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

ROSIE L. DAVIS, ET AL **PLAINTIFFS**

v. **CASE NO. 4:88-cv-4082**

WILLIAM DALE FRANKS, ET AL **DEFENDANTS**

BRIEF IN SUPPORT OF MOTION FOR DECLARATORY JUDGMENT

BACKGROUND

Hope School District ("Hope") is a public school district operating in Hempstead County, Arkansas. Its 2016-17 total enrollment was 2,349 students. The 2016-17 enrollment was comprised of 1,081 black students (46.0%) and 1,268 non-black students (54.0%).[1] Hope enrolls 2,349 of the 3,414 total students (68.8%) enrolled in public schools in Hempstead County. Hope enrolls 1,081 of the 1,165 total black students (92.8%) enrolled in public schools in Hempstead County. Hope is bordered by school districts with enrollments comprised of higher percentages of non-black students: Spring Hill School District ("Spring Hill"), Blevins School District ("Blevins"), and Prescott School District ("Prescott").[2] The 2016-17 total enrollment of Spring Hill was 584 students, which included 4 black students (0.7%) and 580 non-black students (99.3%). The 2016-17 total enrollment of Blevins was 481 students, which included 80 black students (16.6%) and 401 non-black students (83.4%). The 2016-17 total enrollment of

---

[1] In undersigned counsel's experience, desegregation cases typically use the terms black and non-black when discussing race because black students were subject to the state laws mandating segregation in schools. Other minorities were not expressly prohibited from attending the "white" schools. Hope believes black and non-black are the appropriate classifications for use in a desegregation case.

[2] Spring Hill and Blevins are located in Hempstead County. Prescott is located in Nevada County.

Prescott was 999 students, which included 385 black students (38.5%) and 614 non-black students (61.5%).[3]

This case originated in 1988 as an action by black plaintiffs who alleged racial discrimination against Hope regarding, among other things, staffing, board zoning, and student assignment. Until *circa* 1969, Hope – like most other districts in the state – operated a dual system; the white students attended certain schools and the black students attended other, separate schools.[4] Hope had continued operating this dual system post-*Brown v. Board of Education* by adopting a "freedom of choice" desegregation plan, which put simply, allowed black students to attend the white schools if they chose, and white students to attend the black schools if they chose. "Freedom of choice" left the black schools all black and the white schools virtually all white. In other words, "freedom of choice" achieved no desegregation. In 1968, the Supreme Court of the United States specifically declared "freedom of choice" plans such as Hope's unconstitutional. *See Raney v. Board of Ed. of Gould, Ark. School Dist.*, 391 U.S. 443, 447 (1968) (stating the "freedom of choice plans" are "inadequate to convert to a unitary, nonracial school system"). In light of *Raney*, Hope was ordered to – and did – merge its black and white student populations and eliminate its dual system.

[3] As noted above, Hope believes black and non-black are the appropriate classifications for use in a desegregation case. However, for informational purposes, Hope provides the following additional information regarding racial classification: in 2016-17 Hope enrolled 473 white students (20.1%) and 1,876 non-white students (79.9%); Spring Hill enrolled 500 white students (85.6%) and 84 non-white students (14.4%), Blevins enrolled 321 white students (66.7%) and 160 non-white students (33.3%); and Prescott enrolled 537 white students (53.8%) and 462 non-white students (46.2%).

[4] Act 52 of 1868 established "separate schools for white and colored children . . ." Act 52 of 1868, Section 107. The Arkansas Supreme Court, in *State v. School District No. 16*, 154 Ark. 176 (1922), held that, in interpreting that provision, "the word 'colored' means any person having any trace of negro blood, whether visible or not." *Id.* at 181.

This lawsuit was filed on the premise that Hope's elimination of the dual system was not enough – more needed to be done to "redress deprivation of civil rights" and eliminate the vestiges of segregation that still remained in student assignment, staffing, and other areas. (*See* Exhibit 1, Complaint, p. 3, ¶ 2). The Complaint alleged that Hope's "history of racial segregation . . . has not been remediated." (*Id*. at p. 4, ¶ 5). The Complaint further alleged that students were assigned to classes on the basis of a "'tracking' system which operates to segregate pupils in classes by both race and socio-economic status," and that such "policies, practices, customs and usages have discriminatory impact and purpose." (*Id*. at pp. 7-8, ¶ 13).

A consent decree was filed in this case on January 8, 1990. (*See* Exhibit 2, Consent Decree). The consent decree, to which Hope remains subject, specifically states: "it is the intent of this Decree to remedy any past discrimination based upon race and to prevent any like discrimination from occurring in the future." (*See* Exhibit 2, ¶ 3). The decree also provides as follows:

> The Court, by consent of the parties, therefore, enjoins, forbids and restrains [Hope] from hereinafter engaging in any policies, practices, customs or usages of racial discrimination in any of its school operations including, but not limited to, faculty assignments, student assignments, and the treatment of black and other minority pupils within the school system.

