

# Exhibit 26


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EXHIBIT #3

## MEMORANDUM

TO: Representative Joyce Elliott, Chair  
House Interim Committee on Education

Senator Jim Argue, Chair  
Senate Interim Committee on Education

FROM: Timothy G. Gauger, Senior Assistant Attorney General 

CC: Mark Hudson, Legislative Analyst

DATE: February 3, 2006

RE: Discussion of Arkansas Supreme Court Opinions in the *Lake View*  
Litigation Regarding Teacher Salaries and School District Use of Local  
Funds to Support Higher Teacher Salaries

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This memorandum was prepared in response to Mr. Mark Hudson's letter to me, dated January 26, 2006, requesting a presentation on the above-referenced subject at the February 7, 2006 meeting of the House and Senate Interim Committees on Education. This memo outlines my anticipated presentation.

### **I. Discussion of Teacher Salaries and Use of "Local" Funds in Arkansas Supreme Court's *Lake View* Opinions**

Following is a synopsis of the Arkansas Supreme Court's comments concerning teacher salaries, school district use of "local" funds to enhance educational programs, and the context in which the Court's statements were made.

The Court first addressed teacher salaries in its 2002 opinion. In that stage of the litigation the Supreme Court considered the State's appeal of Judge Collins Kilgore's findings that the school funding system was both inequitable and "inadequate." In its opinion, under a heading entitled "educational deficiencies," the Court noted as follows, based upon the evidence in the record before the trial court:

Arkansas' entry level for teacher salaries is last when compared to our eight bordering states, and Arkansas spends twenty percent less than the national average for teachers across the board. The entry level salary for Arkansas school districts bordering Memphis, Tennessee, was about \$5,695 less than that offered in Memphis school districts, and for more experienced teachers the differential was almost \$6,000. A similar disparity exists for beginning salaries between school districts in Texarkana, Arkansas, and Texarkana, Texas. Arkansas school

districts pay about \$4,000 less than those in Texas.

Serious disparities also exist in teacher salaries among school districts within the State of Arkansas. One example given by the trial court was the science teacher with two masters degrees and forty-one years' teaching experience receiving a salary of \$31,500 in the Lake View School District, while a teacher with comparable degrees and experience received \$43,524 in the Fort Smith School District.

Poor school districts with the most ill-prepared students are losing their teachers due to low pay. Both recruitment and retention of teachers are difficult in those districts. The Bentonville School District, which is not impoverished, will lose fifteen percent of its teachers in the next three years due to retirement. Low pay and competition from the private sector present real obstacles to teacher recruitment in that district.

Dr. Raymond Simon, Director of the Department of Education, had this to say about the salary crisis:

MR. HELLER: And I wanted to ask you what else you--you think we should be doing in Arkansas to address students' above and beyond ACTAPP?

DR. SIMON: I think we're facing--I think the most critical thing we need to address now is the issue of teacher's salaries. ACTAAP, Smart Start, Smart Step, all of that depends primarily on the classroom teacher to function. And we are beginning to see a crisis now in our State of quality teachers, some retiring. \*62 My generation has had all of this they want in many cases, and they're--they're retiring.

\* \* \*

MR. MATTHEWS: That's right. Okay. We're getting there. Track with me. In order to implement ACTAPP, you've got to have good teachers?

DR. SIMON: Yes.

MR. MATTHEWS: In order to have good teachers, we've got to have more--

DR. SIMON: Money.

MR. MATTHEWS: Money.

DR. SIMON: For teachers' salaries.

MR. MATTHEWS: And until we have more money for teachers' salaries, we jeopardize the efficiency, the suitability, and the quality of the ACTAPP program, which you and others have implemented. Isn't that true?

DR. SIMON: That's correct, yes, sir.

In short, the Benchmark testing and the ACTAAP program which represent the paramount initiatives by the State to correct the course of educational deficiencies in Arkansas are dependent on quality teachers. And, according to the Director of the Department, quality teachers is an area where we have a crisis.

*Lake View School District No. 25 v. Huckabee* (“*Lake View 2002*”), 351 Ark. 31, 60-62, 91 S.W.3d 472 (2002). Addressing the trial court’s conclusion that the State’s school funding system violated the “equality” provisions of the Arkansas Constitution, the Court further stated as follows:

We hold that the trial court did not err in concluding that the current school-funding system violates the equal-protection sections of the Arkansas Constitution in that equal educational opportunity is not being afforded to the school children of this state and that there is no legitimate government purpose warranting the discrepancies in curriculum, facilities, equipment, and teacher pay among the school districts.

