IN THE SUPERIOR COURT OF DEKALB COUNTY
STATE OF GEORGIA

ELAINE ANN GOLD, AMY JACOBSON SHAYE, HEATHER HUNTER, and RODERICK BENSON, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

DEKALB COUNTY SCHOOL DISTRICT and DEKALB COUNTY BOARD OF EDUCATION,

Defendants.

CIVIL ACTION FILE
NO. 11-CV-3657-5

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO LIABILITY FOR BREACH OF WRITTEN CONTRACT AND BRIEF IN SUPPORT

Roy E. Barnes
Georgia Bar No. 039000
John F. Salter
Georgia Bar No. 623325
BARNES LAW GROUP, LLC
31 Atlanta St
Marietta, GA 30060
roy@barneslawgroup.com
john@barneslawgroup.com

Michael B. Terry
Georgia Bar No. 702582
Jason J. Carter
Georgia Bar No. 141669
Naveen Ramachandrappa
Georgia Bar No. 422036
BONDURANT, MIXSON & ELMORE, LLP
1201 West Peachtree St., Suite 3900
Atlanta, GA 30309
terry@bmelaw.com
carter@bmelaw.com
ramachandrappa@bmelaw.com

Attorneys for Plaintiffs

PJK

TABLE OF CONTENTS

INTRODUCTION

For thirty years, the Defendants DeKalb County School District and the DeKalb County School Board (collectively the "District") promised their employees that they would provide two years notice before reducing the funding of certain retirement benefits. In 2009, the District broke that promise, breaching the employment contract between the District and its employees. The undisputed factual record shows that the District ended contributions to its Tax Sheltered Annuity Plan (TSA) for more than 10,000 of its employees with no prior notice. By its own admission, the District never provided any subsequent notice either—to the contrary, its statements to its employees were vague, misleading and calculated to keep them in the dark. To date, despite promises to the contrary, the District has never resumed the contractually required contributions.

The Georgia Court of Appeals already confirmed the legal authority for Plaintiffs' breach of contract claim ***in this case***, concluding that "consistent with statutes and ordinances establishing retirement benefits for other government employees, the legislative acts of the Board establishing a retirement plan for the School District employees may become part of the employees' contract of employment." *DeKalb Cty. Sch. Dist. v. Gold*, Ga. Ct. App. Case No. A12A0824 (Nov. 20, 2012) ("*Gold I*"), Pls. Ex. 1 at 23.[1] This Court is bound to follow that authority. *See, e.g.* O.C.G.A. § 9-11-60(h) ("any ruling by the Supreme Court or the Court of Appeals in a case shall be binding in all subsequent proceedings in that case in the lower court...."). With the legal authority established, the undisputed facts now confirm that the District breached its contract with employees and Plaintiffs are entitled to judgment as a matter of law.

---

[1] All exhibit references (*e.g.* "Pls. Ex __") are to the Plaintiffs' Appendix filed concurrently herewith.

The record evidence establishes that the two year notice provision became part of the District's employment contract with employees. And the District's own admissions confirm the District's failure to provide that notice.

Resting entirely on straightforward contract interpretation—a question of law for the Court—the Plaintiffs' claim for breach of contract is particularly well-suited for summary judgment. *Megel v. Donaldson,* 288 Ga. App. 510, 513 (2007) ("contract disputes are particularly well suited for adjudication by summary judgment because construction of contracts is ordinarily a matter of law for the court"). Plaintiffs thus hereby move for Summary Judgment as to liability for breach of written contract. Only the extent and amount of damages would remain to be tried.

FACTS

I. Defendants Established A Written Contract Agreeing To Provide Certain Retirement Benefits To Plaintiffs.

A. In 1979, After Giving Two-Years' Notice, The School District Opted-Out Of Social Security And Created A Board Policy Promising An "Alternative Plan To Social Security" To Attract And Retain Employees.

Prior to 1977, employees of the DeKalb County School District were eligible for and received Social Security benefits, just like other American employees. In 1977, the DeKalb County School District sent notice to the Social Security Administrator that the District intended to remove its employees from the Social Security system.

