

**IN THE SUPREME COURT OF MISSOURI**

COMMITTEE FOR EDUCATIONAL )  
EQUALITY, et al., COALITION TO FUND )  
EXCELLENT SCHOOLS, et al., BOARD OF )  
EDUCATION OF THE CITY OF ST. LOUIS, )  
and the SPECIAL ADMINISTRATIVE )  
BOARD OF THE CITY OF ST. LOUIS, )

Plaintiffs and Plaintiff-Intervenors/ )  
Appellants, )

vs. )

STATE OF MISSOURI, et al., )

Defendants/Respondents, )

REX SINQUEFIELD, BEVIS SCHOCK, and )  
MENLO SMITH, )

Defendant-Intervenors/ )  
Respondents. )

Supreme Court No. SC89010  
Cole County Case  
No. 04CV 323022

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**APPEAL FROM THE CIRCUIT COURT OF COLE COUNTY  
NINETEENTH JUDICIAL CIRCUIT  
HONORABLE RICHARD G. CALLAHAN, JUDGE**

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**BRIEF OF APPELLANTS COMMITTEE FOR  
EDUCATIONAL EQUALITY, ET AL.**

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COMMITTEE FOR EDUCATIONAL  
EQUALITY, ET AL.**

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## **JURISDICTIONAL STATEMENT**

Plaintiffs/Appellants Committee for Educational Equality, et al. (“CEE Appellants”), Plaintiff-Intervenors/Appellants Coalition to Fund Excellent Schools, et al. (“CFES Appellants”), Plaintiff-Intervenors/Appellants Board of Education of the City of St. Louis, et al., and Intervenor/Appellant Special Administrative Board of the Transitional District of the City of St. Louis (said Boards and others from the City of St. Louis School District being hereinafter sometimes referred to collectively as the “St. Louis Appellants”), appeal to this Court from a Judgment entered on October 17, 2007, by the Honorable Richard G. Callahan in Case No. 04CV323022 in the Cole County Circuit Court (LF\_5313). A Motion to Amend Judgment (LF\_5422) was filed on November 16, 2007, and was considered by the trial court and overruled on December 3, 2007 (LF\_43). Timely Notices of Appeal were filed by the Appellants, with the first Notices of Appeal being filed on December 12, 2007.

The CEE Appellants filed this action on January 6, 2004, challenging the constitutional validity of the school finance system in Missouri. The CFES Appellants and the St. Louis Appellants intervened in the lawsuit and challenged the constitutional validity of the school finance system in Missouri, with the CFES Appellants also challenging the constitutional validity of local property tax assessments and the impact thereof upon the Missouri school finance system. The Missouri constitutional provisions which are involved in this case include Article IX, Section 1(a), and Article I, Section 2; Article X, Sections 16, 21 and 23; and Article X, Sections 3, 4 and 14. Thus, the

Missouri Supreme Court has jurisdiction of the appeals in this case under the validity of statute provisions set forth in Article V, Section 3, of the Missouri Constitution.

## **STATEMENT OF FACTS**

### **Pretrial Proceedings.**

This case was commenced on January 6, 2004, by the Committee for Educational Equality, a Missouri not-for-profit corporation (“CEE”) and certain Missouri school districts, students, parents and taxpayers (collectively “CEE, et al.”). Petition at LF\_45-92. The Coalition to Fund Excellent Schools (“CFES”) and certain Missouri school districts, students, parents and taxpayers were allowed to intervene as Plaintiff Intervenor (collectively “CFES, et al.”). LF\_222. The Board of Education of the City of St. Louis, parents, students and taxpayers were allowed to intervene as Plaintiff Intervenor (collectively “St. Louis, et. al.”) (LF\_354-375).

Named as Defendants in petitions were the State of Missouri, the Missouri Treasurer (in her official capacity), the Commissioner of Administration (in his official capacity), the Missouri State Board of Education, the Missouri Department of Elementary and Secondary Education (“DESE”), the Missouri Commissioner of Education (in his official capacity) and the Missouri Attorney General (in his official capacity).

In the late spring and early summer of 2004, the Defendants sought by motions to dismiss the Hancock Amendment claims of the Plaintiffs and Plaintiff Intervenor. LF\_169-189, LF\_246-249. These motions were opposed by Plaintiffs and Plaintiff Intervenor. LF\_279-334. After extensive briefing by respective counsel and the presentation of oral arguments, Judge Callahan entered an Order overruling the motions of the Defendants. LF\_335.

Extensive document production and interrogatory discovery was sought by the Defendants in the summer and fall of 2004 and continued over into the first quarter of 2005, with there being disputes about the extent of that discovery. See, generally LF\_394-2208.

On November 10, 2004, the Defendants filed their Motion to Stay and Suggestions in Support Thereof requesting “a stay of this proceeding until conclusion of the 2005 Session’s legislative process or sooner if legislation revising the formula is enacted. . . .” LF\_1814-1819. Thereafter, CEE, et al. and CFES, et al. filed a Cross-Motion for Stay and Suggestions in Support which pointed to statements by Governor-elect Blunt that the “funding formula is broken and wouldn’t stand up to court challenge” and similar statements by other governmental officials.” LF\_1820-1828. On December 2, 2004, a hearing was held. See Transcript. Judge Callahan entered an Order Granting Motion to Stay conditioned upon the Defendants filing “pleadings with the Court confessing to the constitutional inadequacy of the current funding system within fifteen days.” LF\_1982-1983. No such pleadings were filed.

On January 28, 2005, the Defendants filed a Motion for Partial Summary Judgment on Constitutional Adequacy with Supporting Suggestions. LF\_1992-2034. Responses, a Reply and Sur-Reply with Suggestions were filed, with the last being filed on April 1, 2005. LF\_2035-2202, LF\_2209-2375. The Motion was not presented to the Court and no ruling was entered by the trial court with respect to the Motion.

Near the end of its 2005 Regular Session, the General Assembly adopted C.C.S. for H.C.S. for S.S. for S.C.S. for S.B. 287 (“SB287”; CEE Exh. 6, App., Tab 10) which

provided for a revised school finance formula to be effective on July 1, 2006. SB287 was approved by the Governor. It was some time before the ramifications of SB287 were realized.

**Amended Pleadings After the Adoption of SB287.**

The Plaintiffs and the Plaintiff Intervenors were permitted to file their amended Petitions taking into consideration the provisions of SB287 on February 14, 2006. LF\_2494. These consisted of the Second Amended Petition of Plaintiffs CEE, et al. (LF\_2443), the Third Amended Petition of Plaintiff Intervenors CFES, et al. (LF\_2414) and the Second Amended Petition of Plaintiff Intervenors St. Louis (LF\_2384) and added allegations with respect to the effects of SB287.

At the time of the filing of the Second Amended Petition of CEE, et al., the Plaintiffs consisted of Plaintiff CEE which had a membership of 236 Missouri public school districts (some of which were named Plaintiffs) located in 82 Missouri counties with an enrollment of approximately 355,000 students; Plaintiff students and parents from various Missouri public school districts; and Plaintiff taxpayers. Plaintiff Intervenors CFES, et al., in their Third Amended Petition included the CFES, 27 Missouri public school district Plaintiffs with an enrollment of approximately 152,000 students, a Plaintiff public school student and her Plaintiff parent, and six Missouri taxpayer Plaintiffs. The Third Amended Petition for St. Louis, et al., included the St. Louis School District, the members of the District's Board of Education in their official capacities and as residents and taxpayers, six students, parents and four taxpayers. The



Answers of the Defendants to these Amended Petitions were filed on February 24, 2006, and remained in effect at the start of trial. LF\_2497, LF-2509 and LF-2520.

### **Focus Districts.**

To limit the amount of pretrial discovery and the trial itself, the parties agreed under procedures set forth by the trial court to designate “Focus Districts” which illustrated problems of Missouri school districts.

Extensive interrogatories and document production were undertaken by the Defendants with respect to the CEE, CFES and St. Louis Focus Districts. Extended depositions were taken on an accelerated schedule by the Defendants and Defendant Intervenor of Superintendents of the CEE, CFES and St. Louis Focus Districts, and other administrators in certain of the Districts. No discovery was conducted with respect to the Defendants’ Focus Districts.

On January 2, 2007, prior to the commencement of trial, a written Request for Findings of Fact and Conclusions at the conclusion of the trial was filed. LF\_4271.

### **Trial.**

#### **Introductory Summary.**

Trial commenced on January 2, 2007, and continued for 32 days with the last trial date being on February 23, 2007. The Transcript of those 32 days is in Volumes 1 through 34 filed with the Court.

Because of the length of the trial and the over 1,000 exhibits, it is not feasible to completely summarize the evidence within the length limitations under this Court’s

Rules. Also, the Judgment of the trial court did not consider the factual record to any significant extent. Consequently, we limit the statement of facts.

We also incorporate here by reference the greater record detail in the CEE Plaintiffs' Suggested Findings and Conclusions that were submitted to the trial court (LF\_5469-5649), which is in the Appendix, Tab 33. Within the Plaintiffs' Suggested Findings in the Appendix is a summary for the CEE, CFES and St. Louis Focus Districts. A listing of those Focus Districts is set forth below with a reference to the summary in the Appendix for each Focus District.

**List of Witnesses:**

**January 3, 2007 – Wednesday**

CFES Tax Assessment Witnesses

**January 4, 2007 – Thursday**

CFES Tax Assessment Witnesses

**January 5, 2007 – Friday**

CFES Tax Assessment Witnesses

**January 9, 2007 – Tuesday**

CFES Tax Assessment Witness

**Dr. Robert Bartman** – CEE Fact and Expert Witness – Missouri

Commissioner of Education from 1987 to 2000 (currently

Superintendent of Central 58 School District in Kansas City),

Tr. 932-1043.

**January 10, 2007 – Wednesday**

**Dr. Robert Bartman** – continued, Tr. 1051-1160.

**Dr. Sherry Copeland** – Assistant Superintendent, Caruthersville 18 School District (CEE Focus District), Tr. 1161-1315.

**Dr. Nicholas Thiele** – Superintendent, Caruthersville 18 School District (CEE Focus District), Tr. 1316-1339.

**January 11, 2007 – Thursday**

**Dr. Nicholas Thiele** – continued. Tr. 1345-1451.

**January 16, 2007 – Tuesday**

**Dr. Phyllis Chase** – Superintendent, Columbia 93 School District (CEE Focus District), Tr. 1460-1592.

**Dr. Kathy Thornburg** – CEE Expert Witness on Early Childhood Education, Professor, University of Missouri – Columbia. Tr. 1595-1671.

**Tyler Laney** – CEE Chairman, Superintendent, Crane R-III School District (CEE Focus District), Tr. 1671-1739.

**January 17, 2007 – Wednesday**

**Tyler Laney** – continued. Tr. 1750-1942.

**Dr. William Schafer** – CEE Expert Witness re the Missouri Assessment Program (achieving and progressing intermixed). Tr. 1944-1984.

**Dr. Pam Hedgpeth** – Superintendent, Republic R-III School District (CEE Focus District). Tr. 1985-2009 (continued on January 24).

**January 18, 2007 – Thursday**

**Dr. Don Hamby** – Recently Retired Superintendent, Willow Springs R-IV School District (CEE Focus District). Tr. 2020-2131.

**Mr. Chris Gaines** – Superintendent, Crawford County R-I School District (CEE Focus District). Tr. 2132-2253.

**Dr. Gene Oakley** – CEE Witness, Presiding Commissioner, Carter County, and a retired school administrator. Tr. 2256-2272.

**Dr. Jeff Lindsey** – Superintendent, Van Buren R-I School District (CEE Focus District). Tr. 2272-2317.

**January 19, 2007 – Friday**

**Dr. Jeff Lindsey** – continued. Tr. 2328-2419.

**Dr. Tim Hager** – Superintendent, East Carter County R-II School District (CEE Focus District). Tr. 2419-2544.

**Sid Doerhoff** – Superintendent, St. Elizabeth R-IV School District (CEE Focus District). Tr. 2544-2604.

**January 23, 2007 – Tuesday**

**Sid Doerhoff** – continued. Tr. 2610-2709.

**Dr. Richard Salmon** – CEE Expert Witness on Equity Issues, Professor, Virginia Tech. Tr. 2709-2857.

**January 24, 2007 – Wednesday**

**Dr. Richard Salmon** – continued. Tr. 2865-2941 (further testimony on February 23).

**Dr. Linda Gray Smith** – Superintendent, Worth County R-III School District (CEE Focus District and only Worth County School District). Tr. 2941-3059.

**Dr. Pam Hedgpeth** – continued from January 17, 2007. Tr. 3059-3169.

**January 25, 2007 – Thursday**

**Tanya Vest** – Superintendent, East Newton County R-VI School District (CEE Focus District). Tr. 3181-3331.

**Mark Mayo** – Superintendent, Diamond R-IV School District (CEE Focus District). Tr. 3331-3456.

**Dr. Allan Crader** – CEE Expert Witness re Missouri School Finance, Former Superintendent and Former Professor at Missouri State University. Tr. 3456-3483.

**January 26, 2007 – Friday**

**Dr. Allan Crader** – continued. Tr. 3490-3696.

**Dr. Daniel B. Keck** – CEE Expert Witness, re School Facilities, Professor at St. Louis University. Tr. 3696-3790.

**January 29, 2007 – Monday**

**Tom Nichols** – DESE, subpoenaed as a Witness for CEE, School Improvement Supervisor for South Central Missouri. Tr. 3798-3842.

**Dr. Jacque Cowherd** – Deputy Superintendent, Columbia 93 School District (CEE Focus District). Tr. 3842-3925.

**Dr. John Jones** – CEE Expert and Fact Witness re Missouri School Finance, Former Statistician for DESE. Tr. 3925-4062.

**January 31, 2007 – Wednesday**

**Dr. Andrew Wall** – CEE Expert Witness re Adequacy Issues, Assistant Professor, University of Rochester, New York. Tr. 4069-4224.

State Witnesses on Tax Assessment Issues.

**February 1, 2007 – Thursday**

**John Myers** – CEE Expert Witness re Missouri Adequacy Study. Tr. 4377-4631.

**February 2, 2007 – Friday**

**Dr. Bruce Baker** – CEE Expert Witness re Adequacy and Equity Issues, Associate Professor, University of Kansas. Tr. 4640-4846.

**February 5, 2007 – Monday**

**Dr. Bruce Baker** – continued. Tr. 4853-4965.

**Dr. William Duncombe** – St. Louis Expert Witness re Adequacy Issues, Professor, Syracuse University. Tr. 4965-5047.

**February 6, 2007 – Tuesday**

**Dr. William Duncombe** – continued. Tr. 5056-5202.

**Dr. Kendra Johnson** – Associate Superintendent, North Kansas City 74 School District (CFES Focus District). Tr. 5207-5329.

**David Glaser** – Chief Financial Officer, Rockwood R-VI School District (CFES Focus District). Tr. 5331-5387.

**February 7, 2007 – Wednesday**

**David Glaser** – continued. Tr. 5399-5455.

**Dr. David Damerall** – Superintendent, Kirkwood R-VII School District (CFES Focus District). Tr. 5458-5544.

**Dr. Diana Bourisaw** – Superintendent, St. Louis School District (St. Louis Focus District). Tr. 5550-5691.

**February 8, 2007 – Thursday**

**Senator Charlie Shields** – Missouri Senator, State Defendants Witness. Tr. 5700-5815.

Tax Assessment Issues – State Defendants Witness.

**February 9, 2007 – Friday**

**Dr. Donald Francis** – Superintendent, Affton 101 School District (CFES Focus District). Tr. 5892-5947.

**Becky Kemna** – DESE, State Defendants Witness. Tr. 5948-6102.

**February 14, 2007 – Wednesday**

**Dr. Craig Wood** – State Defendants Expert Witness, Professor,  
University of Florida. Tr. 6112-6351.

**February 15, 2007 – Thursday**

**Dr. M. David Miller** – State Defendants Expert Witness, Professor,  
University of Florida. Tr. 6361-6400.

**Dr. R. Anthony Rolle** – State Defendants Expert Witness, Associate  
Professor, Texas A & M University. Tr. 6401-6571.

State Tax Assessment Witness

**Dr. John A. Murphy** – State Defendants Expert Witness. Tr. 6604-  
6639.

**February 16, 2007 – Friday**

State Tax Assessment Witness.

**Dr. John A. Murphy** – continued. Tr. 6692-6879.

**Geraldine Ogle** – State Defendants Witness, Associate

Commissioner of Education, DESE. Tr. 6879-6892 (continued on  
February 21 and 22).

**February 19, 2007 – Monday**

**Dr. Eric Hanushek** – Defendant Intervenors Expert Witness,  
Professor, Stanford University. Tr. 6935-7237.



**February 20, 2007 – Tuesday**

**Dr. Michael Podgursky** – Defendant Intervenors Expert Witness,  
Professor, University of Missouri – Columbia. Tr. 7259-7381.

**Dr. Kern Alexander** – CEE Expert Witness re Adequacy and  
Equity, Professor, University of Illinois at Urbana-Champaign.  
Tr. 7381-7490.

**February 21, 2007 – Wednesday**

**Dr. Kern Alexander** – continued. Tr. 7496-7560.

**Dr. Michael Podgursky** – continued. Tr. 7563-7741 and Tr. 7749-  
7776.

**Marty Drewel** – State Defendants Witness, Deputy Director,  
Division of Budget and Planning, Missouri Office of Administration.  
Tr. 7782-7862.

