UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

LITTLE ROCK SCHOOL DISTRICT **PLAINTIFF**

v. **No. 4:82-cv-866 BSM**

PULASKI COUNTY SPECIAL SCHOOL DISTRICT NO. 1, et al. **DEFENDANTS**

MRS. LORENE JOSHUA, et al. **INTERVENORS**

KATHERINE KNIGHT, et al. **INTERVENORS**

RESPONSE TO COURT'S ORDER REQUESTING BRIEFING ON THE M TO M PROGRAM FUNDING

The Arkansas Department of Education (ADE), by and through its attorneys, Attorney General Dustin McDaniel and Assistant Attorney General Scott P. Richardson, state for their Response to the Court's Order Requesting Briefing on the M to M Program Funding:

On May 19, 2011, Judge Brian Miller held that PCSSD was unitary as to student assignments to schools. This is the first time in many years that all school districts in Pulaski County have been unitary in how they assign students to schools. The primary constitutional violation that gave rise to liability in this case was the assignment of students to schools on a segregated basis. The claimed effect was that PCSSD and NLRSD's student assignment policy was encouraging white students to transfer to those districts and black students to transfer to LRSD. The judicial recognition that students are assigned to schools in Pulaski County on a race-neutral basis represents a significant change in circumstances that warrants modification of the remedies ordered in this case and put into operation by the 89 Settlement Agreement. Additionally, two of the three school districts in Pulaski County are completely unitary in their policies and practices that directly affect students. PCSSD is the only district that still has significant work to do to attain unitary status; even for PCSSD transferring students across

district lines will have no effect on any districts' remaining desegregation plan obligations. These facts represent a significant change in the factual and legal circumstances that underpin the remedies ordered in this case. Because of this, the Court should release the State from its obligation to fund M to M transfers because "applying [the judgment] prospectively is no longer equitable." Fed. R. Civ. Pro. 60(b)(5); *Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367, 112 S.Ct. 748 (1992); *Board of Education of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237, 248, 111 S.Ct. 630, 637 (1991).

1. The M to M Program is No Longer Necessary And the State Should Be Released from the Obligation to Fund this Program

The Supreme Court, the Eighth Circuit, and other federal courts have made clear that a court-ordered desegregation remedy, such as the State's supplemental distributions to fund M to M transfers here, cannot legally be continued longer than necessary to remedy the identified Constitutional violations. *Dowell*, 498 U.S. 237, 248, 111 S.Ct. 630, 637 (1991); *see also Milliken v. Bradley*, 433 U.S. 267, 97 S.Ct. 2749 (1977)(*Milliken II*). Desegregation decrees were never intended to continue forever. *Dowell*, 498 U.S. 237, 248, 111 S.Ct. 630, 637 (1991). They are only "a temporary measure to remedy past discrimination. . . . The legal justification for displacement of local authority by an injunctive decree in a school desegregation case is a violation of the Constitution by the local authorities." *Id*. A desegregation decree can and should continue no longer than necessary to remedy the identified Constitutional violation "to the extent practicable." *Id. see also Milliken v. Bradley*, 433 U.S. 267, 97 S.Ct. 2749 (1977) (*Milliken II*). There are two goals in a desegregation case: a) unitary status and b) "[r]eturning schools to the control of local authorities at the earliest practicable date." *Freeman v. Pitts*, 503 U.S. 467, 490, 112 S.Ct. 1430 (1992).

When the desegregation decree is against a State additional federalism considerations apply. A consent decree and its enforcement against a state may only extend to violations of federal law. *Horne v. Flores*, ___ U.S. ____, 129 S.Ct. 2579 (2009). Consent decrees do not strip states of their sovereignty and federal courts exercise caution to ensure that enforcement of a consent decree does not displace the democratic governance of a state over its institutions. *Id*.; *Frew v. Hawkins*, 540 U.S. 431, 124 S.Ct. 899 (2004). These constitutional rules recognize that "[f]ederal courts operate according to institutional rules and procedures that are poorly suited to the management of state agencies." *Angela R. v. Clinton*, 999 F.2d 320, 325 (8th Cir. 1993); s*ee also Kindred v. Duckworth*, 9 F.3d 638, 644 (7th Cir.1993) ("[D]ecrees imposing obligations upon state institutions normally should be enforceable no longer than the need for them."); *Cody v. Hillard*, 139 F.3d 1197 (8th Cir. 1998).