The relevant agreement with the Federal Government required the District to give two years' notice. Thus, the District's decision could not take effect until 1979. The District used this two year notice period to discuss with its employees the impact of the decision, and to make plans to replace the employees' Social Security benefits with an "Alternative Plan." *See*

Questions and Answers Concerning Social Security and the Alternative Plan dated May 1979, ("Q&A Booklet") Pls. Ex. 3 at Gold&Shaye 0017.

In 1979, the District finally implemented its plan to remove its employees from the Social Security program. DeKalb School Board Resolution dated Oct. 1, 1979 ("1979 Resolution"), Pls. Ex. 4 at DCSD000016. To compensate for the fact that they would no longer receive Social Security, the District agreed to provide employees with an alternative plan that would include life insurance, long-term disability, and certain other retirement benefits—the so called "Alternative Plan to Social Security." *Id.* This "Alternative Plan" was enshrined in the Board of Education's policies for decades. Affidavit of Joseph Willingham dated March 26, 2013 ("Willingham Aff."), Pls. Ex. 5 ¶ 20.[2] From at least September 11, 2000, the Board of Education's policy establishing the Alternative Plan to Social Security was published on line under the title "Board Policy Withholding of Funds," using the School District's Descriptor Code "DFBA." *See* Board Policy Withholding of Funds dated Sept. 11, 2000 ("Policy on Withholding of Funds"), Pls. Ex. 7 at DCSD000161; *see also* Pls. Ex. 6 (Ward-Smith Dep.) at 23. That Board Policy states:

> ALTERNATIVE PLAN TO SOCIAL SECURITY
>
> MISSION: To ensure that employees of the DeKalb County School System are provided retirement and insurance plans as alternatives to Social Security.
>
> The DeKalb County Board of Education shall provide all full-time employees with an alternative program to Social Security. ***The amount of funds placed annually in the alternative program shall equal the amount that the school system would have paid had the school system remained under Social Security.***

[2] The District's former chief of human resources testified:

> Q: Was the board TSA retirement benefit part of something called the alternative plan to Social Security? A: Yes. Q: And was that alternative plan put into writing? A: Yes. Q: And was that writing in the form of a board policy, to your memory? A: Yes.

Deposition of Tekeshia Ward-Smith dated Jan. 5, 2016 ("Ward-Smith Dep."), Pls. Ex. 6 at 22:19-23:3.

> The Alternative Plan to Social Security shall include, as a minimum, the following:
>
> 1. Improvements to the survivor benefit life insurance plan in existence in September 1979
>
> The survivor benefit plan is designed to provide lump sum payments to beneficiaries and monthly income to eligible surviving family members upon the death of an employee.
>
> 2. Improvements to the long-term disability plan in existence in September 1979
>
> The disability benefits plan provides disabled employees a coordinated benefit for a specified period of time following an established elimination period.
>
> 3. ***Supplemental retirement plan paid for by the Board of Education***
>
> The supplemental retirement plan provides retirement benefits through legally mandated and/or Board approved contributions and investment strategies. ·
>
> ***The Board of Education shall give a two-year notice to employees before reducing the funding provisions of the Alternative Plan to Social Security.***

Pls. Ex. 7 at DCSD000161 (emphasis added).

In addition to the binding holding of the Court of Appeals in this case that "the legislative acts of the Board establishing a retirement plan for the School District employees may become part of the employees' contract of employment," (Pls. Ex. 1 (*Gold I*) at 23), the School Board's own witnesses admitted its policies are the binding law of the district. *See, e.g.* Deposition of Eugene Walker dated July 29, 2015 ("Walker Dep."), Pls. Ex. 8 at 30:12-25 (board policy is binding); *id.* 34:1-4 (board policy is the "law that is passed by the board of education"). These policies are binding on the Board, the District's administration, and the District's employees. *See, e.g., id.* at 34:19-35:1 (administrative policies and procedures "must conform to the policy of the board"); Deposition of Rhonda Kelly dated Nov. 30, 2015 ("Kelly Dep."), Pls. Ex. 9 at 70:3-10 (employee testifying: "Q: ...in the course of your employment do you understand that you have to follow school board policy in carrying out your job? A: Yes. Q: And is it your understanding that everybody else in the school district has to follow the school board's policy,

too? A: Yes."); Deposition of Jim Redovian dated July 30, 2015 ("Redovian Dep."), Pls. Ex. 10 at 19:2-5 (administration may not "make decisions ... that contradict a published board policy."); Pls. Ex. 6 (Ward-Smith Dep.) at 37:17-21 ("All policies are available on our website and employees sign a notification that they are aware of all district policies. That is their responsibility."); 30(b)(6) Deposition of Michael Bell dated February 25, 2016 ("Bell 30(b)(6) Dep."), Pls. Ex. 11 at 90:3-25 (identifying requirement that employees adhere to all District policies and procedures).