**Geraldine Ogle** – continued. Tr. 7862-7894.

**February 22, 2007 – Thursday**

**Dr. Robert M. Costrell**, – State Defendants Expert Witness,  
Professor, University of Arkansas. Tr. 7905-8132 and Tr. 8140-  
8204.

CFES Tax Assessment Witness.

**Geraldine Ogle** – continued. Tr. 8236-8266.

CFES Tax Assessment Witness.

**February 23, 2007 – Friday**

CFES Tax Assessment Witness.

**Dr. Richard Salmon** – CEE Expert Witness re Equity – recalled.

Tr. 8431-8474.

**Former State Senator Harold Caskey** – CEE Witness. Tr. 8475-8505.

A listing of most of the introduced Exhibits, with the exception of tax assessment issues, is set forth in the Appendix at Tab 16.

### **Testimony By Depositions**

Jewel D. Scott, Executive Director, Civic Council of Greater Kansas City –

Excerpts selected by CEE , including Civil Council P-12 Education Plan (CEE Exh. 775); excerpts selected by State Defendants (Def. Exh. 678).

Dr. Don Senti, Superintendent, Clayton School District (CFES Focus

District) – excerpts selected by CEE Plaintiffs (CEE Exh. 999); excerpts selected by State Defendants (LF\_4643).

Dr. Carter Ward, Executive Director, Missouri School Boards Association

– excerpts selected by State Defendants (Def. Exh. 677).

### **Focus Districts.**

**Caruthersville 18 School District** (Pemiscot County) (CEE) – Summary at

App. 651.

**Columbia 93 School District** (Boone County) (CEE) – Summary at  
App. 657.

**Crane R-III School District** (Stone County) (CEE) – Summary at  
App. 662.

**Republic R-III School District** (Greene County) (CEE) – Summary at  
App. 666.

**Willow Springs R-IV School District** (Howell County) (CEE) – Summary  
at App. 671.

**Crawford County R-I School District** (Crawford County) (CEE) –  
Summary at App. 676.

**Van Buren R-I School District** (Carter County) (CEE) – Summary at  
App. 680.

**East Carter County R-II School District** (Carter County) (CEE) –  
Summary at App. 685.

**St. Elizabeth R-IV School District** (Miller County) (CEE) – Summary at  
App. 691.

**Worth County R-III School District** (Worth County) (CEE) – Summary  
at App. 696.

**East Newton County R-VI School District** (Newton County) (CEE) –  
Summary at App. 702.

**Diamond R-IV School District** (Newton County) (CEE) – Summary at  
App. 707.

**Community R-VI School District** (Audrain County) (CEE) – Summary at App. 712.

**Eminence R-I School District** (Shannon County) (CEE) – Summary at App. 714.

**North Kansas City 74 School District** (Clay County) (CFES) – Summary at App. 717.

**Kirkwood R-VII School District** (St. Louis County) (CFES) – Summary at App. 720.

**Affton 101 School District** (St. Louis County) (CFES) – Summary at App. 723.

**Clayton School District** (St. Louis County) (CFES) – Summary at App. 725.

**St. Louis City School District** (City of St. Louis) – Summary at App. 728.

### **Educational Funding Problems.**

By 2000 concerns had arisen concerning the adequacy and equity in school funding in Missouri. In early 2000 Senator Harold Caskey, who had been the principal sponsor of SB380 in 1993 (CEE Exh. 5; App. Tab 9), issued “Walking the Tightrope – A blueprint for reaching and teaching Missouri’s children in the 21<sup>st</sup> Century.” CEE Exh. 998, p. 2. Senator Caskey had become concerned with both adequacy and equity in school funding, including that the formula was underfunded and that modifications in the formula since the adoption of SB380 had created equity problems. Senator Caskey introduced legislation in 2000 to begin legislative consideration of a full review of school

funding. Tr. 8478-8481 and CEE Exhs. 997 and 1000. Over the next two or three years, Senator Caskey started working on a bipartisan basis with other senior Senators to begin consideration of the adequacy and equity issues in school funding.

In 2003 a Joint Interim Committee on Education was formed. Senate Concurrent Resolution 16 stated that the Committee would:

“ . . . conduct an in-depth study concerning all issues relating to equity and adequacy of distribution of state school aid, teachers’ salaries, funding for school buildings, and overall funding levels for schools and any other education-related issues the committee deems relevant. . . .”

*Final Report of the Joint Interim Committee on Education* (Feb. 15, 2004) (the “Final Report”), p. 008 – CEE Exh. 772; Final Report Without Exhibits at App. Tab 23. The Chairman of the Senate Education Committee was not appointed to the Joint Interim Committee. Senator Charlie Shields was appointed to chair the Joint Interim Committee and Senator Caskey was among those who were appointed to and served on the Joint Interim Committee. *Id.*, (Tr. 8483).

The Joint Interim Committee held hearings between September 2, 2003, and February 5, 2004. The Committee also heard testimony from Dr. John Augenblick on October 9, 2003, when he presented the adequacy study of his firm which indicated “that Missouri needs to spend an additional \$913 million above what was spent in FY 2002 in order to fund Missouri’s public schools adequately.” *Final Report*, p. 006 – CEE Exh. 772; App. Tab 23.

R.C. Wood & Associates acted as consultants to the Joint Interim Committee. Dr. R. Craig Wood testified at trial for the State Defendants.

Senator Caskey testified that it became apparent that additional funding for education was not going to be recommended by the Joint Interim Committee on Education. Tr. 8484. See also, *Final Report*, p. 010 (CEE Exh. 772; App. Tab 23):

“The Joint Interim Committee gave Dr. Wood two operating principles:

1. Assume the same level of appropriations for FY 05 as for FY 04.
2. Redesign the formula to improve its equity and adequacy.”

In the *Final Report*, the Committee made various “Findings” but did not come to a conclusion on many issues. The *Final Report* appended the *Final Report of R. C. Woods & Associates* and some presentations of Dr. John Augenblick. Among the “Findings” by the Joint Interim Committee are the following:

- “• **The consultant’s final report provides a formidable ‘to-do’ list in terms of developing additional measures that would improve the equity and adequacy of the school aid formula.**
- **The Joint Interim Committee’s experience shows the validity of the received truths about changing a school funding formula.**

The general ‘wisdom’ about school funding formulas has these key elements:

1. The shelf life of a formula is usually about ten years.
2. The impetus to consider a formula change almost always comes from a judicial mandate.

3. Finding additional moneys to make formula changes acceptable is the usual method to achieve 'leveling up.' Without 'leveling up,' large numbers of students could attend schools receiving less money.

The SB380 formula is in its eleventh year of operation. It has been amended numerous times....”

CEE Exh. 772, pp. 009-012; App. Tab 23.

In his Report to the Joint Interim Committee attached to the Final Report, Dr. R. Craig Wood stated:

**“There are at least six concepts that render powerless any hesitancy concerning the importance of financial resources and public elementary and secondary education.** The first concept is that public elementary and secondary schools indeed distribute economic and social opportunities in a nation fueled by competitiveness. The second concept is that these opportunities depend in large measure on the quality of the public elementary and secondary schools these children attend. The third concept is that despite a lack of strong productivity equations, school quality is heavily conditioned by fiscal resources that are purchased with money. The fourth concept is that absent ability to purchase these inputs, public elementary and secondary education must fail because altruism is not a sufficiently offsetting condition within our society. The fifth concept is that people who argue for the irrelevance of money still prefer a larger share.

The sixth concept is that until money is irrefutably shown to make no difference, its effect must be presumed from the behavior of wealthy individuals who choose wealthy communities with high expenditure school districts for their children. The study of education finance litigation is actually the study of the litigation of state aid distribution formulas and the results of those formulas in terms of the expenditure and revenue patterns to school districts.” (emphasis added).

CEE Exh. 772, p. 219. At trial, Dr. Wood reaffirmed the quoted statement. Tr. 6214-6218.

During the Sessions of the General Assembly in 2004, no legislation was adopted to change the school foundation formula or other statutes providing for school funding.

In the fall of 2004, the Missouri State Board of Education determined that **\$904.8 million more** needed to be appropriated in addition to the amount which had been appropriated to fully fund the basic formula and Line 14. The request was based on the Missouri State Board of Education’s determination of the amount that would be required to fully fund the basic formula and Line 14, and in effect, it was a determination that such additional amount was required to provide an adequate education to Missouri’s school children. CEE Exh. 34; App. Tab 22. Consequently, the funding of the basic formula and Line 14 which the Missouri State Board of Education determined was needed was



\$3,086,891,721 (\$2,182,091,721<sup>1</sup> plus \$904,800,000). The additional \$904.8 million requested did not include any additional funding needs for transportation, special education entitlements, gifted children program entitlements, career ladder entitlements, vocational education entitlements, educational and screening program entitlements, other educational programs separately funded by the State, early childhood education or facilities.

Both Dr. Robert E. Bartman and former Senator Harold Caskey testified that without full funding of the basic formula and Line 14, the funding of public education in Missouri was inequitable and inadequate. Both of them testified that at least \$904.8 million was needed to provide an equitable and adequate education for Missouri's children without consideration of other needs such as facilities and transportation. (Dr. Bartman – Tr. 1066-1078, 1147, 1149; Senator Caskey – Tr. 8486-8487).

The General Assembly in its 2005 regular session, however, did not appropriate an additional \$904.8 million for the basic formula and Line 14 under the then existing SB380 school funding formula. Instead of appropriating \$3,086,891,721 needed to fund those two items, the General Assembly appropriated \$2,295,494,218, a shortage of more

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<sup>1</sup> The funds appropriated by the General Assembly for the basic formula and Line 14 for the 2004-05 fiscal year was \$2,182,091,721. CEE Exh. 35, pp. 2-5; Section 2.015 of House Bill 1002, as truly agreed and finally passed and approved by the Governor (2004).

than 25% of the full funding needed for the basic formula and Line 14. State Exh. 552. Other educational programs continued to be underfunded.

During the 2005 regular session, the General Assembly adopted SB287 which revised Missouri's school finance system. See SB287 (CEE Exh. 6; App. Tab 9 ). SB287 was approved and by its terms most of its provisions did not become effective until July 1, 2006. A simulation (CEE Exh. 837-W; App. Tab 24) by the Senate Appropriations Staff taking into consideration SB287 projected the funding authorized over the next **nine fiscal years** (including the last year under the old formula) as follows:

<u><b>Fiscal Years</b></u>	<u><b>State Adequacy Target<sup>2</sup></b></u>	<u><b>Increase for Fiscal Year</b></u>
<u><b>Old Formula</b></u>	---	\$113,402,497
FY06		
<u><b>New Formula</b></u>	\$6,117	\$ 99,290,474
FY07		
FY08	\$6,117	\$ 99,290,474
FY09	\$6,166 <sup>3</sup>	\$111,172,543

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<sup>2</sup> The "State adequacy target" is a per pupil amount target defined and calculated as provided in Section 163.011(18) of SB287. The "state adequacy target" is calculated using certain defined "current operation expenditures" (Section 163.011(3) of SB287), but **not all** of the current operating expenditures, of "performance districts" (Section 163.011(13), SB287).

<u>Fiscal Years</u>	<u>State Adequacy Target<sup>2</sup></u>	<u>Increase for Fiscal Year</u>
FY10	\$6,214	\$ 90,287,341
FY11	\$6,217	\$107,830,428
FY12	\$6,328	\$129,253,446
FY13	\$6,376	\$154,990,620
FY14	\$6,424	<u>\$ 39,830,058</u>
Aggregate Projected Increase Under New Formula		\$831,945,384
Over 8 Fiscal Years		

All of the Focus District administrators who testified (see above listing) stated that school funding was inadequate, and that either all or some students in their Districts were not receiving an adequate education because of such underfunding.

A more detailed factual summary with respect to each of the Focus Districts is set forth in the Plaintiffs' Suggested Findings and Conclusions (LF\_ 5469, 5477-5561; App. Tab 33) and incorporated by reference. In December 2006, DESE compiled an "Annualized Payment Report" for each Missouri school district using the current Senate

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<sup>3</sup> While the per student "state adequacy target" was projected to **increase** from \$6,117 to \$6,166 and \$6,214 in FY09 and FY10, respectively, the amounts computed for those two years have remained at \$6,117. See, DESE Memorandum of October 24, 2007, indicating that the state adequacy target "will remain constant at \$6,117 through the 2009-10 year" at the DESE website.

Bill 287 state adequacy target of \$6,117 to project state formula funding for the 2006-07 school year. These reports were introduced into evidence for many of the “Focus Districts”:

**DESE Annualized Payment Calculation Report -- 2006-2007**

**Caruthersville 18 School District**

(CEE Exh. 84)<sup>4</sup>

<b>State Funding Required to Meet “State Adequacy Target” (Line 7)</b>	<b>Total Basic Formula Payment (Line 17)</b>	<b>Difference</b>
7,280,875.52	-6,516,650.00	764,225.52

Consequently, in the 2006-07 school year, the funding for the Caruthersville 18 School District was 10.5% less ( $\$764,225.52 \div \$7,280,875.52$ ) than “state funding required” to meet the “state adequacy target” which the state has determined is needed for adequate funding for this district.

**Columbia 93 School District**

(CEE Exh. 129)

<b>State Funding Required to Meet “State Adequacy Target” (Line 7)</b>	<b>Total Basic Formula Payment (Line 17)</b>	<b>Difference</b>
47,810,338.60	-45,010,326.00	2,800,012.60

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<sup>4</sup> The DESE Annualized Payment Calculation Report – 2006-2007 is set forth in the Appendix at App. Tab 25 to illustrate the methodology.

Consequently, in the 2006-07 school year, the funding for the Columbia 93 School District was 5.9% less ( $\$2,800,012.60 \div \$47,810,338.60$ ) than “state funding required” to meet the “state adequacy target” which the state has determined is needed for adequate funding for this district.

### **Crane R-III School District**

(CEE Exh. 190)

<b>State Funding Required to Meet “State Adequacy Target” (Line 7)</b>	<b>Total Basic Formula Payment (Line 17)</b>	<b>Difference</b>
3,669,058.82	-3,067,505.00	601,553.82

Consequently, in the 2006-07 school year, the funding for the Crane R-III School District was 16.4% less ( $\$601,553.82 \div \$3,669,058.82$ ) than “state funding required” to meet the “state adequacy target” which the state has determined is needed for adequate funding for this district.

### **Republic R-III School District**

(CEE Exh. 252)

<b>State Funding Required to Meet “State Adequacy Target” (Line 7)</b>	<b>Total Basic Formula Payment (Line 17)</b>	<b>Difference</b>
14,560,914.68	-10,375,194.00	4,185,720.68

Consequently, in the 2006-07 school year, the funding for the Republic R-III School District was 28.7% less ( $\$4,185,720.68 \div \$14,560,914.68$ ) than “state funding required”

to meet the “state adequacy target” which the state has determined is needed for adequate funding for this district.

**Willow Springs R-IV School District**

(CEE Exh. 309)

<b>State Funding Required to Meet “State Adequacy Target” (Line 7)</b>	<b>Total Basic Formula Payment (Line 17)</b>	<b>Difference</b>
6,100,271.51	-4,494,360.00	1,605,911.51

Consequently, in the 2006-07 school year, the funding for the Willow Springs R-IV School District was 26.3% less ( $\$1,605,911.51 \div \$6,100,271.51$ ) than “state funding required” to meet the “state adequacy target” which the state has determined is needed for adequate funding for this district.

**Crawford County R-I School District**

(CEE Exh. 354)

<b>State Funding Required to Meet “State Adequacy Target” (Line 7)</b>	<b>Total Basic Formula Payment (Line 17)</b>	<b>Difference</b>
4,865,748.48	-4,062,015.46	803,733.02

Consequently, in the 2006-07 school year, the funding for the Crawford County R-I School District was 16.5% less ( $\$803,733.02 \div \$4,865,748.48$ ) than “state funding required” to meet the “state adequacy target” which the state has determined is needed for adequate funding for this district.

### Van Buren R-I School District

(CEE Exh. 443)

<b>State Funding Required to Meet “State Adequacy Target” (Line 7)</b>	<b>Total Basic Formula Payment (Line 17)</b>	<b>Difference</b>
2,594,147.46	-1,931,377.00	662,770.46

Consequently, in the 2006-07 school year, the funding for the Van Buren R-I School District was 25.5% less ( $\$662,770.46 \div \$2,594,147.46$ ) than “state funding required” to meet the “state adequacy target” which the state has determined is needed for adequate funding for this district.

### East Carter County R-II School District

(CEE Exh. 492)

<b>State Funding Required to Meet “State Adequacy Target” (Line 7)</b>	<b>Total Basic Formula Payment (Line 17)</b>	<b>Difference</b>
4,497,070.61	-3,175,907.00	1,321,163.61

Consequently, in the 2006-07 school year, the funding for the East Carter County R-II School District was 29.4% less ( $\$1,321,163.61 \div \$4,497,070.61$ ) than “state funding required” to meet the “state adequacy target” which the state has determined is needed for adequate funding for this district.

**St. Elizabeth R-IV School District**

(CEE Exh. 557)

<b>State Funding Required to Meet “State Adequacy Target” (Line 7)</b>	<b>Total Basic Formula Payment (Line 17)</b>	<b>Difference</b>
1,078,135.31	-1,051,109.00	27,026.31

Consequently, in the 2006-07 school year, the funding for the St. Elizabeth R-IV School District was 2.5% less ( $\$27,026.31 \div \$1,078,135.31$ ) than “state funding required” to meet the “state adequacy target” which the state has determined is needed for adequate funding for this district without taking into account the special education funding problem and other funding problems faced by this district as a small school district.