On November 7, 1985, the Eighth Circuit issued its opinion requiring the State to fund the majority-to-minority transfer program that is now at issue. *LRSD 1985*, 778 F.2d 404 (8th Cir. 1985). Specifically, the Court ordered as follows:

> 5. Voluntary intra- or interdistrict majority-to-minority transfers shall be encouraged, with the State of Arkansas being required to fund the cost of transporting students opting for interdistrict transfers and to pay benefits to the sending and receiving schools for the interdistrict transfers similar to those required to be paid in *Liddell*. All three defendant school districts in Pulaski County shall be included in this program. To facilitate these transfers, the proposals of the PCSSD for "effective schools model," uniform grade structures, grading, attendance and discipline policies shall be carefully considered.

Id. at 436.

The Court's opinion did not link any of the constitutional violations it discussed in the main body of the opinion with this remedy. Judge Richard Arnold's partial concurrence, partial dissent did:

> There are certain specific respects, however, in which the State of Arkansas, with a racially discriminatory motive, actually assisted in the movement of school

> children across district lines. During the school year 1958-59, the schools in LRSD were closed, and many children from Little Rock attended segregated schools in PCSSD. The State paid at least part of the cost of these transfers, and I am willing to assume that many more white students than black benefited from this action. Shameful as it was, I cannot see that this episode has any continuing, current effect on the distribution of students as between LRSD and PCSSD. The LRSD schools reopened in the fall of 1959, and there is no evidence that students who attended school elsewhere in 1958-59 did not return to LRSD when they could. I would, however, on the basis of this history, agree that the State should pay for any voluntary majority-to-minority transfers between PCSSD and LRSD. That would be a fair recompense for what it did in the late fifties.

Id. at 442. It is clear from the majority opinion as well, that the M to M program was instituted to address the movement of students across district lines. The theme running through Judge Woods' 1984 order was also the effect of perceived State support for interdistrict transfers in earlier decades. *LRSD 1984*, 584 F.Supp. 328, 351 (finding of fact # 104)(E.D. Ark. 1984). Indeed, the State's participation in the case is principally directed at assisting the movement of students from one district to another.

Since before the 1989 Settlement Agreement, the school districts in Pulaski County have participated in the interdistrict M to M program, at the State's expense. The original M to M stipulation was entered into on August 26, 1986. 89 Settlement Agreement ¶ II. O. (2), p. 11. Since that time, white students have been allowed to transfer from PCSSD to LRSD and black students have been allowed to transfer from LRSD to PCSSD. For the first few years, white students transferred from NLRSD to LRSD and black students were allowed to transfer in the opposite direction. This changed, however, when NLRSD's student enrollment became fifty percent African-American. At that point, and currently, black students from NLRSD could only transfer to PCSSD and only white students could transfer to LRSD.

As the Eighth Circuit's 1985 opinion makes clear, the M to M program was one program instituted to address the trend perceived by the Court that LRSD's percentage of African-American students had increased prior to 1982 because of white students transferring out of

LRSD and African-American students transferring into the LRSD. The M to M program provided a voluntary means to reverse that perceived trend, and it has been in operation for over two decades. The numbers indicate, however, that the M to M program has had very little effect on the enrollment ratios in LRSD and has had a small effect in the PCSSD and NLRSD. According to the latest figures from the Office of Desegregation Monitoring (ODM), the PCSSD student body is currently 43.2% African-American; NLRSD is currently 58.8% African-American; and the LRSD student body is currently 66.6% African-American.

The 2011-12 school year will be the M to M program's 25th year of operation. The ODM reports show that PCSSD's demographics have shifted from 25% black in the 1988-89 school year to 43% black in the 2010-11 school year. ODM Enrollment Report p. 17. The total population of black students in PCSSD has grown from 5,489 in 88-89 to 7,559 in the 2010-11 school year. At the same time the total number of white students has declined from 16,382 in 88-89 to 8,499 in the 2010-11 school year. The percentage of LRSD's African-American student enrollment, however, has shifted by only four percentage points over this same time period from 63% African-American in 88-89 to 67% African-American in 2010-11. ODM 3/14/11 Enrollment Report p. 36. Participation in M to M transfers rose from 1988-89, when 202 students participated in the program, to 1994-95 when 1,850 total students participated in the program. ODM Report p. 54. Since 94-95, however, participation in the program has fluctuated only by about 400 students (with the exception of three of the seventeen years in this period (03-04 to 05-06 when the participation went as high as 2,583 students.) Id. In the 2010-11 school year M to M participation constituted 1,916 students of the 52,501 students attending the public schools in the County; or 3.6% of the public school students in the County. For each school

district, students received via M to M transfers constituted the following percentages of overall enrollment: LRSD – 1.3%; NLRSD – 6.4%; PCSSD – 5.6%.