B. The School District Adopted Specific Plans For Implementing The Board Policy, Including The "Board TSA Plan Document."

Generally, in order to implement policies such as the Alternative Plan to Social Security, the District adopts more specific administrative plans and guidelines. Pls. Ex. 8 (Walker Dep.) at 34.

To implement the third prong of the Alternative Plan—the "supplemental retirement plan"—the District adopted a "Tax-Sheltered Annuity" or "TSA" plan. *See, e.g.*, Pls. Ex. 5 (Willingham Aff.) ¶ 9. This was referred to as the "Board TSA."

The District established a series of plans to administer the Board TSA. The District first signed a contract to administer the TSA in September 1979. *See* Pls. Ex. 5 (Willingham Aff.) at ¶ 12; DeKalb County Georgia Board of Education Tax Sheltered Annuity Plan dated Feb. 12, 2003 ("2003 Plan Document"), Pls. Ex. 12 at DCSD000065 (referring to 1979 plan). They adopted another in 1983. *See* DeKalb County Georgia Board of Education Tax Sheltered Annuity Plan dated July 11, 1983 ("1983 Plan Document"), Pls. Ex. 13. And on August 11, 2003, the District adopted and restated the TSA plan document "in its entirety, effective as of February 12, 2003." Pls. Ex. 12 (2003 Plan Document) at DCSD000065.

This 2003 TSA Plan Document is the currently operative document for administration of the Board TSA and provides the administrative details that allow the District to perform obligations under the Alternative Plan. As it states on its face, the purpose of the Plan Document is to ***"provide a standard written procedure under which defined contribution retirement benefits are provided and administered on behalf of Participants***." Pls. Ex. 12 (2003 Plan Document) at DCSD 000065 (emphasis added).[3]

Further, the Board TSA was established to receive preferential tax treatment as a so-called "403(b) Plan." *See, e.g.*, Pls. Ex. 12 (2003 Plan Document) at DCSD000065 (Article I stating intent to "qualify as a tax-exempt retirement plan ... as described in Section 403(b) of the Internal Revenue Code of 1986").[4] As the District's 403(b) expert testified, the IRS's rules require the Plan Document to serve a very specific statutory purpose: to provide the administrative structure for the plan to ensure the employer's compliance with the tax code required to receive the 403(b) tax benefits. *See* Deposition of Charles Yovino dated Dec. 12, 2016 ("Yovino Dep."), Pls. Ex 14 at 41:4-42:22; *see also* Treasury Decision 9340, dated September 4, 2007 ("T.D. 9340"), Pls. Ex. 15 (IRS's comprehensive 403(b) regulations).[5]

As discussed below and by the Court of Appeals in this case, the relevant contract is formed with the district's employees through the Board's legislative acts and is enshrined in its

---

[3] Similar language also appears as the purpose of the 1983 Plan Document. *See* Ex. 13 (1983 Plan Document) at DCSD 000043 ("The purpose of this Plan is to provide a written standard procedure under which retirement benefits to serve in lieu of Social Security are provided and administered on behalf of Eligible Employees.").

[4] A 403(b) plan operates in many ways like its more well-known cousin, the 401(k) retirement plan. But 403(b) plans are created for employees of public education organizations or non-profits (rather than by private, for-profit employers) and there are some differences in governing law and in certain obligations for 403(b) plans created by government entities like the District.

[5] The 1983 Plan Document was likewise expressly governed by 403(b). *See, e.g.* Ex. 13 (1983 Plan Document) at DCSD 000043 (noting that the relevant annuity contracts were issued "pursuant to Code Section 403(b)").

Board policies. And, as the District itself testified, the Plan Document merely "identifies the manner in which the [District] carries out its obligations with respect to the Board TSA Plan..." Pls. Ex. 11 (Bell 30(b)(6) Dep.) at 12:24-13:4.