**Worth County R-III School District**

(CEE Exh. 275)

<b>State Funding Required to Meet “State Adequacy Target” (Line 7)</b>	<b>Total Basic Formula Payment (Line 17)</b>	<b>Difference</b>
1,678,165.36	-1,355,236.00	322,929.36

Consequently, in the 2006-07 school year, the funding for the Worth County R-III School District was 19.2% less ( $\$322,929.36 \div \$1,678,165.36$ ) than “state funding required” to meet the “state adequacy target” which the state has determined is needed for adequate funding for this district.



### East Newton County R-VI School District

(CEE Exh. 585)

<b>State Funding Required to Meet “State Adequacy Target” (Line 7)</b>	<b>Total Basic Formula Payment (Line 17)</b>	<b>Difference</b>
8,499,186.02	-6,136,072.00	2,363,114.02

Consequently, in the 2006-07 school year, the funding for the East Newton County R-IV School District was 27.8% less ( $\$2,363,114.02 \div \$8,499,186.02$ ) than “state funding required” to meet the “state adequacy target” which the state has determined is needed for adequate funding for this district.

### Diamond R-VI School District

(CEE Exh. 679)

<b>State Funding Required to Meet “State Adequacy Target” (Line 7)</b>	<b>Total Basic Formula Payment (Line 17)</b>	<b>Difference</b>
4,331,627.98	-2,855,731.00	1,475,896.98

Consequently, in the 2006-07 school year, the funding for the Diamond R-VI School District was 34% less ( $\$1,475,896.98 \div \$4,331,627.98$ ) than “state funding required” to meet the “state adequacy target” which the state has determined is needed for adequate funding for this district.

### Community R-VI School District

(CEE Exh. 643)

<b>State Funding Required to Meet “State Adequacy Target” (Line 7)</b>	<b>Total Basic Formula Payment (Line 17)</b>	<b>Difference</b>
1,321,616.73	-1,117,435.00	204,181.73

Consequently, in the 2006-07 school year, the funding for the Community R-VI School District was 15.4% less ( $\$204,181.73 \div \$1,321,616.73$ ) than “state funding required” to meet the “state adequacy target” which the state has determined is needed for adequate funding for this district.

### Eminence R-I School District

(CEE Exh. 718)

<b>State Funding Required to Meet “State Adequacy Target” (Line 7)</b>	<b>Total Basic Formula Payment (Line 17)</b>	<b>Difference</b>
1,097,098.43	-871,504.00	225,594.43

Consequently, in the 2006-07 school year, the funding for the Eminence R-I School District was 20.6% less ( $\$225,594.43 \div \$1,097,098.43$ ) than “state funding required” to meet the “state adequacy target” which the state has determined is needed for adequate funding for this district.

**Affton 101 School District**

(CFES Exh. 69)

<b>State Funding Required to Meet “State Adequacy Target” (Line 7)</b>	<b>Total Basic Formula Payment (Line 17)</b>	<b>Difference</b>
2,300,763.24	-1,754,623.00	546,140.24

Consequently, in the 2006-07 school year, the funding for the Affton 10 School District was 23.7% less ( $\$546,140.24 \div \$2,300,763.24$ ) than “state funding required” to meet the “state adequacy target” which the state has determined is needed for adequate funding for this district.

**St. Louis City School District**

(St. Louis Exh. 8)

<b>State Funding Required to Meet “State Adequacy Target” (Line 7)</b>	<b>Total Basic Formula Payment (Line 17)</b>	<b>Difference</b>
164,249,741.68	-155,912,371.00	8,337,370.68

Consequently, in the 2006-07 school year, the funding for the St. Louis City School District was 5% less ( $\$8,337,370.68 \div \$164,249,741.68$ ) than “state funding required” to meet the “state adequacy target” which the state has determined is needed for adequate funding for this district.

At trial John Myers of the Augenblick firm testified with respect to that firm’s Adequacy Study referred to above. Tr. 4377-4631. The Adequacy Study for Missouri by Augenblick & Myers, Inc. (CEE Exhs. 381 and 382) included both a “professional

judgment” approach and a “successful school” approach. CEE Exh. 381, p. ES-1. The Adequacy Study was not commissioned by the Plaintiff CEE, but rather by the Missouri Coalition for Adequacy, a broad coalition that included the Civic Council of Greater Kansas city, Missouri School Boards Association, Greater Kansas City Chamber of Commerce, Hall Family Foundation, Kauffman Foundation and other associations.

CEE Exh. 381, p. I-1. The Adequacy Study concluded:

“... [W]e conclude that about **\$913 million** was needed in 2001-02 in 484 school districts in order to assure that they had adequate revenues to serve their 728,000 students.” CEE Exh. 382 at p. 9.

At trial, Mr. Myers indicated that an upward adjustment of 7.3% should be made to the calculation to reflect the inflation for a two-year period. Tr. 4422.

In addition to “successful schools” and professional judgment” methodologies used in the Augenblick & Myers Adequacy Study, there are two additional methods for costing out operational school funding requirements – the “statistical” method (sometimes referred to as “cost function”) and the “expert” method. All four methods are recognized in the field of education finance, with each having strengths and weaknesses. While all the conclusions reached by the different methodologies may vary somewhat, they do generally reach the same or similar results.

Dr. Andrew Wall, Dr. William Duncombe and Dr. Bruce Baker, who are experts in education finance, did cost function/statistical analyses with respect to the adequacy and vertical equity of school funding in Missouri. All three concluded that public schools in Missouri were substantially underfunded. All three concluded that in Missouri there

were significant and positive correlations between higher expenditures per student and higher test scores. Dr. Wall found “a statistically linear relationship between the math and communication composite scores and funding.” CEE Exh. 376, p. 20. Dr. Michael Podgursky and Dr. Eric Hanushek, witnesses for the Defendant-Intervenors, found some positive correlations between expenditures and test scores. Testimony and Schock Exhs. 230 and 234.

These cost function/statistical studies indicated that substantially more operational funding of Missouri’s public schools was needed to adequately fund those schools to a level that was needed for the students and schools to meet the standards which the State has established. The cost function/statistical studies found that the operational funding for at-risk children in Missouri was greatly underfunded. The cost function/statistical studies further indicated that as much as \$1.3 billion more in operational funding is needed in Missouri. CEE Exhs. 230 and 376 and St.L. Exh. 17.

Dr. Kern Alexander gave opinions relating to the inadequacy of school funding in Missouri, the need for additional funding for the education of at-risk children and the level of resources being allocated for the education of at-risk children. At-risk children are those living in poverty, with there being more educational costs associated with educating such children. See, Alexander and Wall, “Adequate Funding of Education Programs for At-Risk Children: An Economic Application of Research-Based Cost Differentials,” *Journal of Education Finance* (Winter 2006) (CEE Exh. 375, in the Appendix at App. Tab 27). A usual measure to identify at-risk children is to ascertain those who receive free and reduced lunch. When the concentration of at-risk children

increases, the costs of education increase. Alexander concluded that an overall “weighting” of 2.0 is proper for at-risk children. *Id.*<sup>5</sup>

The national average for current expenditure per pupil in fall enrollment is \$8,661, while Missouri’s current expenditure per pupil in fall enrollment is \$7,398. This indicates that Missouri spends \$1,263 less per pupil than the national average. *Id.* Missouri has a fall enrollment of 897,980. CEE Exh. 1002, p. 6. Applying the \$1,263 below national average difference to Missouri’s fall enrollment of 897,980 pupils, such indicates that Missouri is \$1.13 billion behind the national average in current expenditures for its public schools.

In response to a question suggesting that costs in Missouri were less than in some states, Dr. Alexander pointed out that the costs in Missouri would not be lower than in West Virginia (17<sup>th</sup> place with \$9,461 current expenditures per pupil) and Indiana (23<sup>rd</sup> place with \$8,723 current expenditures per pupil, the first state ranking above the \$8,661 national average). Dr. Alexander stated that it was not necessary to wait for someone to develop a cost model which would satisfy all, and that it was apparent that Missouri was

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<sup>5</sup> State Defendants Witness Dr. Craig Wood in his report to the Joint Interim Committee recommended a weighting of 1.5 for all at-risk children. CEE Exh. 772, p.014. SB287 provides for a weighting of 1.25, but that is diluted by operation of the “free and reduced lunch threshold” calculations. Section 163.011(20) and (7), SB287. As a result of that calculation, the record reflects that weighting of 1.25 at time of trial was not effective for the first 26.0% of the at-risk children. See, e.g., CEE Exh. 84; App. Tab 25.

underfunding the operational needs of its public schools by at least \$1 billion. Dr. Alexander further testified that students currently in school should not be denied the benefits of adequate school funding because of assertions that further studies or analyses need to first be conducted. Tr. 7381-7560.

**Equal Educational Opportunities and Equity.**

Substantial evidence was adduced at trial regarding inequities in school funding in Missouri. Two reports by DESE for the fiscal year 2005 graphically reflect the disparities.

The first DESE report, “Current Expenditures Per Eligible Pupil Data (Low to High Order)” for Fiscal year 2004-05 sets forth the current expenditure per eligible pupil in each school district in Missouri. That report shows that the expenditure ranged in the 2005 fiscal year from a low of \$4,704.11 expenditure per eligible pupil in the Diamond R-IV School District to a high of \$15,251.28 per eligible pupil in the Gorin R-III School District. CEE Exh. 25, with a copy in the Appendix at App. Tab 17.

A second DESE report, “2004-05 Equalized Assessed Valuation Per Eligible Pupil,” reflects the disparities of the local tax bases in the different school districts in Missouri. The assessed valuation per eligible pupil ranges from a low of \$19,605 assessed valuation per eligible pupil to a high of \$416,679 assessed valuation per eligible pupil. CEE Exh. 26, with a copy in the Appendix at App. Tab 18.

In Audit Report No. 2003-36 dated April 16, 2003, with respect to “Education Funding,” (CEE Exh. 37), State Auditor Claire McCaskill concluded:

“This audit found that expenditures per pupil data among school districts is less equitable now than before the formula was rewritten in 1993.” (p. 5).

The State Auditor also found in her 2003 Report that –

“In 2002, *Education Week* issued its ‘Quality Counts’ report. This report was based on school year 1998 funding, and graded each state on the equality of expenditures among school districts. These grades are partially based on two of the measures mentioned above, the McLoone index and the coefficient of variation. Missouri received a grade of D+, one of 17 states to receive a grade less than a C. In *Education Week’s* January 2003 report, Missouri’s equity score dropped to a D- with only 2 other states receiving a lower score.”

Dr. Richard Salmon’s reports and testimony reflect that equity improved after the adoption of SB380 until 1998-99, when education funding then started becoming more disparate. CEE Exhs. 335 and 336, a copy of CEE Exh. 335 being in the Appendix at Tab 28; Tr. 2709-2941. The equity study by Dr. Salmon analyzed equity in Missouri by utilizing the six generally accepted measures of equity.

Dr. Salmon made an analysis of horizontal equity and of vertical equity using the weightings now embedded in SB287 for at-risk students (free and reduced lunch), special education students and limited English proficient children – though Dr. Salmon believed



the weightings in SB287 to be too low.<sup>6</sup> Dr. Salmon concluded with respect to horizontal equity:

“The gap in funding for education between high and low fiscal capacity school districts in the State of Missouri began to close as the funding changes were implemented (FY 1996) and reached its best level of equity in FY 1999. Since FY 1999, the general trend by all the indicators of statistical equity appears to be a general decline in the level of fiscal equity. . . . **Nevertheless, the equity statistics registered by Missouri places it among the states providing the most disparate systems of public education in the United States.**

\* \* \*

The disparity among school districts as measured by adjusted state and local expenditure per eligible pupils has widened since FY 1999, and the link between local fiscal capacity and resources has strengthened, both signs of a deteriorating system of school finance.” CEE Exh. 335, pp. 34-35; emphasis added.

And, with respect to vertical equity, Dr. Salmon concluded:

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<sup>6</sup> Dr. Salmon discussed the concept of horizontal equity – “Horizontal equity assumes that all pupils have essentially the same costs.” He also discussed “vertical equity,” which “recognizes that different students” have different needs, such as at-risk children, special education children and other categories. Tr. 2726.

“The analysis . . . indicates an essentially flat trajectory in fiscal equity improvement over the five years (FY 2001 through FY 2005) analyzed. Finally, the statistical relationship between fiscal capacity and adjusted state expenditure per weighted pupil in average daily attendance characterized as strong . . . – thus, **indicative of a system of school finance that is highly inequitable.**” CEE Exh. 335, p. 35; emphasis added.

On December 19, 1991, the State Board of Education adopted equity standards for school funding in Missouri. CEE Exh. 39; Dr. Bartman, Tr. 939, 941. The equity standards included the following requirements:

Federal Range Ratio Test. “The amount of variance allowed from the above equity tests should not exceed that specified by Federal Impact Aid equity standards. This standard requires that . . . 90 percent of all students be in districts which are within 25 percent of each other in the amount of revenue available for current expenditures.”

Dr. Salmon’s Federal Range Ratio analyses with respect to both horizontal and vertical equity reflect that the school funding in Missouri is far from meeting the Federal Range Ratio score of .25 set by the State Board of Education. CEE Exh. 335, pp. 7 and 24. As the Federal Range Ratio decreases, equity increases. **For the last fiscal year analyzed, 2005, the horizontal equity score was 1.076 and the vertical equity score was .73179.** *Id.* “Missouri’s got 1.076, which is extraordinarily high.” Salmon, Tr. 2757.

Dr. Salmon gave his opinion regarding the system of school finance in Missouri stated – “I think it’s one of the most disparate systems in existence in the United States.” Tr. 2801.

During Dr. Salmon’s initial testimony a discussion ensued as to whether Dr. Salmon could do a projection regarding equity under SB287 through 2012-13. Dr. Salmon was able to make projections through the year 2012-13, prepared a Report of his additional work (CEE Exh. 996), a copy being in the Appendix at Tab 29 and presented his Report on February 23, 2007. Tr. 8431-8473. His methodology is set forth in CEE Exh. 996 and in his testimony. Dr. Salmon in his Report concluded:

“Generally, the equity statistics determined for the WADA [‘weighted average daily attendance as used in Senate Bill 287’] unit and analysis indicate that **equity remains rather flat from FYs 2007 through 2010 before declining still further. From FY 2008 through 2013, the statistics suggest that the level of equity is projected to fall rather precipitously. \* \* \***” (CEE Exh. 996, p. 3, emphasis added).

Dr. Salmon’s final conclusion, in which the trial court concurred, was:

“Unfortunately, previous equity and wealth relationship statistics show that **Missouri provides one of the most disparate systems of public elementary and secondary education among the fifty states. The projections provided by this report suggest that SB 287 will fail to remedy the unhappy situation if it remains unchanged.** The heart of its failure to improve equity and break the strong relationship that exists

between fiscal capacity and state and local revenue plus Proposition C receipts per pupil lies principally with the state's failure to assume primary responsibility for funding public K-12 schools. The projected state aid, i.e., adequacy targets, suggests that the state, rather than assuming greater fiscal responsibility, indicates that a greater financial burden will be placed on the local school districts." (CEE Exh. 996, p. 15, emphasis added).

**With respect to the Federal Range Ratio score of .25 standard of the State Board of Education, Dr. Salmon's analysis projected for the fiscal year 2013 a horizontal equity score of .8887 and a vertical equity score of .9596. CEE Exh 996, pp. 11 and 5.**

**Special Needs Children.**

See Plaintiffs' Suggested Findings and Conclusions regarding problems with respect to funding for special needs children, which are incorporated here by reference. LF\_5600-5621, App. 774-795.

"At-Risk" Children". LF\_5601-5610, App. 775-784.

Special Education Children. LF\_5611-5614, App. 785-788.

Limited English Proficient Children. LF\_5614-5617, App. 788-791.

Gifted Children. LF\_5618-5621, App. 792-795.

**SB287.**

Many problems have been engendered by the enactment of SB287 in 2005. See more detail in Plaintiffs' Suggested Findings and Conclusions (LF\_5571-5599; Appendix, Tab 33, App. 745-773) and are incorporated herein by reference.

SB287 Phase-In. – Seven year phase-in, starting July 1, 2006, through June 30, 2013. LF\_5572-5573, App. 746-747.

SB287 – No Inflation Adjustment. SB287 was initially predicated upon FY2004 information, and then shifts to FY2006 information with the FY2006 information being used through FY2013 without inflation adjustment. LF\_5573-5578, App. 747-752.

Selection of “Performance Districts.” The methodology of selecting “Performance Districts is fatally flawed. LF\_5578-5590, App. 752-764.

“Performance Levy” and “Local Effort.” The “Performance Levy” is defined as \$3.43 without any further explanation or reason. “Local effort” is frozen at the amount a district received in FY2005. LF\_5590-5593, App. 764-767.

“State Adequacy Target.” LF\_5593-5594, App. 767-768.

“Thresholds.” Weighting for at-risk, special education and limited english proficient students only applies above certain “thresholds” (which adjust every two years). LF\_5594-5597, App. 768-771.

“Dollar Value Modifier.” Modifies formula entitlement upward by varying percentages for some Districts, but not others, phased in over the first three years (as compared to seven years for the basic formula). LF\_5597-5599, App. 771-773.

