

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

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No. ED 97129

LAURA ROY

CLERK, MISSOURI COURT OF APPEALS
EASTERN DISTRICT

JORDAN DANIELLE KING-WILLMAN, et al.

92125

Plaintiffs/Appellee,

FILED

v.

NOV 7 2011

WEBSTER GROVES SCHOOL DISTRICT,

Defendant/Appellant

CLERK, SUPREME COURT

ON APPEAL FROM THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS
STATE OF MISSOURI
CAUSE NO. 10SL-CC03268

HONORABLE BARBARA WALLACE

BRIEF OF AMICUS SPECIAL SCHOOL DISTRICT OF ST. LOUIS COUNTY

THOMECZEK & BRINK, LLC

James G. Thomeczek, 34059
Sandra A. Padgett, 37351
1120 Olivette Executive Parkway
Suite 210
St. Louis, Missouri 63132
(314) 997-7733 (Telephone)
(314) 997-4888 (Facsimile)
james.thomeczek@tblawfirm.com
sandra.padgett@tblawfirm.com

*Attorneys for Amicus Curiae
Special School District of St. Louis County*

SCANNED

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james.thomeczek@tblawfirm.com
sandra.padgett@tblawfirm.com

*Attorneys for Amicus Curiae
Special School District of St. Louis County*

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III. Jurisdictional Statement

The Special School District of St. Louis County adopts the Jurisdictional Statement of the Appellant, Webster Groves School District.

IV. Statement of Facts

The Special School District of St. Louis County adopts the Statement of Facts of the Appellant, Webster Groves School District.

V. Point Relied On

The trial court erred in entering an Order in Mandamus requiring the Webster Groves School District “to enroll and place Jordan Danielle King-Willmann in Webster Groves High School immediately,” because there was no clear duty to enroll Ms. King-Willmann under existing law, in that Section 167.131, RSMo. is inapplicable to, or otherwise fails to address, situations where the school in which a student from an unaccredited school district seeks to enroll is a school in a school district that is also part of a special school district.

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VI. Argument

A. Introduction

This matter comes before the Court following the entry of an Order in Mandamus by the Circuit Court of St. Louis County, whereby on June 22, 2011, the Circuit Court ordered the Webster Groves School District (hereinafter referred to as “WGSD”) “to enroll and place Jordan Danielle King-Willmann^[1] in Webster Groves High School immediately.” WGSD has filed a Notice of Appeal.

Amicus Special School District of St. Louis County (hereinafter referred to as “SSD”) files this brief urging this Court (1) to vacate the June 22, 2011 Order in Mandamus and deny the writ; or (2) to vacate the Order in Mandamus and return the matter to the Circuit Court for further consideration of the issues presented, including specifically the affirmative defenses advanced by WGSD, in light of the “dual governance” education system in St. Louis County. In rendering its decision, the Circuit Court relied on Section 167.131, RSMo. and Turner v. School Dist. of Clayton, 318 S.W.3d 660 (Mo. 2010) (hereinafter referred to as “Turner”). Both Section 167.131, RSMo. and Turner are silent with respect to school districts that are part of a special school district. That silence clouds the applicability of Section 167.131, RSMo. to the present situation, raises important questions with significant unresolved financial implications, and muddies any alleged duty on the part of WGSD to a point that the Order of Mandamus is infirm and must be denied or vacated.

¹ Hereinafter referred to as “Student.”

