district court found PCSSD substantially complied with these obligations, it did not consider or decide whether PCSSD must continue to reserve seats for LRSD students at interdistrict schools or otherwise participate in the interdistrict remedy. PCSSD's motion sought a declaration of unitary status and did not request modification of the interdistrict remedy. **[App. 378-379, ¶ E]**

touches upon, modification of the consent decree. **[Transcripts]**. The district court's order does not mention the standard for modification of a consent decree and fails to make findings of fact required by that standard. [**Add. 107-109]**. Despite ending state funding for magnet schools, the district court's order does not even include the words "magnet school."

The State has cited the district court's decision denying LRSD's motion *in limine* regarding interdistrict issues as "signaling that issues including evidence pertaining to termination or modification of the 1989 Settlement Agreement were part of the unitary status hearings." [**App. 633]**. In fact, the district court simply ruled that it could not "determine whether this evidence has probative value until it is offered in the context of the hearing." **[App. 376].** During the unitary status hearings, no evidence was introduced pertaining to termination or modification of the consent decree, and thus, the district court was never asked to rule on its admissibility. **[Transcripts].**

B. Modification of a Consent Decree Requires an Evidentiary Hearing.

Even if the State had filed a motion requesting modification of the consent decree, that motion could not be decided without an evidentiary hearing to resolve disputed facts. *Heath v. DeCourcy*, 992 F.2d 630, 634 (6th Cir. 1993) ("Modification of a consent decree requires a complete hearing and findings of fact demonstrating that new and unforeseen conditions have created a hardship thereby

making impossible compliance with the decree.") (internal quotation and citations omitted)).

The Supreme Court set forth the standard for modification of a consent decree in *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992). The Supreme Court noted that while a consent judgment "embodies an agreement of the parties and thus in some respects is contractual in nature," such a judgment is still "an agreement that the parties desire and expect will be reflected in and be enforceable as a judicial decree that is subject to the rules generally applicable to other judgments and decrees." *Rufo*, 502 U.S. at 378. Thus, the Supreme Court reasoned that modification of a consent decree is governed by the same standards that govern modifications of judgments as set forth in Federal Rule of Civil Procedure 60(b). *Id.* at 379-81, 112 S.Ct. at 758.

This Court described the *Rufo* modification standard in affirming the district court's decision authorizing LRSD's closing of Ish Incentive School in 1995. *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.*, 56 F.3d 904, 914 (8th Cir. 1995). The Court stated:

> A party seeking modification of a consent decree "must establish that a significant change in facts or law warrants revision of the decree." *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 393, 112 S.Ct. 748, 764, 116 L.Ed.2d 867 (1992). If the moving party meets this burden, the District Court must then determine "whether the proposed modification is suitably tailored to the changed circumstance." *Id.* at 391, 112 S.Ct. at 763. The modification "must not create or perpetuate

> a constitutional violation," nor "strive to rewrite a consent decree so that it conforms to the constitutional floor." *Ibid.*

Id. In Appeal of LRSD, 949 F.2d 253 (8th Cir. 1991), this Court found instructive the modification standard developed by the Sixth Circuit. The Court stated:

> Finally, we think it prudent to mention the standard to be used by the District Court for reviewing proposed modifications to the plan (if any are submitted in the future) to which all the parties have not agreed. . . . We find the Sixth Circuit case of *Heath v. DeCourcy*, 888 F.2d 1105 (6th Cir.1989), instructive on this issue:
>
>> To modify [a] consent decree[ ], the court need only identify a defect or deficiency in its original decree which impedes achieving its goal, either because experience has proven it less effective [or] disadvantageous, or because circumstances and conditions have changed which warrant fine tuning the decree. A modification will be upheld if it furthers the original purpose of the decree in a more efficient way, without upsetting the basic agreement between the parties.
>
> *Id.* at 1110.

949 F.2d at 258.

The district court's order contains no discussion of the standard for modification of a consent decree, and as a result, the district court failed to make findings of fact necessary to modify the decree. [**Add. 107-109]**. In order to make the necessary findings of fact, the district court must conduct an evidentiary hearing. *Heath*, 992 F.2d at 635 ("The district court failed to conduct a 'complete hearing' by not allowing any evidence or expert testimony to be presented at the

March 6, 1992, motion hearing. Thus, the court failed to follow proper procedure in ruling on the modification motion."). This case involves constitutional rights "so the courts must be ever vigilant to preclude a termination or modification of proceedings until everyone affected has an opportunity to be heard." *Id.* Because the district court failed to conduct an evidentiary hearing before modifying the consent decree, the order of the district court should be vacated.