If the M to M program were to end, the effect on the enrollment figures for the districts would be small. In the 2010-11 school year, LRSD sent out 792 black students and received 340 non-black students. ODM Enrollment Report p. 55. Assuming that the students returned to their home districts, the net change for LRSD would be an additional 452 students to the LRSD's overall enrollment.[1] The LRSD's overall enrollment would change from the current 66.6% African-American to 68.5%; less than two percentage points. In the 2010-11 school year, NLRSD sent out 183 black students and received 603 white students. The net change for NLRSD would be a loss of 420 students. NLRSD's overall enrollment would change from the current 58.8% African-American to 63.5% African-American; a less than five percent change. In the 2010-11 school year, PCSSD sent out 941 white students and received 973 black students. The net change for PCSSD would be 32 students. PCSSD's overall enrollment would change from the current 43.2% African-American to 37.7% African-American; a change of 5.5%.

The impact of the M to M program on racial balance in the schools does not justify its high price. In essence, it cost the State $10,478,331 to shift the demographics of the PCSSD by

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[1] Whether this would cause an overall increase or decrease to any district's total enrollment cannot be determined from the ODM Enrollment Report. The districts typically experience an increase or decrease of students in any given year. For example, in the 08-09 school year the LRSD experienced a decline in enrollment of 816 students but in the 05-06 school year the LRSD experienced an increase in enrollment of 665 students. ODM Enrollment Report p. 36. With these fluctuations in Average Daily Membership of the districts, it is difficult to determine what effect, if any, these changes in M to M enrollment would have on a given district's finances. Also, it is unknown how many of the students would choose to remain at the school they currently attend under the program. The districts do not appear to have reached any agreements about how to handle these transfers going forward.

5.5% or nearly two million dollars for every percentage point; $5,988,915 to shift the demographics of the NLRSD by 4.5% or over $1.3 million per percentage point; and $4,905,188 to shift the demographics of LRSD by only 1.5% (this doesn't include the cost to transport these students). Considering that these students are spread out over thirty-seven schools in the PCSSD, twenty schools in the NLRSD, and forty-two schools in the LRSD (not including the stipulation magnet schools), and considering that most, if not all, of these schools each have multiple classrooms per grade, the effect on racial balance in the schools and classrooms in the County is not significant.

In addition to the above, all of the Pulaski County districts are unitary as to assignment of students to schools. NLRSD was the first to be declared unitary as to student assignments; that ruling was handed down September 18, 1995. DE# 2525, Order Declaring NLRSD unitary as to student assignments. LRSD was declared unitary in student assignments next in 2002. *LRSD 2002*, 237 F.Supp.2d 988 (E.D. Ark. 2002). Finally, in the Court's May 19, 2011, Findings of Fact and Conclusions of Law the PCSSD was declared unitary as to student assignments, except as to one race classrooms. These findings recognize that students are assigned to schools in Pulaski County on a race-neutral basis. In other words, the violation to which the M to M program was addressed has been remedied to the extent practicable. To the extent that enrollment in schools in Pulaski County remains racially identifiable, it is not as a result of the segregative practices that were found by the Court in 1984. The chain of causation has been broken by the remedial efforts of the districts as supported by the State. Accordingly, there is no need to continue the M to M program because it does not assist in any remaining desegregation obligations of the districts.