**Judge Callahan Rules Submissible Case Made.**

On February 7, 2007, there was a discussion between Judge Callahan and counsel concerning the scheduling of an expert witness for the Plaintiffs and a concern expressed by counsel for the Defendant Intervenors about filing motions at the close of the Plaintiffs' case. (Tr. 5544-5546). Judge Callahan stated:

“... [Y]our more important motions will be at the end of all the evidence.

I don't mean to treat that – but for me to take all the evidence as presented as true, thus far, **I think they've made a submissible case.**”  
(emphasis added).

On February 23, 2007, the record was closed (except for specific documents to be submitted by agreement within a few days). Counsel for the Defendant Intervenors made an oral motion “at the close of the Plaintiffs' case and the Defendants' case” (Tr. 8544) and of “all the evidence” (Tr. 8545). Counsel for the Defendants also made an oral motion that “the Plaintiffs have failed to make a submissible case.” Tr. 8546. Judge Callahan indicated that he had some concerns with respect to the Hancock claims “as to some of the government issues.” Tr. 8545. See also, Tr. 8548. Judge Callahan then stated and ruled:

**“The motions for directed verdicts at the close of all the evidence are considered and overruled.”** (emphasis added) Tr. 8548-8549.

And Judge Callahan made the following docket entry for February 23, 2007:

“Evidence taken all parties rest. Defendants move for a directed verdict at the close of all evidence. Motion Denied.” LF\_39.

### **Post Trial Procedures.**

On March 26, 2007, Post Trial Briefs (which are included in the Legal File) were filed by (i) the CEE Plaintiffs (LF\_4687-4770), (ii) the CFES Plaintiff Intervenor (LF\_4866-4867) and (iii) the State Defendants and the Defendant Intervenor (LF\_4771-4866). The St. Louis Plaintiff Intervenor also filed a Post Trial Brief which is referred to by Judge Callahan at page 5 of the Transcript of March 28, 2007, but apparently did not get docketed.

Oral arguments were presented by counsel to Judge Callahan on March 29 and 31, 2007. Transcripts of the March 29 and 31 Hearings have been filed with this Court.

Reply Briefs were filed on April 9, 2007, by CEE, et al. (LF\_4937-4946), CFES, et al. (LF\_4959-4969), St. Louis, et al. (LF\_4947-4958) and by the Defendants and Defendant Intervenor (LF\_4924-4936).

Proposed findings of fact, conclusions of law and judgments were thereafter submitted by the parties to the trial court, as follows:

CEE Plaintiffs' Suggested Findings and Conclusions (LF\_5469-5649), a copy of which is set forth in the Appendix, Tab 33, and incorporated herein by reference.

CEE Plaintiffs' Suggested Judgment (LF\_5650-5658), a copy of which is set forth in the Appendix, Tab 34, and incorporated herein by reference.

Plaintiff Intervenor CFES' Proposed Findings of Fact and Proposed Judgment and Opinion (LF\_5740-5940).

St. Louis, et al.'s Proposed Findings of Fact, Conclusions of Law, Order  
and Judgment (LF\_5944-6000).

Defendant and Defendant Intervenors' Proposed Findings of Fact  
(LF\_6001-6087).

Defendant and Defendant Intervenors' Proposed Conclusions of Law,  
Judgment and Order (LF-6088-6151).

**Judge Callahan Reopens Case *Sua Sponte*.**

On August 29, 2007, Judge Callahan entered an Order (LF\_4970-4999) much of which became a part of the Judgment of October 17, 2007 (LF\_5313-5345). **No motion was filed with the Court to reopen the case for the submission of further evidence.**

The August 29 Order "request[ed] additional briefs and argument . . . and the parties are given leave to present additional evidence on the twenty-five percent requirement" with "hearing and argument" being set for September 20 (LF\_4998-4999). Also, on August 29, the Defendant Intervenors filed a Motion for Leave to Name Expert Witness (Dr. Joseph H. Haslag), with an attached vitae, and Notice of hearing on September 10. LF\_5000-5010. After oral arguments on that date objecting to the reopening of evidence and allowing the proposed expert witness, the Defendant Intervenors' Motion was sustained over all Plaintiffs' objections. LF\_41.

Plaintiffs CEE filed a Supplemental Brief With Respect to 25% of State Revenue with attachments on September 17, 2007, and renewed the objection to reopening the record. LF\_5056-5276. CFES also filed a Brief on the 25% issue on September 17



(LF\_5276-5288) as did the State Defendants (LF\_5040-5051) and the Defendant Intervenor (LF\_5052-5055).

An evidentiary hearing was held on September 20, 2007. The State Defendants called as witnesses Marty Drewel of the Office of Administration and Geraldine Ogle of DESE, both of whom had previously testified. The Defendant Intervenor called Joseph Haslag as a witness. See, Transcript of September 20, 2007.

On September 20, 2007, the Special Administrative Board of the Transitional School District was allowed to intervene, without objection (Sept. 20 Tr. 7-8; LF\_5288-5290).

Post September 20 hearing Memoranda with respect to the 25% of state revenue issues were submitted to the trial court on September 26 (CEE-LF\_5291-5306), September 28 (CFES-LF\_5307-5310) and October 1 (St. Louis Board, et al.-LF\_5311-5313).

On October 17, 2007, Judge Callahan issued the Judgment in this case. LF\_5313-5345; Tab 1.

On November 16, 2007, CEE, et al. and CFES, et al., filed a Motion to Amend Judgment, which was overruled on December 3. LF\_43.

On December 12, 2007, the CEE Plaintiffs and the CFES Plaintiff Intervenor filed their Notices of Appeal to this Court. LF\_43, 6161 and 6217. The St. Louis Board Plaintiff Intervenor and the Intervenor Transitional St. Louis Board thereafter filed their Notices of Appeal to this Court. LF\_43, 6272 and 6364.



## **ARGUMENT**

### **Standard of Review**

This appeal involves constitutional challenges to legislation relating to the system of funding of public schools in Missouri. The Judgment (LF\_ 5313-5345; App. Tab 1) did not make findings of facts, but did make interpretations of the Missouri Constitution which are here challenged. “This Court’s standard of review for constitutional challenges to a statute is *de novo*.” *Rizzo v. State*, 189 S.W.3d 576, 578 (Mo. banc 2006).

“Likewise, this Court reviews a trial court’s interpretation of the Missouri Constitution *de novo*.” *City of Arnold v. Tourkakas*, 249 S.W.3d 202, 204 (Mo. banc 2008). A *de novo* review is therefore the proper standard of review with respect to the issues in this appeal.

## **POINTS RELIED ON**

### **I.**

**THE TRIAL COURT ERRED IN DISMISSING THE SCHOOL FINANCE CLAIMS OF THE CEE APPELLANTS, THE CFES APPELLANTS AND THE ST. LOUIS APPELLANTS, INASMUCH AS THE RECORD IN THIS CASE ESTABLISHED VIOLATIONS OF THE PROVISIONS OF ARTICLE IX, SECTION 1(a), OF THE MISSOURI CONSTITUTION WHICH REQUIRES THE GENERAL ASSEMBLY, AND HENCE THE STATE OF MISSOURI, TO MAINTAIN A SYSTEM OF FREE PUBLIC SCHOOLS WHICH WILL PROVIDE FOR THE “GENERAL DIFFUSION OF KNOWLEDGE AND INTELLIGENCE” WHICH IS NECESSARY IN THIS ERA TO PRESERVE THE “RIGHTS AND LIBERTIES OF THE PEOPLE” AND THE STATE HAS NOT DONE SO.**

#### **A. Historical Background of Education Provisions in the Missouri Constitutions.**

*McDuffy v. Secretary of the Executive Office*, 615 N.E.2d 516 (Mass. 1993)

Jefferson, “A Bill for the More General Diffusion of Knowledge” (1779)

Jefferson,” Notes on the State of Virginia” (1781-1782)

An Act Providing for the Government of the Territory of Missouri (1912)

(2 U.S. Stat. 743)

#### **B. Education Provisions From 1820 to 1865.**

Enabling Act to Authorize the People of Missouri Territory to Form a

Constitution and State Government (1820) (3 U.S. Stat. 545)

Ordinance of Acceptance by Missouri (1820)

Article VI, Section 1, Missouri Constitution of 1820

*Laws of Missouri*, 1853, page 146 (Article II, Sections 1 and 2 of Kelly Act,  
page 151)

**C. 1865 Constitutional Convention and Constitution – Education.**

Journal of the 1865 Missouri Constitutional Convention – Education

Committee Report, pp. 196-198; pp. 199, 213-214, 221, 230, 247,  
249, 279-280

Article IX, 1865 Missouri Constitution

Shoemaker, “Missouri and Missourians,” Vol. I (1943), at p. 946

**D. 1875 Constitutional Convention and Constitution – Education.**

*Debates of the Missouri Constitutional Convention, 1875*, Vols. VIII, IX,  
XI, and XII

Article XI, 1875 Missouri Constitution

**E. 1944 Constitutional Convention and 1945 Constitution – Education.**

Report of the Education Committee, File 13, to the Constitutional  
Convention (1944)

Debates of the 1944 Constitutional Convention, pp. 2321-2336

Article IX, 1945 Missouri Constitution

**F. Provisions of Article IX, Section 1(a), Missouri Constitution Are Fundamental and Enforceable in Court.**

*Concerned Parents v. Caruthersville 18 School District*, 548 S.W.2d 554

(Mo. banc 1977)

*Committee for Educational Equality v. State*, Case No. CV190-137CC,

Cole County Circuit Court, Memorandum Opinion and Judgment

(January 15, 1993)

*Lake View School District v. Huckabee*, 91 S.W.3d 472 (Ark. 2002)

*Montoy v. State of Kansas*, 120 P.3d 306 (Kan. 2005)

Article IX, Section 1(a), Missouri Constitution

Article III, Section 36, Missouri Constitution

**G. Duties of the State Under Section 1(a) and Section 3(b) of Article X Are Separate and Distinct.**

*State ex rel. Sharp v. Miller*, 65 Mo. 50 (1877)

*Committee for Educational Equality v. State*, Case No. CV190-137CC,

Cole County Circuit Court, Memorandum Opinion and Judgment

(January 15, 1993)

Article IX, Section 1(a), Missouri Constitution

Article IX, Section 3(b), Missouri Constitution

## II.

**THE TRIAL COURT ERRED IN DISMISSING THE CLAIMS PREDICATED UPON THE PROVISIONS OF ARTICLE I, SECTION 2, OF THE MISSOURI CONSTITUTION RELATING TO EQUAL OPPORTUNITIES INASMUCH AS EDUCATION IS A FUNDAMENTAL RIGHT IN MISSOURI AND THE RECORD REFLECTS THAT SCHOOL FUNDING IN MISSOURI IS DISPARATE AND VIOLATES SECTION 2.**

*Weinshenk v. State*, 203 S.W.3d 201 (Mo. banc 2006)

*Concerned Parents v. Caruthersville 18 School District*, 548 S.W.2d 554

(Mo. banc 1977)

Article I, Section 2, Missouri Constitution

Article IX, Section 1(a), Missouri Constitution

### **III.**

## **THE TRIAL COURT ERRED IN FAILING TO CONSIDER AND THEN REQUIRE FUNDING FOR FACILITIES AND EARLY CHILDHOOD EDUCATION AND FOR INCREASED FUNDING FOR TRANSPORTATION.**

Article IX, Section 1(a), Missouri Constitution

Article I, Section 2, Missouri Constitution

### **A. Facilities and Infrastructure.**

*Normandy School District v. Small*, 356 S.W.2d 864 (Mo. banc 1962)

Article IX, Section 1(a), Missouri Constitution

### **B. Early Childhood Education**

Section 313.835, RSMo

Section 162.670, RSMo

Section 210.102, RSMo

Section 161.210, RSMo

State Board of Education, *Strategic Plan* (January 2006)

### **C. Transportation.**

Article IX, Section 1(a), Missouri Constitution

Section 163.161, RSMo

Section 167.231, RSMo

Section 163.061, RSMo



**IV.**

**THE TRIAL COURT ERRED IN DISMISSING THE HANCOCK AMENDMENT CLAIMS BASED UPON SECTIONS 16, 21 AND 23 OF ARTICLE X OF THE MISSOURI CONSTITUTION INASMUCH AS THE STATE WITH RESPECT TO SCHOOL DISTRICTS HAS REDUCED THE STATE-FINANCED PORTION OF THE COSTS OF EDUCATIONAL PROGRAMS AND HAS REQUIRED NEW PROGRAMS WITHOUT FUNDING THOSE PROGRAMS.**

*Taylor v. State*, 247 S.W.3d 546 (Mo. banc 2008)

*Durant v. State of Michigan*, 566, N.W.2d 272 (Mich. 1997)

Article X, Sections 16, 21 and 23, Missouri Constitution

V.

**THE COURT ERRED IN ALLOWING MESSRS. SINQUEFIELD, SCHOCK AND SMITH TO INTERVENE AS DEFENDANTS OVER THE OPPOSITION OF ALL OF THE OTHER PARTIES AND IN LATER REFUSING TO DISMISS THEM AS PARTIES INASMUCH AS THEIR ONLY ALLEGED STANDING IS AS TAXPAYERS AND ONLY PLAINTIFFS ALLEGING THAT AS TAXPAYERS THEY ARE HARMED BY ACTIONS OF DEFENDANTS HAVE STANDING.**

*State ex. rel. Nixon v. American Tobacco, Inc.*, 34 S.W.3d 122 (Mo. banc 2000)

*State ex rel. Cooper v. Washington County Commission*, 848 S.W.2d 620, 623 (Mo. App. E.D. 1993)

Supreme Court Rule 52.12

I.

THE TRIAL COURT ERRED IN DISMISSING THE SCHOOL FINANCE CLAIMS OF THE CEE APPELLANTS, THE CFES APPELLANTS AND THE ST. LOUIS APPELLANTS, INASMUCH AS THE RECORD IN THIS CASE ESTABLISHED VIOLATIONS OF THE PROVISIONS OF ARTICLE IX, SECTION 1(a), OF THE MISSOURI CONSTITUTION WHICH REQUIRES THE GENERAL ASSEMBLY, AND HENCE THE STATE OF MISSOURI, TO MAINTAIN A SYSTEM OF FREE PUBLIC SCHOOLS WHICH WILL PROVIDE FOR THE “GENERAL DIFFUSION OF KNOWLEDGE AND INTELLIGENCE” WHICH IS NECESSARY IN THIS ERA TO PRESERVE THE “RIGHTS AND LIBERTIES OF THE PEOPLE” AND THE STATE HAS NOT DONE SO.

*“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 person in this state within ages not in excess of twenty-one years as prescribed by law.”* Article IX, Section 1(a), Missouri Constitution.

*“... [T]he education of the people is to be interwoven with the very framework of the commonwealth. It is not to be left wholly to the ever*

*changing whim and caprice of the Legislature, but is to be made organic and fundamental.”*<sup>7</sup>

\* \* \*

*“ . . . [A]ll of the people of the State should pay the amount, and that money should be spread broadcast like the dew of Heaven, throughout the whole State, for the benefit of the children of the State. The children of the State should have its benefits equally, without regard to whether they are children of the rich, or of the poor, whether a particular locality is a wealthy or a poor locality; the money is to be spread abroad equally, whether it is paid equally or not.”*<sup>8</sup>

**A. Historical Background of Education Provisions in the Missouri Constitutions.**

The current constitutional provisions are traceable to the principles enunciated by Thomas Jefferson, as well as by John Adams, prior to Missouri becoming a state. In 1779, at a time when Thomas Jefferson became Governor of Virginia, he proposed for consideration in Virginia “A Bill for the More General Diffusion of Knowledge,” which

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<sup>7</sup> Mr. William F. Switzer of Boone County, chairman of the Education Committee, 1875 Constitutional Convention, reporting the proposed Education Article to the Convention. Vol. IX, *Debates of the Missouri Constitutional Convention, 1875*, p. 27.

<sup>8</sup> Mr. Halliburton, a Convention Delegate, speaking at the Convention. Vol. IX, *Debates of the Missouri Constitutional Convention, 1875*, p. 27.

though not then adopted, set forth certain principles relative to the necessity for universal public education in order to preserve the rights and liberties of the people. Section 1 of that Bill declared:

**“[Those persons] . . . should be rendered by liberal education worthy to receive, and able to guard the sacred deposit of the rights and liberties of their fellow citizens, and that they should be called to charge without regard to wealth, birth or other accidental condition or circumstance; but the indigence of the greater number disabling them from so educating, at their own expence, those of their children whom nature has fitly formed and disposed to become useful instruments for the public, it is better that such should be sought for and educated at the common expence of all. . . .”<sup>9</sup>** (emphasis added).

Jefferson further explained his Bill for the More General Diffusion of Knowledge in his *Notes on the State of Virginia*, written in 1781 and 1782 and later published:<sup>10</sup>

**“The general objects of this law are to provide an education adopted to the years, to the capacity, and the condition of every one, and directed to their freedom and happiness.”** (emphasis added, p. 273).

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<sup>9</sup> See text at <http://etext.virginia.edu/toc/modeng/public/JefPap.html>.

<sup>10</sup> See, *Notes on the State of Virginia*, on line at <http://etext.virginia.edu/toc/modeng/public/JefVirg.html>.

