

**IN THE SUPREME COURT OF THE STATE OF MISSOURI**

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**Appeal No. SC90236**

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**JANE TURNER, et al.,**

Plaintiffs-Appellants,

**v.**

**SCHOOL DISTRICT OF CLAYTON, et al.,**

Defendants-Respondents.

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ON APPEAL FROM THE CIRCUIT COURT  
OF ST. LOUIS COUNTY, MISSOURI  
CAUSE NO. 07SL-CC00605

HONORABLE DAVID LEE VINCENT, III

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**SUBSTITUTE BRIEF OF RESPONDENT  
TRANSITIONAL SCHOOL DISTRICT OF  
THE CITY OF ST. LOUIS**

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## STATEMENT OF FACTS

As Respondent Transitional School District of the City of St. Louis (“City District”) is dissatisfied with the completeness of Appellants’ Statement of Facts, it submits its own Statement of Facts pursuant to MO. S. CT. R. 84.04(f). In an effort to promote efficiency and preserve judicial resources, Respondent adopts and incorporates herein by reference the Statement of Facts submitted by Respondent Clayton School District (“Clayton”) in its Substitute Brief.

Additionally, Respondent notes that Appellants improperly substitute legal arguments for facts. In particular, Appellants claim that “[n]either [the St. Louis Public School District] or [the Transitional School District] has maintained, at any time relevant hereto, any schools accredited by the Missouri Department of Elementary and Secondary Education (‘DESE’).” (Appellants’ Brief, p. 9). As support for this claim, Appellants cite only the Statement of Uncontroverted Facts from Clayton (L.F.\_10-11) and the Affidavit of Clayton Superintendent Dr. Don Senti (L.F.\_261-62), neither of which support Appellants’ purported fact concerning unaccredited schools. In fact, Dr. Senti refers in his affidavit to unaccredited *students*. (*Id.*).

At issue here is the loss of the Saint Louis Public School District’s accreditation as a *district*, not the accreditation status of individual schools. (*See* Point Relied On II, *infra.*). Moreover, when Appellants alleged as an undisputed

fact in the trial court that “[n]either SLPSD nor TSD has maintained, at any time relevant hereto, any accredited schools,” Respondent denied that claim. (L.F.\_508-509; *see also* L.F.\_513, establishing that City District had schools that were independently accredited by North Central Association Commission on Accreditation and School Improvement). The Court should disregard Appellants’ purported “fact” concerning unaccredited schools, which is unsupported by the record and constitutes improper argument that has no place in a Statement of Facts.

## POINTS RELIED ON

**I. The Trial Court Correctly Entered Summary Judgment In Favor Of Respondents And Denied Summary Judgment In Favor Of Plaintiffs Because Senate Bill 781, Passed In 1998, Includes Statutory Language That Specifically Addresses (1) All Matters Related To The Transfers Of Students Between The St. Louis Public School District And School Districts In St. Louis County And (2) All Matters Relating To The Governance Of The St. Louis Public School District Following Loss Of Accreditation In That As Specific Statutes Concerning The St. Louis Public School District, The Provisions Of SB 781 Take Precedence Over Any Conflicting Provisions Of The Older Statute Of General Application, § 167.131 R.S.Mo. (Responding To Points Relied On I, II, V).**

*Board of Education of the City of St. Louis v. Missouri State Board of Education*,  
271 S.W.3d 1 (Mo. banc 2008)

*Greenbriar Hills Country Club v. Dir. of Revenue*, 935 S.W.2d 35 (Mo. banc 1996)

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*Board of Education v. State*, 229 S.W.3d 157 (Mo. App. E.D. 2007)

§ 162.1100 R.S.Mo. (2000)

**II. The Trial Court Correctly Entered Summary Judgment In Favor Of Respondents And Denied Summary Judgment In Favor Of Plaintiffs Because § 167.131 R.S.Mo. Does Not Apply To These Plaintiffs And The St. Louis Public School District In That § 167.131 Is Ambiguous And Relevant Evidence Shows That It Was Never Intended To Apply To Situations Where Entire School Districts Have Lost Their State Accreditation Pursuant to New Legislation (Responding to Points Relied On I, V).**

*United Pharmacal Co. v. Missouri Board of Pharmacy*, 208 S.W.3d 907 (Mo. banc 2006)

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## ARGUMENT

**I. THE TRIAL COURT CORRECTLY ENTERED SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS AND DENIED SUMMARY JUDGMENT IN FAVOR OF PLAINTIFFS BECAUSE SENATE BILL 781, PASSED IN 1998, INCLUDES STATUORY LANGUAGE THAT SPECIFICALLY ADDRESSES (1) ALL MATTERS RELATED TO THE TRANSFERS OF STUDENTS BETWEEN THE ST. LOUIS PUBLIC SCHOOL DISTRICT AND SCHOOL DISTRICTS IN ST. LOUIS COUNTY AND (2) ALL MATTERS RELATING TO THE GOVERNANCE OF THE ST. LOUIS PUBLIC SCHOOL DISTRICT FOLLOWING LOSS OF ACCREDITATION IN THAT AS SPECIFIC STATUTES CONCERNING THE ST. LOUIS PUBLIC SCHOOL DISTRICT, THE PROVISIONS OF SB 781 TAKE PRECEDENCE OVER ANY CONFLICTING PROVISIONS OF THE OLDER STATUTE OF GENERAL APPLICATION, § 167.131 R.S.MO. (Responding to Points Relied On I, II, V).**

**A. Standard of Review.**

Appellate court review of the decision of a trial court to grant or deny summary judgment is *de novo*. *ITT Commercial Finance Corp. v. Mid-America Marine*, 854 S.W.2d 371, 376 (Mo. banc 1993).