The districts make some argument about the "victims of segregation." There are, however, few students (if any) that have attended school in this County under segregative school attendance policies. The fact that the NLRSD has been unitary as to student assignments since 1995 means that no students enrolled in NLRSD schools for the upcoming 2011-12 school year were subject to any form of student assignment related to past segregative acts in this area. LRSD has been unitary as to student assignments since 2002, or for nine years now. The only students in LRSD schools who could even arguably be said to have been subject to any form of student assignments that might relate to past segregative assignment policies would be eleventh and twelfth graders.[2] While the Joshua Intervenors initially opposed LRSD's request for unitary status as to student assignments, Joshua eventually conceded the point. *LRSD 2002*, 237 F.Supp.2d 988, 1022 (E.D. Ark. 2002). Given that plan compliance must generally be shown to have occurred for a reasonable time prior to the unitary status finding, it is reasonable to conclude that LRSD had not been assigning students to schools on segregative basis for at least two years before the Court's 2002 ruling. As such, the eleventh and twelfth graders attending LRSD next year have probably never been attended school when a segregative student assignment policy was in place. PCSSD has recently been declared unitary as to student assignments, based on evidence ending with the 2009-10 school year. The Court, in its Findings of Fact and Conclusions of Law, found that the majority of the schools had complied with the plan standard for student assignments for a significant amount of time. DE# 4507 p. 44-49, 53-

[2] Considering that LRSD was actually declared fully unitary by United States District Judge William R. Overton on July 9, 1982, (including the area of student assignments) it seems that a strong argument could be made that any segregative student assignment policies that existed in the LRSD were eliminated and their effect cured before the current version of this case was filed on November 30, 1982. *See LRSD 2002*, 237 F.Supp.2d at 999.

59. Additionally, there was no finding, nor any evidence presented, that students had been assigned to schools in PCSSD on a segregative basis anytime this century. Thus, if there are students who attended school in the district when a segregative student assignment policy was in place (which is unlikely) they are probably a small number of students. Therefore, it is likely that few students, if any, have been assigned to schools in Pulaski County in the last ten years on a segregative basis; i.e. few if any students enrolled in school for the 2011-12 school year have been the "victims" of segregative student assignment practices in Pulaski County. This state of affairs, additionally renders the M to M program unnecessary.

Moreover, State law also renders the M to M program unnecessary because it provides for integrative transfers similar to those in the M to M program. If the districts choose to allow them to do so, the M to M students will likely be able to remain in the districts for the foreseeable future under State law without a mandated M to M program. Arkansas Code Annotated section 6-18-206, the "Arkansas Public School Choice Act of 1989" (or the School Choice Act) established a system that somewhat incorporates the principles of the M to M school choice program. Under the M to M program students are categorized as either black or non-black and allowed to transfer across district lines based on whether black students are in the majority or minority in the home and host district. The School Choice Act allows students to transfer across district lines unless "the percentage of enrollment for the student's race exceeds that percentage in the student's resident district." Ark. Code Ann. § 6-18-206(f)(1). The Act does not apply "[i]n any instance in which the provisions of this subsection would result in a conflict with a desegregation court order or a district's court-approved desegregation plan." Ark. Code Ann. § 6-18-206(f)(4). In that case, the terms of the plan or the court order "shall govern." Id. The receiving districts are given the responsibility to accept or deny the choice transfer

application of the students. Ark. Code Ann. § 6-18-206(b)(1). All three districts in Pulaski County currently allow transfers of students into the districts under the School Choice Act. This is the primary law that would allow integrative transfers among the three Pulaski County school districts. It would generally allow students who have transferred under the M to M program to remain, however, the decision as to whether or not to allow these transfers would rest with the school district in which the student is attending school (i.e. the non-resident district).

In addition to the School Choice Act, several other statutes are in place that allow choice transfers of students. See Ark. Code Ann. § 6-18-203, 204, 307. Most are limited in the terms on which they allow transfers, except the statute that authorizes what are known as "legal transfers." Ark. Code. Ann. § 6-18-316. These statutes allow students, on application, to transfer across district lines if the sending and receiving districts agree to the transfer. Id. One final statute should be noted as well: Arkansas Code Annotated section 6-18-317. This statute provides:

> (a) Boards of directors of local school districts are prohibited from granting legal transfers in the following situations:
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> > (1) When either the resident or the receiving district is under a desegregation-related court order or has ever been under such a court order; and
> >
> > (2) The transfer in question would negatively affect the racial balance of that district which is or has been under such a court order.
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> (b) Each form filed with the Department of Education reporting a legal student transfer must be accompanied by an affidavit signed by each member of both school boards of directors stating that the transfer does not violate the prohibition set forth in subsection (a) of this section.
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> (c) If the transfer fails to comply with subsection (b) of this section, the department shall withhold from each district state aid in an amount equal to that to be generated by the student in question in the respective districts.