John Adams in Massachusetts<sup>11</sup> was also enunciating contemporaneously the same principles when he drafted in 1779-1780 provisions of the Massachusetts Constitution which became effective in 1780 and continues in effect to this day in Part II, C.5, § 2, of that Constitution:

**“Wisdom and knowledge as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages of education in the various parts of the country, and among the different orders of the people, it shall be the duty of the legislatures and magistrates, in all future periods of this Commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them; especially the university at Cambridge, public schools and grammar schools in the towns. . . .”** (emphasis added).

See, discussion of the Massachusetts Constitution in *McDuffy v. Secretary of the Executive Office of Education*, 615 N.E.2d 516, 1.c. 523-537 (Mass. 1993), and the role of John Adams at pages 533-536.

The Jeffersonian principles with respect to education were set forth organic law of the Missouri territory by “An Act Providing for the Government of the Territory of

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<sup>11</sup> It is noted in Phillips, *A History of Education in Missouri* (1911), p. 1, that the New England experience regarding education was one of the most influential in the formation of Missouri’s school system.

Missouri” enacted by Congress on June 4, 1812 (2 U.S.Stat. 743), providing for the establishment of a territorial government:

“Sec. 14. \* \* \* **[k]nowledge being necessary to good government and the happiness of mankind, schools and the means of public education shall be encouraged and provided for from the public lands of the United States** in the said territory, in such manner as Congress may deem expedient.” (emphasis added).

## **B. Education Provisions From 1820 to 1865.**

The Enabling Act for the admission of Missouri as a state in 1820 (U.S. Stat. 545) and the Missouri Constitution of 1820 also adopted the Jeffersonian principles with respect to public education. Congress enacted “An Act to authorize the people of the Missouri territory to form a constitution and state government . . .” (the “Enabling Act,” 3 U.S.Stat. 545, March 6, 1820). Sec. 6 of the Enabling Act which provided:

“*First, that section numbered sixteen in every township, and when such section has been sold or otherwise disposed of other lands equivalent thereto, and as contiguous as may be, shall be granted to the state for the use of the inhabitants of such township, for use of schools.*” (emphasis added).

The “Ordinance of Acceptance” adopted at the Convention for the people of Missouri on July 19, 1820, in St. Louis, accepted the provisions of the Enabling Act.

On July 19, 1820, the Convention also adopted the Missouri Constitution of 1820 which carried forth in Article VI the Jeffersonian principles regarding education:

“Section 1. **Schools and the means of education, shall forever be encouraged in this state; and the general assembly shall take measures** to preserve, from waste or damage, such lands as have been, or may hereafter be, granted by the United States for the use of schools within each township in this state, and shall apply the funds, which may arise from such lands, in strict conformity to the object of the grant, and one school, or more, shall be established in each township as soon as practicable and necessary, **where the poor shall be taught gratis.**” (emphasis added).

Following statehood, Governor Alexander McNair in his First Annual Message on November 6, 1821, called public education “the first great duty of a legislator.” A year later on November 4, 1822, McNair espoused Jeffersonian principles and reiterated that “general diffusion of knowledge is the best safeguard. . . .” *The Messages and Proclamations of the Governors of the State of Missouri*, Vol. I, pp. 25, 26, 31 and 32 (State Historical Society of Missouri 1922).

Missouri prior to the Civil War moved slowly but surely toward the realization of the Jeffersonian educational plan. In 1839, the General Assembly adopted “An Act to provide for the organization, support and government of schools,” commonly known as the Geyer Act. *Laws of Missouri, 1839*, p. 112. This Act provided for “a comprehensive system of public schools at the elementary, secondary, and university levels . . . [that] reflected Thomas Jefferson’s views on education.” McCandless, *History of Missouri, 1820-1860*, p. 191. A “State School Fund” was created to supplant the Common School Fund. Provision was made for a State Superintendent of Schools.



In 1853, the General Assembly adopted the Kelly Act. *Laws of Missouri, 1853*, page 146. By this time it had become apparent that the income from the State School Fund was not sufficient to fund the public schools in Missouri. Article II of that enactment provided for additional revenues for public schools:

**“§ 1. Hereafter twenty-five per centum of the state revenue shall annually set apart and become state school moneys, and shall be distributed annually for the support of organized school townships.**

**§ 2. All moneys which have been or shall be paid into any county treasury, on account of fines, penalties or forfeitures, shall be held and accounted for as county school moneys, and shall be applied to the support of common schools within such county as hereinafter provided.”** (*Laws of Missouri, 1853*, p. 151, emphasis added).

Significantly, the Kelly Act of 1853 did not limit the source of the funding of public schools to “twenty-five per centum of state revenue.” Instead, it also set aside “all moneys . . . on account of fines, penalties or forfeitures. . . .” Article II, § 2.

Consequently, from the very beginning, 25% of “state revenue” was but one source of funding of public schools. Further provisions were made in Article VIII for “school corporations in towns and villages,” with certain funds generated from the settlement of territorial land claims being set aside to support public schools in said towns and villages. *Laws of Missouri, 1853*, p. 164, Article VIII, § 1. The Kelly Act also recognized the “corporation heretofore established in the city of St. Louis for school purposes.” *Laws of Missouri, 1853*, p. 168, Article VIII, § 35.

The first public high school in Missouri, at St. Louis, was dedicated on March 24, 1856, by Charles D. Drake, who later was to become so instrumental in the formulation of the 1865 Constitution that it came to be known as the “Drake Constitution.” See, *infra*.

### **C. 1865 Constitutional Convention and Constitution – Education.**

In 1864, the General Assembly authorized a calling of the Missouri State Convention which convened in St. Louis on January 6, 1865, and continued in session until April 10, 1865. Charles Drake was elected Vice-Chairman of the Convention, but his influence was much greater than the position would indicate. Drake had prepared a draft constitution prior to the Convention, and he was usually in control of the Convention proceedings. See, March, “Charles D. Drake and the Constitutional Convention of 1865,” 47 *Mo. Historical Review* 110 (Jan. 1953).

Provisions were adopted in the 1865 Constitution making **mandatory in Missouri** the Jeffersonian concepts of education. The final provisions, contained in Article IX, as formulated by the Constitutional Convention include:

**“1. 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 schools for the gratuitous instruction of all persons in this state between the ages of five and twenty-one years.”**

\* \* \*

“5. The proceeds of all lands that have been, or hereafter may be granted by the United States to this state, and not otherwise appropriated by this state or the United States; also, all moneys, stocks, bonds, lands and other property now belonging to any fund for purposes of education; also, the net proceeds of all sales of lands, and other property and effects that may accrue to the state by escheat, or from sales of estrays, or from unclaimed dividends, or distributive shares of the estates of deceased persons, or from fines, penalties and forfeitures; also, any proceeds of the sales of the public lands which may have been or hereafter may be paid over to this state, (if congress will consent to such appropriation); also, all other grants, gifts or devises, that have been or hereafter may be made to this state, and not otherwise appropriated by the terms of the grant, gift or devise, shall be securely invested and sacredly preserved as a public school fund, the annual income of which fund, together with so much of the ordinary revenue of the state as may be necessary, shall be faithfully appropriated for establishing and maintaining the free schools and the university in this article provided for, and for no other uses or purposes whatsoever.”

\* \* \*

**“8. In case the public school fund shall be insufficient to sustain a free school, at least four months in every year, in each school district in this state, the general assembly may provide by law for the raising of such**

**deficiency, by levying a tax on all the taxable property in each county, township or school district as they may deem proper.”** (emphasis added).

The Education Committee of the Convention, in its Report submitting proposed language for the Education Article (which language was in the main adopted), indicated the purpose and the reasons for the provisions:

“It will be readily admitted that the subject of general education is one of the most important that can engage the attention of those who desire the success and permanency of free institutions. **All the constitutional safeguards which can be thrown around the liberty of the people will avail but little, unless the people themselves possess a sufficient degree of knowledge and intelligence rightly to appreciate the benefits of free government.”**

“In our own State, just emerging from the desolations and dangers of a terrible civil war . . . and proscribed the general diffusion of knowledge, **it seems a most appropriate time to establish a system of public schools,** which, in the munificence of its provisions, the comprehensiveness of its objects, shall make free Missouri a worthy pattern for all States that would carry the means of a good education to the door of every inhabitant, without distinction of race, of color, or condition.”

“The plan we propose **contemplates the establishment of a free school** in every neighborhood where a sufficient number of children can be found to compose a school, in which the primary branches of instruction --

reading, writing, spelling, arithmetic, geography, and grammar -- shall be taught to every child in the State, who desires or needs the advantages of such instruction.”

**“As population increases, the same plan will permit the establishment of schools of a higher grade, for instruction in the higher branches of education.”**

\* \* \*

“The thorough training of professional teachers, thereby securing for that most honorable and important calling, the rank and dignity of the so-called ‘learned and liberal professions,’ appears to be the first step towards securing the complete success of any system of popular education.”

\* \* \*

**“The management of the affairs of the public schools is committed to a board of education. . . .”**

\* \* \*

“The great object to be secured is the education of **every child in the State** to that extent which is perhaps most generally understood by the phrase, ‘**a good common school education**’ while a **higher degree of attainment ought to be, and will be, provided for all who desire it, under our system, when fully organized.** Nothing less than this would deserve the name of popular education. To secure at least this degree of

mental culture, provision is made for **requiring attendance at the public schools of all children who are not otherwise instructed, . . . .**”

\* \* \*

“Ample provision is made by the State for the publication of the laws, by which the people are to regulate their conduct. But of what avail are such provisions, unless the people are able to read? \* \* \* If, then, the State would insure the success of her efforts to make every one acquainted with the laws of the land, we should furnish to every citizen an education which will enable him to at least to read the Constitution and laws under which he lives.”

\* \* \*

**“We have thus endeavored to set forth, in general terms, some of the principles of the system of popular education, which is embodied in the article herewith submitted.”**

\* \* \*

“A careful and thrifty husbandry may pour into the marts of commerce, and into the granaries of every inhabitant of the State, abundant productions of our exuberant soil; capital and skill may secure, for our rich and exhaustless mines, returns of untold wealth; but, **after all, the security of free institutions, and the honor and glory of a free commonwealth, will be found only in an intelligent and virtuous people.**” (emphasis added; *Journal of the 1865 Constitutional Convention*, pp. 196-198).

As reported, Section 1 of the Education Article provided as follows:

**“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 schools, for the gratuitous instruction of all persons in this State, between the ages of five and eighteen years.”** (emphasis added; *Journal*, p. 199).

Debate began with respect to the Education Article on April 3, 1865 (*Journal*, p. 213). Certain amendments were proposed and voted down (*Journal*, pp. 213-214), but a new section was proposed and adopted which authorized the General Assembly to levy property taxes if funds to maintain a free public school for four months were not sufficient (*Journal*, p. 214).

During the afternoon of April 4, 1865, debate on the Education Article resumed (*Journal*, p. 221). Several other amendments were proposed and rejected, and a motion that the Article on Education be engrossed for a third reading was then adopted (*Journal*, p. 222).

On April 10, the final day of the Convention, the following is reflected in the *Journal*:

“The President caused a dispatch to be read announcing the surrender of the rebel army under General Lee to General Grant.” (*Journal*, p. 249).

The Constitution was put to a vote of the people on June 6, 1865, approved and declared adopted by the Governor (*Journal*, pp. 279-280).

Floyd C. Shoemaker in his *Missouri and Missourians*, Vol. I (1943), at p. 946, described the education features which were effectuated by the 1865 Constitution:

“The practical application on a state-wide scale of the theory of a free public school system, from elementary school to university, was first made under this constitution. A public school fund was created from the proceeds of public land sales, former education funds, escheats and other sources of revenue, to be used in establishing and maintaining the free schools and the university, in case the fund proved insufficient to sustain the free schools at least four months a year, the legislature was empowered to raise such deficiency ‘by levying a tax on all the taxable property in each county, township, or school district, as they may deem proper.’”

**D. 1875 Constitutional Convention and Constitution – Education.**

William F. Switzer,<sup>12</sup> chairman of the Convention's Education Committee, explained to the Convention on July 8, 1875, the proposed Article on Education as reported by the Education Committee:

“It has been well and truthfully said by one of our great American statesmen [Thomas Jefferson] that at this day no public man comes up to

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<sup>12</sup> Switzer was from Boone County and had served also as a delegate to the 1865 Constitutional Convention. In the 1865 Constitutional Convention, he was not aligned with Charles Drake. Switzer Hall at the University of Missouri in Columbia is named after William Switzer in recognition of his support for education.



the standard of a statesman who does not in his policy **make broad and universal the diffusion of education among the masses of the people.**”

(emphasis added) (Vol. IX, *Debates of the Missouri Constitutional Convention*, 1875, p. 26).

\* \* \*

“To deduce a conclusion from the action thus far had of this body, the education of the people is to be interwoven with the very framework of the commonwealth. **It is not to be left wholly to the ever changing whim and caprice of the Legislature, but is to be made organic and fundamental.**” (emphasis added) (Vol. IV, *Ibid*, p. 27).

\* \* \*

“**[T]he Committee was about unanimous** in the conviction that we should present a **system of education, a complete scheme, harmonious and consistent throughout, capable of growth and expansion ...**” (emphasis added) (Vol. IX, *Ibid*, p. 27-28).

\* \* \*

“The object of it [the provision re the State Superintendent of Public Schools and State Board] was . . . to place the Superintendent of Public Schools or Board of Education, not only theoretically, but in fact at the head of the **system.**” (emphasis added) (Vol. IX, *Ibid*, p. 31).

\* \* \*

“[Y]our Committee have presented these details of **the system of education** which ... will redound to the permanent prosperity and enduring glory of the people, a system which recognizes the **free public school as one of the great forces of our civilization**, as the elevating, assimilating organ of the body politic . . . and **starting in early life from the middle, and many of them from the lower classes of society they make their successful way through the common schools and through poverty, and finally reach the loftiest niche** in the world's esteem; a system, likewise, Mr. President, which does not outlaw the intermediate by the higher education -- that rich and exhaustless fountain of knowledge which supplies the lower, and which, if it be dried up, makes an arid and boundless waste in the whole field of knowledge.” (emphasis added) (Vol. IX, Ibid, p. 53)

In the general debate that followed, Mr. Bradfield questioned whether the state could afford the cost to which Section 1, now Section 1(a), of the Education Article would commit the state. Bradfield noted that there were then 708,354 children in Missouri who were between the ages of five and 21, noted the per pupil educational costs in Massachusetts, Pennsylvania, New York, Illinois and Ohio, and pointed out that if any of those comparable costs were utilized in calculations there would be much more substantial costs for the State of Missouri:

“Now, I say in view of these facts are we prepared or ready to adopt the **first section which pledges us to the support & maintenance of a system of education which will cost us more in dollars and cents every**

**year than double the taxes we now pay for all state purposes.”**

(emphasis added) (Vol. IX, Ibid, p. 59).

Bradfield pointed out that even with the utilization of 25% of state revenues, interest on the School Fund and fines and forfeitures, the Legislature would probably have to raise more money to comply with the requirements of Section 1:

**“Now supposing that the fines & penalties should be the same in future years, this fund, allowing twenty-five per cent upon the whole amount, including the revenue & state interest fund, and ten per cent upon all county funds, and the fines & penalties it would only yield annually the sum of \$1,027,127.23, and that would not be more than one fourth enough, according to the scholastic reports in other states to educate these 708,354 children in this State. Now three times that amount must be raised in some other way & manner before we can carry out the provisions of this first section in good faith, if we adopt it.”**<sup>13</sup> (emphasis added) (Vol. IX, Ibid, p. 60).

\* \* \*

“My idea is we should adopt no system that we do not intend to carry out in good faith, and if it will cost the figures I have stated, taken from reliable data, then we are to consider whether or not we will in the

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<sup>13</sup> It is clear that the Convention was aware that 25% of state revenue would not be enough to fund the education required by Section 1 of the Education Article.

adoption of this section **pledge the State & the Legislature to raise the necessary means to carry out such a system as we put down here.”**

(emphasis added) (Vol. IX, Ibid, p. 61).

No modifications were made to Section 1 of the Education Article during the Convention deliberations, except with respect to the ages of children to be educated, nor were there any assertions advanced that the funding for education obligations imposed upon the state was limited to 25% of state revenues. The **mandatory obligation** upon the General Assembly, and hence the State of Missouri, to fund and maintain the general diffusion of knowledge to preserve the rights and liberties of the people which had been adopted in 1865 remained in the Constitution, as it does today.

During the general debate, Mr. Brockmeyer observed:

**“Duties are devolved upon our citizens** by our form of government, and **how are they to perform them, save & except as they receive intelligence sufficient to understand those duties?** Whence do our laws come? They come from the hearts of the citizens. And how can we be expected to be capable of instituting good laws unless we are possessed of sufficient intelligence to understand what is best? **Hence it is that the State uses its taxing power, for the purpose of supplying the conditions essential to the existence of our government.** It cannot exist as a Republic without these conditions; and this, I fancy, was the meaning of the founders of the American nation, when they said that intelligence &

virtue were the corner stone of the fabric they had raised.” (emphasis added) (Vol. IX, Ibid, p. 71-72).

During the course of the Debates, motions to strike the obligation to “establish” free public schools and to strike the words “A general diffusion of knowledge and intelligence being essential to the people” were rejected by the Convention. (Vol. IX, Ibid, pp. 87, 91).