The district court did not question the efficacy of the magnet and M-to-M programs, only whether the State's funding of those programs creates a disincentive to unitary status in the defendant districts. Accordingly, the district court's order terminates State funding for magnet schools but says nothing about the magnet schools themselves.

Magnet schools are required by the consent decree, so it is now left to LRSD and the defendant districts to pay for them. *See LRSD v. PCSSD*, 921 F.2d 1371, 1390 (8th Cir. 1990) (The districts' desegregation obligations "remain binding" "[w]hether the State makes the payments required by the Settlement Agreement or not. . . ".) Shifting responsibility for these costs to LRSD, the plaintiff in the interdistrict case, for the defendants' failure to comply with their intradistrict desegregation plans is unprecedented, unjustified and unfair to the victims of past discrimination that this case was intended to benefit. The district court's determination to punish the defendant districts will ultimately punish the victims of

past discrimination. LRSD successfully sued the State and the defendant districts in order to remedy interdistrict constitutional violations which hurt LRSD students. It would be fundamentally wrong to require LRSD and those students, as victims of the constitutional violations, to bear the burden of remedying them.

II. THE DISTRICT COURT ERRED IN FINDING THAT STATE FUNDING OF THE INTERDISTRICT REMEDY MOTIVATED THE DISTRICTS TO AVOID UNITARY STATUS.

A. The District Court's Findings.

The district court's 110 page opinion includes just three paragraphs explaining the court's decision to relieve the State of its funding obligations under the Magnet Stipulation and for past violations of the 1989 Settlement Agreement. The district court's entire discussion of the issue is quoted below:

> After listening to weeks of testimony regarding these school districts' desegregation efforts and reading thousands of pages of court submissions and filings, it is clear that one of the problems with this case is that the State of Arkansas pays millions of dollars to these districts, along with the Little Rock School District, to aid their desegregation efforts. The districts plow these funds into programs that are supposedly used to desegregate.
>
> The problem with this process is that it results in an absurd outcome in which the districts are rewarded with extra money from the state if they fail to comply with their desegregation plans and they face having their funds cut by the state if they act in good faith and comply. Indeed, if a district fails to comply and remains under court supervision, it stands the chance that it will continue to obtain millions of dollars in additional state funds to pay for various programs. If a district actually complies with its desegregation obligations and is found unitary, it faces the likelihood that the state will ask the court to discontinue the state's obligation to pay for the various programs that are funded with desegregation funds.
>
> It seems that the State of Arkansas is using a carrot and stick approach with these districts but that the districts are wise mules that have learned how to eat the carrot and sit down on the job. The time has finally come for all carrots to be put away. These mules must now either pull their proverbial carts on their own or face a very heavy and punitive stick. For these reasons, the State of Arkansas is hereby

> released from its obligation to pay for any and all of the North Little Rock School District's, the Pulaski County Special School District's, and the Little Rock School District's desegregation efforts, except for those associated with M-to-M transfers. Further, Little Rock, North Little Rock and Pulaski County are hereby ordered to show cause why the State of Arkansas should not be ordered to stop funding for M-to-M transfers. Each district has thirty days from the entry of this order to file a ten page brief on this issue.

[Add. 107-108]. As discussed in more detail below, the district court's reasons for relieving the State of its funding obligations find no support in the facts or the law.

B. State Funds Pay for the Interdistrict Remedy.

The unitary status hearings of NLRSD and PCSSD were, by order of the district court, limited to the districts' compliance with their intradistrict desegregation plans. **[App. 374-375]**. No evidence was offered or introduced pertaining to the interdistrict remedy, and thus, no evidence was introduced pertaining to why "the State of Arkansas pays millions of dollars to these districts, along with the Little Rock School District, to aid their desegregation efforts." **[Add. 107]**. The district court stated that "the districts plow these funds into programs that are supposedly used to desegregate." **[Add. 107]**. This statement oversimplifies the situation and seems to miss the distinction between the interdistrict remedy (magnet schools and M-to-M transfers) and the districts' intradistrict desegregation plans. The district court seems to have erroneously presumed that the state funds assist the districts in implementing their intradistrict desegregation plans when, in fact, the state funds pay for implementation of the

interdistrict remedy and compensate the districts for the State's past violations of the consent decree.

