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PRELIMINARY STATEMENT

Amicus Curiae Missouri School Boards' Association (hereinafter "MSBA") has submitted an amicus brief which largely adopts the same positions taken by Relators and the Kansas City, Missouri School District (hereinafter "District") in this matter. MSBA's brief sheds no new light regarding the issues of subject-matter jurisdiction or other matters currently before the Court. Rather, MSBA focuses substantially on arguments which are raised in the Relators' Substitute Brief and which have been responded to by Westport in its Substitute Brief in response to the Relators' Substitute Brief. Accordingly, Westport adopts and incorporates its Substitute Brief, filed in response to the Relators' Substitute Brief, into this brief as if more fully set forth herein. In particular, Westport incorporates herein those portions of its Substitute Brief which address the arguments made in MSBA's brief, found at pages 14-26, 28-32, 33-35 and 42-50 of Westport's Substitute Brief.

RESPONSE TO POINTS RELIED ON

I. Relators Are Not Entitled to an Order Prohibiting Respondent from Granting Plaintiff a Preliminary Injunction and from Otherwise Exercising Jurisdiction over this Matter Because the Circuit Court had Subject-matter Jurisdiction and Jurisdiction to Enter the Preliminary Injunction, Because the Preliminary Injunction Would Not Unfairly Restrict the District's Use of its Facilities, Equipment, and Property and Because the Preliminary Injunction Did Not Violate Any Proscription Against Westport's Use of the District's Facilities under Missouri or other Applicable Law.

MSBA generally asserts that the Respondent exceeded his jurisdiction by effectively depriving the District of its property interests in schools and equipment and by interfering with the District's contract rights with teachers under contract to both the District and to Westport. In this regard, MSBA engages in a significant degree of hyperbole regarding the meaning and effect of the Judge's Order in an attempt to characterize it as something that it is not.

It is significant to note that the Order issued by the Respondent was a preliminary injunction. Based upon the Court's clearly articulated findings (L.F. at p. 519-525)¹, Respondent determined that it was necessary to preserve the status quo between the parties to the Circuit Court litigation by precluding termination of the Charter Agreement between Westport and the District pending final determination on the merits. The suggestion by MSBA

¹ References to the Legal File and/or Appendices shall be as follows: "L.F. at p. ____.

that the Respondent's Order interferes with property or contract rights of the District ignores the reality of the Charter Agreement which, according to the Respondent's Order, remains in effect pending further determination on the merits of the issues raised in the Petition.

Obviously, a preliminary injunction is designed to preserve the status quo so as to preclude the aggrieved party from suffering irreparable harm. Implicit in that grant is a determination by the trial court that the issuance of the injunction will necessarily further public policy and that it is likely that the aggrieved party will prevail on the merits. *State on Information of McKittrick v. American Insurance Co.*, 173 S.W.2d 519 (Mo. 1943).

A grant of a preliminary injunction in this case would, of course, be entirely meaningless if Westport had no school buildings, no teachers, and no students. Certainly, at the time the District entered into the Charter Agreement with Westport, the District expressly granted to Westport the license to use District school buildings, facilities, and equipment, and implicitly acknowledged that it was in the best interest of the students to be educated at the charter schools. *See* L.F. at p. 1411 (from original Charter Application). The parents who enrolled their children did so voluntarily because they wanted to exercise their choice to have their children attend a charter school rather than other schools available through the District. Likewise, one can hardly argue against the proposition that the teachers who are teaching at Westport chose to teach there as well.

In support of its position, MSBA relies on Missouri statutes giving the District the authority and responsibility to keep and care for its property (*see* MSBA's Brief at 8) as well as two cases, *Normandy School District v. City of Pasadena Hills*, 70 S.W.3d 48 (Mo. App.

E.D. 2002), and *Coalition to Preserve Educ. on the West Side v. School District of Kansas City, Missouri*, 649 S.W.2d 533 (Mo. App. W.D. 1983). Those two cases are entirely distinguishable from this dispute on their facts and, thus, have no precedential value on the matters before this Court.