A Minority Report of the Education Committee by Mr. Todd proposed that Section 1 be amended so as to provide that **only** spelling, reading and writing in the English language, grammar, arithmetic, geography and the history of the United States be required to be taught at public expenses. (Vol. IX, Ibid, pp. 23, 102). Todd argued that without such a limitation, the State was committing itself to a “system of education which ... begins ..., with the lacteal condition of the infant brain and terminates at no age of the minor; nor does it terminate in any grade of education, short of all the learning of the world, ancient and modern.” (Vol. IX, Ibid, pp. 156-157). Notwithstanding Mr. Todd's repeated calls to limit the scope of the education to be afforded in the “free public schools,” his proposed amendment was tabled and never revived. (Vol. XI, Ibid, p. 242). Mr. Pulitzer from St. Louis in speaking against the minority report indicated – **“The gentlemen who want all these restrictions are very much afraid that the public schools of this State will teach too much. I am afraid they teach too little.”** (emphasis added) (Vol. IX, Ibid, p. 127). The expansive scope of the education to be provided in free public schools was therefore not limited.

The Convention specifically rejected the concept that the support of public schools should be dependent on taxes raised in particular localities. Mr. Pipkin of Jefferson County proposed an amendment which would have provided that no more state monies could be distributed to a county for education than the state taxes raised in that county. (Vol. IX, Ibid, p. 135). Pipkin's amendment was never adopted. Mr. Halliburton, in speaking against the amendment, spoke of what was implicit in the Education Article as formulated by the Convention -- and no one during the Convention challenged the correctness of the interpretation which he expressed:

“I had supposed that the business of this body was to establish a **general school system, and not a local school system.** I had supposed, and have ever believed, from all that I have heard, and read, that the theory was, that **the school system was to be a general one, established and supported by the State,** and that **it was not for a state to attempt to build up for each locality,** without consulting them, or regarding their interests, or condition, **a local school system to be carried on by each county, in, and of itself.** The whole theory upon which the public school system is **carried on,** as has been proclaimed here by gentlemen on various sides of the question, but who have, all agreed upon the main point, while they differ as to the modes of building up, **is, that it is to the interest of the State, to make the children of the State intelligent;”**

\* \* \*

“to impart intelligence, information, and knowledge, which can only be done successfully by educating the young, thereby making of them when they grow into manhood and womanhood, better men and women, and consequently better prepared and qualified to fill positions in society, and in the State, when the present generation shall pass away.”

“I say, the proposition is, to abandon that system, and to compel a local taxation by each locality, for the purpose of educating its young. Now, Mr. President, we abandon the whole theory, and it at once becomes, so to speak, a despotism. **The object of levying a tax, for the purpose of educating the young, is because a large proportion of the people, are too poor to furnish the means of educating their children.**”

\* \* \*

“Then the moment you abandon that theory, you abandon the whole idea, that the wealthy of the State should educate the poor, all that is abandoned, and the very argument offered by the member from Jefferson, is an argument that the wealthy of the State should not educate the poor, but that the poor should be left to educate themselves.”

\* \* \*

**“The object is, that information should be as much diffused among all the people, as it is possible to diffuse it, and that each, and every member of society shall be raised and elevated as high upon the general plane of intelligence, as it is possible, thereby making society**

**better, thereby, improving the State, and thereby you enable each individual the better to act and play his part in a republican government,** where each man is a sovereign, and each man exercises his proportion of the sovereign power of the republic at the ballot box.”

\* \* \*

**“But you establish a common school system;** they all go to the same school, they all together recite in the same classes, they all participate in the same pleasures, in the same excitements, and the same recreations, and there they learn to measure each other by their characteristics of manhood and of womanhood, their deportment, their uprightness, their capacity to learn and to do their part as one of a community.”

\* \* \*

**“Sir, if the State proposes to decline entering into the public school education of its young, this effort to throw it off, by authorizing each locality to levy a particular sum for the purpose of educating its young, will be all that is necessary. \* \* \*** The whole theory is, that it is the **duty of the State to provide for the public education of the children of the State,** and if the State provides for it, then it is the duty of the State to pay their proportion, whether they send their children to school or not, but all of the people of the State should pay the amount, **and that money should be spread broadcast like the dew of Heaven, throughout the whole State, for the benefit of the children of the State. The children of**



**the State should have its benefits equally, without regard to whether they are children of the rich, or of the poor, whether a particular locality is a wealthy or a poor locality; the money is to be spread abroad equally, whether it is paid equally or not.”** (emphasis added, Vol. IX, Ibid, pp. 135-141).

At the conclusion of Mr. Halliburton's remarks, Mr. Pipkin attempted to further explain his amendment. Mr. Elijah Norton of Platte County raised a point of order that Pipkin's amendment was not germane to Section 1, which objection was sustained. (Vol. IX, Ibid, p. 142).

During continuing debate on July 9, 1875, Education Committee Chairman Switzer reiterated that the provisions requiring the state to fund free public education were “fundamental” and not subject to the control or caprice of the General Assembly:

**“I call the gentleman's attention to the fact that the Committee also placed beyond the control of the Legislature, the appropriations of the common schools.”** (emphasis added) (Vol. IX, Ibid, p. 152).

And later in the debates he stated:

**“I propose to stand by the Free Public School system of the State, not only by having suitable laws enacted by the Legislature, but I propose to plant their interests in the bed-rock of the fundamental law. I propose, and this Committee on Education proposes, to this Convention, that instead of letting this great interest abide the fortunes or caprices of Legislatures that may assemble in this capital hereafter and**

**withdraw, it may be, the needed support of public instruction through the instrumentality of public schools, that we shall plant these institutions in the fundamental law -- make them organic -- for the first time in the history of Missouri.” (emphasis added) (Vol. IX, Ibid, p. 173).**

With respect to 25% of state revenue for the support of public schools, there were references in the debates and actions of the Convention to such a provision being placed or not placed in the Constitution. At **no** point in the debates was there a contention that by the constitutional dedication of 25% of state revenue to public schools, such would limit the mandatory obligation of the General Assembly, and hence the state, under Section 1 of the Education Article to provide for the general diffusion of knowledge to protect the rights and liberties of the people. Mr. Switzer, in explaining the Education Committee’s initial language including a provision for 25% of state revenue to go to public schools recognized that such a provision was already specified in the statutes, stated:

“The 8<sup>th</sup> section is simply the law of the State. Twenty five per cent of the State revenue is mentioned to abide the action of the Convention in reference to another article which is before it, and that 25% is to be changed according to the action of the Convention if not stricken out entirely.

‘Twenty-five per cent of the State revenue shall be set apart and applied to the support of the public schools’: -- that is the present law, and has been the law since 1853 (sic).” (Vol. IX, Ibid, p. 35).

When it had become time to consider Section 8 of the Education Article as proposed by the Education Committee of the Convention relating to 25% of state revenue, Mr. Norton moved to postpone consideration of that section until “after the consideration of the Report on Revenue and Taxation.” The motion to postpone carried. Vol. IX, Ibid, pp. 323-324. Section 12 of the Education Article as proposed by the Education Committee was also passed over for later consideration.

On July 19, 1875, Mr. Norton moved that the two remaining sections, Sections 8 and 12, of the Education Article be taken up for consideration, which motion was agreed to. Vol. IX, Ibid, p. 230. Section 8 of the Education Article as proposed by the Education Committee provided:

“Twenty-five per cent of the state revenue shall be set apart and applied annually to the support of the public schools and one and three quarter of one per cent of the remaining three-fourths shall be appropriated annually for the support of the State University.” (Vol. VIII, Ibid, pp. 179-180).

And Section 12 of the Education Article as proposed by the Education Committee provided:

“Section 12. In case the public school fund shall be insufficient to sustain a free public school four months in every year in each school district in this State, the General Assembly may provide, by law, for supplying such deficiency by levying a tax on all the taxable property within such school district. . . .” (Vol. VIII, Ibid, p. 180).

After a brief discussion of Section 8 as proposed by the Education Committee, Mr. Norton moved that Section 8 be laid on the table, which “motion was agreed to.” Vol. IX, Ibid, p. 232.

Section 12 as proposed by the Education Committee was then taken up for discussion. Mr. Halliburton noted:

“Now this section goes against the old hypothesis that the Legislature levies taxes everywhere. . . . Now we have provided that the General Assembly shall not levy local taxes for any purpose.” (Vol. XI, Ibid, pp. 233-234).

It is noted that Section 8 of Article IX of the **then** existing 1865 Constitution provided:

“8. In case the public school fund shall be insufficient to sustain a free school, at least four months in every year, in each school district in this state, the general assembly may provide by law for the raising of such deficiency by levying a tax on all the taxable property in each county, township or district as they may deem proper.”

The Section 12 proposed by the Education Committee was a modification of Section 8 of Article IX of the 1865 Constitution.

Section 12 as proposed by the Education Committee was then laid upon the table. Vol. IX, Ibid, p. 234. It was then realized that not all of the Education Committee’s Report had been disposed of – since an amendment by Mr. Todd proposing a new section had been previously offered, but not voted upon, providing:

“Sec. — There shall be taught in the free public schools of the State at the State expense only the following studies: spelling, reading, writing in the English language English Grammar, arithmetic, geography and the history of the United States; but other additional studies may be taught in the same school house, if without any State expense therefore.” (Vol. XI, Ibid, p. 234).

Mr. Todd realistically indicated – “I scarcely expect the adoption of this proposition by reason of the discouragement it has met so far. . . .” (Vol. XI, Ibid, p. 234). Todd’s proposed section was tabled (Vol. XI, Ibid, p. 242).

There was further debate about putting the 25% of state revenue provision into the Constitution. Mr. Norton proposed that it be placed in the Constitution. Mr. Fyan raised the question as to whether the “25 percent” to be set aside “constitute[d] any part of the school fund.” Mr. Norton indicated that “. . . **my object was to include in that amendment 25 percent of the State revenue now set apart as a school fund by the Legislature of the State** and incorporate it in this section.” (emphasis added) (Vol. XI, Ibid, p. 281). Mr. Norton further responded that –

“I think Mr. President that the language is now unambiguous. If the gentleman thinks it is ambiguous and proposes to amend it so as to make it unambiguous and clear to him I have no objection to supporting such an amendment. . . .” (Vol. XI, Ibid, p. 281).

Messrs. Fyan and Brockmeyer accepted Mr. Norton’s comment regarding a further amendment to remove any supposed ambiguity re the inclusion in the Constitution of a

provision including the “25 percent of the State revenue now set apart . . . by the Legislature.” Mr. Fyan proposed an amendment adding to the Norton Amendment the following:

“but in no case shall there be collected less than twenty five per cent of the State revenue to be applied to the support of public schools.”

Mr. Brockmeyer suggested that the words “set aside” be inserted in place of the word “collected,” which was accepted by Mr. Fyan. Vol. XI, Ibid, p. 282. Mr. Cottey then proposed to further amend the Fyan Amendment by –

“inserting after the words ‘State Revenue’ these words ‘exclusive of the interest and sinking funds.’”

The Cottey proposal was accepted by Mr. Fyan (Vol. XI, Ibid, p. 285). Mr. Brockmeyer then sought to clarify what “seems still to be some confusion in the minds of the members”:

“The General Assembly can establish as many funds as they please – make one hundred thousand funds, if they see fit, nevertheless the money all goes into the treasury and out of it, it is appropriated no matter whether it is out of one fund or out of a thousand.”

\* \* \*

“It is perfectly evident that we **can mean but one thing and that is that twenty-five percent as is now established by law out of the revenue, although for general purposes shall be appropriated to this specific use.**” (emphasis added) (Vol. XI, Ibid, p. 287).

The amendment of Mr. Fyan (with the modifications suggested by Mr. Brockmeyer and Mr. Cottey) to the Norton Amendment was approved by the Convention, and then the Norton Amendment was approved. (Vol. XI, Ibid, pp. 288-289). The Norton Amendment, which in effect carried forward and **amended Section 8 of the 1865 Constitution**, became Section 7 of the 1875 Constitution. From a consideration of the amendments and debates with respect to that Section, it is clear that the Convention wanted to make a constitutional set aside of the **same** twenty-five percent of state revenue set aside for public schools that had previously been done by statute. The wording added to the section after the Norton Amendment was adopted was added only to make clear that other changes being made by the Constitution would not change the set aside that was previously in effect by statute.

On July 29, 1875, the Revision Committee presented the Education Article for the Convention's final approval. (Vol. XII, Ibid, p. 417). The revised text of the Education Article was put to a vote. Mr. Todd, during the voting, **explained his "No" vote** by pointing out the scope of the educational system which had been formulated by the Education Article:

“Mr. President, **the first section** obligates the State to furnish gratuitous instruction for all children between six and twenty years. **There is no limitation in the article upon the appropriations by the Legislature of the revenues of the State for that purpose**; it only provides that it shall not be less than twenty-five per cent, and it may be more. **I consider that the State should be saved from oppressive**

**taxation for this purpose, and that a system of education should be provided which should have limitations.** As it is there is no scheme of education made but you go from the alphabet up to all the higher departments of knowledge, and I would try to get a free public school system of education under some system. Believing that as it is, the powers granted are dangerous, like the member from Howard (Mr. Schackelford); I feel bound to I vote no.” (emphasis added) (Vol. XII, Ibid, p. 421).

The revised Education Article was adopted by a vote of 48 ayes and 8 noes. (Vol. XII, Ibid, p. 421).

An “Address” to the citizens was presented by the Committee to the Convention on August 2, 1875, and adopted (Vol. XII, Ibid, pp. 693-701). This Address explained the proposed Constitution to the citizenry, including the Education Article:

“**The Maintenance of free public schools for the gratuitous instruction** of all children between the ages of six and twenty years **is required.** The public school fund of the State is continued, and securely-guarded [and] **provision made for its gradual increase.** Ample provision is also made for the preservation of county and township school funds. **Whilst local taxation,** when necessary, for the maintenance of public schools, **is still allowed, it is under such restrictions** and limitations as will tend to prevent the abuses which have become so common under the present system.” (emphasis added) (Vol. XII, Ibid, p. 697).



**“That section [§ 8 of the Education Article, now § 3(b)] is not to be regarded as a limitation upon, or curtailment of, the power conferred upon the legislature in section 1 of the same article of the constitution, which makes it obligatory on the legislature to establish and maintain free schools for the gratuitous instruction of all persons in the State between the ages of five and twenty-one years.”** (emphasis added).

**E. 1944 Constitutional Convention and 1945 Constitution – Education.**

The Report of the Education Committee, File No. 13, was submitted by Mr. Alva F. Lindsay, Chairman on March 10, 1944. The text of the Article as proposed by the Education Committee was set forth in the Report, as well as “Remarks.” Pertinent parts of the “Remarks” with respect to Section 1 were:

“Section 1. The present Section defines the free public school system as applicable to those from six to twenty years of age. The re-writing makes more flexible such definition of the free public schools, yet **establishes principle of permitting the General Assembly to fix the period in which free public schools shall be maintained at public expense.**” (emphasis added).

When the Education Article came on for consideration by the Convention, Mr. Alva Lindsay, Chairman of the Education Committee of the Convention, opened the debate upon Section 1(a) of the Education Article by indicating that “... This is the definition of our free public school system.” (Ibid, p. 2321). Another delegate prophetically looked to the future:

“MR. OPIE: Mr. President, I think I have always been a conservative. I didn't like to see any money wasted for education ..., but I am going to tell you that **we are writing a Constitution for many years to come, and we can't go by what we have done in the past or what we think we'd like to do, or what the cost is going to be.** That is beyond our control. **Other governments in this world, and there's (sic) many of them, are going all out on education, and the country that doesn't provide the highest class of education and every advantage, is going to be left to switch (sic) in a competitive way. I think we ought to support the report of this Committee and look to the future, because if we don't, the citizens of Missouri will be left ... [at the] switch (sic) in a competitive way.**” (emphasis added) (Ibid, p. 2330).

Chairman Lindsay joined back in the debate:

“This is not a school system of isolated districts. **It's a state school system, and it's the state's obligation to see that we have a school system, and if the money doesn't come from some other source, why, I never could see anything wrong with the state supplying the money.**”

\* \* \*

“**They [the Education Committee] have also compared it with the sections in all of the other Constitutions in the United States. I believe it's the feeling of the Committee that this is the best common school**

**section in any Constitution in the United States, if it is adopted, the way it is now written.”** (emphasis added) (Ibid, p. 2331).

In speaking in favor of the language in Section 1 which was adopted, Mr. Meador, a member of the Education Committee, asserted in debate:

**“Missouri should make provision for the equal education of all of the citizens in all parts of the state ... Therefore, this poor education that boys and girls get in certain isolated places of Missouri means poor citizens if education has any effect on citizenship in every county, city and state in the Union, because these people go there and they reside there as mature men and women. Therefore, Missouri should meet that challenge and provide as nearly as possible equal educational opportunities for every section of this state. We must take education to the boy or to the girl wherever we find them. Those people -- those children are not responsible for being born in a certain place or of certain parentage.”** (emphasis added) (Ibid, p. 2333).

Delegate Richard Nacy, a well known Democrat and former State Treasurer, then moved to strike the first part of Section 1(a) -- the Jeffersonian language stating that “a general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people.” (Ibid, p. 2336.) V. E. Phillips, a member of the Education Committee, was “very much surprised” that delegate Nacy was “trying to eliminate from our fundamental document the immortal words of Thomas Jefferson . . .

the duty of the state concerning the great subject of education of which Jefferson was so proud to be a founder.” (Ibid, pp. 2336-37).