*Id.*, 351 Ark. at 79.

Ultimately, in *Lake View 2002* the Court stayed the issuance of its mandate until January 1, 2004, to give the General Assembly time to address the constitutional deficiencies identified in the Court’s opinion. In early 2004, while the General Assembly was still in Special Session, the Court withdrew its mandate and appointed Special Masters to examine the actions taken by the executive and legislative branches in response to *Lake View 2002*. In its order appointing the Masters, the Court directed the Masters to inquire into ten separate areas, each of which was represented to be part of a synopsis of the various holdings of *Lake View 2002*. Among the matters the Court asked the Masters to investigate was:

(6) The measures in place to assure that teacher salaries are sufficient to prevent the migration of teachers from poorer school districts to wealthier school districts or to neighboring states;

*Lake View School Dist. No. 25 v. Huckabee*, 356 Ark. 1, 3, 144 S.W.3d 741 (2004) (per curiam).

After the Special Masters issued a report to the Court on April 2, 2004, the Supreme Court entered a Supplemental Opinion, in which the Court discussed the Masters’ report and, ultimately, relinquished jurisdiction over the case. *Lake View School Dist. No. 25 v. Huckabee* (“*Lake View 2004*”), 358 Ark. 137, \_\_\_ S.W.3d \_\_\_ (2004) (Supplemental Opinion). Among other things, in *Lake View 2004* the Court clarified what it meant in *Lake View 2002* when it made reference to “substantial equality” of educational opportunity:

One issue raised in the Masters' Report is whether this court's term "substantial equality" in *Lake View [2002]* means a basic level of adequate education for all or whether it means identical education assets for all.

We said in *Lake View [2002]* that "[i]t is the State's responsibility, first and

foremost, to develop forthwith what constitutes an adequate education [.]” *Lake View III*, 351 Ark at ---, 91 S.W.3d at 500. We went on to say that it is the State’s responsibility to afford a substantially equal educational opportunity to all school children, based on what comprises an adequate education. *See id.*

An adequate educational opportunity must be afforded on a substantially equal basis to all the school children of this state. This does not mean that if certain school districts provide *more than* an adequate education, all school districts must provide *more than* an adequate education with identical curricula, facilities, and equipment. Amendment 74 to the Arkansas Constitution allows for variances in school district revenues *above* the base millage rate of 25 mills, which may lead to enhanced curricula, facilities, and equipment which are superior to what is deemed to be adequate by the State. Nevertheless, the over arching constitutional principle is that an adequate education must be provided to all school children on a substantially equal basis with regard to curricula, facilities, and equipment. Identical curricula, facilities, and equipment in all school districts across the state is not what is required.

*Lake View 2004*, 358 Ark. at \_\_\_\_\_. Later, the Court specifically discussed the Special Masters’ conclusions and concerns concerning teacher salaries, as follows:

*f. Teacher Pay*

The Masters observed that the ten percent across-the-board teacher pay increase recommended by the Adequacy Study had not been enacted. Rather, the General Assembly has raised beginning salaries dramatically and provided substantial bonuses and other incentives for performance and work in high-priority areas like the Delta.

The Masters voiced reservations as to whether the gap in teacher pay between poorer and wealthier school districts will ever be completely closed due to Amendment 74.

The General Assembly has addressed this issue in a meaningful way. Though counsel for Lake View advocated a uniform salary scale for teachers, while the Adequacy Study advocated an increase, we cannot say that the General Assembly has failed to address this issue.

*Id.*, at \_\_\_\_\_.

Finally, in early 2005, after the conclusion of the Regular Session of the 85<sup>th</sup> General Assembly, several school districts again asked the Court to withdraw its mandate. The complaining districts alleged, among other things, that the General Assembly had failed to comply with Act 57 of 2003 (Second Extra. Sess.) and had otherwise “backtracked” on educational issues. The Court again appointed Special Masters to take evidence and prepare a

Report, which was then reviewed by the Court. In its subsequent opinion, the Court stated as follows:

*E. Other Deficiencies*

We adopt the Masters' Report as it pertains to findings of other deficiencies directly related to the constitutionality of Arkansas' school funding system and discuss those deficiencies *seriatim*:

\* \* \*

5. The Masters found other examples of unintended consequences that further affect the economic stability and adequacy of school districts. They underscored that when a school district loses students, its foundation funding is decreased for the following year though salary costs and personnel costs remain unchanged and are ongoing for the following year. They further alluded to "the seeming impossibility of solving the perpetual inequities of teacher salaries" between poor and wealthy school districts.