**B. Discussion.**

**1. Introduction.**

This appeal involves the parents of several children who live within the confines of the St. Louis Public School District<sup>1</sup> but who all signed contracts to voluntarily send their children to schools in the Clayton School District (“Clayton”) in St. Louis County and pay tuition to Clayton. (L.F.\_480-504). Because the St. Louis Public School District lost its state accreditation in 2007, the parents, plaintiffs below and appellants here, maintain that § 167.131 R.S.Mo. gives them the right to send their children to Clayton at the expense of the City District, notwithstanding the fact that the children were not attending a school

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<sup>1</sup> Pursuant to statute, the Special Administrative Board of the Transitional School District is the governing body of the City District and is the real party in interest. While also named as a defendant in its official capacity, the Board of Education (which adopts this brief by this reference) has no ability to effect any remedy that the Court may order. §§ 162.1100.3, 162.621.2 R.S.Mo.

within the St. Louis Public School District during the 2007-08 school year, the first year affected by the district's loss of accreditation. (L.F.\_493-504).

The trial court rejected Appellants' construction of § 167.131, granting summary judgment to Respondents and denying summary judgment to Appellants. Appellants appealed to the Eastern District of the Missouri Court of Appeals.

On June 23, 2009, the Court of Appeals issued its opinion, correctly rejecting Appellants' arguments and affirming the ruling of the trial court. Judge Sherri B. Sullivan wrote for a unanimous panel that "as a result of plaintiffs' Tuition Agreements, "[plaintiffs] are barred from claiming that someone else, other than they, are obligated to pay the tuition" (Court of Appeals opinion p. 6). The Court of Appeals held, the Tuition Agreements "must be enforced as written" and the Court was "not at liberty to disregard [their] terms" (*Id.*, citing *Lake Cable, Inc. v. Trittler*, 914 S.W.2d 431, 436 (Mo. App. E.D. 1996) and *Alverson v. Alverson*, 249 S.W.2d 472, 475 (Mo. App. 1952)). The Court of Appeals also noted that plaintiffs, through their Tuition Agreements, had agreed their children would be "*subject to the same rights, privileges, duties and responsibilities as a [Clayton] resident, non-tuition paying student*" and that plaintiffs could not accept that status "then claim City District status for the Children 'out of the other side of their mouths . . .'" (*Id.* at pp. 2, 8) (emphasis in original). The City District agrees with the Appellant Court's well-reasoned decision. Clayton's Substitute Brief

substantially addresses those grounds for affirmance and for judicial economy are not repeated here.

The Court of Appeals further held that plaintiffs “cite no legal authority by which they have the power to order [Clayton] to bill someone else for their Children’s tuition,” and that plaintiffs had failed to show “that the St. Louis Public School District does not maintain any accredited schools in the City of St. Louis,” as required for § 167.131 to apply. (*Id.* at pp. 7–8). The Court of Appeals then ordered the case transferred to this Court on its own motion pursuant to Rule 83.02. (*Id.* at p. 9). The opinion of the appellate court did not consider or decide, with the exception of the accreditation argument noted immediately above, any of plaintiffs’ arguments addressed here in Points Relied On I and II. These Points provide compelling additional and independent grounds for affirming the decision of the trial court.

The appeal turns on the proper construction of § 167.131 within the broader context of the state’s regulation of education generally and of the City District specifically. The statute provides in relevant part:

The board of education of each district in this state that does not maintain an accredited school pursuant to the authority of the state board of education to classify schools as established in section 161.092, R.S.Mo., shall pay the tuition of and provide

transportation consistent with the provisions of section 167.241, R.S.Mo., for each pupil resident therein who attends an accredited school in another district of the same or an adjoining county.

§ 167.131.1 R.S.Mo. (Appendix, pp. 66-67).

In 1998, the Missouri General Assembly passed Senate Bill 781 (App., pp. 1-65)<sup>2</sup>, in order to fund, facilitate, and implement the settlement of the long-running desegregation lawsuit, *Liddell v. Board of Education*, No. 72-0100, then pending in the United States District Court, Eastern District of Missouri. *Board of Education of the City of St. Louis v. Missouri State Board of Education*, 271 S.W.3d 1, 5 (Mo. banc 2008); *Board of Education v. State*, 229 S.W.3d 157, 159 (Mo. App. E.D. 2007). SB 781 mandated a number of reforms for City District. Key provisions of SB 781 were made subject to the terms of an eventual settlement in the *Liddell* case. See § 162.1060.2(1). In February, 1999, all parties entered into a new, final settlement agreement of the *Liddell* case that was subsequently approved by the United States District Court, Eastern District of Missouri. (L.F.\_13-32, 37-174).