It is undisputed that each of the named Plaintiffs was an employee subject to the Board policies in place in July 2009. And the District in fact performed its obligations with respect to each named Plaintiff by making TSA payments pursuant to the Plan Document prior to July 31, 2009. *See* Plaintiff's Statement of Facts Pursuant to Uniform Superior Court Rule 6.5, filed this same day ¶¶ 26-27.

II. This Written Contract Required Defendants To Provide Two Years' Notice To Plaintiffs Before Reducing The Amount Of The Supplemental Retirement Benefit.

On its face, the Board's legislative act states that "[t]he Board of Education ***shall give a two-year notice to employees*** before reducing the funding provisions of the Alternative Plan to Social Security." Pls. Ex. 7 (Policy on Withholding Funds) at DCSD000161 (emphasis added).

This two year notice requirement was part of the District's retirement benefit contract since the policy was adopted in 1979. Indeed, this requirement was included among the original legislative acts establishing the Alternative Plan, including a Resolution passed on May 14, 1979, which specifically stated:

> NOW THEREFORE, BE IT RESOLVED, That in the event of withdrawal from Social Security, ***funds currently budgeted for Social Security shall be used for the support of the alternative plan, and the funding of the alternative to Social Security shall be adjusted annually in proportion to the employer's Social Security amount***; and
>
> BE IT FURTHER RESOLVED, That before the budget is adopted each year, a determination shall be made as to the amount that would have been required for continued participation in Social Security during the current year and the projection shall be made as to the amount that would have been required to be continue participation in Social Security during the forthcoming budget year; and
>
> BE IT FURTHER RESOLVED, that the amount required for the forthcoming year to continue funding Social Security ***shall*** be the amount budgeted to fund the

> alternative to Social Security, and ***that the Board of Education will give a two year notice to the employees before reducing or terminating these funding provisions***.

Pls. Ex. 4 (1979 Resolution) at DCSD00016 (emphasis added).

Indeed, the District further evidenced its intent to be bound by the two year notice requirement at the time of adopting of the Alternative Plan. In 1979, the School District distributed a booklet to employees entitled, "Questions and Answers Concerning Social Security and the Alternative Plan for Employees of the DeKalb County Board of Education." Pls. Ex. 3 (Q&A Booklet). The Q&A Booklet directly addressed the issue of whether a future Board could reduce funding for the Alternative Plan, stating:

> Q: ***Could a future Board reduce the funding for the Alternative Plan***?
> A: ***Yes***. It could ***with a two year notice terminate Social Security*** without a vote of the employees. It could also reduce or terminate the health insurance program, life insurance program, or the professional liability insurance program. It could also reduce your salary or eliminate your job. The Board has been strongly committed to an exemplary program of employee benefits and there is every reason to believe this commitment will continue. ***A resolution was adopted by the Board on Monday, May 14, committing the Board to budget for the Alternative Plan for the amount of funds that would be required for Social Security if withdrawal occurs. (See Appendix C)***.

Pls. Ex. 3 (Q&A Booklet) at Gold&Shaye0004 (emphasis added). The "Appendix C" referenced in this answer is, of course, the 1979 Resolution that resolves, *inter alia*, that the School District "will give a two-year notice to the employees before reducing or terminating these funding provisions." *Id.* at Gold&Shaye 0017 (including the resolution).

As the author of this original resolution testified, this requirement makes good sense and was adopted as a protection for employees to ensure that funding for the Alternative Plan was not reduced suddenly or without sufficient notice. *See, e.g.*, Pls. Ex. 5 (Willingham Aff.) ¶¶ 16 & 18. The requirement was borrowed from the Social Security regulations that had required two years' notice before the District could "opt-out" of Social Security. *Id.* ¶ 18. The requirement

protects employees (who are ineligible for social security) and who may need time to make other arrangements if these promised benefits are discontinued. Also, by its nature, any decision regarding retirement benefits is a decision whose impacts are only felt in the long-term, and a waiting period forces the District to carefully consider such decisions with a full discussion and the full ability of employees and others to weigh in and be heard before such a long-term decision takes effect. *See, e.g., Id.* ¶ 26.

This two year notice requirement remained the District's published policy until the Board purported to repeal it almost a year after the District stopped paying the benefits. *Id.* ¶¶ 19-21; *see also* Pls. Ex. 7 (Policy on Withholding Funds) at DCSD000161.