In *Normandy School District*, the issue before the Court of Appeals was whether a city could deny a building permit to a school district with regard to the district's plans for constructing modular schools on its property. The holding in that case has no bearing on the issues now before this Court. Here, the District entered into a charter agreement with Westport, pursuant to the Missouri Charter School Statutes, for Westport to operate a charter school on the premises of two District-owned buildings.

The other case relied upon by MSBA, *Coalition to Preserve Educ.*, involved a claim by an unincorporated association to force the defendant school district to honor an agreement to conduct an experimental school for three years. There, the District decided, due to severe financial constraints, to decline to open the experimental school. The Court held that the District could not contract away its rights to close a district-operated school. 649 S.W.2d at 538-539. The case was decided in 1983, long before the Charter School statutes expressly authorizing the kind of long-term relationship at issue here were enacted by the Legislature in 1999. Thus, the holding is inapplicable to this case.

Essentially, MSBA's argument is that the District has a right to utilize its facilities as it deems fit. In this case, however, the District entered into a charter agreement with Westport which expressly contemplated Westport's use of District facilities. Thus, MSBA's arguments

are without merit. Moreover, the cases it cites are not applicable to these facts and must be disregarded.

For four and one-half years, Westport has conducted charter school operations consistent with that Charter Agreement, and the evidence at the hearing established that Westport had met or exceeded District's criteria and performance standards for its students. The notion, therefore, that the District had some obligation to students to place them in other schools, despite the fact that the Charter Agreement had not terminated, is entirely unwarranted.

The argument by MSBA that the Respondent's Order constitutes an unwarranted interference with the District's property is both contrary to the evidence in this case and to the law. Certainly, there is abundant case law establishing that, although a licensor may generally be entitled to revoke a license at will, it is appropriate for a court to enjoin revocation of a license in order to avoid inequity. *See Hermann v. Lindbrook Land Co.*, 806 S.W.2d 128, 130 (Mo. App. E.D. 1991) (a court of equity may apply equitable estoppel in situations where the licensee has made material expenditure of money or labor to secure the enjoyment of its use); *see also Hill v. Eads*, 970 S.W.2d 822 (Mo. App. W.D. 1998). There is no question in this case but that Westport has expended substantial sums of money in educating students and otherwise providing them with educational opportunities. The notion that a sponsoring district should be entitled to unilaterally withdraw its grant of authority for a charter school to continue using the schools' buildings and equipment at a time when the charter agreement, which expressly contemplated use of those facilities, remains in effect would not only be

entirely inequitable, but would also be in direct violation of the charter agreement itself. Hence, the Court did not exceed its jurisdiction in precluding the District from doing so in this case.

Similarly unavailing is the argument that Westport did not have a lease for the premises it occupies. Not having been a party to the proceedings in the Circuit Court, MSBA is likely unaware that Westport adduced evidence, uncontroverted by Relators, that the District expressly declined Westport's request to enter into a lease for the premises after the Charter Agreement had been adopted.

II. The District Is Not Entitled to an Order Prohibiting Respondent's Order Granting Preliminary Injunction in That the Order Did Not Exceed the Respondent's Jurisdiction or Violate and State or Federal Law or Regulation by Placing Limited Restriction on the District's Ability to Communicate with Certain Students and Parents.

Again, MSBA mischaracterizes the nature and extent of the restrictions placed by the Preliminary Injunction on the District's ability to communicate with its patrons. While MSBA would suggest that the Order completely prohibited the District from communicating with its patrons, the Order does no such thing. It does not preclude the District from communicating with parents. Rather, Respondent only barred the District from trying to induce students to change schools. The Order was entered with knowledge of the fact that the District had taken the action it did in regard to Westport's charter at a time when students would be making plans for attending Westport for summer school and for the school year in the fall. All the Respondent did by ordering the District not to communicate with parents or teachers in an effort to dissuade them from continuing at Westport was provide a reasonable order, designed to preserve the status quo pending final determination on the merits of the issues in the case.