Ark. Code Ann. § 6-18-317. A district no longer under a court order may apply to the State Board of Education for a waiver of this restriction. Ark. Code Ann. § 6-18-318. Thus, Arkansas

law provides avenues for students to transfer across district lines other than the M to M program. These laws provide methods that can allow student transfers to continue on terms similar to the M to M program should the Court release the parties of their obligations under the M to M program. Transportation, however, would be up to the districts and the students and their parents.

As a result of the foregoing, there is no need to continue the M to M program. It was instituted to further the racial balancing of the schools. The M to M program, however, has only a limited effect on racial balancing. Finally, the districts are all unitary as to student assignments, therefore, they are relieved of any requirement to adjust school enrollments to achieve a particular racial balance in the classrooms. *Parents Involved in Community Schools v. Seattle School District No. 1,* 551 U.S. 701, 127 S.Ct. 2738 (2007).

The districts present varying shades of the argument that this case should continue in perpetuity. That result violates not only the sovereignty of the State, embodied in the Tenth and Eleventh Amendments, but it would also upend the federal system in place in the United States. The Court should decline to entertain those arguments. There is no authority that would allow a court of the United States to maintain indefinite jurisdiction over a State. Because the purpose of the M to M program has been satisfied, the districts are all unitary as to student assignments, and any further transfers (including the existing M to M transfers) can continue under State law without federal court oversight, the State should be released from its obligation to fund M to M transfers just as the districts are released from the obligation to racially balance the schools.

2. The M to M Funding Does Not Support Desegregation Efforts in the Districts

In the May 19 Order, the Court identified the patently obvious disincentive provided by the State's ordered desegregation disbursements. The situation is actually worse than the Court

perceived, however. The Court stated in its order that "[t]he districts plow these funds into programs that are supposedly used to desegregate." DE# 4507 p. 107. This potential justification for continuing the M to M payments does not appear in any district's brief arguing for continuation of the M to M funding. This is because the districts do not use this funding for any desegregation programs or efforts. They simply use the money as ongoing, unrestricted revenue to fund normal operations of the districts. None of the districts can produce any hard evidence that they used any of the M to M funding for any desegregation programs. In fact, in the briefing before this Court and the Eighth Circuit on whether or not to issue a stay of the Court's release of State funding, none of the districts pointed to any desegregative program that was supported by the desegregation disbursements with the exception of the stipulation magnet schools. This failure of the districts to utilize the over $20 million in yearly M to M funding they receive for any sort of desegregation purpose should be the most damning fact against continuing this funding. This failure strengthens the Court's finding that the districts "have learned how to eat the carrot and sit down on the job." DE# 4507 p. 108. Because the districts do not use the M to M funding for any desegregation purposes, it should be ended immediately.

3. The Court Should Decline PCSSD's Suggestion that 6-20-416 Somehow Invites the Court to Perpetuate this Case.

PCSSD has raised a statute and suggested that by this statute the State has somehow ceded authority to this Court to grant an extended wind-down of the funding. Ark. Code Ann. § 6-20-416. First, this Court's authority proceeds from federal law. The Court's jurisdiction in this case extends only so far as necessary as to correct violations of federal law. *Dowell,* 498 U.S. 237, 111 S.Ct. 630 (1991). Consent decrees, like the 89 Settlement Agreement, are subject to constitutional limitations on the federal court's judicial powers and are interpreted according to contract principals. *Harris v. Brownlee*, 477 F.3d 1043 (8th Cir. 2007). Consent decrees do

not strip states of their sovereignty and federal courts must exercise caution so that enforcement of a consent decree does not displace the democratic governance of a state over its institutions. *Horne v. Flores*, ___ U.S. ____, 129 S.Ct. 2579 (2009); *Frew v. Hawkins*, 540 U.S. 431, 124 S.Ct. 899 (2004). This Court cannot co-opt a state law to extend this litigation beyond is constitutional viability. Moreover, doing so would violate the democratic governance established by the federal and state constitutions. *Horne*, 129 S.Ct. at 2595 ("If a federal consent decree is not limited to reasonable and necessary implementations of federal law, it may improperly deprive future officials of their designated legislative and executive powers.")