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<sup>2</sup> SB 781 as finally passed may be found at the following web address, last accessed on August 25, 2009: <http://www.senate.mo.gov/98info/billtext/tat/SB781.htm>.

SB 781 was the culmination of two years of efforts to ensure that in the event the *Liddell* suit was settled the City District would still receive the funding necessary to educate its large population of at-risk and impoverished students while satisfying critics of the district that the administration of the City District would be reformed. Indeed, without the provisions of SB 781 and the local option sales tax passed in the City of St. Louis in January, 1999, (the tax itself was also authorized by SB 781) the suit could not have been settled because the necessary funding for the transition from court supervision would not have been in place. After SB 781 passed, the court-appointed settlement coordinator, Dr. William Danforth, said that it was “good for the children in St. Louis, and it gives us a chance to reach an equitable settlement. We have a wonderful opportunity.” (“Legislature OKs Bill That Could Close Desegregation Case; Plan Would Replace Aid Ordered By Court -- If City Taxes Increase,” *St. Louis Post-Dispatch*, May 16, 1998).

Several provisions of SB 781 that are now part of the Missouri Revised Statutes and several provisions of the 1999 Settlement Agreement conflict directly with § 167.131. These conflicts, which implicate key provisions of SB 781 and the 1999 Settlement Agreement concerning student transfers from the City District and the governance of the City District following loss of accreditation, cannot be trumped by or “harmonized” with § 167.131 as Appellants contend. Thus, the

provisions of the more recent statutes with specific application to City District must be given precedence over § 167.131, which is an older statute of general application.

**2. SB 781 Is The More Recent And More Specific Statute And Takes Precedence Over § 167.131.**

It is well settled that a specific, chronologically more recent statute must prevail over an earlier statute of general applicability. *Chiodini v. Summer Ridge Dev. Co.*, 751 S.W.2d 378, 381 (Mo. banc 1988) (holding that later enacted, specific language prevailed over general language in a different section of the same statute); *Smith v. Missouri Local Government Employees Retirement System*, 235 S.W.3d 578, 582 (Mo. App. W.D. 2007) (“chronologically later statute . . . will prevail over an earlier statute of a more general nature, and the latter statute will be regarded as an exception to or qualification of the earlier general statute”); *Lett v. City of St. Louis*, 948 S.W.2d 614, 619 (Mo. App. E.D. 1996) (same); *Moats v. Pulaski County Sewer Dist. No. 1*, 23 S.W.3d 868, 872 (Mo. App. S.D. 2000) (same; especially true where later statute is more “detail[ed]”).

Likewise, even where chronology is not at issue, the specific statute will always take precedence over the general statute where their provisions conflict. *Greenbriar Hills Country Club v. Director of Revenue*, 935 S.W.2d 35, 38 (Mo. banc 1996); *Goldberg v. Administrative Hearing Comm’n*, 609 S.W.2d 140, 144

(Mo. 1980); *Cantwell v. Douglas County Clerk*, 988 S.W.2d 51, 56 (Mo. App. S.D. 1999).

As will be discussed in detail below, the provisions of SB 781 directly conflict with Appellants' interpretation of § 167.131 in at least two crucial areas: (1) specific student transfer provisions between the City and County of St. Louis, including the creation of the Voluntary Interdistrict Choice Corporation ("VICC"); and (2) the statutory mandate of the Special Administrative Board of the Transitional School District to return the City District to full accreditation. These vital components of SB 781 conflict so completely with § 167.131 that it cannot reasonably be said that the General Assembly intended for the older statute to apply to the City District in its present situation following the passage of SB 781.

Appellants assert in their Point Relied On II that § 167.131 is actually the more specific statute. As an initial matter, this is an argument that was not made in the trial court. This novel claim places Appellants in a quandary, because on the one hand they argue in Point Relied On I that § 167.131 is so broad that it necessarily includes City District in its scope (Appellants' Brief, pp. 18-19), while on the other hand they claim in Point II that § 167.131 is actually so narrow in scope that it is narrower than SB 781. (*Id.*, p. 24). Appellants make no attempt to address or resolve this paradox.

This confusion is emblematic of Appellants' misapplication of the relevant law. Both this Court and the Missouri Supreme Court have held that SB 781 was intended by the General Assembly to apply specifically to the City District. In fact, the Supreme Court held that one component of SB 781, § 621.1100 R.S.Mo., was so evidently drafted just for the City District that it was, on its face, special legislation within the meaning of Article III, § 40 of the Missouri Constitution. *Board of Education*, 271 S.W.3d at 10. Between SB 781 and § 167.131, SB 781 is undoubtedly the more specific legislation because it deals almost exclusively with the City District, while § 167.131 purports to apply to all school districts. SB 781, therefore, creates an exception to § 167.131.

The General Assembly is presumed to have been aware of § 167.131 when it passed SB 781 several years after § 167.131 was last amended. *See Smith*, 235 S.W.3d at 582. When the General Assembly provided for a comprehensive state-funded multi-student transfer program for the City District in SB 781, it perforce excluded the City District from the scope of § 167.131 with its contradictory focus on individual students using district-funded transfers between individual schools. Likewise, when the General Assembly made specific provision for how the City District was to be governed in the event of a loss of state accreditation, it perforce excluded the City District from the scope of any prior statute, including § 167.131, the operation of which would interfere in any way with the return of City District

to accredited status. In short, following the passage of SB 781, § 167.131 no longer applied to the City District in the manner urged by Appellants, even in the absence of an express repeal or change to the wording of the statute.