(*See* Exhibit 2, ¶ 4, emphasis added).

Following the entry of the 1990 consent decree, Hope has continued to operate under the jurisdiction of this Court and under the scrutiny of the federal agencies overseeing education (formerly the Department of Health, Education, and Welfare, now the Department of Education and its Office of Civil Rights). From *circa* 1990 to present, Hope has complied with this Court's orders by neither taking any action, nor refraining

from taking any action, the natural and probable consequence of which would be a segregative impact in Hope (i.e., the creating, maintaining, or increasing of racially identifiable schools).

ARKANSAS SCHOOL ATTENDANCE LAWS PRIOR TO 2013

The historic basis for school attendance in Arkansas was attendance in the district of residence. There was a statutory option to reside in one district and enroll in a non-resident district by obtaining a "legal transfer", which required the consent of both district's school boards. *See Edgerson ex rel. Edgerson v. Clinton*, 86 F.3d 833, 835-836 (8th Cir. 1996). After 1987 even legal transfers contained "white flight" protection. (*See*, for example, Exhibit 3, Act 762 of 1987 Regular Session (allowing legal transfers with consideration of desegregation history of district and integrative nature of transfers) and *see* Exhibit 4, Act 950 of 1989 Regular Session (amending legal transfer statute and finding that "certain Arkansas Code provisions which have their roots in the segregative practices of the 1950s, are still in effect and may be impeding the state's efforts to rid itself of all vestiges of segregation")).

In 1989, a school choice program was adopted that allowed inter-district transfers without consent of the resident district as long as the movement was integrative. (*See* Exhibit 5, Act 609 of 1989, the Public School Choice Act of 1989 (hereafter, the "1989 Act")). The 1989 Act prohibited segregative transfers of both non-black and black students. A white child could not transfer to a "whiter" district, nor a black child to a "blacker" district. The 1989 Act remained in effect until 2013.

In sum, between 1987 and 2013, Arkansas law allowed student transfers between districts, as long as the transfers were integrative in nature and did not conflict with either

district's desegregation obligations. These statutes assisted (or at least, did not hinder) Hope's ongoing efforts to remove all vestiges of previous segregation. From *circa* 1989 to 2013, state statutes allowed Hope to reject segregative transfers in and out of Hope. The state statutes governing school choice transfers – including opportunity choice transfers, discussed *infra* at pp. 9-11 – recognized the State's obligation not to approve or facilitate state policies that had the purpose or effect of maintaining or creating school districts or school attendance zones that were racially identifiable. This obligation involved intra-district assignment and movement, as well as assignment and movement between and among districts. *See, e.g. LRSD v. PCSSD*, 778 F.2d 404, 436 (8th Cir. 1985) (in light of the State's history, and its prior use of "freedom of choice" plans that did not promote integration, fashioning a remedy within which "[v]oluntary intra- or interdistrict majority-to-minority transfers shall be encouraged."). The statutes worked, accordingly, to the extent that they "prohibited transfers that would negatively affect the racial balance in the . . . districts, and those districts . . . refused to grant transfers." *Edgerson*, 86 F.3d at 837.

The previous school transfer laws also recognized and gave effect to the reality that the State may not allow private decisions to promote or achieve the same unconstitutional result. *See Norwood v. Harrison*, 413 U.S. 455, 465 (1973) ("Racial discrimination in state-operated schools is barred by the Constitution and '[i]t is also axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish.'" (quoting *Lee v. Macon County Board of Education*, 267 F. Supp. 458, 475-76 (M.D. Ala. 1967)). The fact that such private choices may reflect the best of intentions – for example, a claim that a

choice transfer is in the best interests of the child – is irrelevant. "[G]ood intentions as to one valid objective do not serve to negate the State's involvement in violation of a constitutional duty. . . . The Equal Protection Clause would be a sterile promise if state involvement in possible private activity could be shielded altogether from constitutional scrutiny simply because its ultimate end was not discrimination but some higher goal." *Id*. at 455-67.