Clearly, if the Court ultimately concluded that the Charter Agreement had been terminated, which is unlikely in light of the evidence, the District would, then, be free to contact students who would no longer be able to attend a KCMSD-sponsored Westport charter school. Similarly, if the preliminary order was made final, students would be secure in the

continuation of their chosen educational opportunities. Just as the District would not have a unilateral right to bar students from attending the Westport charter school if the Charter Agreement had clearly specified an end date a year or more from the present, the District would have no right to do so under the Respondent's Order entered to preserve the status quo between the parties.

The Court Order does not prohibit students from voluntarily changing schools. The Order also did not restrict the District's ability to comply with any statutory or regulatory obligations to provide information regarding special-needs programs (referred to as special education in MSBA's Brief). As MSBA concedes, the District's obligation under the *Missouri State Plan for Special Education* in regard to special-needs students is only to provide annual advertising in the media of programs available in such areas. See MSBA's Amicus Brief at 11.²

MSBA's argument fails to acknowledge the fact that Westport, as a charter school operating under applicable law, is obligated and does, in fact, provide services to special-needs students.

There is nothing in the Respondent's preliminary injunction that would violate any of the requirements of state or federal law regarding the District's need to communicate with patrons regarding school programs, or with regard to providing information on programs for special-needs students. Rather, it merely prohibits actions to recruit Westport students to

² Interestingly, this point was never asserted by the District in the Circuit Court or Court of Appeals.

District Schools. If the District had any real belief that the Respondent's Order unduly restricted it from some notice requirement under law, rather than limiting its efforts to undermine Westport's operations by recruiting away its students under claims that the charter school was closing, the District could have asked the Circuit Court for clarification or modification of the injunction on any such point, which the District did not at any time do. That would be the proper remedy for any such concern, and MSBA's arguments in this regard have no bearing on the issue of Respondent's jurisdiction to enter a preliminary injunction. Again, MSBA mischaracterizes the Respondent's Order as something beyond the preliminary injunction designed to preserve the status quo pending a determination on the merits.

III. The District Is Not Entitled to an Order Prohibiting Respondent's Order Granting Preliminary Injunction in That the Order Does Not Unfairly Restrict the District's Ability to Communicate with its Own Employees.

MSBA also mischaracterizes the nature of the Respondent's Order as it relates to teachers' contracts with Westport pending determination of the issues in the case. In essence, MSBA contends that the Order prohibits the District from communicating with its teachers and interferes with the District's and teachers' contract rights. MSBA Amicus Brief at 12-13. Rather, the preliminary injunction merely prohibits the District from attempting to induce teachers under contract to Westport to teach at other schools. It in no way effects the teachers' individual rights to act in regard to their contracts.

This Order was minimally necessary in order to preserve the status quo between the parties by preventing the District from affirmatively seeking to induce Westport's teachers to teach elsewhere. A number of those persons teaching at Westport has also previously taught at District schools and were, for retirement and pension purposes, still considered District employees. If the Order restricting the District's ability to induce those teachers to teach elsewhere was not entered, Westport would be deprived of those employees, and the employees themselves would be placed in an impossible position – responding to the demands of the District for possible reassignment to another location or continuing their employment as teachers at the Westport charter school – all at a time when the Court had entered an order to preserve the status quo pending determination of the issues on the merits. Without teachers, Westport would be unable to continue operations. Not having been involved in the

underlying action, MSBA may well have been unaware of the letters that the District sent to teachers at Westport and to the parents of Westport students, effectively trying to influence them that Westport would not be open for school operations in the summer and fall 2004 school year. *See* L. F. at p. 723-725. The logical conclusion that teachers would draw from such information would be that one had better look elsewhere for a teaching position. Obviously, the Charter Agreement contemplated that teachers would be under contract to teach at Westport and, therefore, students would have a place to learn. If, despite the Respondent's Order, the District would be permitted to attempt to induce Westport's teachers to contract with the District to teach at other schools, the status quo would not be preserved, and Westport would not be able to remain in operation.