**3. The Student Transfer Provisions Of SB 781 Conflict With § 167.131 And, As They Are More Recent And Apply Specifically To The City District, Must Be Given Precedence.**

Appellants ask this Court to allow them, in essence, to use § 167.131 to ignore their contracts with Clayton and instead force the City District to pay their voluntary tuition to Clayton. Even if the statute allowed this sort of judicial interference in the existing contractual arrangements between two parties, § 167.131 does not apply here, having been preempted by specific provisions of SB 781. A critical part of the settlement framework established by SB 781 was the creation of a new student transfer program between the City District and St. Louis County to replace the court-ordered transfer system. There can be no dispute that the new transfer program (the Voluntary Interdistrict Choice Corporation, or VICC) is a foundational element of the *Liddell* settlement regime, because it is the means, at least in part, by which metropolitan-wide *de facto* school segregation is ameliorated.

The provisions of § 167.131 clash with the new VICC program because the SB 781 in establishing VICC expressly shifts the cost of transferring students from the City District to other districts to the state while § 167.131 shifts the cost back to the City District. In addition, allowing § 167.131 to provide a separate, competing system of student transfers will necessarily destabilize the VICC program as transferee districts would have to pull away from VICC to accommodate students who seek to transfer under § 167.131.<sup>3</sup> Because of these conflicts, § 167.131, as

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<sup>3</sup> In the trial court, Appellants argued vehemently that Clayton was required to accept students from the City of St. Louis while the City District was unaccredited. (S.L.F.\_5). If Appellants had prevailed on that point, VICC certainly would not have survived because no County school district would have (or, more to the point, could have) continued to accept both voluntary transfers under VICC and compulsory transfers under § 167.131 and § 167.151 R.S.Mo. Here, Appellants try to have it both ways, continuing to urge in Point Relied On III that § 167.131 bars Clayton from refusing to accept City of St. Louis students while telling this Court that the issue is irrelevant because the children of the Appellants already attend Clayton schools. The risk to the viability of VICC remains, however, because transferee school districts under threat of subsequent lawsuits may feel compelled to limit their participation in VICC (or pull out altogether) because of unresolved

the older statute of general application, is subordinated to the newer provision of § 162.1060 R.S.Mo., which applies exclusively to the City District and the transferee districts in St. Louis County who participate in VICC.

With respect to VICC, § 162.1060 established “an urban voluntary school transfer program within a program area which shall include a city not within a county [the City of St. Louis] and any school district located in whole or in part in a county with a population in excess of nine hundred thousand persons [St. Louis County] which district chooses to participate.” The statute contains a lengthy recitation of rules that relate to the operation of the VICC program. Moreover, the statute is expressly made subject to the provisions of a settlement agreement that was in fact entered into in the *Liddell* case. § 162.1060.2(1); (L.F.\_13-32, 37-174).

Together, the statute and the 1999 Settlement Agreement address all aspects of the transfer of students between the City District and the County districts. The provisions include those creating VICC as a new governing entity, those relating to the governance of VICC, those establishing the mechanics of student transfers, including eligibility, a system of zones within the City of St. Louis with each zone tied to a participating County school district, and those establishing the rights of the participating parties, including the transferee students, their families, and the

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issues regarding what Appellants have contended is the compulsory nature of § 167.131.

participating districts. There is no room for a competing system of student transfers under § 167.131, particularly where the non-VICC transfers will occur haphazardly, without any regard for the negotiated balance and careful rationing of scarce resources that the VICC program represents.

Beyond the damage that will occur to the vitally important VICC program if § 167.131 is established as a competing method for transfers (forced transfers, no less), the funding mechanism for the VICC program creates an irreconcilable conflict between SB 781 and § 167.131. Under the VICC program, the state pays the amount of aid that would have been paid to the district of residence for each transferring student. § 162.1060.3(1) R.S.Mo. Under § 167.131, the City District would have to pay tuition costs of transferring students out of its own funds. As illustrated by the contracts of the students here, the per-pupil tuition cost is substantial. (L.F.\_480-504). This direct drain on the resources of the City District is contrary to the purposes of SB 781, which was intended to provide sufficient funding to the City District to allow a successful transition from court supervision. *Board of Education v. State*, 229 S.W.3d at 158.

Despite the claims of Appellants, the fact that Appellants seek to shift the burden of funding transfers from the state to the school district is not “rank speculation,” nor is the City District’s position “fanciful,” “prolix,” “tortured,” or any of the other colorful adjectives that Appellants employ in the absence of

relevant case law or reasoned argument. Indeed, not only do Appellants not dispute that City District will be required to pay the tuition for their children if they prevail here, *that is precisely the remedy they seek*. (Appellants' Brief, p. 20). Thus, Appellants readily admit that their construction of § 167.131 would contravene a central purpose of SB 781—providing adequate funding to the City District—by siphoning away the District's meager funds so that their children can attend for free the same very same schools that they already attend pursuant to contract.