LRSD receives approximately $38 million a year to implement the interdistrict remedy (magnet schools and M-to-M transfers) and for the State's past violations of the consent decree (teacher retirement and health insurance funding). As ordered by this Court and agreed in the Magnet Stipulation, the State pays LRSD[5] one-half of the cost of operating the magnet schools, $15.5 million in 2010, and reimburses LRSD for the full cost of transporting magnet students. **[App. ¶ 2]**. *LRSD v. PCSSD*, 778 F.2d at 436. As ordered by this Court and agreed in the M-to-M Stipulation, the State pays LRSD for recruiting and encouraging M-to-M transfers to PCSSD and educating M-to-M students from PCSSD, $4.5 million in 2010, and the full cost of transporting M-to-M students. **[App. 731, ¶ 2]**. *LRSD v. PCSSD*, 778 F.2d at 436. In 2010, the State reimbursed LRSD approximately $4 million for magnet and M-to-M transportation. [**App. 731, ¶ 2]**. The remaining $14 million reimburses LRSD for its teacher retirement and health insurance costs so that LRSD will not be funded to a lesser degree than other districts in Arkansas. **[App. 731, ¶ 2]**. The district court ordered the State to pay these costs because, in violation of the 1989 Settlement Agreement, the State changed it regular education funding formula so that it underfunds teacher retirement and health insurance costs

[5] LRSD receives this funding because all six magnet schools are located in and operated by LRSD, but the funds benefit students from all three districts.

of LRSD, NLRSD and PCSSD. **[App. 134-145; 146-153]**. These orders were affirmed on appeal. *LRSD v. PCSSD*, 148 F.3d at 968.

The districts no longer receive state funding to implement their intradistrict desegregation plans. The State limited its liability to pay for remedial and compensatory programs in the 1989 Settlement Agreement, and the State made its last payment for these programs in 1999. **[App. 681, ¶ N and 693, (1)]**.

C. State Funding Does Not Reward Noncompliance

The district court described the State funding received by the districts to implement the interdistrict remedy (magnet schools and M-to-M transfers) and for the State's past violations of the decree (teacher retirement and health insurance funding) as "one of the problems with this case." **[Add. 107]**. In the district court's view, "[t]he problem . . . is that it results in an absurd outcome in which the districts are rewarded with extra money from the state if they fail to comply with their desegregation plans and they face having their funds cut by the state if they act in good faith and comply." **[Add. 107]**.

The district court's description of State funding as a problem is clearly erroneous because the settlement funds support the successful interdistrict remedy but not the districts' intradistrict desegregation plans, where the district court found a number of failures, particularly with respect to PCSSD. The law makes a clear distinction between interdistrict and intradistrict remedies in school desegregation

cases. *See Milliken v. Bradley*, 418 U.S. 717, 744-45 (1974) (An interdistrict remedy requires proof that "racially discriminatory acts of the state or local school districts, or a single school district have been a substantial cause of interdistrict segregation."). Where the interdistrict remedy is based on state-imposed residential segregation, the interdistrict remedy does not end upon a school district remedying its intradistrict constitutional violations and attaining unitary status. *See United States v. Bd. of School Comm'rs of the City of Indianapolis*, 128 F.3d 507 (7th Cir. 1997). *See also Berry v. Sch. Dist. of the City of Benton Harbor*, 195 F.Supp.2d 971 (W.D. Mich. 2002). In *Bd. of School Comm'rs of the City of Indianapolis, supra,* the district court held that the school district attaining unitary status was "irrelevant" to the continued validity of the interdistrict busing remedy based on state-imposed residential segregation. *Bd. of Sch. Comm'rs of the City of Indianapolis*, 128 F.3d at 510 ("The postponed hearing on 'unitary status' is, in the district judge's view, irrelevant to the continued validity of the interdistrict busing order."). The Seventh Circuit agreed and stated that any argument to the contrary "would border on the frivolous" because of "the fundamental difference between interdistrict and intradistrict remedies in school desegregation cases." *Id.*