The Respondent's Order does not interfere with or limit freedom of a contract. Rather, it prevents the District from engaging in illegitimate efforts to circumvent the Charter Agreement by effectively raiding Westport's teacher base and rendering it incapable of operating a school. MSBA's interpretation of the Court's Order stretches it well beyond its plain meaning and effect. MSBA's arguments must be disregarded.

IV. The District Is Not Entitled to an Order Prohibiting Respondent's Order Granting Preliminary Injunction Because the Respondent Did Have Jurisdiction to Issue the Order and Because Westport Was Not Required to Exhaust Other Administrative Remedies Before Seeking Review in the Courts.

The final point in MSBA's Amicus Brief is that Respondent did not have jurisdiction to issue an injunction in this case because Westport did not first avail itself of administrative remedies provided by statute (MSBA's Amicus Brief at 13). This argument is raised also by the Relators in their Substitute Brief and is responded to in substantial detail in Westport's Substitute Brief in response to Relators' Substitute Brief at pages 14-36. Thus, Westport incorporates those arguments herein by reference and respectfully refers the Court to those arguments for a more detailed response to MSBA's contentions.

CONCLUSION

MSBA's arguments effectively restate the positions taken by the Relators in their substitute briefing in this Court. For the reasons stated above and in Westport's Substitute Brief in response to Relators' Substitute Brief, MSBA's arguments are unavailing and must be disregarded.

Respectfully submitted,

WYRSCH HOBBS & MIRAKIAN, P.C.

By:

JAMES R. WYRSCH MO#20730

STEPHEN G. MIRAKIAN MO#29998

KEITH E. DRILL MO#37065

1101 Walnut, Suite 1300

Kansas City, Missouri 64106

Tel: (816) 221-0080

Fax: (816) 221-3280

Attorneys for Plaintiff

Replying on Behalf of Respondent

CERTIFICATE OF SERVICE

The undersigned does hereby certify a true and correct copy of the above and foregoing and a disk containing the brief were hand delivered this ____ day of September, 2004, to:

Allan V. Hallquist
Hayley E. Hanson
Kirsten A. Byrd
Blackwell Sanders, et al.
1000 Two Pershing Square
2300 Main Street
Kansas City, Missouri 64108
(two copies)

The Honorable J.D. Williamson, Jr.
Circuit Court Judge, Division 11
Jackson County Circuit Court
415 E. 12th Street
Kansas City, Missouri 64106

Brian Wood
Wickham & Wood, LLC
4240 Blue Ridge Blvd., Suite 350
Kansas City, Missouri 64133

Jean Paul Bradshaw
Patrick Fanning
Lathrop & Gage, LC
2345 Grand, Suite 2800
Kansas City, Missouri 64108

Jennifer J. Coleman
Stinson Morrison Hecker, LLP
1201 Walnut, Suite 2900
Kansas City, MO 64106

and a copy by United States mail, postage prepaid, this 3rd day of September, 2004, to:

Melissa Randol
Susan Goldammer
2100 I-70 Drive SW
Columbia, Missouri 65203

**Attorney for Westport Community
Secondary Schools, Inc.**

CERTIFICATE OF COMPLIANCE

PURSUANT TO MO. R. CIV. P. 84.06(c) and 84.06(g)

I hereby certify that the above and foregoing brief includes the information required by Rule 55.03, complies with the limitations contained in Rule 84.06(b), and contains 2,962 words.

I also hereby certify that the floppy disk containing the above and foregoing which is being filed concurrently herewith has been scanned for viruses using Trend Micro OfficeScan Corporate Edition and there were no viruses detected.

Attorney for Westport Community
Secondary Schools