Second, PCSSD's assertions about this law are simply incorrect. Arkansas Code Annotated section 6-20-416 was passed as Act 395 of 2007. At the time of its passage the LRSD had just been released from its final desegregation obligations and the other two districts (PCSSD and NLRSD) had not requested a declaration of unitary status in over ten years. Resolution of LRSD's unitary status had taken six years and still was not final but had been appealed to the Eighth Circuit. Because the other two districts had not filed for unitary status it was unknown how long resolution of that issue would take. Neither district had expressed any interest in moving for unitary status on its own. (The "absurd outcome" identified by this Court was fully manifesting itself.) Thus, the question in 2007 was how to push the two remaining districts to move forward with unitary status while granting the executive branch authority to negotiate a resolution to the case in a narrower time-frame than what a litigated resolution might require. Act 395 of 2007 attempted to solve this riddle by offering the districts reimbursement for legal fees if the districts could obtain declarations of unitary status, and authorizing the ADE and the Attorney General to negotiate a resolution of the case for the State. The law worked on

the first point: PCSSD and NLRSD filed their petitions for unitary status just before the deadline set by Ark. Code Ann. § 6-20-416(c)(2). The second point proved fruitless, however.

Around the time that Judge Wilson notified the parties that he would not hold hearings on the unitary status petitions of PCSSD and NLRSD, the State approached the districts and Joshua and began negotiations for a resolution of the State's obligations in this case. Those negotiations continued for two years. Ultimately, the districts rejected the State's effort to resolve the case. They chose litigation instead of negotiation, presumably on a theory that they could obtain a better result from the Court; i.e. that litigation would maintain the desegregation disbursements beyond the seven years authorized for a negotiated resolution in Act 395.

This Court's authority has limits, however, especially when it comes to the displacement of the sovereignty of the State of Arkansas over its school districts and its budget. Once unitary status is achieved, the Court's authority terminates, and the local authorities are free to operate the school system without judicial oversight. *United States v. Overton*, 834 F.2d 1171 (5th Cir. 1987)(stating that "[t]he carrot of unitariness can be a meaningful incentive for school districts to desegregate only if we abide by our promise to release federal control when the job is done."). "[B]ecause retained supervision restricts state government, the principles of federalism require that federal courts draw the limits which they impose on the state no more tightly than the limits of the Constitution." *Flax v. Potts*, 915 F.2d 155, 159 (5th Cir. 1990). Maintaining judicial supervision over local authorities beyond unitary status is incompatible with the unitary status finding. *Lee v. Talladega County Bd. Of Educ.*, 963 F.2d 1426, 1429 (11th Cir. 1992). The Supreme Court has ruled that the goal of desegregation cases is to return schools to the control of local authorities "at the earliest practicable date." *Freeman*, 503 U.S. 467, ___, 112 S.Ct. 1430, 1435. Once unitary status has been achieved, judicial intervention is no longer justifiable.

Bradley v. School Bd. Of City of Richmond, 462 F.2d 1058, 1069 (4th Cir. 1972); *see also Morgan v. Nucci*, 831 F.2d 313 (1st Cir. 1987).

Unitary status as to student assignments to schools has now been achieved by all of the Pulaski County school districts. With that finding, the Court should relinquish control over the remedies put in place to achieve this goal. M to M funding is one of the principal remedies. Relinquishing control over the M to M program and funding will allow PCSSD to focus its efforts on the areas where it was not held unitary, will not have a significant effect on the racial balance of the classrooms in Pulaski County, and will send a clear message to the parties that this case will end and the economic windfall that these three districts enjoy will not last forever. It also is consistent with the principles laid down by the Supreme Court with regard to racially balancing schools:

> At some point, these school authorities and others like them should have achieved full compliance with this Court's decision in *Brown I*. The systems would then be 'unitary' in the sense required by our decisions in *Green* (*Green v. County School Board*, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716) and *Alexander* (*Alexander v. Holmes County Board of Education*, 396 U.S. 19, 90 S.Ct. 29, 24 L.Ed.2d 19).
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> It does not follow that the communities served by such systems will remain demographically stable, for in a growing, mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies (or faculties) once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system. This does not mean that federal courts are without power to deal with future problems; but in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary.'

Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 31-32, 91 S.Ct. 1267, 1283 (1971) *see also Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 96 S.Ct. 2697 (1976).

PCSSD's suggestion that this Court take up the authority granted the executive branch of this State in 6-20-416, is nothing short of a suggestion that the Court disregard the above

precedent and substitute the Court into the State's place at the bargaining table. It would completely be at odds with the purposes for which that law was enacted. The Court should flatly reject this proposal. The State requests that the M to M funding obligation be terminated immediately.