The interdistrict remedy in this case is based on different constitutional violations and serves a different purpose than the intradistrict remedies. *Bd. of Sch. Comm'rs of the City of Indianapolis*, 128 F.3d at 510. *See Missouri v. Jenkins*,

515 U.S. 70, 97 (1995)("A district court seeking to remedy an *intra*district violation that has not 'directly caused' significant interdistrict effects [citation omitted] exceeds its remedial authority if it orders a remedy with interdistrict purpose.")(emphasis in original). The interdistrict remedy addresses state-imposed residential segregation by allowing LRSD's African-American students to leave their one-race, neighborhood schools and to attend a truly desegregated LRSD magnet school or a majority-white PCSSD school via an M-to-M transfer. *LRSD v. PCSSD*, 778 F.2d at 428 and 436. The districts' intradistrict desegregation plans address past intentional discrimination against African-Americans by requiring the districts to implement certain policies and programs to ensure fairness and equity in the operation of the districts, including intradistrict student assignments. *Bd. of Educ. of Okla. City Public Schools v. Dowell*, 498 U.S. 237, 250 (1991)("In considering whether the vestiges of past discrimination have been eliminated as far as practicable, the District Court should look not only to student assignments, but to every facet of school operations-faculty, staff, transportation, extra-curricular activities and facilities." [internal quotes and citations omitted]). There is no legal or practical reason why the districts' unitary status should impact the need for the interdistrict remedy (magnet schools and the M-to-M transfer program) to address the lingering effects of state-imposed residential segregation. Even if all three districts were now unitary, magnet

schools and M-to-M transfers would remain necessary in order to bring about the "desegregative effect" of "reducing the number of black students in LRSD and the number of white students in PCSSD." *LRSD v. PCSSD*, 921 F.2d at 1379-80.

D. Unitary Status Does Not End the Consent Decree

The State nevertheless has argued that the parties intended the 1989 Settlement Agreement to terminate when all three districts are unitary. **[App. 634].** Nothing in the M-to-M Stipulation, the Magnet Stipulation, the 1989 Settlement Agreement, orders of this Court or the district court, or the record in this case supports this argument. *See Sutton v. Sutton*, 28 Ark. App. 165, 167, 771 S.W.2d 791, 792 (1989) ("It has long been established that the first rule of interpretation is to give to the language employed by the parties to a contract the meaning they intended."). In fact, all evidence is to the contrary. The first agreement reached by the parties, the M-to-M Stipulation, requires the State to make payments for M-to-M transfers "beginning in the 1987-88 school year *and continuing thereafter*." [**App. 71, ¶ 1** (emphasis supplied)**]**. Later agreements, the Magnet Stipulation and the 1989 Settlement Agreement, do not include a "sunset clause" or other provision for termination of the interdistrict remedy. It would have been easy for the parties to say that the State's funding obligations would end when the Districts attained the anticipated unitary status, but they did not do so.

That is not to say that the 1989 Settlement Agreement is silent on the subject. The 1989 Settlement Agreement clearly contemplated that the districts would become unitary, but it expressly provides, "The settlement of the State's liability, while contingent on the district court's approval, is not contingent upon court approval of any District's plan *or a finding of unitary status for any District*." **[App. 688-689, ¶ A** (emphasis supplied)]. Moreover, because the 1989 Settlement Agreement anticipated the districts becoming unitary, the districts' unitary status would not be a change in circumstances justifying modification of the interdistrict remedy. *See White v. National Football League*, 585 F.3d 1129, 1138 (8th Cir. 2009)("When, as here, changed conditions have been anticipated from the inception of a consent decree, they will not provide a basis for modification . . . .").

The district court appears to have adopted the unsupported allegation from the State's September 15, 2009 status report that state funding had "become a significant impediment to termination of Court oversight." [**App. 325]**. The State argued that "the districts have significant motivation to avoid unitary status in order to maintain additional funding." [**App. 326]** The State's unsupported allegation cannot be the basis for modifying a consent decree. *Heath*, 992 F.2d at 635 (reversing the district court's decision to modify a consent decree where "the district court relied on unverified statements in the record . . . unauthenticated

materials and oral argument . . . and failed to conduct a 'complete hearing' by not allowing any evidence or expert testimony . . . .").