B. The Dual Governance System of Public Education in St. Louis County

SSD is a special school district duly organized and operating pursuant to the laws of the State of Missouri. §§ 162.815 and 162.820, RSMo. WGSD is a seven-director school district. See, generally, §§ 162.211 through 162.321, RSMo. SSD is charged with two primary purposes: (1) to educate and train children with disabilities who reside within the special district; and (2) to provide vocational education for residents of the special district. § 162.815, RSMo. “The local school district or special school district in which a child with a disability **resides** is responsible for implementation of FAPE.” 5 C.S.R. 70-742.140 at 41 (emphasis added).²

² “FAPE” refers to “free appropriate public education,” required of states to receive federal financial assistance under the Individuals with Disabilities Education Act:

In order to fully implement section 1(a) of article IX, constitution of Missouri, 1945, providing for the establishment and maintenance of free public schools for gratuitous instruction of all persons in this state within ages not in excess of twenty-one years as prescribed by law, it is hereby declared the policy of the state of Missouri to provide or to require public schools to provide to all handicapped and severely handicapped children within the ages prescribed herein, as an integral part of Missouri’s system of gratuitous education, a free appropriate education consistent with the provisions set forth in state and federal regulations implementing the

Districts included in SSD are relieved of any obligation to provide special education or related services to children with disabilities: “If a special school district is organized in any area of this state . . . , neither the state board of education nor any school district within the special school district shall be required to establish schools or classes for the training or education of handicapped or severely handicapped children under any other existing law” § 162.890, RSMo. WGSD cannot be required to establish classes for the education of children with disabilities.

SSD is “a body corporate and political subdivision of the state and . . . may sue and be sued, levy and collect taxes . . . issue bonds and possess the same corporate powers as seven-director school districts” § 162.875, RSMo. SSD is a school district unto itself, separate and distinct from the school districts which comprise SSD. § 162.830, RSMo. (“[T]he special school district shall be in addition to the school districts comprising the special district.”); St. Louis Developmental Disabilities Treatment Ctr. Parents Ass’n v. Mallory, 591 F. Supp. 1416, 1429 (W.D. Mo. 1984) aff’d sub nom. St. Louis Developmental Disabilities Treatment Ctr. Parents’ Ass’n v. Mallory, 767 F.2d 518 (8th Cir. 1985)(hereinafter cited as “SLDDTC”)(“The SSD is separate and independent from the local school districts. The latter continue to serve nonhandicapped

Individuals with Disabilities Education Act (IDEA), 20 U.S.C. Section 1400 et seq. and any amendments thereto. . . .
§ 162.670, RSMo.

children, and the SSD is responsible for educating the handicapped children of the local districts.”).

SSD does not receive funding from its component districts, including specifically WGSD. SSD levies and collects taxes. § 162.875, RSMo. Taxpayers in WGSD pay a school tax to WGSD and another school tax to SSD. The same is true in the other component districts that comprise SSD. SSD receives state aid, but the process for calculating the state aid for a special school district is different from the process used for a seven-director, non-special school district, such as WGSD. See, e.g., §§ 162.935 and 163.011(16), RSMo. SSD and WGSD each has its own board of education, employees, and facilities.

The boundaries of SSD “coincide with the boundaries of the school districts included in the special district.” § 162.830, RSMo. There are twenty-two school districts included in SSD; WGSD is one of those districts. St. Louis Public Schools is **not** included in SSD. Children with disabilities who reside in WGSD are entitled to FAPE from SSD, not WGSD; children with disabilities who reside in St. Louis City are entitled to FAPE from St. Louis Public Schools.

The dual governance system in St. Louis County has been in place since 1956. It is recognized by the General Assembly in school district organization statutes, see, e.g., § 162.815, RSMo., et seq.; in school funding statutes, § 163.011(16), RSMo.; and even in statutes pertaining to juveniles in court-operated facilities, §§ 178.295-298, RSMo., and in facilities operated by the Department of Mental Health. § 162.740, RSMo.

The dual governance system highlights another difference between educating children with disabilities in the St. Louis Public Schools and in St. Louis County. Children with severe disabilities who reside in the City of St. Louis may be assigned to a State School for the Severely Handicapped. Such schools are operated by the State, and not by St. Louis Public Schools. § 162.730.1, RSMo. (“The state board of education shall establish schools or programs in this state sufficient to provide special educational services for all **severely handicapped children not residing in special school districts** or in other school districts providing approved special educational services for severely handicapped children which schools or programs shall be referred to herein as ‘Missouri Schools for the Severely Disabled.’”)(emphasis added). SSD educates severely handicapped children who reside in one of its component districts. § 162.815, RSMo.