III. In July Of 2009, The District Abruptly Eliminated Plaintiffs' Benefits And Admittedly Failed To Provide The Required Notice.

A. The District Called An Emergency Meeting On July 27, 2009 And Eliminated Board TSA Benefits With No Prior Notice.

On Monday, July 27, 2009, the DeKalb Board of Education held an "emergency" meeting to address budget constraints placed on them by then-Governor Sonny Perdue. The only notice of this "emergency" meeting was sent three days before—on Friday July 24, 2009, and said nothing about reducing employee benefits. *See, e.g.*, Deposition of Jay Cunningham dated July 30, 2015 ("Cunningham Dep."), Pls. Ex. 16 at 32:4-33:22 (discussing July 24 meeting announcement and agreeing that "it doesn't give anybody any notice at all about the TSA."); *see also* Memo to All DeKalb Employees dated July 24, 2009 ("July 24, 2009 Meeting Notice"), Pls. Ex. 17 at DCSD 000118.

At that meeting, the School Board amended the Plan Document to eliminate contributions for certain employees who participate in the Teacher Retirement System of Georgia ("TRS") or the Employees Retirement System of Georgia ("ERS") – including the plaintiffs here—as of July

31, 2009. *See* Pls. Ex. 12 (2003 Plan Document) at DCSD000100-101. Specifically, the operative plan amendment states as follows:

> With respect to Participants who participate in the Teachers Retirement System of Georgia or the Employees Retirement System of Georgia ... the Employer shall make no contribution (that is, 0% of Compensation) to the Plan for each payroll period commencing after July 31, 2009.

Id. at DCSD 000101.[6]

For the TRS and ERS employees, the District internally identified these individuals in their payroll system and made this change effective immediately. Pls. Ex. 9 (Kelly Dep.) at 50:3-52:12 (describing payroll process for ending TSA benefit payments). These employees did not receive TSA benefits after July 31, 2009, and it is these participants who the named plaintiffs seek to represent in this class action.

B. The District Has Repeatedly Admitted That It Never Provided Notice To Employees That Complied With Its Board Policy.

In its 30(b)(6) deposition, the District affirmatively admitted that it never provided any notice that could comply with the Board Policy. Specifically, the District testified that "Relative to [deposition] Exhibit 12 [the Policy on Withholding of Funds containing the two-year notice requirement], ***I am not aware of anything that occurred that would satisfy that specific [notice] provision***." Pls. Ex. 11(Bell 30(b)(6) Dep.) at 127:15-18 (emphasis added).

While this admission alone is sufficient to grant summary judgment, the entire record confirms the truth of the admission and the absence of any fact issue on the District's breach. It is undisputed—and indeed admitted in Defendants' Answer—that there was no notice ***before*** the District's elimination of the benefits. Answer to Plaintiffs' First Amended Complaint, ¶ 46; *see also, e.g.*, Pls. Ex. 16 (Cunningham Dep.) at 32:4-33:22; Pls. Ex. 17 (July 24 2009 Meeting

[6] This decision did not affect the District's other employees who participate in the Board TSA plan, including those who participate in the Public School Employees Retirement System (PSERS). Pls. Ex. 12 (2003 Plan Document) at DCSD 000100.

Notice) at DCSD000123; Pls. Ex. 6 (Ward-Smith Dep.) at 69:2-9 ("the July 2009 suspension was enacted without prior notice to the employees").

The District's candid admission of breach is not surprising given that, at the time it eliminated TSA contributions, the District's representatives were "not aware" of the notice requirement in its Board Policies. Pls. Ex. 11 (Bell 30(b)(6) Dep.) at 102:11-15; *see also, e.g.*, Pls. Ex. 8 (Walker Dep.) at 44:15-17 (then-Board Chair testifying he was "totally unaware" of board policy requiring two years notice); *id.* 45:1-2 (he was "unaware" of board policy); Pls. Ex. 16 (Cunningham Dep.) at 29:8-16 (then-Board member testifying that Board was unaware of notice requirement); Pls. Ex. 11 (Bell 30(b)(6) Dep.) at 103:15-18 (no evidence that decision makers were aware of notice requirement).