The district court wrongly presumed that the districts are motivated by a belief that the interdistrict remedy ends when all three districts are unitary. LRSD has consistently argued that the interdistrict remedy should remain in place until the State pleads and proves that it has complied in good faith with the consent decree and that any current racial disparity "is not traceable, in a proximate way, to the prior violation." *Freeman v. Pitts*, 503 U.S. 467, 494 (1992); *Jenkins v. Missouri*, 216 F.3d 720, 725 (8th Cir. 2000)("[O]nce there has been a finding that a defendant established an unlawful dual system in the past, there is a presumption that current disparities . . . are the result of the defendant's unconstitutional conduct."). LRSD stated its position in response to the district court's request for a status report on September 11, 2009. **[App. 318]**. LRSD reiterated its position at the September 30, 2009 status conference. Counsel for LRSD gave the following response when asked by the district court whether, if NLRSD and PCSSD were found to be unitary, there would have to be another hearing to deal with "the interdistrict problem":

> That's exactly right, Your Honor, because at some point in this case, we're going to be talking about the remedy, the interdistrict remedy, and how long that should be in effect and whether it's still serving a useful purpose. And in order to address that question, I think the Court needs to take evidence about whether or not the residential segregation, for example, that exists in Pulaski County that the State

> was found to be at least partly responsible for – whether or not that still exists, or whether it's been remedied. And the presumption is, once you're found to be a constitutional violator, that the continuing existence of that condition of segregation is traceable to the constitutional violation.

[App. 336-337]. Counsel for LRSD went on to discuss the proof which would be required for the State to meet its burden concerning residential segregation:

> And the State could come in and present evidence to you that any segregation which exists today is purely the result of private choices and not traceable to the constitutional violations that Judge Woods found in 1984 that the State had engaged in. They can attempt to make that case. They'll have the burden of proof, and you can decide whether or not the remedy, the interdistrict remedy, is still serving a useful purpose.

[App. 337]. These transcript excerpts clearly show that LRSD has never accepted the State's argument that the interdistrict remedy should end when all three districts are unitary, and thus, LRSD never had a financial motive to avoid unitary status itself or to oppose unitary status by of the other districts.

Even if the law or the consent decree clearly required that the interdistrict remedy end when all three districts are unitary, there was no evidence presented that the districts sought to avoid unitary status. LRSD is unitary, **[App. 245-293]**, and the district court heard no evidence that LRSD is not complying with its interdistrict obligations. **[Transcripts; Add. 1-110]**. The district court found NLRSD unitary with regard to eight of the nine areas covered by its intradistrict desegregation plan, and it denied unitary status on the ninth area (staff recruitment)

only because NLRSD failed to adequately document its compliance. **[Add. 1; 19-20]**. NLRSD has appealed denial of complete unitary status, further demonstrating that the district is not trying to "avoid unitary status," as has been argued by the State. [**App. 326]**. While the district court found that PCSSD failed to comply with its intradistrict desegregation plan in a number of respects, the district court failed to cite any evidence that PCSSD was motivated by a desire to avoid unitary status. **[Add. 107-109]**. If PCSSD were attempting to avoid unitary status, it could have accepted the district court's decision denying complete unitary status. Instead, like NLRSD, PCSSD has appealed that decision.

The State has argued that LRSD opposed the other districts' petitions for unitary status **[App. 326]** and that LRSD's opposition is evidence that it knew that the interdistrict remedy would end when all three districts were unitary. LRSD did not oppose unitary status for NLRSD or PCSSD. LRSD filed no response to the districts' unitary status petitions. When all parties were later asked by the district court for a status report on whether NLRSD and PCSSD have achieved unitary status, LRSD responded, "LRSD has no reason to believe that NLRSD is not operating as a unitary school district. . . . PCSSD may not have achieved sufficient good faith compliance with its desegregation obligations to be declared unitary." **[App. 313]**. LRSD identified its "concerns" about PCSSD's compliance, and those concerns were echoed in the district court's order. **[App. 314; Add. 43-44]**.

