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Mr. Johnny Key
Secretary of Education
Division of Elementary and Secondary Education
4 State Capitol Mall
Little Rock, Arkansas 72201-1019

Re: Proposed Annexation of the Dollarway School District to the Pine Bluff School District

Dear Secretary Key:

My office is in receipt of your request for an advisory opinion, pursuant to Arkansas Code Annotated §§ 6-13-1408(b) and 6-13-1403(a)(1), concerning the impact of the proposed annexation of the Dollarway School District into the Pine Bluff School District on the State's effort to assist a school district or districts in the desegregation of the public schools of this state.

Section 6-13-1408(a) provides that the State Board of Education must not order any annexation that "hampers, delays, or in any manner negatively affects the desegregation efforts of a school district or districts in this state." Further, subsection 1408(b) provides that, prior to the entry of any order, annexing or consolidating school districts, "the state board shall seek an advisory opinion from the Attorney General concerning the impact of the proposed annexation or consolidation on the effort of the state to assist a school district or districts in desegregation of the public schools of this state." Lastly, Arkansas Code Annotated § 6-13-1603(c) provides that "[a]ll administrative consolidations or annexations

under this section shall be accomplished so as not to create a school district that hampers, delays, or in any manner negatively affects the desegregation of another school district in this state."

Under United States Supreme Court precedent, the term "desegregation" is a legal term of art that describes the process by which a school district eliminates, to the extent practicable, the lingering effects or "vestiges" of prior *de jure* racial discrimination. Thus, in the absence of a finding that a school district has engaged in the past in activities prohibited by the Fourteenth Amendment to the United States Constitution, and that there are presently lingering effects or vestiges of that discrimination that remain unaddressed, a school district is not "desegregating" as that term is used in case law.

In your letter you indicate that the State Board is considering the involuntary annexation of the Dollarway School District into the Pine Bluff School District. The annexation will result in the elimination of the Dollarway School District and the expansion of the Pine Bluff School District. The geographically contiguous school districts are: DeWitt, England, Pulaski County Special, Sheridan, Star City, Watson Chapel, White Hall, and Woodlawn. The Department of Education has indicated that it is unaware of any desegregation order that applies to the Dollarway or Pine Bluff school districts. Additionally, it does not appear that the Dollarway, Pine Bluff, or any of the geographically contiguous school districts have sought and been provided an exemption from participating in transfers under the School Choice Act for the 2019-2020 school year due to an active desegregation order or active court-approved desegregation plan from a federal court, expressly limiting transfers of students between school districts.

However, of the geographically contiguous school districts, the Pulaski County Special School District is subject to a federal desegregation order. *See Little Rock School District, et al. v. Pulaski County Special School District, et al,* Case No. 4:82 cv 866 (Eastern District of Arkansas). The *Pulaski County* case is the product of many years of desegregation litigation, tracing as far back as events that took place in 1957. Throughout the course of litigation, several school districts, including PCSSD have sought release from federal court supervision in various areas, including transportation, facilities, equal employment, student assignment, etc., asserting that the districts have implemented measures to desegregate its schools and are now unitary. The most recent desegregation plan—Plan 2000—was

approved on March 20, 2000. This plan did not involve the Pine Bluff or Dollarway School Districts.

In a 2011 order, Judge Brian Miller opined that, in order for PCSSD to demonstrate that it is unitary, it must demonstrate: (1) a good faith implementation of the terms of the desegregation plan; and (2) substantial compliance with the terms of the desegregation plan. In analyzing "good faith," a district court will examine:

> [W]hether the school district has demonstrated, to the public and to the parents and students of the once disfavored race, its good-faith commitment to the whole of the court's decree and to those provisions of the law and the Constitution that were the predicate for judicial intervention in the first instance.

Additionally, "substantial compliance" requires a determination of whether there have been violations of a consent decree and whether those violations "were serious enough to constitute substantial noncompliance."

At the time of the 2011 opinion, PCSSD was under court supervision in the areas of (1) student assignment; (2) advanced placement, gifted and talented 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; and (12) monitoring. The court concluded that PCSSD was not unitary in the areas of student assignment; advanced placement, gifted and talented and honors programs; discipline; school facilities; scholarships; special education; staff student achievement. Since the 2011 decision, PCSSD has filed various motions for unitary status concerning the remaining areas. This year, PCSSD again sought release from federal court supervision. The issues were tried to the Honorable D. Price Marshall during the weeks of October 7, 2020 and October 14, 2020. No final order has been entered in that case concerning PCSSD's request for unitary status.

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As will be the case in any proposed annexation or consolidation, the Board must be cognizant that it may not order or approve any proposed annexation or

consolidation with the purpose or intent to create racially segregated schools. As the Supreme Court noted in *Missouri v. Jenkins,* 515 U.S. 70, 115 (1995):

> [I]n order to find unconstitutional segregation, we require that plaintiffs "prove all of the essential elements of *de jure* segregation — that is, stated simply, a current condition of segregation resulting from *intentional state action directed specifically* to the [allegedly segregated] schools." *Keyes v. School Dist. No. 1, Denver*, 413 U.S. 189, 205-206 (1973) (emphasis added). "[T]he differentiating factor between *de jure* segregation and so-called *de facto* segregation . . . is purpose or *intent* to segregate." *Id.*, at 208 (emphasis in original).

There are numerous cases that discuss legal challenges to school district annexations and consolidations in the context of desegregation litigation, but in each case the question of whether a particular annexation or consolidation (or series of annexations or consolidations) was done with the requisite unconstitutional intent is a highly fact-specific inquiry.

To assist the State Board, Department of Education staff has provided the Board with enrollment figures showing the racial composition of the school district to be annexed or consolidated and the surrounding school districts. We suggest that this practice continue and that the State Board consider the relative racial balance of the affected school districts in making its decision.

Neither state nor federal law requires the Board to create school districts in a manner that would achieve any particular "racial balance" in the student population of a school district.[1] Even so, we strongly advise the Board to scrutinize this proposed annexation with great care and to satisfy itself that there are legitimate, non-racially-motivated reasons for the involuntary annexation of the Dollarway School District into the Pine Bluff School District.

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[1] It should be noted that a decision made solely on a racial basis, even for laudable purposes such as diversity in education or the prevention of (re)segregation, would be subject to "strict scrutiny" analysis. *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 127 S.Ct. 2738 (2007).

If you require further assistance, please do not hesitate to contact my office.

Sincerely,

Kat Guest
Senior Assistant Attorney General

KG
cc: Ms. Lori Freno (*via electronic mail*)