The two transfer schemes and the funding for those schemes as provided by § 167.131 and SB 781 conflict not, as Appellants claim, because the General Assembly made a policy choice to have different funding mechanisms for different purposes. They conflict because in adopting SB 781 to implement and adequately fund the *Liddell* settlement and related reforms, the General Assembly made the conscious choice to shift the cost of student transfers to the state from the City District in order to maximize the resources available to the City District. Appellants seek to shift that burden back to the City District, and therefore the conflict between § 167.131 and SB 781 goes to the heart of the purposes behind SB 781, and the statutes cannot be reconciled. As the more recent statute that specifically addresses the City District, SB 781 must prevail in this conflict.

**4. Appellants’ Interpretation Of § 167.131 Stands In Direct Opposition To The Statutory Mandate To Reform The City District.**

In passing SB 781, the General Assembly included a provision, § 162.1100.3 R.S.Mo., specifying how the City District was to be governed in the event that it lost state accreditation. *See Board of Education*, 271 S.W.3d at 9-11. Under that provision, the Special Administrative Board (“SAB”) of the Transitional School District is to assume virtually all of the powers of the elected Board. This was just one of a broad array of reforms that were included for City District in SB 781. The bill also eliminated tenure for school principals, reduced the size of the Board of Directors of the City District from 12 to 7 and shortened their terms of office from 6 to 4 years, among other provisions. (App., pp. 1-65).

In contrast to the provision for the appointment of special administrative boards in other school districts, which allows for the imposition of an SAB only after certain events occur following the loss of accreditation (§ 162.081 R.S.Mo.), the St. Louis-specific statute provides for the SAB to take over governance of the City District immediately upon loss of accreditation and the appointment of a Chief Executive Officer (which is precisely what occurred in 2007). § 162.1100.3 R.S.Mo.; *Board of Education*, 271 S.W.3d at 6. SB 781 was intended to

substantially reorder nearly every aspect of the governance and operations of the City District.

The precedent which Appellants seek to establish here constitutes a direct assault on the ability of the SAB to carry out its statutory mandate to govern and reform the City District and return it to accredited status. The loss of resources to the City District that would result from the Appellants prevailing in their interpretation of § 167.131 was established in the record at the trial court. Appellants' oft-repeated claim that the City District provided "no such evidence" is absolutely false. Moreover, Appellants never disputed the evidence that was presented in the trial court on this point.

The cornerstone of the state school aid funding formula is the average daily attendance of students at schools. (L.F.\_434-35). Under the so-called "foundation formula" as set forth on the Formula Calculation sheet, the basic "District Entitlement" is derived from the average daily attendance figure. (See Line 1 and accompanying definition, L.F.\_434-35). "Average daily attendance" is defined by § 163.011 R.S.Mo., and includes all children between the ages of five and twenty-one who reside in a district *and* who are attending kindergarten through twelfth grade in that district. § 163.011(2) R.S.Mo. Thus, an exodus of students from the City District to County schools under Appellants' interpretation of § 167.131 will have a drastic negative impact on the amount of state aid received by the district.

Even as state aid declines under the formula, the City District would also have to fund tuition payments from its remaining revenue.

It is not difficult to imagine what the twin, spiraling events of declining aid and rising tuition outflows will do to the SAB's mission to reform the City District and regain accreditation for the district. Even if the worst does not come to pass, the SAB's task will become much harder as available funds dwindle. Under the worst case scenario, the largest school district in Missouri will fail. In response, Appellants blithely say that this is a risk they are prepared for others to take so that they can escape from their voluntary contracts with Clayton. Besides, Appellants declare, there is no proof that any of this will come to pass. However, it must be emphasized: *Appellants did not dispute that under their interpretation of § 167.131 and the interplay of that interpretation with other statutes and regulations, the City District may be confronted with a situation where it would have to pay out more tuition to students departing for suburban districts even as its revenues decrease as a consequence of declining average daily attendance figures.*

In short, Appellants would require the City District to pay for tuition for uncounted numbers of former students (as well as for those City residents who never attended City schools) when it would have no money to do so. Appellants' children did not attend City schools and so the City District did not receive state funding for them under the formula. Nevertheless, Appellants want the City

District to reduce the amount of money available to instruct those students actually in City schools so that they may be relieved of the obligation that they voluntarily assumed to pay tuition to Clayton.

No rational person would think that this sort of senseless gamble is what the General Assembly intended when it passed its reform package for City District as a vital part of SB 781. Most importantly, Appellants did not at the trial court (and cannot now) answer the key question raised by this highly probable turn of events: why would the General Assembly even provide for a Transitional School District and a Special Administrative Board to govern the City District following loss of accreditation when the TSD and SAB (and, indeed, the District itself) would be at great risk of failure through the pernicious operation of § 167.131? The clear answer is that the General Assembly intended for § 162.1100, and not § 167.131, to be applicable to the City District in its present unaccredited status. The issue of funding presents an intractable clash between § 167.131 and the central goals of SB 781. Appellants' claims to the contrary are self-serving, invite disaster, and should be rejected.