This is evidence of a straight-forward assessment of NLRSD's and PCSSD's compliance with their intradistrict desegregation plans given by LRSD at the request of the district court, not a manipulative effort to prevent those districts from obtaining unitary status.[6]

E. State-Imposed Residential Segregation Required an Interdistrict Remedy.

LRSD could have obtained unitary status without filing this interdistrict desegregation case by eliminating the vestiges of its past discrimination "to the extent practicable." *Bd. of Educ. v. Dowell*, 498 U.S. 237 (1991). Although LRSD would have been unitary, it would have been a one-race, all-black school district. *See Clark v. Bd. of Educ. of Little Rock Sch. Dist.*, 705 F.2d 265, 271 (8th Cir. 1983). Instead, LRSD filed this case "to ensure a complete and constitutional remedy that will eradicate the vestiges of Arkansas' prescribed racially dual structure of public education and a century and a half of racial discrimination in Pulaski County." **[App. 69 ¶15]**.

The district court found that residential segregation was a key component of Arkansas' prescribed racially dual structure of public education. In 1984, the

[6] In its Status Report, the State asserted that both NLRSD and PCSSD "have substantially complied with the requirements of their desegregation plans and, accordingly, the districts should be declared unitary." **[App. 325]**. Given the district court's findings as to PCSSD, the State's assertion that PCSSD had substantially complied with its desegregation plan provides further evidence that the State's monitoring system is "useless." **[App. 193]**

district court (the Honorable Henry Woods presiding) found that the State participated in numerous schemes that were "major contributing factors to the residential segregation in Pulaski County which exists today." *See Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.*, 584 F.Supp. 328, 353 (E.D. Ark. 1984). Judge Woods concluded that the State's "goal of preserving residential segregation has been successful." *LRSD v. PCSSD*, 584 F. Supp. at 353. The State appealed Judge Woods' findings, and this Court affirmed stating:

> The district court made detailed and extensive findings regarding the existence of segregated housing in the Little Rock metropolitan area and regarding the causal role of the State of Arkansas and PCSSD in creating and perpetuating this condition. After reviewing these findings for clear error, we find none, and conclude that the record amply supports the district court's determination.

LRSD v. PCSSD, 778 F.2d at 423. This Court considered the issue of whether it was proper for the district court to order an interdistrict remedy based, in part, on residential segregation. After reviewing precedent from the Supreme Court and two courts of appeal, the Court affirmed "imposition of remedial liability upon the State of Arkansas." *Id.* at 426. In so doing, the Court distinguished cases relied upon by the State because they did not involve "state-imposed residential segregation." *Id.* at 428-29.

The remedy ordered by this Court included magnet schools and an M-to-M transfer program to address, at least in part, the interdistrict impact of residential segregation. The Court included "segregated housing" in its list of violations that

the Court's remedial principles were intended to address. *LRSD v. PCSSD*, 778 F.2d at 434. The Court noted that it could have ordered the State to pay for magnet schools and the M-to-M transfer program "even if there were no interdistrict violations in this case . . . ." *Id*. at 436 n.21. LRSD's magnet schools have worked and are working to provide students an opportunity to move out of their racially-identifiable neighborhood schools and to receive a quality education in a truly desegregated environment. *See Liddell v. State of Mo.*, 731 F.2d 1294, 1310 (8th Cir. 1984) ("Before reviewing the State's specific arguments, we observe that the utility and propriety of magnets as a desegregation remedy is beyond dispute."); **[Add. 75-76]**.

F. Termination of a Consent Decree

PCSSD's noncompliance with its intradistrict desegregation plan does not justify relieving the State, the "primary constitutional violator," *LRSD v. PCSSD*, 778 F.2d at 427, from funding the interdistrict remedy. The consent decree cannot be terminated unless and until the district court considers the factors outlined by this Court in *Cody v. Hillard*, 139 F.3d 1197 (8th Cir. 1998):

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

139 F.3d at 1199 (*quoting McDonald v. Carnahan*, 109 F.3d 1319, 1321 (8th Cir.

1997)). The district court heard no evidence and made no findings as to any of these factors. The State has not and cannot establish a record of good faith compliance with the consent decree. LRSD's Motion to Enforce 1989 Settlement Agreement outlines the State's past violations of the consent decree. **[App. 411-417, ¶¶ 18-25]**. It further alleges new violations of the consent decree that must be addressed by the district court before modifying or terminating the decree. Because factual disputes exist with regard to, for example, the State's good faith compliance and the continuing efficacy of a decree, the district court must conduct an evidentiary hearing before relieving the State of its funding obligations under the decree. *Id.* at 1200; *See Youngblood v. Dalzell*, 925 F.2d 954, 955 (6th Cir. 1991)(district court improperly terminated the consent decree without addressing the plaintiff's pending motion for enforcement.").