*Lake View School Dist. No. 25 v. Huckabee* ("Lake View 2005"), \_\_\_ Ark. \_\_\_, \_\_\_ S.W.3d \_\_\_, 2005 WL 3436660 (December 15, 2005). Once again, the Court ultimately stayed its mandate until December 1, 2006, to give the General Assembly time to address the Court's opinion.

II. Discussion

The Court's statements over time concerning teacher salaries and school districts' ability to use "local" funds, (i.e., revenue from local millages authorized by Amendment 74, see Art. XIV, § 3(c)(1)) lead to the following conclusions.

While the Court views teacher salaries generally and teacher salary disparities (between school districts, and between Arkansas school districts and schools in other states) as relevant to whether the State maintains an "adequate" and "substantially equal" system of public education, the Court plainly does not seem to interpret the Constitution as requiring that all teacher salaries be "equal" or that all teachers of equivalent skill and qualifications receive the same, or roughly the same, compensation. While language in *Lake View 2002*, taken out of context, might lead one to the conclusion that the Court believes that the Constitution requires the State to achieve that sort of "equality" with regard to teacher salaries, the context in which the Court discussed teacher salaries in *Lake View 2002* and the Court's subsequent opinions counter such a conclusion.

Taken in context, the Court's opinion in *Lake View 2002* should not be viewed as holding that teacher salary disparities are *per se* unconstitutional. Rather, the Court's discussion of teacher salary levels and disparities came in the context of the Court's larger discussion of the fact that some districts have difficulty employing quality teachers generally or teachers with particular expertise in one or more subject matters. Thus, *Lake View 2002* is best understood as raising concerns about the perceived results – lack of properly qualified, quality teaching staff in

some districts – which may be caused or exacerbated, in whole or in part, by inadequate salaries and/or disparities in salaries between districts within the State, and between districts in the State and districts in other nearby States.

Such an interpretation of *Lake View 2002* is bolstered both by the Court's subsequent statements about teacher salaries and the Court's clarification of what "substantial equality" means. As noted, in *Lake View 2004*, the Court clarified what it meant by "substantial equality" by noting that it "does not mean that if certain school districts provide *more than* an adequate education, all school districts must provide *more than* an adequate education with identical curricula, facilities, and equipment. Amendment 74 to the Arkansas Constitution allows for variances in school district revenues *above* the base millage rate of 25 mills, which may lead to enhanced curricula, facilities, and equipment which are superior to what is deemed to be adequate by the State." It follows from this interpretation of Amendment 74 and definition of "substantial equality" that if school districts choose to use "local" revenue (i.e., revenue not derived from the Uniform Rate of Tax or other State funding sources) to enhance teacher salaries, any resulting "disparity" between those enhanced salaries and salaries paid by other districts is not of constitutional significance so long as the other districts are still able to hire and retain teachers that can provide an "adequate" education as defined by the State. Indeed, specifically addressing teacher salaries, the Court in *Lake View 2004* noted the Masters' concern that the gap in teacher pay between poorer and wealthier school districts can ever be completely closed due to Amendment 74 and nonetheless concluded: "The General Assembly has addressed this issue in a meaningful way. Though counsel for Lake View advocated a uniform salary scale for teachers, while the Adequacy Study advocated an increase, we cannot say that the General Assembly has failed to address this issue."

Thus, while the Court's *Lake View* opinions cannot be read as mandating "uniformity" in teacher salaries, they can be interpreted as imposing a duty upon the General Assembly to implement programs designed to ensure that all children receive instruction from teachers who can provide the type of instruction the State defines as "adequate." Should the State discover that some districts are unable to attract and retain such instructional staff, it is for the General Assembly to determine, as a matter of policy, what steps can or should be taken to address the issue.<sup>1</sup> Efforts to promote or require greater "equality" of teacher pay between districts may be but one of many ways in which to address such a problem, if it exists, but it is not the sole constitutionally acceptable way.

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<sup>1</sup> I note here that the weight of published studies, and anecdotal evidence, demonstrate that compensation may be but one of many factors considered when teachers make decisions about where to live and teach, or whether to enter or remain in the teaching profession at all.