SCHOOL CHOICE ACTS OF 2013, 2015, AND 2017

In 2013, the General Assembly passed the Arkansas Public School Choice Act of 2013. (*See* Exhibit 6, Act 1227 of 2013, hereafter the "2013 Act"). The 2013 Act expressly repealed the 1989 Act. The 2013 Act allowed transfers between districts without requiring that the movement of students facilitate integration. Said another way, the 2013 Act retained a student's ability to transfer but removed a district's ability to consider the segregative impact of the transfer. Instead, the 2013 Act contained language that allowed districts to avoid participating in school choice if such participation "conflicted" with their desegregation order or if the district declared itself "exempt" because it was "subject to the desegregation order or mandate of a federal court or agency remedying the effects of past racial segregation." (*See* Exhibit 6, 2013 Act, codified at 6-18-1906(a)-(b)).

In 2015, the General Assembly passed the Arkansas Public School Choice Act of 2015, which amended the 2013 Act. (*See* Exhibit 7, Act 560 of 2015, hereafter the "2015 Act"). The 2015 Act eliminated the pure "opt out" exemption language but retained the "Supremacy Clause" exemption for districts whose desegregation obligation would be violated by participation in school choice. (*See* Exhibit 7, p. 5). The only recourse for

districts with a history of segregation was the 2015 Act's recognition of the right of a school district subject to a valid federal court order to declare a conflict with participating in school choice. (*See* Exhibit 7, 2015 Act, p. 5, codified at Ark. Code Ann. 6-18-1906). The 2015 Act also added the requirement that any district claiming a conflict with participating in school choice must

> immediately submit proof from a federal court to the Department of Education that the school district has a genuine conflict under an active desegregation order or active court-approved desegregation plan with the interdistrict school choice provisions of this subchapter.

(*See* Exhibit 7, 2015 Act, codified at 6-18-1906(a)(1)-(2)).

In 2017, the General Assembly again amended the language allowing districts to declare a conflict with participating in school choice. (*See* Exhibit 8, Act 1066 of 2017, hereafter the "2017 Act"). There are three notable changes regarding desegregation conflicts:

1. The 2017 Act requires that the district's desegregation order "explicitly limits the transfer of students between school districts" in order for the district to claim a conflict with participating in choice.
2. The 2017 Act also requires that the "proof" submitted by a district contain documentation that the desegregation order is "still active and enforceable" and documentation showing the specific language the district believes limits its participation in school choice.

3. The 2017 Act gives the Arkansas Department of Education ("ADE") the power to determine whether a district's proof is sufficient and whether or not the district must participate in school choice.[5]

Hope notified the ADE that it would claim the exemption from participating in school choice under the 2013 Act in 2013 and 2014. (*See* Exhibit 9, 2013 and 2014 Hope Board Resolutions). In 2015, Hope also declared its conflict with participation in school choice, based on the 1990 Order's prohibition on Hope "engaging in any policies, practices, customs or usages of racial discrimination in any of its school operations including, but not limited to, faculty assignments, student assignments, and the treatment of black and other minority pupils within the school system." (*See* Exhibit 2, Consent Decree, p. 2; *see also*, Exhibit 10, April 20, 2015 Letter to ADE). Hope believes that participation in school choice conflicts with this Court's 1990 Order, not only based on the text of the Order, but also because participating in school choice would destroy or impede its ability to attain unitary status consistent with its obligations to do so under the longstanding, clear, and consistent commands of the operative decisions of this Court, the United States Court of Appeals for the Eighth Circuit, and the Supreme Court of the United States. *See generally Brown v. Board of Education*, 347 U.S. 483 (1954) (*Brown I*); *Brown v. Board of Education*, 349 U.S. 294 (1955) (*Brown II*); *Cooper v. Aaron*, 358 U.S. 1 (1958); *Raney v. Board of Ed. of Gould, Ark. School Dist.,* 391 U.S. 443 (1968); *Milliken v. Bradley*, 418 U.S. 717 (1974).

---

[5] Hope has not overlooked the possibility that the 2017 Act, in this context, runs afoul of Judge Marshall's admonition that the issuing court is the proper entity to interpret its orders (see *infra*, p. 14), as well as the argument that this provision is unconstitutional because it violates the Supremacy Clause. However, undersigned counsel believes consideration of such questions is premature at this time because Hope has not yet suffered an adverse impact under the 2017 Act.

The 2015 Act eliminated the annual notice requirement. (*See* Ex. 6, 2015 Act). The ADE included Hope on its website's list of districts declaring an exemption from (in 2013 and 2014) or a conflict with (in 2015, 2016, and 2017) participating in school choice. (*See* Exhibit 11, ADE website documentation).

Under both the 2013 Act and the 2015 Act, the process for school choice applications from residents of a district that has declared a conflict, such as Hope, is for the resident district to notify surrounding districts of its conflict and non-participation, and the non-resident district to reject the application based on the conflict declaration. (*See* Exhibit 12, ADE Rules on School Choice). The school districts confronted with requests for school choice transfers from Hope under the 2013 Act and the 2015 Act have acknowledged that students residing in Hope are not eligible for choice transfers under the Acts, likely in reliance upon the ADE's inclusion of Hope on the list of non-participating districts. (*See*, for example, Exhibit 13, 2016 Spring Hill applications, rejected applications at pp. 12, 14, 38, 42).