**5. Appellants' Constitutional Argument Rests On The False Premise That The Missouri Constitution Requires That Children Attend State-Accredited Public School Districts.**

Appellants next argue that if the interpretation of § 167.131 put forward by Clayton and City District is correct, then Article IX, § 1(a) of the Missouri Constitution and equal protection rights will be violated by SB 781 because the Constitutional guarantee of a free public education would not apply equally to children who live in the territory of the City District. This claim rests on the presumption that Article IX, § 1(a) requires free public schools that are in a school district that is fully accredited by the state, which is patently incorrect. The language of § 1(a) makes no reference to accreditation:

A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the general assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this state within ages not in excess of twenty-one years as prescribed by law.

Missouri Constitution, Article IX, § 1(a). Appellants point to no other provision in the Constitution that they contend supports their claim.

While City District and the Transitional School District strongly believe that Article IX, § 1(a) does grant Missouri's children a right to an adequate education,

Appellants cite no evidence whatsoever tying § 167.131 to Article IX, Section 1(a). No court in Missouri has held that a district must be accredited to satisfy § 1(a). If the General Assembly believes that attendance at an accredited district is an inalienable right, then it would not permit districts to remain in operation for even a single day after they lost accreditation. In reality, § 162.1100, dealing with City District, and § 162.081 R.S.Mo., dealing with other districts, both provide for districts to keep operating for years after accreditation is lost. It is in these statutes, not in § 167.131, that the General Assembly has clearly expressed its policy toward unaccredited districts, and it is not a policy of wholesale abandonment.

The legislative history of § 167.131 proves that it was originally drafted not to carry out any Constitutional mandate, but rather to ensure that students would have the opportunity to attend a high school that would allow them to meet the entrance standards at the University of Missouri and other state-funded institutions of higher learning. The 1931 School Law provided that “[a]ll work in an accredited high school shall be given full credit in requirements for entrance to and classification in any educational institution supported in whole or in part by state appropriations.” § 10602 (R.S.Mo. 1939, § 9447 R.S.Mo. 1929) (App., pp. 74, 79). Section 167.131, which today differs very little from its predecessor in the 1931 School Law, was not meant to serve as an end in itself or to vindicate any inviolable rights, it was meant to give small-town students in Depression Era

Missouri a fighting chance to attend university. It should not be read to have any greater significance or a broader scope today.

Appellants' constitutional argument fails for the exact same reason that their other arguments fail: § 167.131 was never intended to apply where entire districts have lost state accreditation. Section 167.131 is incompatible with the "reform-in-place" policies expressed in § 162.1100, which emphasizes the need to return the district to accreditation rather than abandon it.

Appellants' position raises other questions that remain unanswered. If departure from an unaccredited district is a Constitutional right, then why is it not a right immediately afforded to all students in an unaccredited district? Why is there not a mandated plan to swiftly redistribute students from unaccredited to accredited districts instead of a single vague, largely outdated statute that individual parents might or might not choose to invoke depending on their degree of knowledge? Simply put, there is no Constitutional right to attend school in an accredited district, and so no Constitutional violation occurs when § 167.131 is limited to its proper and intended scope. Plaintiffs' constitutional argument is illogical and finds no support in the Constitution, the statutes, or case law. It should be rejected.

The passage of SB 781, with its specific provisions concerning student transfers from the City District and establishing the method for governing the City District following loss of accreditation, provided an exception from § 167.131 for

the St. Louis schools. Given the fact that the comprehensive reforms of SB 781 cannot succeed if § 167.131 is applied to the City District, SB 781, as the later passed and more specific legislation, must take precedence. Appellants' claims, which rely upon § 167.131, have no merit and the judgment of the trial court should be affirmed.

**II. THE TRIAL COURT CORRECTLY ENTERED SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS AND DENIED SUMMARY JUDGMENT IN FAVOR OF PLAINTIFFS BECAUSE § 167.131 R.S.MO. DOES NOT APPLY TO THESE PLAINTIFFS AND THE ST. LOUIS PUBLIC SCHOOL DISTRICT IN THAT § 167.131 R.S.MO. IS AMBIGUOUS AND RELEVANT EVIDENCE SHOWS THAT IT WAS NEVER INTENDED TO APPLY TO SITUATIONS WHERE ENTIRE SCHOOL DISTRICTS LOST THEIR STATE ACCREDITATION PURSUANT TO NEW LEGISLATION (Responding to Points Relied On I, V).**

**A. Discussion.**

**1. Introduction.**

Appellants can only prevail if their repeated and vociferous assertions that § 167.131 R.S.Mo. is unambiguous in this instance meet approval from this Court. Just as they did at the trial court, however, the Appellants utterly disregard the fact

that the statute makes no reference at all to the loss of accreditation by an entire school district. Rather, it refers to the failure of a district to “maintain” an “accredited school.”<sup>4</sup> For its remedy, the statute requires the district where the student resides to pay the tuition of each pupil “who attends an accredited school” in another district of the same or an adjoining county. Again, no mention is made of districts with respect to the prescribed remedy, only of a singular “accredited school.”