As the decision in SLDDTC notes, special school districts in Missouri provide a unique system of delivering special education services to children with disabilities who reside in such special school districts. This unique system has gone unaddressed in Section 167.131, RSMo., in Turner, and in the Order/Judgment of the Circuit Court, below. This silence, especially in the statute, evidences beyond cavil that Section 167.131, RSMo. is not applicable to SSD and its component districts, including WGSD.

This Court should vacate the Order in Mandamus and deny the Writ – or at the very least, vacate the Order and return this matter to the Circuit Court for further consideration in light of the dual governance system of education in St. Louis County.

C. Section 167.131, RSMo.

The Circuit Court based its Order in Mandamus on its reading of Section 167.131, RSMo. and the Supreme Court’s decision in Turner. Section 167.131, RSMo. does not contemplate a dual governance system. There is no mention of a special school district in the statute or in Turner.

On its face, the statute requires an unaccredited school district to pay a single tuition to a single accredited receiving school district. § 167.131.1, RSMo. (“The board of education of each district in this state that does not maintain an accredited school . . . shall pay **the tuition** of . . . each pupil resident therein who attends an accredited school in another **district** of the same or an adjoining county.”)(emphasis added).

The statute then states that the tuition to be paid by the sending school is “the per pupil cost of maintaining the district’s grade level grouping which includes the school attended.” § 167.131.2, RSMo. “The cost of maintaining a grade level grouping shall be determined by the board of education of the district but in no case shall it exceed all amounts spent for teachers’ wages, incidental purposes, debt service, maintenance and replacements.” § 167.131.2, RSMo. “Per pupil cost of the grade level grouping shall be determined by dividing the cost of maintaining the grade level grouping by the average daily pupil attendance.” § 167.131.2, RSMo.

The “per pupil cost of maintaining the district’s grade level grouping” formula in § 167.131.2, RSMo. is different from that used in other statutes that address a student’s attendance in a district other than that of his or her domicile in two respects: (1) it fails to acknowledge special school districts; and (2) it is based on grade level grouping.

Compare, § 167.126, RSMo. (placements “arranged by or approved by the department of mental health, the department of social services or placement arranged by or ordered by a court of competent jurisdiction” not based on grade level grouping); §§ 178.295-298, RSMo. (placements in “court-operated facilities for the care and protection of juveniles” not based on grade level grouping); § 162.705, RSMo. (contracting “with a nearby district or districts or public agency or agencies for such special educational services” not based on grade level grouping).

Unlike a K-12 school district such as WGSD, SSD does not educate children with disabilities based on grade level groupings. Instead, SSD provides services to children with disabilities based upon each child’s individualized needs as stated in each child’s respective individualized education program, or IEP, 5 C.S.R. 70-742.140 at 43, and are programmatic in nature. The General Assembly has recognized this difference:

*

The board of education of the special school district shall determine as nearly as possible the per capita cost of its programs and file the same with the state department of elementary and secondary education. Upon approval thereof by the state department of elementary and secondary education, the board of education of the special school district shall require of all resident students over twenty-one years of age and all nonresident students desiring to participate in the programs of the special school district a tuition fee in an amount approved by the state department of elementary and secondary education.

§ 162.940, RSMo.

Section 167.131, RSMo. is not applicable to special school districts. This limitation renders Section 167.131, RSMo. inapplicable to school districts such as WGSD which are included within a special school district, as well. See § 162.890, RSMo., supra.