Hope has not participated in school choice under the 2013 Act or the 2015 Act. The 2017 Act will go into effect next year, and submission of "proof" of a district's conflict is due by January 1, 2018.

THE OPPORTUNITY PUBLIC SCHOOL CHOICE ACT

In 2004, the General Assembly enacted the Opportunity Public School Choice Act of 2004 (the "Act"). (*See* Exhibit 14, Act 35 of the Second Extraordinary Session of 2003). Its stated purpose was to "give students attending underperforming schools certain choices." (*See* Exhibit 14, p. 1, emphasis added). The Act stated as follows:

> The General Assembly further finds that a student should not be compelled, against the wishes of the parent, guardian, or the student, if the

> student is over eighteen years of age, to remain in a school designated as a Level 1 school under § 6-15-1903 for two or more consecutive years. The General Assembly shall make available a public school choice option in order to give a child the opportunity to attend a public school that is performing satisfactorily.
>
> . . .
>
> A public school choice program is hereby established to enable any student to transfer from a failing school to another public school in the state, subject to the restrictions contained in this section.

(*See* Exhibit 14, Section 7, Ark. Code Ann. § 6-18-227(a)(2)-(4), pp. 23-24, emphasis added).

At the time the Opportunity Choice Act was passed, there was no provision that the student desiring a transfer provide proof that he or she was "underperforming" or otherwise not receiving an adequate education. There was no prohibition on transfers of students who were achieving. The sole prohibition on transfers was a reference to the racial restriction of the 1989 Act: "[t]he provisions of this section and all student choice options created in this section are subject to the limitations of § 6-18-206(d) through (f)." (*See* Exhibit 14, Section 7, Ark. Code Ann. § 6-18-227(e), p. 26). The version of the 1989 Act in effect at the time of the Opportunity Choice Act's passage, provided as follows, in pertinent part:

> (f) The provisions of this section and all student choice options created in this section are subject to the following limitations:
> (1) No student may transfer to a nonresident district where the percentage of enrollment for the student's race exceeds that percentage in the student's resident district except in the circumstances set forth in subdivisions (2) and (4) of this subsection;
> . . .
> (5) In any instance where the foregoing provisions would result in a conflict with a desegregation court order or a district's court-approved desegregation plan, the terms of the order or plan shall govern . . . .

(*See* Exhibit 15, Ark. Code Ann. § 6-18-206 (Lexis 2003) (Repl. 2013)). Put simply, the 2003 General Assembly did not intend for the Opportunity Choice Act to give cover to white flight. Opportunity choice transfers were only allowed if the transfer facilitated integrative movement, *e.g.* a white student leaving a school with a higher percentage of white students for a school with a lower percentage of white students.

In 2011, the Arkansas Legislature deleted the Opportunity Choice Act's reference to the 1989 Act. In its place, the legislature added the following language: "If any part of this section conflicts with the provisions of a federal desegregation court order applicable to a school district, the provisions of the federal desegregation court order shall govern." (*See* Exhibit 16, Act 1124 of 2011, codified at Ark. Code Ann. § 6-18-227(e)(2)). Section (e)(2) has not been revised since 2011.

In 2016, Hope High School ("HHS") was classified as academically distressed. An academic distress classification is based on a school or district's test scores for the previous three years; an average of less than 49.5% proficient will result in an academic distress classification. Until 2016, all academic distress classifications were made based on three year's worth of scores from the same test. HHS's classification is suspect because the State changed assessments in 2015; schools designated in academic distress in 2016 received that classification based on an average of the 2013 and 2014 Benchmark exams and the 2015 PARCC exam. HHS appealed the academic distress classification on this basis to the State Board of Education (the "SBE"), to no avail.

HHS is the only high school operated by Hope, serving grades 9 through 12. Its 2016-17 total enrollment was 660 students. The 2016-17 enrollment was comprised of 307 black students (46.5%) and 353 non-black students (53.5%). In 2016-17, HHS

enrolled 307 of the 343 black high school students (89.5%) residing in Hempstead County.

Hope allowed Opportunity Choice Act transfers in 2016. At the time, the school board and administrators believed they had no alternative but to allow the transfers. (*See*, for example, Exhibit 17, Angie Raney's May 15, 2017 correspondence with Bobby Hart noting her conversation with an ADE staff member, Oliver Dillingham, who stated "academic distress 'trumps' the desegregation order"). Hope administrators assumed participation would confirm their belief that the natural and probable consequence of a choice program would, in fact, be white flight. Spring Hill accepted 16 opportunity choice applicants, of which 14 were non-black and two were black.