Mr. Hanks, speaking in opposition to the Nacy Amendment stated:

“Mr. President, I arise to oppose the Nacy Amendment. ”

\* \* \*

**“I think Republicans are indebted to Tom Jefferson, the same as Democrats are indebted to him for those gallant fights which he made which made it possible, my friends, to have public education in the United States of America, and I oppose the Nacy Amendment upon that ground.”** (emphasis added) (Ibid, p. 2338).

Education Committee Chairman Lindsay, in arguing against the Nacy Amendment, stated:

“I am not trying to support Thomas Jefferson, the Democrat, but Thomas Jefferson is an American institution. **I think these words serve a very useful purpose as a matter of declaring the policy of the state. I have a feeling that they mean something more than some of the delegates do. If you will look through many of the decisions in this state of our Supreme Court dealing with the validity of school laws, you will find that they often quote from that section, and I have the feeling that it has had a great deal of influence in the writing of their decisions as pertain to acts of Legislature dealing with school problems.**

Personally, I would very much like to see it left in the section.” (emphasis added) (Ibid, p. 2339).

Mr. Nancy’s amendment was rejected, and the Jeffersonian language was left in the Constitution.

**F. Provisions of Article IX, Section 1(a), Missouri Constitution Are Fundamental and Enforceable in Court.**

The Missouri Supreme Court in *Concerned Parents v. Caruthersville 18 School District*, 548 S.W.2d 554 (Mo. banc 1977) (per Finch, J., for a unanimous Court), held that the Plaintiff parents and children had standing to maintain an action based upon alleged violations of Article IX, Section 1(a) of the Missouri Constitution and that Missouri Courts had the authority to enforce the provisions of Section 1(a). The School District was requiring fees to be paid for certain courses and requiring certain supplies to be furnished. The State Board of Education intervened on the side of the Plaintiffs. In reversing the dismissal by the trial court, Judge Finch for the Supreme Court reasoned:

“Do these practices, admitted for purposes of this review, violate Mo.Const. art. IX, § 1(a)?”

“The words ‘**free public schools for the gratuitous instruction**’ of all children of school age were not included in the section on schools and education of Missouri’s first constitution. In art. VI, § 1, of the Constitution of 1820, after providing that ‘[s]chools and the means of education shall forever be encouraged in this state’, the legislature was required to established township schools ‘as soon as practicable and necessary, where

the poor shall be taught gratis’. The constitution contained no directive to establish free public schools for all school children. **It was later that the state accepted the Jeffersonian concept that education is fundamental to democracy and that the state should assume the primary education role.**<sup>14</sup> From time to time thereafter, the legislature enacted various laws designed to encourage education but it was not until 1865, when a new constitution was adopted, that **the state had a constitutional provision which required the legislature to ‘establish and maintain free schools for the gratuitous instruction’ of all persons between 5 and 21 years of age.** Mo.Const. art. IX, § 1 (1865). That same provision was repeated in the subsequent constitutions of 1875 and 1945, the only difference being that the 1875 constitution specified instruction between 6 and 20 years of age and **the 1945 constitution called for such education for persons within ages specified by law but not to exceed 21 years.**” (emphasis added, pp. 558-559).

The Court then looked to dictionary definitions of “free” and “gratuitous” –

“*Webster’s Third New International Dictionary (1965)* defines ‘free’ as meaning ‘not costing or charging anything \* \* \* given or furnished without cost of payment’ and gives as an example ‘a free school’. The

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<sup>14</sup> The Court at this point cites to D. March, *History of Missouri*, 724-725, and later 720-733.

word is defined in the *Oxford English Dictionary (1961)* as follows:

‘Given or provided without payment, costless, gratuitous. Of persons: (Admitted, etc.) without payment. \* \* \* *Free School*: ‘a school in which learning is given without pay’.”

“‘Gratuitous’ is defined in *Webster’s Third New International Directory (1965)* as meaning ‘costing the recipient or participant nothing: FREE’. The *Oxford English Dictionary (1961)* defines the term as ‘Freely bestowed or obtained; granted without claim or merit; provided without payment or return; costing nothing to the recipient; free’”.

“Applying the foregoing definitions, it seems perfectly clear that the language in art. IX, § 1(a) provided that the legislature must establish schools to which admission is without charge and that instruction was to cost the students nothing. The use of both terms emphasized and underscored the intention that these schools were to provide free public education.” (p. 559).

The Supreme Court then cited and quoted with approval from an earlier Court of Appeals case – *State ex rel. Roberts v. Wilson*, 297 S.W.419, l.c. 420 (Mo. App. 1927):

“‘The right of children . . . to attend the public school established in their district for them is not a privilege dependent upon the discretion of any one, **but is a fundamental right, which cannot be denied, except for the general welfare.** (p. 560, emphasis added).

It is noted that the Brief filed in the Supreme Court in the *Concerned Parents* case by Attorney General Danforth on behalf of the State Board of Education took the position that:

“Article IX, Section 1(a) of the Missouri Constitution, was a product of the **Jeffersonian concept that education was fundamental to democracy and that the State should assume the primary education role.**” (emphasis added).

Brief at 13 (citing March, *History of Missouri*, Vol. I (1967), pp. 724-725; “*The Missouri School Code of 1825*,” *Missouri Historical Review*, Vol. LXIX, No. 2 (Jan. 1975), p. 122; and Phillips, *A Century of Education in Missouri* (1921), p. 305). It is further noted that in *Concerned Parents*, the State Board of Education at pages 15 through 17 of its brief quoted extensively from the statements made by Mr. Halliburton during the Debates in the 1875 Constitutional Conversation.

And, see also the following Missouri cases recognizing education as a fundamental right – *Fowler v. Clayton School District*, 528 S.W.2d 955, 959 (Mo. App. 1975) (education is a “fundamental right”); *Sikeston R-VI School District v. Ashcroft*, 828 S.W.2d 372, 375 (Mo. banc 1992) (“vital interest”).

Article III, Section 36, the Missouri Constitution, by making the funding of “public education” the first priority in state funding after the payment of sinking fund and interest on outstanding obligations of the state,” as it has been since 1875, reiterates the primacy of public education. In reality only two programs are actually mandated by the Missouri Constitution – public education in Article IX and the blind pension fund found



in Article III, Section 38(b). See, *Gerkin v. Sherman*, \_\_\_ S.W.3d \_\_\_, WD 69053 (Mo. App. W.D. Jan. 13, 2009) (Spinden, Jr.), reversing the Judgment of the Cole county Circuit Court, and holding that the State had violated its obligations under the Constitution with respect to pension funding for the blind.

In order to better understand the provisions of Article IX, Section 1(a), the following are dictionary definitions from *Webster's New Collegiate Dictionary (1980)* with respect to the words set forth in bold type:

“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 21 years as prescribed by law.”

**general** “involving or applicable to the whole. . .involving, relating to, or applicable to every member of a class, kind, or group. . .”

**diffuse** “to pour out and permit or cause to spread freely . . .to break up and distribute. . .”

**knowledge** “the fact or condition of knowing something with familiarity gained through experience or association . . . acquaintance with or understanding of a science, art or technique. . .”

**intelligence** “the ability to learn or understand . . . the skilled use of reason . . . the ability to apply knowledge to manipulate one’s environment or to think abstractly. . .”

<b>establish</b>	“to make firm or stable. . .to institute permanently by enactment or agreement”
<b>maintain</b>	“to keep in an existing state; preserve from failure or decline. . .to support or provide for”
<b>free</b>	“having the legal and political rights . . . not obstructed or impeded”
<b>gratuitous</b>	“given unearned or without recompense. . .costing nothing. . .”
<b>instruction</b>	“to give knowledge or information to. . .to impart knowledge to in a systematic manner”
<b>all</b>	“the whole amount or quantity of . . .as much as possible. . .every member or individual component of. . .”

It is the duty of the General Assembly, and hence the State of Missouri, to fund and provide the resources which are necessary to provide adequate and equitable educational opportunities to children throughout Missouri. It is clear from the constitutional provisions, the constitutional debates and actions and the history of education in Missouri that this was not and is not intended to be minimal, nor can the State delegate its duties to school districts and then proverbially “wash its hands.” The State’s obligation extends to operational needs and facilities and equipment needs.

In the Memorandum Opinion and Judgment of January 15, 1993, in *Committee for Educational Equality v. State*, Case No. CV190-1371CC, (CEE Exh. 7; App. Tab 2), Judge Kinder stated:

“Educating the children of Missouri is essential to the people of this state, and the State of Missouri through the General Assembly has the duty to provide for it.”

\* \* \*

“By reason of Article IX, Section 1(a), **the State of Missouri is required to maintain a system of free public schools which will provide for that ‘general diffusion of knowledge and intelligence’ which is necessary in any given era to preserve the ‘rights and liberties of the people.’** It is not sufficient that a system be only ‘establish[ed]’, it is constitutionally essential, as well, that it be ‘maintain[ed]’ at an ever evolving level which will assure the ‘preservation of the rights and liberties of the people.’”

“**The State of Missouri's legal obligation to maintain the elementary and secondary public schools of Missouri, by providing adequate financing to the free public schools,** is given high priority by the Missouri Constitution, second in importance only to payment of sinking fund and interest on outstanding obligations of the state. Article III, Section 36, Missouri Constitution.”

“**The Constitution of Missouri requires that the State of Missouri provide and fund a system of free public schools so that every child in Missouri will be afforded substantially equal educational opportunities** without regard to place of residence, wealth or other

economic circumstance. A child living in a poor school district must have the same opportunity to receive substantially the same education as a child living in a rich district.”

“A deviation from equality on a per student basis in the distribution of the total resources (both state and local) among the schools in the Missouri school system should not be permitted except to provide resources either (a) to the least advantaged or (b) for specially identified educational needs. **There are greater costs involved in educating disadvantaged or “at risk” children.**”

“**The state must provide adequate funds** to ‘maintain’ a system of education providing a ‘general diffusion of knowledge and intelligence’ at the level which is necessary in this era to ‘preserv[e] the rights and liberties of the people.’”

“The system of public schools in Missouri is a state system, not separate district systems.”

\* \* \*

“**The duties of the General Assembly and hence the State of Missouri to equitably and adequately fund a public school system in Missouri cannot be delegated in a manner so as to avoid responsibility for all parts of the system.**”

\* \* \*

“While there are total revenue and spending limits imposed by the Hancock Amendment upon the state, there are no constitutional limits upon that part of the state revenues that may be devoted to free public education.” (emphasis added, pp. 27-31).

And in Appendix H to the January 15, 1993, Memorandum Opinion and Judgment, Judge Kinder also set forth the following Additional Conclusions of Law:

**“3. The allocation of sufficient funds for the support of free public schools is the constitutional duty of the State of Missouri through the General Assembly.** In no event may the amount of funds from the state for free public schools be less than 25% of the state revenues, exclusive of interest and sinking fund. Article IX, Section 3(b), Missouri Constitution.

\* \* \*

**The State’s funding obligations, however, are not limited to 25% of state revenue.**

**4. The constitutional duties of the General Assembly and hence of the State of Missouri to establish and maintain a system of free public schools are not limited to providing funds for current operational purpose but also extend to needed buildings and equipment for free public schools as well.”** (emphasis added) 6.

Following the issuance of the January 15, 1993, Memorandum Opinion and Judgment (CEE Exh. 7; App. Tab 2), the General Assembly in adopting the Outstanding

Schools Act (SB380 – CEE Exh. 5; App. Tab 9) and requiring academic performance standards, embedded the construction of Section 1(a) of Article IX by Judge Kinder into the Missouri Statutes –

“1. **By rule and regulation**, and consistent with the provisions contained in section 6 of this act, the **state board of education shall adopt** no more than seventy-five **academic performance standards which establish the knowledge, skills and competencies necessary for students to successfully advance through the public elementary and secondary education system of this state;** lead to or qualify a student for high school graduation; prepare students for post-secondary education or the workplace or both; **and are necessary in this era to preserve the rights and liberties of the people.**” (emphasis added). Section 3 of SB380; Section 160.514, RSMo.

The standards of what “are necessary in this era to preserve the rights and liberties of the people” are also embedded in the regulation of the State Board of Education setting forth “Academic Standards” (5 CSR 50-375; CEE Exh. 8; App. Tab 11):

“(1) **The following academic standards establish the minimum** knowledge base, skills and competencies necessary for students to successfully advance through the public elementary and secondary education system of this state; prepare students for post-secondary education or the workplace or both; **and are necessary in this era to**

**preserve the rights and liberties of the people.** The standards incorporate both what students should know and be able to do.” (emphasis added).

Clearly, the whole regimen created by the Outstanding Schools Act was to establish standards constant with the constitutional standards required by Section 1(a) of Article IX of the Constitution. Having done that, the State of Missouri must provide the funding which is needed for students to attain those standards.

Courts in many other states have enforced the Education Article in their State constitutions to require additional state funding in order to provide an adequate education to all of their children. Of particular importance are decisions in three of our neighboring states – Arkansas, Kansas and Kentucky.

With respect to Arkansas, it is to be first noted that Judge Finch in *Concerned Parents v. Caruthersville*, *supra*, looked to a decision by the Arkansas Supreme Court and noted that the Education Article in the Arkansas Constitution “is remarkably similar to our own art. IX, § 1(a).” 548 S.W.2d at 560. Since the time of the *Concerned Parents* decision, the Arkansas Supreme Court has struck down the school finance system in Arkansas as being inadequate and violative of the Arkansas Constitution. See, *DuPree v. Alma School District*, 651 S.W.2d 90 (Ark. 1983); *Lake View School District v. Huckabee*, 10 S.W.3d 892 (Ark. Nov. 21, 2000); 91 S.W.3d 472 (Ark. 2002) (finding Arkansas school funding system to be unconstitutional and “stay[ing] the issuance of our mandate until January 1, 2004. This will give the General Assembly an opportunity to meet . . . to implement appropriate changes”, p. 511); 142 S.W.3d 643 (Ark. Jan. 22, 2004) (“Because of noncompliance with the November 21, 2002, opinion of this court,

we recall our mandate in this case forthwith. This court will appoint a master. . . .”; 144 S.W.3d 741 (Ark. Feb. 3, 2004) (Court appoints two special masters); 2004 WL 1406270 (Ark. June 18, 2004) (Court reviews legislative actions and report of masters). Also, see other actions of the Arkansas Supreme Court and in *Lakeview*, after January 1, 2004. Note also, that some Missouri school districts are now losing teachers to Arkansas because of higher teacher salaries in Arkansas. Tanya Vest, East Newton Superintendent, Tr. 3188.

And with respect to Kansas, see *Montoy v. State of Kansas*, 62 P.3d 228 (Kan. 2003) (reversing dismissal and remanding for trial); 2003 WL 23171455 (Kan. Dt. Ct. Sept. 8, 2003) (pretrial memorandum decision and order); 2003 WL 22902963 (Kan. Dt. Ct. Dec. 2, 2003) (memorandum decision and preliminary interim order); 2003 WL 23002704 (memorandum decision and order – “The cost of providing a suitable education, as the legislature itself has defined it, is apparently over a billion dollars more<sup>15</sup> than is currently provided . . .”, p. 5); 120 P.3d 306 (Kan. Jan. 3, 2005) (Supreme Court substantially affirms District Court; formal opinion withheld “until corrective legislation has been enacted or until April 12, 2005, whichever first occurs; issuance of

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<sup>15</sup> In 2004-05, the expenditure per pupil in Kansas was **higher** than in Missouri. The public school enrollment in Kansas was 468,512 compared to 892,831 in Missouri. CEE Exh. 942, NEA Rankings and Estimates (2006), pp. 55, 6. Common sense tells one that if Kansas school funding was inadequate by one billion dollars, Missouri is inadequate by much more.



our mandate stayed); and 112 P. 3d 923 (Kan. June 3, 2005) (Supreme Court found that new school formula was unconstitutional; ordered remedial action by July 1, 2005, and retained jurisdiction).

And with respect to Kentucky, the opinion in *Rose v. Council for Better Education*, 790 S.W.2d 186 (Ky. 1989), is regarded by many as the seminal case in requiring a state to provide adequate school funding for public schools in a state.<sup>16</sup> The Kentucky Supreme Court in *Rose* stated that –

“A child’s right to an adequate education is fundamental under our Constitution.”

Continuing, the Court enunciated “minimum goals” to “provide each and every child with at least the seven following capacities:

“. . . (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi)

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<sup>16</sup> Drs. Kern Alexander and Richard Salmon, expert witnesses for CEE, et al., in this case, were witnesses in the *Rose* case. 790 S.W.2d 186.

sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states,<sup>17</sup> in academics or in the job market.”

p. 212.

Decisions in other states also provide guidance to this Court. See, in particular, *Campaign for Fiscal Equity v. State*, 655 N.E.2d 661 (NY 1995) (upheld claims under Education Article, but dismissed claim under equal protection clause);<sup>18</sup> 719 N. Y. S. 2d 94<sup>th</sup> (Sup.Ct. N.Y. County) 2001 (judgment for plaintiffs after trial funding that **operational and facilities** funding for public schools in the City of New York was constitutionally inadequate under the Education Article); 801 N.E.2d 326 (N.Y. June 23, 2003) (generally affirmed the trial court and set a deadline of July 30, 2004, “to implement the necessary measures”); 2005 WL 5643844 (Sup. Ct., New York County,

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<sup>17</sup> Since 1989, it is now clear that from the evidence in this case that public school students must be enabled “to compete favorably with their counterparts in” a worldwide economy.