Even if the General Assembly intended for § 167.131 to apply to districts like the City District that have lost state accreditation, it did not choose language that either communicates or effectuates that intent. If Appellants’ contentions regarding the applicability of § 167.131 were correct, the opening sentence of the statute would read simply “[t]he board of education of each district in this state that does not maintain accreditation from the state . . .” Instead, the General Assembly opted to refer only to individual schools, even after the concept of district-wide accreditation had supplanted school-by-school credentialing. Thus, § 167.131 is ambiguous, and the appeal must fail because the legislative history of § 167.131

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<sup>4</sup> Appellants give the statute the impressive but completely false title of the “Unaccredited District Tuition Statute,” conveniently ignoring the fact that in the 78 years since its predecessor statute was first enacted, § 167.131 has never referred in its text to unaccredited *districts*, only unaccredited *schools*.

demonstrates that the statute has no application to the City District in its present circumstance.

**2. Section 167.131 Is Open To Multiple Interpretations And Its Meaning Is Therefore Ambiguous In This Instance.**

Section 167.131 is ambiguous on its face as exemplified by the present situation faced by the City District. As will be discussed below, the most reasonable interpretation of § 167.131 is that it was originally intended to address those situations that commonly arose in smaller, rural school districts that did not maintain a high school and instead sent their students to schools in neighboring communities. The General Assembly, either by design or by omission, has failed to update § 167.131 to reflect the modern regime of district-wide accreditation. While the statute by its terms still applies to those small districts that close their middle or high schools and offer no classes at those grade levels, the General Assembly has allowed the statute's applicability to narrow as its language becomes increasingly obsolete within the broader context of the state's system of educational regulation.

The ambiguity of § 167.131 is further underscored by the fact that the City District in actuality does maintain schools that are individually accredited, giving rise to another possible interpretation of the statute. Perhaps, in referring to individual schools rather than districts, the General Assembly was not referring to

accreditation solely under the state’s auspices, but accreditation achieved under the sponsorship of any responsible accrediting agency. If this was the General Assembly’s intent—and that could explain why § 167.131 refers to accreditation of individual schools rather than that of districts—then Appellants’ claims must fail, because the City District maintains schools that are independently accredited by the North Central Association Commission on Accreditation and School Improvement. (Affidavit of Dr. Dan Edwards, L.F.\_513). Appellants conceded, by not contesting this Affidavit, that the City District does maintain schools that are individually accredited independent of the district’s overall classification by the state.

The references in § 167.131 to singular schools rather than entire school districts prompts many plausible, but conflicting interpretations of the statute and confirms that it is ambiguous. Consequently, the Court should examine the long history of the statute to determine its actual meaning. *See United Pharmacal Co. v. Missouri Board of Pharmacy*, 208 S.W.3d 907, 912 (Mo. banc 2006) (“the Court may review the earlier versions of the law, or examine the whole act to discern its evident purpose, or consider the problem that the statute was enacted to remedy.”) *quoting In re M.D.R.*, 124 S.W.3d 469, 472 (Mo. banc 2004).

**3. The Legislative History Of § 167.131 Demonstrates That It Does Not Apply Where Entire Districts Have Lost State Accreditation.**

Despite the existence of credible alternative interpretations of § 167.131, the legislative history of the statute reveals the correct understanding of its purpose and present scope. The history of § 167.131 and its roots in Missouri's 1931 School Law unequivocally demonstrate that the statute was never intended to be applied in situations where an entire school district loses its accreditation, because the concept of district-wide accreditation did not exist in 1931. Further, the General Assembly has not amended § 167.131 to reflect such a possibility.

At the time of its enactment, the statute read in relevant part:

The board of directors of each and every school district in this state that does not maintain an approved high school offering work through the twelfth grade shall pay the tuition of each and every pupil resident therein who has completed the work of the highest grade offered in the school or schools of said district and attends an approved high school in another district of the same or adjoining county where work of one or more higher grades is offered . . .

C.S.S.B. 237, 269, 322, 323, 326, and 327, Section 16, 1931 Laws of Missouri, p. 343. (App., pp. 75-77). The 1931 law was codified as § 10458 R.S.Mo. (App.,

pp. 71-73). The above-quoted operative heart of the law, which was recodified first as § 161.095 (App., pp. 68-70) and then as § 167.131 (App., pp. 66-67), has remained essentially unchanged ever since, even after it was amended into its present form as part of SB 380, the Outstanding Schools Act, in 1993.

School districts in the state of Missouri in 1931 were divided between districts that were classified as “common,” which typically did not offer any high school courses unless separate action was taken to offer ninth and tenth grade courses, and several other classifications of districts that were expected to operate high schools. The common school districts would automatically fall within the scope of § 10458 because by statute they could not maintain high schools that offered work through the twelfth grade. *See, e.g., Linn Consol. High Sch. Dist. v. Pointer’s Creek Pub. Sch. Dist.*, 203 S.W.2d 721 (Mo. 1947) (interpreting § 10458 in dispute between common school district with no high school and approved high school district).

