

**Summary of SC92653, *Gina Breitenfeld v. School District of Clayton, et al., State of Missouri*  
and Attorney General Chris Koster**

Appeal from the St. Louis circuit court, Judge David Lee Vincent III

Argued and submitted March 5, 2013; opinion issued June 11, 2013

**Attorneys:** The state was represented by Solicitor General James R. Layton, Thomas D. Smith and Christopher J. Quinn of the attorney general's office in Jefferson City, (573) 751-3321, and Breitenfeld was represented by Elkin L. Kistner and Sean M. Elam of Bick & Kistner PC in Clayton, (314) 571-6823. The Clayton school district and Clayton taxpayers were represented by Mark J. Bremer and D. Leo Human of Kohn, Shands, Elbert, Gianoulakis & Giljum LLP in St. Louis, (314) 241-3963. The transitional school district was represented by Richard B. Walsh Jr. and Evan Z. Reid of Lewis, Rice & Fingersh LC in St. Louis, (314) 444-7600.

Certain St. Louis school district residents, who filed a brief as friends of the Court, were represented by Joshua M. Schindler of The Schindler Law Firm PC in St. Louis, (314) 862-1411; and the cooperating school districts of greater St. Louis, which also filed a brief as friends of the Court, were represented by Melanie Gurley Keeney, Katherine L. Nash and Elizabeth J. Mooney of Tueth, Keeney, Cooper, Mohan & Jackstadt PC in St. Louis, (314) 880-3600.

*This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.*

**Overview:** The state and the mother of two children residing in the St. Louis school district appeal a trial court's judgment that the statute governing transfers of and tuition for children from an unaccredited school district to attend school in a neighboring accredited district violated the state constitution and made it impossible for the school districts to comply. In a unanimous decision written by Judge Mary R. Russell, the Supreme Court of Missouri reverses the trial court's judgment and remands (sends back) the case to the trial court. The statute does not violate the state constitution, the trial court erred in accepting the "impossibility" defense offered by the school districts and the trial court must assess the tuition issue in light of this opinion.

**Facts:** After the St. Louis public school district became unaccredited in 2007, it was operated by the special administrative board of the transitional school district. Some parents sought to have their children obtain transfers pursuant to section 167.131, RSMo 2000, and tuition payments from the transitional school district that would enable them to attend school in the neighboring Clayton school district. Both the St. Louis and Clayton school districts objected. The parents sued, and the trial court entered judgment in favor of the school districts. On appeal, this Court reversed the judgment, holding that section 167.131 applied to the transitional school district and required it to pay the tuition costs for the plaintiffs' children to attend Clayton. *Jane Turner, et al v. School District of Clayton, et al.*, 318 S.W.3d 660 (Mo. banc 2010). By the time the case was hard on remand, only one plaintiff remained – Gina Breitenfeld and her two children – as the other plaintiff children either graduated from high school or chose not to participate in the litigation any longer. The trial court allowed taxpayers from Clayton district and one from the

St. Louis district to intervene in the case to raise arguments that section 167.131 violates the Hancock amendment (article X, sections 16 to 22 of the Missouri Constitution).

Following trial on remand, the trial court determined the statute was unenforceable as to the defendant school districts, finding it was an unfunded mandate in violation of the Hancock amendment. The trial court also determined that it would be “impossible” for the defendant school districts to comply with section 167.131. The trial court entered judgment in favor of Clayton on the district’s counterclaim against Breitenfeld, ordered Breitenfeld to pay Clayton more than \$49,000 for tuition owed, and awarded attorney fees and costs to the school districts and the intervening taxpayers. The state and Breitenfeld appeal.

### **REVERSED AND REMANDED.**

**Court en banc holds:** (1) Section 167.131 does not violate the Hancock amendment, and the trial court erred in so holding.

(a) Because section 167.131 imposes nothing “new” or “increased” for Hancock purposes as to the defendant school districts’ provision of K-12 educational services, the trial court erred in determining that the statute creates an “unfunded mandate” for providing educational services. The statute does not alter the basic, longtime mandate directing schools to provide a free public education to eligible students, nor does it create a new category of students to whom educational services are to be provided. There is no Hancock violation because Clayton would continue to be engaged in its existing activities and services of operating schools for eligible students in grades K-12. To the extent that *School District of Kansas City v. State*, 317 S.W.3d 599, 611 (Mo. banc 2010), suggests in dicta that an increased cost of performing an existing activity or service itself can result in a Hancock violation, it is incorrect.

(b) The intervening taxpayers fail to show a Hancock violation as to section 167.131 reassigning among school districts the long-existing mandates for providing public education to eligible children. The Hancock amendment is designed to prohibit the shifting of burdens from the state to a local entity, not to prevent the state’s reallocation of responsibilities among political subdivisions. Section 167.131 does not expand the total number of children eligible to be educated statewide. Rather, its only change is to reallocate responsibilities for educating certain children among school districts. As such, it does not involve the type of burden-shifting the Hancock amendment prohibits. *See Berry v. State*, 908 S.W.2d 682, 685 (Mo. banc 1995).

(c) The trial court erred in finding an “unfunded mandate” regarding section 167.131’s requirement that an unaccredited school shall provide transportation, consistent with section 167.241, RSMo 2000, for each resident student who attends a neighboring accredited school. The state concedes – and this Court agrees – these transportation requirements are “new” mandates on the St. Louis district for purposes of the Hancock amendment. But proving a Hancock violation requires more than simply showing a statute mandates a “new” or “increased” activity – there also must be proof that the mandate is, indeed, “unfunded.” Without having “designated” any accredited districts for

purposes of effectuating the transportation mandates of section 167.131, however, the St. Louis district is left with only speculative evidence related to the costs of compliance. Evidence that is merely speculative cannot support a finding of an “unfunded mandate” in violation of the Hancock amendment. *See School District of Kansas City v. State*, 317 S.W.3d 599 (Mo. banc 2010).

(2) The trial court erred in accepting the “impossibility” defenses advanced by the defendant school districts. There is no affirmative defense of “impossibility,” however, available to the defendant school districts to allow them to refuse compliance with section 167.131. The “impossibility” arguments they raise echo the doctrine of impossibility or impracticality that is applied typically in contract law, and the doctrine is not applied unless the party demonstrates that it has performed virtually every action possible to promote compliance with the contract. But there are no en masse transfers of students pursuant to section 167.131 looming, and the St. Louis district now has achieved provisional accreditation, narrowing the scope of the case to the two Breitenfeld children who already transferred to the Clayton district. The issue was based on the transfer of potentially thousands of new students that simply cannot occur now, and the Court need not reach this issue.

(3) The trial court did not abuse its discretion in allowing the taxpayers to intervene to bring their Hancock claims. It is clear that taxpayers and not school districts must advance any Hancock challenges to section 167.131. At the time of intervention, the taxpayers’ claims were in common with the main action as required for permissive intervention.

(4) The trial court’s judgments awarding the intervenors attorney fees are reversed. They are not entitled to such an award because they now have not made a successful Hancock challenge.

(5) The trial court’s judgment regarding ordering Breitenfeld to pay Clayton unpaid tuition costs must be reversed to the extent this judgment was premised on the trial court’s belief that section 167.131 was not enforceable. It did not address to what extent, if any, Breitenfeld would owe unpaid tuition costs for her two children if the defendant school districts had not prevailed in their assertions that section 167.131 should not be enforced against them. The case is remanded so the trial court can enter a tuition reimbursement judgment that is consistent with this opinion.