G. Conclusion.

The State's argument that funding ends when all three districts are unitary is just another in a long line of erroneous interpretations of the consent decree advanced by the State in order to minimize its financial liability under the decree. (*See* App. 81-98; Magnet Funding); [**App. 99-103]** (ODM funding); *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.*, 83 F.3d 1013 (8th Cir. 1996) (workers' compensation funding); *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.*, 83 F.3d 1013(8th Cir. 1996) (loss funding); *Little Rock Sch. Dist. v.*

Pulaski County Special Sch.Dist., 148 F.3d 956 (8th Cir. 1998) (teacher retirement and health insurance funding); *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.*, 378 F.3d 774 (8th Cir. 2004) (Jacksonville splinter district). Indeed, the State's noncompliance with the decree is the source of all the litigation about which the State has complained. **[App. 636]**. As the district court (the Honorable Susan Webber Wright presiding) told the State in 1995, "The swiftest and surest way out of the federal court is to abide by the terms and spirit of this settlement Agreement, and this includes following proper procedures for modification of the settlement." **[App. 129-130**]. *See LRSD v. PCSSD,* 83 F.3d at 1018 (affirming Docket No. 2337).

III. THE DISTRICT COURT ABUSED ITS DISCRETION IN TERMINATING THE STATE'S FUNDING OBLIGATIONS WHERE AN IMMEDIATE CESSATION OF FUNDING WILL SUBSTANTIALLY DISRUPT THE EDUCATION OF PULASKI COUNTY STUDENTS.

A. Transition Phase Required.

Assuming *arguendo* that changed circumstances justified relieving the State of its funding obligations under the consent decree, the district court abused its discretion by failing to "provide an orderly means for withdrawing from control." *Freeman,* 503 U.S. at 489-90. As the U.S. Supreme Court stated in *Freeman*:

> Just as a court has the obligation at the outset of a desegregation decree to structure a plan so that all available resources of the court are directed to comprehensive supervision of its decree, so too must a court provide an orderly means for withdrawing from control when it is shown that the school district has attained the requisite degree of compliance. A transition phase in which control is relinquished in a gradual way is an appropriate means to this end.

Id. Other courts have interpreted *Freeman* to require a phase-out of funding where an immediate cessation of funding would substantially disrupt students' educations. *See, e.g.*, *Berry*, 195 F.Supp.2d at 998 ("As with the transportation payments, termination of a desegregation remedy should not be made in a manner that penalizes the class entitled to the original remedy so as to undermine the very *status quo* upon which the finding of unitary status is made. The court has an obligation to provide, as the Supreme Court has recognized, an orderly means for

withdrawing from control. *Freeman*, 503 U.S. at 490, 112 S.Ct. 1430. The court therefore accepts the suggestion of the BHASD that a transition phase is proper for the elimination of state payments.”).

An immediate end of state funding of the consent decree would substantially disrupt the education of Pulaski County students. LRSD cannot adjust its budget to accommodate the precipitous loss of $38 million, more than 10 percent of its total budget, without a substantial negative impact on students. Given that roughly 75 percent of LRSD’s operating costs are employee salaries and benefits, LRSD would be forced to lay off a large number of teachers. This will be complicated by the fact that teachers are already under contract for the 2011-2012 school year by virtue of the automatic contract renewal provision of the Arkansas Teacher Fair Dismissal Act (“TFDA”), Ark. Code Ann. § 6-17-1506. **[App. 731-732, ¶¶ 2-3]**.