In 1931, the terms “approved,” “classified,” and “accredited” were used interchangeably with respect to the schools. Under the law then in effect, the state superintendent of public schools was empowered to classify public high schools according to the “minimum course of study for each class.” § 10602 (R.S.Mo. 1939, § 9447 R.S.Mo. 1929). (App., pp. 78-79, 74). Thus, a high school of the first class would have to offer four years of studies for at least nine months in each

year in the subjects of English, mathematics, science, and history, and would have to employ at least three teachers approved for high school work. At the bottom of the “approved” scale were third class high schools, which had to offer two years studies for at least eight months in each year in the same subjects. The statute concluded that “[a]ll work in an accredited high school shall be given full credit in requirements for entrance to and classification in any educational institution supported in whole or in part by state appropriations.” *Id.*

Former Section 10603 further elucidates the concept of accreditation as it existed in 1931:

For the purpose of classifying high schools and having their work accredited by higher educational institutions, the state superintendent of public schools shall, in person or by deputy, inspect and examine any high school making application for classification, and he shall prescribe rules and regulations governing such inspections and examinations, and keep complete record of all inspections, examinations, and recommendations made. He shall, from time to time, publish lists of classified high schools: *Provided*, he may drop any school in its classification if, on reinspection or re-examination, he finds that such school does not maintain the required standard of excellence.

Section 10603 (R.S.Mo. 1939, § 9448 R.S.Mo. 1929) (emphasis in original) (App., pp. 74, 78-79). Under this statutory scheme, only those high schools who were “classified” as provided for in § 10602 were “accredited,” and those terms were interchangeable with “approved.”

The provisions of §§ 10602 and 10603 inform the reading of § 10458. As it was passed, the predecessor statute to § 167.131 had no relation to the present-day concept of overall school district “accreditation” because that concept did not exist in 1931. Contrary to the complex regulatory scheme that led to the loss of accreditation by the City District in 2007 (the Missouri School Improvement Program), approval or accreditation in 1931 was limited to individual high schools and was based on meeting a very few enumerated factors that related entirely to a minimum level of course offerings, the length of the school year, and staffing.

When the General Assembly passed the Outstanding Schools Act in 1993, it made changes to § 167.131, but those changes amounted to little more than a cosmetic update. “Approved” was changed to “accredited” but, as we have seen, those terms were largely interchangeable in 1931. The statute was also expanded to embrace all “schools” rather than just “high schools.” Crucially, however, unaccredited school “districts” do not replace individual unaccredited “schools” in the amended statutory language. If the General Assembly had intended to include school districts within the scope of § 167.131 it certainly could have done so, and it

is not the province of the courts to rewrite the statute, even if the General Assembly might have erred. *United Air Lines, Inc. v. State Tax Comm'n*, 377 S.W.2d 444, 448 (Mo. 1964) (“[w]e are guided by what the legislature says, and not by what we may think it meant to say.”). Thus, the relevant portion of § 167.131 remains essentially unchanged from its original form in the 1931 School Law and has no application in the present circumstances, where the City District as an single entity has lost state accreditation.

In light of the legislative history of § 167.131, the trial court appropriately granted summary judgment to the Transitional School District on behalf of the City District and denied summary judgment to Appellants. The trial court’s judgment should be affirmed.

### **CONCLUSION**

Appellants are trying to use an obsolete, inapplicable statute to force the City District to pay tuition for their children to attend the Clayton schools that they already attend pursuant to contract. They claim that § 167.131 and SB 781 can be “harmonized.” In reality, Appellants would “harmonize” the statutes by ripping the heart out of SB 781 and replacing it with § 167.131, thereby turning the interpretive rule giving preference to newer, more specific statutes on its head.

Instead of the comprehensive scheme for the reform of the City District contained in SB 781, including an ambitious inter-district transfer program paid for

by the state and the provision for a Special Administrative Board to lead the district back to accreditation, the dated, quaintly drafted § 167.131 would become the core of Missouri's policy toward its largest school district. Rather than having the state pay for transfers as mandated by SB 781 and the *Liddell* settlement agreement, Appellants would have § 167.131 require that the City District pay for transferees' tuition out of already strapped revenues, including those "transferees," like Appellants' children, who did not attend City schools and who are voluntary, tuition paying students in another district.

The General Assembly provided comprehensively for matters related to the City District in SB 781, including governance issues and student transfers. Appellants' interpretation of § 167.131 is illogical and would contradict and severely undercut both SB 781 and the landmark 1999 Settlement Agreement. The judgment of the trial court granting summary judgment in favor of the Transitional School District of the City of St. Louis and Clayton School District and denying summary judgment to Appellants should therefore be affirmed.

Respectfully submitted,

**LEWIS, RICE & FINGERSH, L.C.**

Dated: \_\_\_\_\_

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**CERTIFICATION**

The undersigned certifies that Respondent's Substitute Brief complies with the requirements of Rule 84.06. Respondent's Substitute Brief contains 7,631 words. The undersigned also certifies that pursuant to Rule 84.06(g), a compact disk with a copy of the Brief, in Word for Windows format and scanned and found to be virus-free, was sent to the Court together with this Brief.

Dated: \_\_\_\_\_

\_\_\_\_\_  
Richard B. Walsh, Jr., #33523

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on August 25, 2009, one true and correct copy of the foregoing Substitute Brief of Respondent was addressed and delivered to Elkin Kistner, Jones, Bick, Kistner & Jones, 1600 S. Hanley, Ste. 101, St. Louis, MO 63144 and Mark Bremer, Kohn, Shands, Elbert, Gianoulakis & Giljum, LLP, One U.S. Bank Plaza, 24th Floor, St. Louis, MO 63101, together with a compact disk with a copy of the Brief, in Word for Windows format and scanned and found to be virus-free.

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