4. Terminating the M to M Funding Requirement Would Not Cause a Fiscal Crisis as Suggested by the Districts

Under the M to M stipulation, students in the program are not counted in the districts' ADM count for regular state funding. M to M Stipulation p. 6, § 15(b). If the program is released then the students will return to the regular state funding formula.

a. Declining Enrollment Funding

If the M to M funding is discontinued, then the State will provide Foundation Funding for these students beginning with the 2012-13 school year. School districts in Arkansas receive Foundation and Categorical funding based on the prior year's third quarter ADM. M to M students are not included in the prior year ADM; they are funded separately. If it happens that all of the students return to their home district, then a district that incurs a net loss of students (such as NLRSD) would benefit from the state funding system because the loss of enrollment would not be reflected in the district's Foundation Funding for the 2011-12 school year. It would have a whole school year to adjust to the change in enrollment.

Even in the following school year, however, the districts may qualify for declining enrollment funding. Ark. Code Ann. § 6-20-2305(a)(3).

> A school district that has experienced a decline in average daily membership over the two (2) immediately preceding school years shall receive . . . Declining enrollment funding equal to the difference between the average of the two (2) immediately preceding years' average daily memberships and the average daily membership for the previous school year multiplied by the amount of foundation funding set forth in subdivision (a)(2) of this section

Ark. Code Ann. § 6-20-2305(a)(3). So, for example, if a district experiences a decline in their ADM in the 2011-12 school year of 420 students, then that decline in ADM will only affect their funding for the 2012-13 school year (this is because funding for the 2011-12 school year is based on ADM from the 2010-11 school year). Assuming that a district had an ADM in 2010-11 of 8,565 students and in 2011-12 of 420 fewer students (8,145) were counted in the district's ADM, then that district would qualify for declining enrollment funding. The Foundation Funding amount for 2011-12 is set at $6,267. Act 1039 of 2011. Under the declining enrollment funding formula cited above, that district would receive approximately $1.3 million in declining enrollment funding for the 2012-13 school year.

b. Growth Funding

If a district experiences an increase in enrollment as a result of the M to M program, then it may trigger "growth funding" for the district. Growth funding is provided to districts in each quarter of the current school year. It is calculated based on the difference between the prior year third quarter ADM and the ADM of the current quarter. Foundation Funding for the 2011-12 school year is set at $6,144 per student. Act 1039 of 2011. If a district's prior year third quarter ADM was 24,380 students, and its ADM for the first quarter of the year increases by 452 students then it may receive approximately $700,000 to assist with the increase in enrollment for that first quarter. If the enrollment numbers stay the same for each quarter, the district may receive approximately $2.8 million for the year in growth funding, the same funding as if those students had been included in the district's prior year third quarter ADM.

These provisions of state law would assist these three districts in adjusting to any change in enrollment that may (or may not) occur as a result of the ending of the M to M funding system. Of course, whether the districts gain or lose M to M students will primarily be a

function of the districts' decisions about how to handle the student transfers after the M to M funding ends. It would also depend on the normal fluctuation of the district's enrollment in the past school year. It is possible that a district could have experienced enough of an increase in enrollment over the 2010-11 school year, that the M to M students would have no effect on the districts' finances, or a positive effect. Thus, it is difficult to determine what effect the elimination of the M to M funding would actually have on the districts. Certainly it would not be as severe as the districts argue. State law provides adequate funding measures to help mitigate any funding loss that may (or may not) occur in the districts if the State is released from funding the M to M program.

5. LRSD's Residential Segregation Argument Should be Rejected

As LRSD points out, the 89 Settlement Agreement is a consent decree that is contractual in nature. The State, with NLRSD and PCSSD, was found to have liability by Judge Henry Woods. *LRSD 1984*, 584 F.Supp. 328 (E.D. Ark. 1984). The Eighth Circuit ordered a remedy for the liability. *LRSD 1985*, 778 F.2d 404 (8th Cir. 1984). The purpose of the 1989 Settlement Agreement was to negotiate the implementation of the remedy ordered by the Eighth Circuit, and to limit the remedies imposed upon the State to those contained in the 89 Settlement Agreement. To the latter end, releases were signed in favor of the State, and the State was dismissed as a party to this litigation. *LRSD 1990*, 921 F.2d 1371, 1394 (8th Cir. 1990). The 89 Settlement Agreement contains only one reference to any remedy related to housing:

> ADE agrees to use its best efforts to influence appropriate state agencies to assist PCSSD in its efforts to promote and secure scattered site housing in the PCSSD by securing and providing, to the extent feasible, state owned or controlled land suitable for such use.