D. Turner

On July 16, 2010, the Missouri Supreme Court handed down its decision in Turner. In a *per curiam* decision, a sharply divided Court held “that § 167.131’s unambiguous mandatory language requires unaccredited school districts to pay the tuition of its students who choose to attend an accredited school in an adjoining district.” Turner, 318 S.W.3d at 663. The majority went on to state: “[Section] 167.131.2 does not give an accredited school chosen by a student discretion to deny admission to that student.” Turner, 318 S.W.3d at 669.

Judge Breckenridge, joined by Judge Russell and Judge Stith, penned a stern dissent. Judge Breckenridge posited that “Section 167.020 makes clear the legislature intended for school districts to have discretion in granting waivers to allow non-resident students to register and attend school.” Turner, 318 S.W.3d at 674 (Breckenridge, J., dissenting).

The majority, with no judge claiming authorship, dismissed Judge Breckenridge’s argument. However, Judge Breckenridge’s argument underscored an important aspect of Section 167.131.2 that was unaddressed by the majority – that is, the introductory phrase of the last sentence: “Subject to the limitations of this section.” § 167.131.2, RSMo.

Section 167.131 assumes a single receiving school district that is a comprehensive school district. It does not address or anticipate a situation in which the receiving school district is a component district of a special school district. This limitation in Section 167.131 is not addressed in Turner. Because the Turner Court failed to address the ramifications of having the receiving school district be one that is included in a special school district, the application of the Turner reasoning to this case is improper, and the issuance of the writ in mandamus by Circuit Court was improvident. The writ should be vacated and an order entered denying same. In the alternative, the writ should be vacated and the matter returned to the Circuit Court for further consideration.

E. WGSD Does Not Have a Clear Duty to Admit Student

It is ironic that the Circuit Court cited a special education case in setting out the standard for mandamus. State ex rel. St. Joseph Sch. Dist. v. Missouri Dept. of Elementary & Secondary Educ., 307 S.W.3d 209, 213 (Mo. Ct. App. 2010)(hereinafter referred to as "St. Joseph Sch. Dist."). In St. Joseph Sch. Dist., the Western District Court of Appeals quoted from its 2009 decision State ex rel. Lee v. City of Grain Valley, 293 S.W.3d 104, 106–07 (Mo. Ct. App. 2009): “The remedy of a writ of mandamus is only appropriate where a party has a **clear duty** to perform a certain act. Mandamus only lies when there is an unequivocal showing that a public official failed to perform a ministerial duty imposed by law. The purpose of mandamus is to require the performance of a duty already defined by the law.” Id. (emphasis added).

Plaintiffs do not plead that the Student is disabled or is not disabled. They do not plead whether Student would require special education services or not require special

education services. By statute, WGSD is relieved of any duty to provide special education services to children with disabilities. § 162.890, RSMo. Given the dual governance system in St. Louis County and the Student's failure to allege whether she is a child with a disability in the Amended Petition, there was no clear duty on the part of WGSD to enroll Student.

The dual governance system of public education in St. Louis County negates any claim of a clear duty on the part of WGSD to enroll Student, even if Student is not currently identified as a child with a disability. For children who are residents of one of the component districts, SSD has a duty to locate, identify and evaluate children who may be disabled. 5 C.S.R. 70-742.140 at 18 ("It is the policy of the State of Missouri that all children with disabilities, residing in the state . . . are identified, located, and evaluated."). This process of identifying, locating and evaluating children suspected of being children with disabilities is often referred to as "child find," 34 C.F.R. § 300.111, and specifically includes "children who are suspected of being a child with a disability . . . and in need of special education, even though they are advancing from grade to grade." 34 C.F.R. § 300.111(c)(1). Child find activities, by definition, occur prior to a child's receiving special education. See, e.g., § 162.700.2, RSMo. ("Every local school district or, **if a special district is in operation, every special school district** shall obtain current appropriate diagnostic reports for each with disabilities child **prior to** assignment in a special program.")(emphasis added).

WGSD and SSD are aware of their respective child find responsibilities of children who reside in WGSD, including children who attend private schools in WGSD.