According to the District, there is no evidence "that the Board took any specific action to provide this specific notice [referenced in the board policy] relative to the actions taken in July of 2009." Pls. Ex. 11 (Bell 30(b)(6) Dep.) at 98:15-18; *see also id.* 105:9-13 ("not aware" and "have not ... seen any documents that would indicate some type of calculation of options of notice ...").

Further, the School Board itself eventually realized that its failure to provide notice violated its own established Board Policy, and admitted as much. At the School Board's May 10, 2010 meeting, Board Member Jim Redovian consulted with the Board's lawyers and then informed the Board that its elimination of the TSA benefits violated the Board Policy requiring two years' notice. According to the minutes of the May 10 meeting:

> Mr. Redovian stated that ... [a]fter reviewing the Board's policy on withholding funds [for the TSA Plan], it was determined that the Board violated its own policy and now need to correct that action. He went on to say that the current policy states that the Board must provide a two (2) year notice of suspension to all employees before reducing the funding provision of the Alternative Plan to Social Security. Mr. Redovian stated that the policy amendment would eliminate the

> two (2) year notice. He also stated that the Board is working with the staff to identify funds to correct the error of suspension during the 2009-2010 fiscal year.

Business Meeting of the DeKalb County Board of Education dated May 10, 2010 ("May 10, 2010 Board Minutes"), Pls. Ex. 19 at DCSD0000227; *see also* Video of May 10, 2010 Board Meeting, Pls. Ex. 20.

As a factual matter, Mr. Redovian's statement is particularly damning for Defendants' case. It shows that (a) the Board understands that it is bound by its policies; (b) the two year notice requirement was mandatory; (c) the Board's action in eliminating the TSA contributions "violated" this requirement; and (d) the consequence for violating the two year notice requirement was to "identify funds to correct the error of suspension," *i.e.* pay the employees the benefits they should have received.

However, rather than provide clear notice to its employees or remedy the violation of its own policies, the School Board took the opposite approach. At the next Board meeting on June 14, 2010, the Board purported to amend the Board Policy on Withholding of Funds to eliminate the two year notice requirement. Business Meeting of DeKalb County Board of Education dated June 14, 2010 ("June 14, 2010 Minutes"), Pls. Ex. 21 at DCSD000218; *see also* Redlined Version of Board Policy, Pls. Ex. 22. By this action, the District again tacitly admitted that it violated its own polices, that it failed to provide the required notice, and that it never intended to provide any notice at all.

C. The District's Contradictory And Misleading Statements Cannot Constitute The Notice Required Under The Board Policy.

According to the District, the only "notice" of any kind that the District provided at the time of the suspension was an email to all employees from then-superintendent Crawford Lewis. Pls. Ex. 11 (Bell 30(b)(6) Dep.) at 99:24-100:9. However, rather than providing appropriate

notice, this email and a subsequent email from Superintendent Lewis were affirmatively (and admittedly) misleading.

On July 27, 2009, the day of the meeting, Lewis sent an e-mail entitled, "Budget Cut Letter to Employees," writing:

> During an emergency called Board of Education meeting today, the Board voted to temporarily suspend the Board-sponsored retirement plan from August 1, 2009 through June 30, 2010 for all employees who participate in the Teachers Retirement System of Georgia (TRS) retirement plan.

Memorandum to All Employees Re: Budget Cut Letter to Employees dated July 29, 2009 ("July 29 Budget Cut Letter"), Pls. Ex. 18 at DCSD000123. This informed Plaintiffs and the other class-members that the reduction in benefits would be temporary and would only last until June 30, 2010. Nothing in that email—or any communication to employees from the District since—disclosed to employees that the supposedly temporary "suspension" was in fact a permanent termination. Pls. Ex. 6 (Ward-Smith Dep.) at 56:7-17.

Later that same school year, on January 25, 2010, Superintendent Lewis again communicated with all employees regarding the Board TSA "suspension." And he repeated the promise that the TSA payments would be reinstated, stating that, "I am pleased to announce that the BTSA will be restored as of July 1, 2010 as promised." Budget FY2010 News Flash dated Jan. 25, 2010, Pls. Ex. 23.