Before the Court’s May 19, 2011 order, the State was obligated to pay one-half the cost of operating the magnet schools and all of the transportation cost for magnet students. **[App. 732, ¶ 5]**. It is unlikely that LRSD can continue to operate the magnet schools as required by the consent decree absent the funding provided by the decree. Students from all three districts have already been assigned to magnet schools for the 2011-12 school year.

NLRSD and PCSSD also pay half of the costs of educating their students who attend magnet schools. These districts, which have both been identified by the

State as being in fiscal distress (*See* Ark. Code Ann. §6-20-1901-1911), will also suffer significant financial losses as a result of the district court's order, and it is unknown whether they can double their financial contributions to support the magnet schools, or accommodate their students who may be displaced from the magnet schools. **[App. 735, ¶ 6]**.

Finally, abruptly ending the magnet schools and the M-to-M program will deny students rights guaranteed by the consent decree. The M-to-M stipulation provides:

> The commitment to accept a student shall be for the duration of the student's voluntary participation. . . . It is expected that the student will follow the pattern of assigned schools for the resident students in the school in which the transfer student first enrolls.

[App. 73, ¶ 6]. Similarly, students transferring to magnet schools remain in the magnet school until they complete the final grade at the magnet school. The district court's decision will likely result in magnet and M-to-M students immediately returning to their home district and school or going to private schools, contrary to the intent of the consent decree. *See Jenkins v. State of Missouri,*103 F.3d 731, 741-42 (8th Cir. 1997) ("[The district court] rejected the State's argument that the program should be discontinued after one year, but looked to the public interest in seeing the State honor its agreements made on the public's behalf. The district court therefore ordered that the present participants in the program be allowed to remain with present state funding until they graduate eighth grade or voluntarily

leave the program."); *Liddell v. Board of Educ. of City of St. Louis*, 1999 WL 33314210, *2 (E.D. Mo. 1999)(" In the event of any phase-out of the transfer program, all city students then enrolled in county schools will have the right to complete high school in the county.").

For these reasons, the district court should be instructed on remand that, if state funding is to end, it should be phased-out over time in order to minimize the educational disruption to Pulaski County students. The district court should not end funding in a manner that creates chaos, penalizes students, and diminishes respect for the federal judiciary.

CONCLUSION

LRSD respectfully requests:

(1) That the order of the district court releasing the State of Arkansas "from its obligation to pay for any and all of the North Little Rock School District's, the Pulaski County Special School District's and the Little Rock School District's desegregation efforts, except for those associated with M-to-M transfers," and requiring the districts "to show cause why the State of Arkansas should not be ordered to stop funding for M-to-M transfers," be vacated;

(2) That the district court be instructed that the standard for modification of a consent decree must be satisfied before the State of Arkansas may be released from some or all of its funding obligations under the consent decree;

(3) That the district court be instructed that the standard for termination of a consent decree must be satisfied before the decree may be terminated;

(4) That the district court be instructed that, if funding is to be terminated, it should be phased-out as necessary to minimize the educational disruption to Pulaski County students;

(5) That the cause be remanded to the district court for further proceedings consistent with the Court's opinion;

(6) That LRSD be awarded its costs and attorneys fees expended herein; and,

(7) That LRSD be awarded all other just and proper relief to which it may be entitled.

Respectfully submitted,
LITTLE ROCK SCHOOL DISTRICT

Friday, Eldredge & Clark
Christopher Heller (#81083)
400 West Capitol, Suite 2000
Little Rock, AR 72201-3493
(501) 370-1506
heller@fridayfirm.com

/s/ Christopher Heller

Clay Fendley (#92182)
John C. Fendley, Jr., P.A.
Attorney at Law
51 Wingate Drive
Little Rock, AR 72205
(501) 907-9797
clayfendley@comcast.net

CERTIFICATE OF COMPLIANCE

The undersigned certifies (i) that the brief complies with the type-volume limitations of FRAP 32 (a)(7)(B) and contains 12,878 words from the jurisdictional statement though the conclusion, and (ii) that the electronic version of the brief and addendum have been scanned for viruses and that the brief is virus-free.

/s/ Christopher Heller
Christopher Heller

CERTIFICATE OF SERVICE

I do hereby certify that on the 22nd day of July, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which shall send notification all counsel of record.

/s/ Christopher Heller
Christopher Heller

ADDENDUM

ADDENDUM TABLE OF CONTENTS