89 Settlement Agreement § VII.D., p. 30. The State is unaware of any party ever invoking this paragraph and requesting the State assistance offered in the paragraph at any time since 1989.

The other issue that arose in the case relative to housing was the transference of the Granite Mountain housing development from the PCSSD to the LRSD. *LRSD 1985*, 778 F.2d 404 (8th Cir. 1985). That transfer happened around 1953, fifty-eight years ago. *Id.* at 412-413, 418. The remedy was that the land in the Granite Mountain area was transferred back to PCSSD. *Id.* at 435. This transfer was accomplished and the Granite Mountain area remains in the PCSSD's territory.

Essentially, what LRSD is requesting is that the Court expand the remedies that LRSD agreed to in the 89 Settlement Agreement on a basis that has not been mentioned in the case since before the 89 Settlement Agreement. LRSD seeks to do this by morphing the case from a public school desegregation case to a housing desegregation case, something it never has been. The LRSD and NLRSD's unitary status as to (almost) all of their operations, is a judicial recognition that the segregative practices of the last century no longer affect classrooms in those districts. The finding that PCSSD is unitary as to assignment of students to schools similarly recognizes that any segregative practices that occurred in the last century as to the placement of students in schools are no longer a part of education in the district. Said another way, students are free to attend any school in Pulaski County without regard to their race (except the stipulation magnet schools). Accordingly, LRSD's request to expand the remedies in this case to encompass curing residential segregation in the County 1) violates the 89 Settlement Agreement and the releases executed in favor of the State; 2) disregards the Court's finding as to the unitary status of the districts in the area of assignments of students to schools; and 3) is simply an unabashed effort to continue receiving desegregation funding from the State for a district that is fully unitary and has been so for a long time. This argument should be dismissed summarily.

6. Alternatively, If the Court Orders Continued Funding It Should Only Be for Transportation for Students to Matriculate Out of their Current Organizational Level.

The State's position is that M to M funding should be released immediately because 1) the districts are unitary as to student assignments, 2) the M to M program is not necessary for any further desegregation obligations imposed upon PCSSD and NLRSD, 3) State law provides sufficient procedures that would allow transferred students to remain in the district they have transferred to, and 4) the financial impact to the districts will not be detrimental to the fiscal health of the school districts. The weight of federal authority commands termination of federal court oversight of the State once the districts are unitary.

That said, the State recognizes that there are a few cases where courts have required state funding to continue past a unitary status finding. In these cases, funding only extended to allow students to finish in their chosen school. *See Berry v. Sch. Dist. of the City of Benton Harbor,* 195 F.Supp.2d 971 (W.D. Mich. 2002). Schools in Pulaski County are organized according to elementary (K-5), middle (6-8), and high school (9-12). As explained above, if the M to M funding is released, State law will provide a sufficient financial cushion to mitigate any adverse financial impact the loss of M to M funding might have. The only area that will not be specifically covered is transportation. The Foundation Funding formula contains funding for transportation of students within the district, so some transportation funding will be provided. Students in the M to M program are transported across district lines. If the Court decides to order continued support for the districts for M to M transfers, it should only be to fund transportation across district lines, and then only so long as the students remain in their current organizational level. No new M to M students should be admitted to the program. Any new cross district transfers should occur under State law without federal court intervention.

WHEREFORE, the State of Arkansas requests that the Court end the M to M transfer funding requirement, or, alternatively, end the M to M funding except as to transportation and, then, only for current M to M students to graduate from their current organizational level (elementary, middle, or high school), and for all other relief to which it is entitled.

Respectfully submitted,

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ATTORNEYS FOR STATE OF ARKANSAS AND
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CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which shall send notification of such filing to the following:

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I, Scott P. Richardson, Assistant Attorney General, do hereby certify that I have served the foregoing and a copy of the Notice of Electronic Filing by depositing a copy in the United States Mail, postage prepaid, on June 27, 2011, to the following non-CM/ECF participants:

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/s/ Scott P. Richardson
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