These Crawford Lewis emails are the official communications of the District. *See* Pls. Ex. 16 (Cunningham Dep.) at 37:4-24 (Superintendent is responsible for all communication between the School Board and employees); *id.* at 41:13-16 (same); Pls. Ex. 11 (Bell 30(b)(6) Dep.) at 105:15-23 (noting these emails were the District's "principle" communication). These emails go to all employees, and the District expects the employees to believe and rely on these communications. Pls. Ex. 16 (Cunningham Dep.) at 76:24-77:6; Pls. Ex. 11 (Bell 30(b)(6) Dep.)

at 83:3-13. Of course, the representations in these emails are simply incorrect. In fact, there is no dispute that the TSA payments for the Plaintiffs and the Class were eliminated entirely and have never been resumed.

The District's other testimony likewise establishes a complete lack of notice at best, and misleading statements at worst. For example, Rhonda Kelly, a finance department employee, testified that the District has provided no direction at all about the status of the TSA since it eliminated the benefits. Pls. Ex. 9 (Kelly Dep.) at 59:4-13 (Q ...As an employee of DeKalb County, have they ever told you one way or the other what they are doing with the TSA?...A This particular TSA? No, they have not said anything about the TSA. Q Not since the freeze? A No.").

Had it wished to, the District possessed several means of efficiently broadcasting communication to employees, including e-mails, intranet systems and specific notice mechanisms used for other policies. Pls. Ex. 6 (Ward-Smith Dep.) at 38-40. It could have used any of these to clarify the status of funding for the Board TSA retirement benefit from 2010 to 2015.

Instead, rather than retract or clarify Crawford Lewis's repeated promises that the benefits would be reinstated, the District went silent and has exploited the uncertainty created by its own misleading and conflicting statements. Pls. Ex. 6 (Ward-Smith Dep.) at 56:11-17. For example, as late as March of 2013—years after the District eliminated benefits to the vast majority of its full-time employees—the District's Human Resources website still promised the same Board TSA it had in 2009 and made no reference to a suspension or termination. *Id.* at 126:1-23; *see also* DeKalb County School District Human Resources webpage dated March 2013, Pls. Ex. 24 at DCSD020860. Further, the District's chief human resources officer could

not identify a single document from 2010 to 2015 explaining the status of the Board TSA benefit to employees. Pls. Ex. 6 (Ward-Smith Dep.) at 104:1-6. And the District has never provided notice that the reduction of funding for the Alternative Plan's TSA benefit would be permanent. *Id.*

Such inconsistent statements would not meet any reasonable standard for notice—including the District's own. *See, e.g.*, Pls. Ex. 11 (Bell 30(b)(6) Dep.) at 57:7-15 (testifying regarding notice: "Q: ...the District wants to be sure that they are saying the same thing throughout so that it's not giving conflicting messages? A: That is correct, yes. Q: And conflicting messages would be – would not actually achieve the goal of the notice, right? A: No, it wouldn't.").

IV. After This Suit Commenced, The District—Without Any Factual Support—Began Denying The Existence Of The Notice Requirement Entirely.

Given the District's admissions—both before and during this litigation—that it never provided any sufficient notice, and the other record evidence that the communications with employees were in fact misleading, the District has chosen to defend this case by arguing that there was never any notice requirement at all. After the litigation was filed, the district began arguing that various Plan Documents altered the contract and eliminated the notice provision. *See, e.g.*, Defendants' Memorandum in Support of Defendants' Motion for Summary Judgment, dated September 11, 2013 at 15. As a factual matter, this cannot be true.[7]

First, the 2003 Plan Document did not intend to, and as a matter of fact could not, alter the Board Policy establishing the Alternative Plan and the two-year notice requirement. The School Board adopted the Plan Document on August 11, 2003. The person who drafted the Plan Document expressly stated prior to the Board's adoption that, "[t]he proposed Plan Document on

[7] As discussed below at 26-33, the District's argument cannot be true as a matter of law either.

the August agenda relates only to the Board TSA. It ***will only govern the administration*** of the Board TSA." Email from C. Spencer regarding TSA Changes dated July 31, 2003 ("July 31 Spencer Email"), Pls. Ex. 25 (emphasis added).[8] Accordingly, the Plan Document was adopted ***only*** as an administrative document. For example, it was not subject to the formalities required to alter Board Policy, and it purports to be retroactive, which Board Policies cannot be. *See* Business Meeting of the DeKalb County Board of Education dated August 11, 2003 ("August 11, 2003 Board Minutes"), Pls. Ex. 26 at 192 & 196 (reflecting adoption of Plan Document on consent calendar with no first reading); Pls. Ex. 12 (2003 Plan Document) at DCSD00062 (reflecting effective date of February 12, 2003).[9]