HHS remains in academic distress for the 2017-2018 school year based on the average of three different tests – the 2014 Benchmark exams, the 2015 PARCC test, and the 2016 ACT Aspire assessment. For the 2017-18 school year, Hope notified its neighboring districts, including Spring Hill and Prescott, that it would not be participating in opportunity choice due to the segregative impact that resulted from its 2016-17 participation. (*See* Exhibit 18, Hope Letter to Spring Hill). Pursuant to that notice, both Spring Hill and Prescott rejected opportunity choice transfer applications from HHS. (*See*, for example, Exhibit 19, Spring Hill's Letter rejecting Foster application).

<u>THE SBE GRANTED AN OPPORTUNITY CHOICE TRANSFER OVER HOPE'S DESEGREGATION-BASED OBJECTION</u>

At the July 13, 2017 meeting of the SBE, Cindy Foster, a woman residing in Hope, appealed the decision of Spring Hill to reject the opportunity choice application she submitted for P. Lee, her nephew who resides in China, based on Hope's declaration

of a conflict with participating in opportunity choice. Ms. Foster's nephew has never attended HHS.

Hope appeared at the SBE meeting and made the following arguments for denial of the appeal: (1) Hope has a conflict with participating in opportunity choice due to its desegregation order, (2) the SBE does not have authority to interpret court orders and therefore must respect Hope's conflict, (3) HHS's 2016 participation in opportunity choice had a segregative impact, and (4) Hope's exemption from participating under the 2013 Act and declaration of a conflict with participating under the 2015 Act extend to opportunity choice transfers. (*See* Exhibit 20, Hope's letter to Davis (duplicate exhibits omitted)).

Hope relied heavily on orders entered last year in federal court desegregation cases involving El Dorado School District ("EDSD") and Jacksonville-North Pulaski School District ("JNPSD"). The hearings followed the SBE's decision to allow two school choice transfers over the objections of EDSD and JNPSD, the two resident districts that had declared desegregation-based conflicts with participating in school choice, in accordance with the 2015 Act. The non-resident districts to which the students had applied for transfer – Parkers Chapel and Cabot – had denied the applications based on the 2015 Act and EDSD's and JNPSD's declarations of a conflict. Nevertheless, on July 14, 2016, the SBE considered, and allowed, the transfer from JNPSD to Cabot over JNPSD's declared exemption from and conflict with participation in choice. The SBE then voted 5-3 to deny the transfer from EDSD to Parkers Chapel in light of EDSD's desegregation conflict, resulting in two different outcomes on the same issue. After multiple votes to reconsider both transfers, talk amongst board members and

Commissioner Key during a break, and no further discussion of the EDSD transfer, the SBE then reversed course and allowed both transfers over the desegregation-based objections of JNPSD and EDSD.

JNPSD filed a motion asserting that the SBE decision was in direct conflict with an order filed in the Pulaski County desegregation case, *LRSD, et al. v. PCSSD, et al,*, No. 4:82-cv-866, U.S. Dist. Ct., E.D. Ark., Western Division. The Honorable D. Price Marshall considered JNPSD's argument that it was entitled to declare itself exempt from participation in school choice based on a settlement agreement and consent decree and in that case. Ruling from the bench, Judge Marshall voided the transfer, confirmed JNPSD's right to declare an exemption from participating in school choice, and noted that federal courts are the proper entities to construe federal court orders – not a state court or state agency such as the SBE. (*See* Exhibit 21, JNPSD Hearing Transcript and *see* Exhibit 22, JNPSD Order).

The JNPSD Order expressly directed the SBE (and by extension, the ADE) to honor school choice exemptions claimed by PCSSD and JNPSD. (*See* Exhibit 22, p. 1). From the bench, Judge Marshall described as "unworkable" a situation where one of three decision-makers (the federal court, a state court, and the SBE) "could be charged with construing [a federal court] consent decree . . . depending upon what the disagreement was about." (*See* Exhibit 21, p. 88). Instead, he noted it was "an all-or-nothing thing, and it's all in this situation," concluding that the federal court has the obligation to construe a federal court settlement and decree. (*Id.*).