However, Section 167.131, RSMo. does not make clear – it does not even address – which district – WGSD, SSD, or SLPS – would be responsible for child find responsibilities for children who reside in the City of St. Louis but who would be attending school in WGSD under Section 167.131, RSMo. The cost of which is borne totally by the responsible district – with no state or federal funds allocated therefor.

Section 167.131, RSMo. does not on its face provide for the payment of two tuitions by the unaccredited school district – one to the component district and one to the special school district. As previously noted, the obligation to make FAPE available to children with disabilities lies with the district of residence. 5 C.S.R. 70-742.140 at 41. Nothing in Section 167.131, RSMo. changes the residency of the child or the obligation to provide FAPE. WGSD does not provide the services – and its costs of maintaining grade level placements would likely not include the costs of providing FAPE. This limitation in Section 167.131, RSMo. eviscerates any claim of a clear duty on the part of WGSD to enroll Student. The Order of the Circuit Court places WGSD in a position of having to enroll a child who is now identified – or who may later become identified – as a child with a disability with no mechanism in place for providing such a child with the FAPE required under federal law.

This limitation in Section 167.131, RSMo. with respect to school districts such as WGSD that are included in a special school district is no small matter. The provision of FAPE can require the provision of a vast array of special education and related services, as set out in Section § 161.850, RSMo.:

The right of parents to have a free appropriate public education for their child with an individualized education program designed to meet their child's unique needs, which may include, but not be limited to, special education and related services such as assistive technology devices and services, transportation, speech pathology services, audiology services, interpreting services, psychological services, including behavioral interventions, physical therapy, occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, orientation and mobility services, school health services, school nurse services, social work services, parent counseling and training, and medical services for diagnostic or evaluation purposes.

§ 161.850, RSMo.

There is no clear duty on the part of WGSD to provide special education and related services to children with disabilities. There is no clear duty on the part of SSD to provide the services to nonresident students. Indeed, Section 162.940, RSMo. requires that SSD charge such nonresident students a tuition – a tuition based on factors other than the “per pupil cost of maintaining the district’s grade level grouping”:

The board of education of the special school district shall determine as nearly as possible the **per capita cost of its programs** and file the same with the state department of elementary and secondary education. Upon approval thereof by the state department of elementary and secondary

education, **the board of education of the special school district shall require of** all resident students over twenty-one years of age and **all nonresident students desiring to participate in the programs of the special school district a tuition fee** in an amount approved by the state department of elementary and secondary education.

§ 162.940, RSMo. (emphasis added). SSD submits that it is under no obligation to provide such services – first, because there is no mandate in Section 167.131, RSMo. requiring SSD to do so, and because there is no funding mechanism in place in the statute.³

³ SSD notes that there has been no state appropriation made and disbursed to pay the SSD for any costs that the District could incur, if it were to be found to have an obligation to provide special education and related services to children enrolled in one of the districts that are included in the SSD. SSD does not waive, and specifically reserves its right to raise a Hancock Amendment defense, and any and all other appropriate defenses (including, for example, whether the presence of accredited public charter schools in the City of St. Louis limits the applicability of Section 167.131, RSMo.), should this matter be remanded and SSD joined as a party, or should there be an action on the same or similar issues in any other action involving SSD and/or one of its component districts.

The limitations in Section 167.131, RSMo. and Turner, as well as the foregoing discussion, nullify any claim of a clear duty on the part of WGSD to enroll Student. The writ in mandamus was improvidently issued.

F. Other Issues

There are a myriad of issues unaddressed by Section 167.131, RSMo. that arise out of the dual governance system. The following list is not exhaustive.

- Which district is responsible for FAPE?
- Which district is responsible for convening IEP teams?
- Which district is responsible for the costs of a private school placement, if needed?
- Which district is responsible for the costs of a residential school placement, if needed?
- Which district would be responsible for employing special education teachers?
- Does SSD have to admit nonresident students into its programs just because WGSD was required to enroll a child with a disability?
- Does SLPS have to pay tuition to SSD in addition to the tuition paid to WGSD?
- Does WGSD have to make classroom space available to SLPS for special education classrooms?
- Can SLPS be required to contract with SSD for the provision of special education and related services?