Further, by its express terms, the resolution adopting the TSA Plan Document states that the Document and any action taken by the Superintendent must remain subject to the Board Policy establishing the Alternative Plan. Specifically, the August 11, 2003 resolution states:

> IT IS HEREBY RESOLVED, that the Board hereby authorizes the Superintendent to execute the Plan, as restated effective as of February 12, 2003, in substantially the form presented to the Board, and to make such amendments to the Plan and any related annuity contracts or custodial agreements under the Plan as the Superintendent may consider necessary or desirable in order to satisfy all of

---

[8] He went on to note that, "[t]he Board TSA is our program that replaced Social Security in 1979 when DeKalb Schools opted out of Social Security." Pls. Ex. 25.

[9] The Board's rules provide that any proposal to amend an actual Policy must "sit on the table" for one month and may not "be voted upon until the next regular monthly meeting subsequent to the meeting at which proposal is offered." *See* Board Policy-Policy Adoption, Descriptor Code BDC ("BDC Policy"), Pls. Ex. 27 (BDC Policy); *see also* Pls. Ex. 11 (Bell 30(b)(6) Dep.) at 95:1-18 (discussing one month requirement for policy adoption). The Board's rules also state that, "***No such alteration, amendment, repeal, new policy shall be retroactive***, but shall become operative at the time such affirmative vote is made or at such time in the future as the Board may designate." Pls. Ex. 27 (BDC Policy) (emphasis added).

As discussed above, the board demonstrated its understanding of how to amend a Policy when it purported to repeal the two-year notice requirement in 2010. The proposed policy amendment was submitted at the May 10, 2010 meeting as an "Initial Request," but the policy change was not eligible for a vote until the next meeting. Pls. Ex. 19 (May 10, 2010 Minutes) at DCSD000227. At that subsequent meeting on June 14, the policy amendment was passed after a separate discussion and a separate vote.

> the requirements of the Code that must be satisfied in order for the Plan to continue to satisfy Section 403(b) of the Code or in order to satisfy the requirements of other applicable laws and regulations, or for such other purposes as the Superintendent, in his discretion, and upon the advice of designated benefits counsel, may deem necessary or desirable, ***consistent with the general compensation policies of the Board***; ....

Pls. Ex. 26 (August 11, 2003 Board Minutes) DCSD000196 (emphasis added). Thus, the Board made clear when it adopted the Plan Document that it did not purport to alter or amend the Board Policy that requires two years' notice. As discussed above, this conclusion is also bolstered by the Board's admission in May and June of 2010 that (a) the TSA plan was subject to the notice requirement; (b) that the Board's elimination of the benefits violated that requirement; and (c) that the Board had to repeal the requirement in order to eliminate it. *See also*, Pls. Ex. 8 (Walker Dep.) at 35:8-10 ("Q: And once a policy is passed, does it stay effective until it's repealed or amended? A: Yes, sir.").

The other record evidence—including the testimony of the District's own retirement plan expert—shows that the Plan Document ***does*** provide details of how the District fulfills its contractual obligations to provide benefits to its employees, but the Plan Document ***does not*** alter or amend the contractual obligations themselves. *See, e.g.,* Pls. Ex. 14 (Yovino Dep.) at 30:18-19 (noting that the plan document is "is a plan. It's not a contract."); *id.* at 53:10-11 (same); *id.* at 53:24-54:1 (repeating that "plan document is viewed differently than any kind of a contract between individuals"). As the District's expert stated, any actual contract obligations to employees exist separate and apart from the 403(b) Plan Document. *Id.* at 113:19-114:3. And such a separate employment contract—like the one in this case—is governed by the state law of contracts rather than the IRS regulations that govern the Plan Document. *Id.* at 114:4-7; *see also id.* at 31:5-32:14 (noting that state constitution or other contract rights would constrain District's ability to cut employee benefits like those at issue here); Deposition of James Williamson dated