EDSD then filed a motion for declaratory judgment in its desegregation case, *Kemp v. Beasley*, No. 1:89-cv-1111, U.S. Dist. Ct., W.D. Ark., El Dorado Division,

requesting an order from the Court that its desegregation obligations conflicted with participation in school choice. The Honorable Susan O. Hickey conducted a hearing; counsel for the plaintiffs and EDSD were present, and a letter to the Court from an attorney for the parents who applied for the transfer was also admitted. The State was not a party to the EDSD case and did not seek intervention. Judge Hickey concluded that "EDSD has a continuing constitutional obligation to avoid taking any action the natural and probable consequence of which would be a segregative impact in EDSD" and that participation in school choice, since it would allow inter-district movement, "would have a segregative impact in EDSD." (*See* Exhibit 23, EDSD's August 31, 2016 Order, ¶¶ 8-9, hereafter "EDSD Order"). The EDSD Order advances the proposition that high probability of white flight also violates a desegregation order initially imposing an intra-district remedy for racial segregation. Hope believes – and argued before the SBE – that this proposition extends to it as well.

Following Hope's argument in the Foster appeal, Spring Hill suggested to the SBE that Hope "met their obligation under their desegregation order by resisting this transfer." (*See* Exhibit 24, Transcript of SBE's July 13, 2017 meeting, p. 28). Spring Hill representatives also stated that the student "is not going to affect the desegregation status of Hope because he has never attended Hope to start with." (*See* Exhibit 24, p. 30).

During discussion, SBE member Diane Zook stated "I guess also I agree that this is similar to what Judge Hickey decided. . . . Now, Hickey I totally completely agree. But based on the other and the – it seems like there – if you're under Judge Hickey, with El Dorado, that was a decision based purely on El Dorado and the court case and deseg and all of that." (*See* Exhibit 24, pp. 37-38). Johnny Key, the Commissioner of

Education, asked what the State's argument was in the EDSD case. Jennifer Davis, an ADE staff attorney, responded that the State didn't have a part in the EDSD case. Commissioner Key responds that EDSD "was a unilateral . . . presentation to the Judge, and the Judge agreed" and then asks "can we make an assumption, a blanket assumption on all cases based on that type of situation?" Ms. Davis answers "[n]o. In fact . . . the El Dorado, and even the Eighth Circuit, you know, those were all individual districts, their own consent decrees, their own agreements. And I don't think that you can make any assumptions, anything, because all of those are unique, much like [Hope]'s order is unique to their situation." (*See* Exhibit 24, p. 39).

SBE member Mireya Reith noted her concern "with us taking some authority in this matter and playing the role of the courts." SBE member Jay Barth agreed, noting "we did have two court rulings, and I understand every case is different. But those two judges were quite clear in terms of the limitations of our interpretive responsibility and power, no matter, you know, what the appeal process is." (*See* Exhibit 24, p. 40).

By a vote of 5 to 2, the SBE allowed the transfer over Hope's objection. (*See* Exhibit 24, p. 43; *see also*, Exhibit 25, SBE Order, July 14, 2017). SBE members Reith and Susan Chambers were the only votes to deny the transfer. SBE member Barth, as chairman, did not participate in the vote.

At the SBE's meeting on August 10, 2017, Jackie Harris, a woman residing in Hope, appealed the decision of Spring Hill to reject the opportunity choice application she submitted for her daughter, J. Harris, based on Hope's declaration of a conflict with participating in opportunity choice. The appeal was not timely filed. The SBE unanimously denied the transfer because it was untimely. (*See* Exhibit 26, Transcript of

SBE's August 10, 2017 meeting, pp. 29-32). There was no discussion amongst SBE members regarding Hope's desegregation-related objections, although SBE member Brett Williamson did note that he is "against all this deseg stuff." (*See* Exhibit 26, p. 29).

ARGUMENT

The aforementioned changes in Arkansas law regarding students who desire to transfer to a school district outside their resident district, and more recent changes in how the SBE applies certain laws to Hope and districts like it, lead Hope to the conclusion that declaratory relief from this Court is necessary.

The demographics of Hope are similar to those of EDSD, specifically that both districts have a black student population near 50%. As mentioned above, in 2016-17, Hope's black student population was 46.0%; EDSD's was 48.9%. Hope, also like EDSD, has a substantially higher black student population than its neighboring districts. In 2016-17, Hope's neighbors had black student percentages of 0.7% (Spring Hill), 16.6% (Blevins), and 38.5% (Prescott); EDSD's neighbors had black student percentages of 9.4% (Parkers Chapel) and 18.3% (Smackover-Norphlet). The fact that Hope (and EDSD and other similarly situated districts) has a black student population that far exceeds the black enrollment of neighboring districts illustrates that "all vestiges" of segregation formerly required by law have not been eliminated. The "existing conditions" within Hope that are traceable to state-mandated segregation of students go back to the years in which the state did not require that black children attend a school located in their communities. Because the smaller, rural schools had either inadequate schools for black students or no black schools at all, it most often fell to the county seat school district to educate the county's black children. Schools like Spring Hill likely do