- Against which district would the parents of a child with a disability file a complaint under Section 162.961, RSMo.?
- If Section 167.131, RSMo. is applicable and the writ made absolute, whether the administrative process under Section 162.961, RSMo. limits the rights of children with disabilities to enroll in a school in St. Louis County?
- Which district is required to file reports with the federal government?
- If a child is suspended or expelled, which district would be responsible for continuing the provision of FAPE?
- If a child is suspended from school on a number of occasions during the course of a school year, which district is responsible for determining whether a pattern of exclusions exist?
- How is state aid distributed?
- If Section 167.131, RSMo. is applicable and the writ made absolute, whether a child who resides in the City of St. Louis and who is severely disabled and attending a State School for the Severely Handicapped can attend a school operated by SSD?

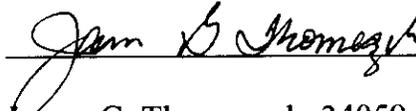
SSD submits that the lack of clarity due to the limitations in Section 167.131, RSMo. compels this Court to vacate the underlying Order issuing the writ of mandamus and deny the writ.

VII. Conclusion

The trial court erred in entering an Order in Mandamus requiring the Webster Groves School District “to enroll and place Jordan Danielle King-Willmann in Webster Groves High School immediately,” because there was no clear duty to enroll Ms. King-Willmann under existing law, in that Section 167.131, RSMo. is inapplicable to, or otherwise fails to address, situations where the school in which a student from an unaccredited school district seeks to enroll is a school in a school district that is also included in a special school district.

WHEREFORE, Amicus Special School District of St. Louis County respectfully prays that this Court vacate the Order of the Circuit Court requiring the Webster Groves School District to enroll Student and enter in its place an Order denying the writ. In the alternative, Amicus Special School District of St. Louis County respectfully prays that this Court vacate the Order of the Circuit Court and remand the case to the Circuit Court for further consideration of the matter in light of the dual governance system of public education in place in St. Louis County.

THOMECZEK & BRINK, LLC



James G. Thomeczek, 34059
Sandra A. Padgett, 37351
1120 Olivette Executive Parkway
Suite 210
St. Louis, Missouri 63132
(314) 997-7733 (Telephone)
(314) 997-4888 (Facsimile)
james.thomeczek@tblawfirm.com
sandra.padgett@tblawfirm.com
Attorneys for Amicus Curiae
Special School District of St. Louis County

CERTIFICATE OF SERVICE

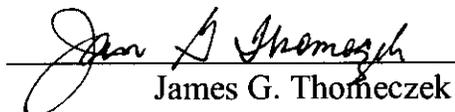
The undersigned hereby certifies that a copy of the foregoing Brief and an electronic copy on a CD were mailed by U.S. Mail, postage prepaid, on October 21, 2011 to each of the following:

Douglas A. Copeland
Stephen C. Hiotis
COPELAND THOMPSON FARRIS, PC
231 S. Bemiston, Suite 1220
St. Louis, MO 63105

Steven L. Leonard, Esq.
7751 Carondelet Avenue, Suite 606
Clayton, MO 63105

Brian D. Dunlop, Esq.
Dunlop & McCarter
7905 Forsyth Blvd.
Clayton, MO 63105

Keith Willmann
4329 Alma
St. Louis, MO 63116



James G. Thomeczek

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Brief includes the information required by Rule 55.03 and complies with the requirements contained in Rule 84.06. Based upon the word count feature of Microsoft Word, this Brief contains 5,576 words.

The undersigned further certifies that the disk filed with this Brief and the disks served on the parties were scanned for viruses and found virus free using an anti-virus computer program.



James G. Thomeczek