not have a substantial black student population today because they were either never required to educate black students or black students left those areas because the black schools were inadequate. (*See*, for example, *LRSD v. PCSSD*, 778 F.2d 404, 412 and fn 6 (8th Cir. 1985), noting black students' migration out of Pulaski County and into Little Rock School District "to attend senior high in Little Rock from the 1920s to the 1960s. They probably became numerous in the early 1930s when Paul Laurance Dunbar High School acted as a magnet for county students who had little opportunity to attend senior high in their own district."). As in Little Rock, black students residing in south and central Arkansas historically migrated to schools such as those now known as Hope, EDSD, Camden Fairview School District ("CFSD"), Hot Springs School District ("Hot Springs"), and other "county seat" school districts, either because their area didn't have a black school or the one they had was inadequate. State decisions approving the construction of public housing in some of these districts, *e.g.* CFSD (and the absence of public housing in the smaller, more rural districts) also contributes to the county seat districts being racially identifiably "blacker" than the racially identifiably "whiter" districts they border.

Like EDSD, Hope's desegregation case is "intra-district" in nature, in that the case was filed by black plaintiffs against a single school district; no other school district is a party to the case. The argument was made on behalf of the parent in the EDSD case that because EDSD's desegregation order restricted intra-district movement of students, not inter-district school choice movements, the desegregation order did not conflict with school choice and those transfers should be allowed. This Court rejected that argument. The Court held that inter-district transfers also violated the intra-district order when the

natural and probable consequence of those transfers would be to create racially identifiable schools within EDSD, as would be the case, the Court found, with transfers from EDSD to PCSD.

That's exactly the situation that exists in Hope. Hope has an old, but still active, desegregation order that bars creating racially identifiable schools within the district. Here a natural and probable consequence of permitting inter-district transfers to Spring Hill would be to create racially identifiable schools within Hope. Applying the rationale of the EDSD case to Hope, the SBE's action granting an inter-district opportunity choice transfer to Spring Hill is in violation of Hope's desegregation order.

Likewise, the Little Rock School District ("LRSD") was directed "in furtherance of its affirmative duty to eliminate all vestiges of segregation root and branch, and in compliance with prior orders of [the] Court to provide a desegregated education for its students." *LRSD, et al., v. PCSSD*, et al., 584 F. Supp. 328, 352 (E.D. Ark. 1984). This case is authority for the proposition that an intra-district desegregation order can be violated by segregative inter-district movement of students. In other words, a non-unitary school district has an affirmative duty to refrain from taking action the natural and probable consequence of which would be resegregation, *i.e.*, the creation of racially identifiable schools. Participation in school choice, for example, violates that affirmative duty. Therefore, participation in choice conflicts with Hope's desegregation order.

In support of its belief that school choice and opportunity choice transfers have a segregative impact in Hope, Hope submits the following data:

- In 2015-16, although Hope had declared a conflict and had never participated in school choice transfers under the 2013 Act or the 2015 Act, Spring Hill

received four school choice applications from Hope. All four applicants were non-black and specifically identified as white. Spring Hill rejected all four. (*See* Exhibit 27, 2015 Spring Hill applications).

- In 2016-17, following HHS's academic distress classification, Spring Hill accepted 16 HHS students pursuant to opportunity choice. Two of those applicants were black, and 14 were non-black. Of those 14, ten identified as white, one identified as both white and Pacific islander, one identified as both white and Hispanic, one identified as Asian, and one was a Spanish exchange student. In addition to the 16 accepted applications, Spring Hill rejected seven school choice applications (four applications for students in grades K-8 on the basis of Hope's conflict and three applications due to lack of capacity). (*See* Exhibit 13, 2016 Spring Hill applications).
- In 2017-18, 22 students applied for an opportunity choice transfer[6] from HHS to SHHS. Only one of those students was black. Of the remaining 21 applicants, 11 identified as white, four identified as Hispanic, one identified as Asian, and two identified as two or more races. Additionally, three white students applied to transfer to Prescott. Spring Hill and Prescott rejected all 25 applications based on Hope's declaration of a conflict. Two of these applicants appealed Spring Hill's rejection of their applications to the SBE. (See Exhibit 28, 2017 Spring Hill and Prescott applications).

[6] All but one of the 22 applications was submitted on the form for a 2015 Act school choice transfer, but Spring Hill and the SBE treated the applications for students in grades 9-12 as opportunity choice applications.

Hope believes that school choice transfers – such as those allowed to Spring Hill under the Opportunity Choice Act (of 16 students in 2016 and one student in 2017) and those contemplated by the 2017 Act – would create a system nearly identical to the alleged "tracking" system referenced in the complaint: a system that segregates pupils by race and socio-economic status. The only difference being that in 1988 that system was administered by a single district, Hope, and in 2017 the segregation of these students is between Hope, with substantial populations of both minority and impoverished students, and Spring Hill, which is lily-white and has significantly fewer students receiving free or reduced lunch assistance, a common indicator of poverty. Hope is already the racially identifiable "black" district in Hempstead County, while Spring Hill is unquestionably the most racially identifiably "white" district in Hempstead County. The fact that these two school districts coexist approximately 10 miles apart is further testament that the vestiges of the dual system remain in place today.

Hope has already experienced the segregative effects of choice transfers, due to the 2016 opportunity choice transfers to Spring Hill. Given the SBE's willingness to approve opportunity choice transfers despite Hope's assertion of a desegregation conflict, Hope assumes that segregative transfers will continue as long as HHS remains in academic distress. Hope believes it is impossible for HHS to exit academic distress as long as the single year of PARCC testing (2015) is included in its three-year average, unless of course the SBE stops classifying districts in academic distress based on averages of different tests.

CONCLUSION AND RELIEF REQUESTED

In Hempstead County, Hope is already the racially identifiable "black" district, even though its black student population is a plurality rather than a majority, while Spring Hill and Blevins are racially identifiable "white" districts. Therefore, the effect of participation in school choice – whether under the 2015 Act, the 2017 Act, or the Opportunity Choice Act – would be resegregation. To enable Hope to continue to comply with its desegregation obligations, Hope respectfully requests that this Court issue a declaratory judgment confirming the following.

a. First, that Hope has a conflict with participating in school choice – under the 2015 Act, the 2017 Act, and/or the Opportunity Choice Act – based on the "intent of [the 1990 consent decree] to remedy any past discrimination based upon race and to prevent any like discrimination from occurring in the future," (*see* Exhibit 2, ¶ 3), as well as the Decree's prohibition on Hope "hereinafter engaging in any policies, practices, customs or usages of racial discrimination in any of its school operations including, but not limited to . . . student assignments. (*See* Exhibit 2, ¶ 4);

b. Second, that Hope has a continuing constitutional obligation to avoid taking any action the natural and probable consequence of which would be a segregative impact in Hope;

c. Third, that participation in the 2015 Act, the 2017 Act, and/or the Opportunity Choice Act would allow inter-district movement of students between Hope and its surrounding districts, and if allowed, based on the demographics of

Hope and the surrounding districts, said movement would have a segregative impact in Hope;

d. Fourth, that under the rationale of the EDSD order, inter-district school choice transfers between Hope and other school districts violate Hope's desegregation orders and obligations;

e. Fifth, that Hope's desegregation case is an enforceable desegregation court order regarding the effects of past racial segregation in student assignment and that the orders filed herein are "still active and enforceable" for purposes of the school choice acts, including but not limited to the 2015 Act, the 2017 Act, and the Opportunity Choice Act;

f. Sixth, that Hope has a conflict with participating in school choice under the school choice acts, and that conflict means that Hope is not a participant in or subject to the school choice transfers contemplated by the school choice acts, including but not limited to the 2015 Act, the 2017 Act, and the Opportunity Choice Act;

g. Seventh, that Hope's conflict with participating in school choice and opportunity school choice will continue until further order of this Court finding that (1) participation in school choice would not cause Hope to create, maintain, or increase racially identifiable schools in Hope and (2) school choice would not impair Hope's ability to attain unitary status;

h. Eighth, that this Court continue to maintain jurisdiction over this matter until it finds that Hope should be released from Court supervision.

Respectfully submitted,

Allen P. Roberts (64036)
Allen P. Roberts, P.A.
325 Jefferson St., S.W. P.O. Box 280
Camden, Arkansas 71711-0280
Phone: (870) 836-5310
Facsimile: (870) 836-9662
Email: allen@aprobertslaw.com

and
Whitney F. Moore (2009193)
Allen P. Roberts, P.A. – Little Rock Office
1818 N. Taylor, St., Suite B
PMB 356
Little Rock, AR 72207
Telephone: (870) 818-5490
Fax: (870) 836-9662
Email: whitney@aprobertslaw.com

By: **/s/ Whitney F. Moore**
Whitney F. Moore

Attorneys for Hope School District

CERTIFICATE OF SERVICE

I, Whitney F. Moore, do hereby certify that on September 7, 2017, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which shall send notification of such filing to:

All counsel of record

/s/ Whitney F. Moore
Whitney F. Moore