<sup>18</sup> An earlier New York Court of Appeals decision had held that state equal protection claim would not lie with respect to education funding. *Board of Education Levittown v. Nyquist*, 439 N.E.2d 359 (NY 1982).

Feb. 14, 2005) (when July 30, 2004, deadline passed without implementation, referees appointed; referees found that for the **New York City School District additional operational funding** of at least \$5.63 billion phased in over a four-year period was required and that **additional capital funding of at least \$9.179 billion** phased in over a five-year period was required; referees' determinations adopted); 769 N.Y. S.2d 130 (App. Div. March 23, 2006) (generally affirmed, except that the \$5.63 billion in operational funding was reduced to \$4.7 billion); 861 N.E.2d 50 (N.Y. Nov. 20, 2006) (generally affirmed, with some reductions in amounts).

Some of the decisions from other states are particularly pertinent with respect to issues with respect to SB287.

SB287'S seven-year phase in period would not pass constitutional muster under several opinions by other State Supreme Courts. In *Montoy v. State, supra*, 112 P.3d at 940 (Kan. 2005), the Kansas Supreme Court considered the needs of the students now in school:

“They [plaintiffs and *amici curae*] remind us that we cannot continue to ask current Kansas students to ‘be patient.’ The time for their education is now. As the North Carolina Supreme Court eloquently stated:

‘The children . . . are our state’s most valuable renewable resource. If inordinate numbers of them are wrongfully being denied their constitutional right to the opportunity for a sound basic education, our state courts cannot risk further and continued damage because the perfect

civil action has proved elusive. We note that the instant case commenced ten years ago. If in the end it yields a clearly demonstrated constitutional violation, ten classes of students as of the time of this opinion will have already passed through our state's school system without benefit of relief. We cannot similarly imperil even one more class unnecessarily.' *Hoke Cty. Bd. of Educ. v. State*, 358 N.C. 605, 616, 599 S.E.2d 365 (2004).”

The Kansas Supreme Court then ruled that one-third of the additional educational funding should be made in the first year and the remaining amount should be made in the second year. See also, *Claremont School District v. Governor*, 744 A.2d 1107 (N.H. 1999), where the New Hampshire Supreme Court held in the New Hampshire school finance litigation that a five-year phase-in of a tax to fund education was unconstitutional. While a phase-in period, of say three years, would be reasonable, a seven-year phase-in period is constitutionally unreasonable.

*Campbell School District v. State of Wyoming*, 19 P.3d 518 (Wy. 2001), is also instructive with respect to some of the issues with respect to SB287. The Wyoming Supreme Court found that a statutory provision which did not adjust costs for inflation was unconstitutional and directed that costs be adjusted every two years –

“As long as the state continues to rely upon a cost of education model based upon historic actual costs to determine the appropriate funding for schools,

regular and timely inflation adjustments are essential to funding the real costs of education.”

\* \* \*

“The model and statute must be adjusted for inflation no later than July 1, 2002, and each biennium thereafter so long as a cost of education model using historical costs is relied upon for the basis of education funding.” (pp. 549-550).

And, in *Campbell, supra*, the Court also held that a “threshold” for at-risk children was constitutionally deficient. Weighting for at-risk children (“economically disadvantaged youth” or “EDY”) did not start until the “concentration of these students is equal to or greater than 150 percent of the statewide average.”

“Not only is the EDY adjustment not cost-based, its completely arbitrary 150 percent trigger results in dramatic differences in funding even among districts that border each other and, consequently, are likely to have similar student characteristics.”

19 P.3d at 545-546.

There have been a number of Opinions in Texas, starting with *Edgewood Independent School District v. Kirby*, 777 S.W.2d 391 (Texas 1989), which have held school funding to be constitutionally inadequate.

In *West Orange-Cove Consolidated I.S.D. v. Alanis*, 107 S.W.3d 558, 563 and 573 (TX 2003), the Court interpreted language in the Texas Constitution which is similar to what is found in Section 1(a) of Article IX of the Missouri Constitution as follows:

**“First, the education provided must be adequate: that is the public school system must accomplish that ‘general diffusion of knowledge . . . essential to the preservation of the liberties and rights of the people.’**

\* \* \*

**‘[T]hese are admittedly not precise terms,’ as we have acknowledged, but ‘they do provide a standard by which this court must, when called upon to do so, measure the constitutionality of the legislature’s actions.’ The final authority to determine adherence to the Constitution resides with the Judiciary.**

\* \* \*

**‘. . . [T]he State’s provision for a general diffusion of knowledge must reflect changing times, needs, and public expectations.’”** (emphasis added).

Other state court decision are cited and discussed in the supporting *Amici* Brief of Educational Justice at Education Law Center, Missouri School Boards Association, the National School Boards Association and the Rural School and Community Trust, and we incorporate here the authorities and arguments set forth in that Brief.

The decision by the Nevada Supreme Court which arose in another context illustrates the authority of the courts when school funding is insufficient. In *Guinn v. Legislature of the State of Nevada*, 71 P.3d 1269 (Nev. 2003), the Republican Governor of Nevada brought an original mandamus action against the Nevada Legislature to compel the Legislature to act to appropriate monies to fund the K-12 school system in

Nevada. The Governor had requested \$980 million in new revenue to balance the proposed budget for the 2003-2005 biennium. The Legislature had not appropriated monies for the Nevada school system. The writ of mandamus issued, the Nevada Supreme Court ordered the Nevada Legislature to fund the K-12 school system, the Court held that a constitutional provision requiring a two-thirds vote to raise taxes was procedural and subordinate to the duty to fund education:

“Our Constitution’s framers strongly believed that each child should have the opportunity to receive a basic education. Their views resulted in a Constitution that places great importance on education. Its provisions demonstrate that education is a basic constitutional right in Nevada.

When a procedural requirement that is general in nature prevents funding for a basic, substantive right, the procedure must yield. \* \* \* We agree with the Wyoming Supreme Court that the ‘[c]onstitutional provisions imposing an affirmative mandatory duty upon the legislature are judicially enforceable in protecting individual rights, such as educational rights.’ [*Campbell, supra*]. It is paramount that we give Section 18(2) a construction that will preserve the basic right of education. Other states with constitutional provisions similar to ours have also given significant import to the educational clauses of their constitutions.” [citing to *Lake View v. Huckabee, supra*, and a Vermont decision]. 71 P.3d at 1275.

**G. Duties of the State Under Section 1(a) and Section 3(b) of Article X Are Separate and Distinct.**

The house of cards upon which the Judgment of dismissal by the trial court was based starts with the conclusion that the State has appropriated 25% of “state revenue” as required by Section 3(b) of Article IX. The trial court, however, does not make findings that 25% of “state revenue” were appropriated.<sup>19</sup> The Court then posits that no claim can be asserted under Section 1(a) of Article IX which requires funding of public schools which will provide for that “general diffusion of knowledge and intelligence” which is necessary in any given era to preserve the “rights and liberties of the people.” The house of cards must fall!

Neither the CEE, CFES nor the St. Louis Appellants asserted any claims with respect to 25% of “state revenue” under Section 3(b) of Article IX. However, the trial court ignored the lack of any claim under Section 3(b), and held that the adequacy claims under Section 1(a) would be “construed” to be under Section 3(b). App. 11.

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<sup>19</sup> In fact, the State did **not** appropriate 25% of “state revenue” to free public schools in FY2006. See, Memorandum of the CEE Plaintiffs After the September 20, 2007, Hearing With Respect to 25% of State Revenue Issue, LF\_5291-5306; excerpt from CEE Exh. 1004 in the Appendix, Tab 36, App. 848; and Plaintiff CEE’s Supplemental Brief With Respect to 25% of State Revenue, LF\_5056-5275.



The 25% of “state revenue” set aside for public schools as well as the requirement to set aside revenues from “fines, penalties or forfeitures” began with the enactment of the Kelly Act in 1853. *Laws of Missouri, 1853*, page 146; see discussion and text under Point I.B., *supra*. Both of the 1853 set aside provisions are now a part of the Constitution (Sections 3(b) and 7 of Article IX), and there are other set asides within the Constitution – e.g., Section 5 of Article IX (escheats), Section 39(b) of Article III (lottery), Section 39(d) of Article III (gaming). Does this mean that the only remedy for a failure to comply with one of these provisions vitiates the obligations under Section 1(a) of Article IX? Certainly not! The obligation to fund education under each provision is separate and distinct.

The 25% of “state revenue” constitutional provision was adopted in 1875. However, the only constitutional history that the trial court discussed was the 1944 Constitutional Convention. At about the same time as the 25% of “state revenue” provision was made a part of the Missouri Constitution, Texas adopted a constitutional provision (Article VII, Section 3) in 1876 setting aside “one-fourth of the general revenue of the State, and a poll tax . . . , for the benefit of public free schools.” Later amendments have changed the Texas Constitution to provide – “One-fourth of the revenue derived from the State occupation taxes shall be set apart annually for the benefit of free public schools.” But, the underlying conclusion one must reach from the school finance litigation in Texas from the 1980’s until the present is that the constitutional provisions with respect to the set

aside of 25% of certain revenues for “free public schools” has **never** been considered or advanced as a defense in school finance litigation in Texas.

The issue of whether a “set aside” of specific funding provisions for public education in the Constitution was a part of, or a separate duty from, that set forth in Section 1(a) of Article IX was laid to rest in 1877 shortly after the adoption of the 1875 Constitution, which for the first time included in the Missouri Constitution the 25% of state revenue. In 1877, the Honorable Elijah Norton of Platte County wrote the Opinion in *State ex rel. Sharp v. Miller*, 65 Mo. 50 (1877). We note that Judge Norton had a long history of public service, including being a key delegate in the 1875 Constitutional Convention with respect to the formulation of the Education Article. His “tracks” are found throughout the debates and actions which formulated the Education Article in the Convention. He was at the center of the actions taken to limit the scope of the constitutional duties in Section 1, as well as supplanting the provisions authorizing the General Assembly to levy local property taxes in particular districts (Section 8 of the 1865 Education Article) with the 25% of “state revenue” provision that had to that point been statutory. See debates and actions set forth in Point I.D., *supra*. It is clear that Mr. Norton labored at the Convention to keep the broad duties in Section 1 of the Education Article intact, and he did so. *Id.* In 1877, he was appointed to this Court. With this background, Judge Norton’s Opinion in *State ex rel. Sharp v. Miller* is even more significant.

The Court in *State ex rel. Sharp v. Miller* held that the powers and **duties under Section 1** of the Education Article of the 1865 Constitution were **not limited** by the provisions of Section 8 of the 1865 Education Article which authorized the General Assembly to levy a tax on “all of the taxable property in each county, township or school district” if the funding “shall be insufficient to sustain free public schools.” Section 8 in 1875 became what is now Section 3(b) containing the provision for 25% of “state revenue” being set aside for free public education.<sup>20</sup> Judge Norton reasoned and held:

**“That section [§ 8 of the Education Article, which as modified became what is now Section 3(b)] is not to be regarded as a limitation upon, or curtailment of, the power conferred upon the legislature in section 1 of the same article of the constitution, which makes it obligatory on the legislature to establish and maintain free schools for the gratuitous instruction of all persons in the State between the ages of five and twenty-one years.”** (emphasis added).

*State ex rel. Sharp v. Miller* squarely holds that the duties under Section 1, now Section 1(a), are not limited by the provisions of Section 8, now Section 3(b), and that decision is still binding. The trial court’s analysis was simply wrong.

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<sup>20</sup> See graphic illustration of changes, in color, in the Education Article between 1865, 1875 and 1945 which are set forth in the Appendix at Tab 3, App. 127-128.

By 1887, the 25% of state revenue set aside was not sufficient to fund the public schools of Missouri, and the set aside was raised to **one-third of state revenue** by statute. See, Section 3 of the appropriations set forth in the *Laws of Missouri, 1887*, at page 4.

From 1887 forward for most, if not all years, through the 1955 fiscal year, the Missouri General Assembly set aside in their appropriation bills one-third rather than twenty-five percent of the state revenue. See, e.g., *State ex rel. Gass v. Gordon*, 181 S.W.1016 (Mo. Banc 1915), and appropriations by the General Assembly. For the 1956 and 1957 fiscal years, the set aside was raised to **thirty-seven and one-half percent of the state revenue**. *Laws of Missouri, 1955*, p. 57. Beginning with the 1958 fiscal year, there was not a percentage set aside in the appropriation bills for education and has not been since. See, *Laws of Missouri, 1957*, page 43, and subsequent appropriation bills.

Judge Kinder's decision in 1993 properly found and determined:

“3. The allocation of sufficient funds for the support of free public schools in the constitutional duty of the State of Missouri through the General Assembly. **In no event** may the amount of funds from the state for free public schools be less than 25% of the state revenues, exclusive of interest and sinking fund. Article IX, Section 3(b), Missouri Constitution. The Court does not now determine what constitutes “state revenue” and that question is reserved for later consideration. **The State's funding obligations, however, are not limited to 25% of state revenue.**”

(emphasis added). Appendix Tab 2, App. 122.

Clearly, whether or not the State appropriates 25% of “state revenue” for public schools is not relevant to the State’s duty under Section 1(a) of Article IX.

## II.

THE TRIAL COURT ERRED IN DISMISSING THE CLAIMS PREDICATED UPON THE PROVISIONS OF ARTICLE I, SECTION 2, OF THE MISSOURI CONSTITUTION RELATING TO EQUAL OPPORTUNITIES INASMUCH AS EDUCATION IS A FUNDAMENTAL RIGHT IN MISSOURI AND THE RECORD REFLECTS THAT SCHOOL FUNDING IN MISSOURI IS DISPARATE AND VIOLATES SECTION 2.

*“That all constitutional government is intended to promote the general welfare of the people; that all persons have a natural right to life, liberty, **the pursuit of happiness** and the enjoyment of the gains of their own industry; **that all persons are created equal and are entitled to equal rights and opportunity under the law**; that to give security to these things is the principal office of government, and that when government does not confer this security, it fails in its chief design.”* Article I, Section 2, Missouri Constitution. Text in bold added by the 1945 Constitution.

While Section 2 of Article I of the Missouri Constitution is often referred to as the equal protection section, it has a different constitutional history from the equal protection provisions contained in the Fourteenth Amendment. Prior to 1945, the equal opportunities or equal protection provision did not exist in the Missouri Constitution. Prior to that date, state equal protection type of issues appear to have been decided primarily under the special legislation provisions of the Missouri Constitution.

With respect to equal educational opportunities for Missouri's children, it is readily apparent from the 1865, 1875 and 1944 Constitutional Conventions and the prior historical development (Point I.A., B., C. and D, *supra*) that the right of Missouri's school children was and is embedded within the concepts of "general diffusion of knowledge and intelligence" provisions of Section 1(b) of Article IX.

With respect to the "equal opportunities" provisions added to Section 2 of Article I in the 1945 Constitution, the 1944 Constitutional Debates are helpful. Mr. Marr, the Chairman of the Convention's Committee on the Bill of Rights, on April 6, 1944, explained that the new language derived from the Declaration of Independence. He explained:

"Mr. President, this Section is the same as the former Section with the addition of the following words. In line 4 there has been **added the words 'the pursuit of happiness' and** in lines 5, 6, and 7 the words **'that all men are created equal and are entitled to equal rights and opportunities under the law.'**"

"Now, the expression 'the pursuit of happiness' and the words 'that all men are created equal' are taken from the second paragraph of the Declaration of Independence, and the next clause that is added 'are entitled to equal rights and opportunities under the law' that is simply a definition of what those words mean and what is meant by the expression 'that all men are created equal.' \* \* \* It was the opinion of the Committee that we have gone as far in Section 4 [later became Section 2] as we can. We are

aware of the fact that we cannot provide equality for different races by law, and neither can we provide social equality within races by law. Those are matters that have to be adjusted in other ways, and as far as we could go was to set out that men are created equal in the sense that they have equal rights and opportunities under the law. . . .” (emphasis added). Transcript of Debates, April 6, 1944, pp. 1423-24.

An amendment was proposed that the language of the New York Constitution indicating that “no person shall be denied the equal protection of the laws” be substituted for the new proposed “equal rights and opportunity” provisions because the new language might be construed too broadly, particularly in the area of social equality. Ibid, pp. 1424-25. After further debate, the substitution of the more limited “equal protection” language was rejected. Ibid, p. 1437.

Clearly, as discussed in Point I.F., education is a fundamental right in Missouri. See, in particular, Judge Finch’s Opinion in *Concerned Parents v. Caruthersville 18 School District*, 548 S.W.2d 554, 558 (Mo. banc 1977). Commencing with the 1865 Constitution, “ . . . **the state accepted the Jeffersonian concept that education is fundamental to democracy and that the state should assume the primary role.**” See also, *State ex rel. Roberts v. Wilson*, 297 S.W. 419, 420 (Mo. App. 1927) (education is a “fundamental right”); *Fowler v. Clayton School District*, 528 S.W.2d 955, 959 (Mo. App. 1975) (education is a “fundamental right”); and the Memorandum Opinion and Judgment by Judge Kinder on January 15, 1993:



“The Constitution of Missouri sets forth the Jeffersonian concept that **education is fundamental** to democracy. . . .” (emphasis added).

Appendix Tab 2, App. 59.

Judge Kinder, in analyzing whether Section 2 of Article I was violated by the disparities in funding public education, found that not only were there these violations when a “strict scrutiny” test was applied, there were also violations when the “rational basis” test was applied. Appendix, Tab 2, App. 62-63. We would respectfully suggest that the record in this case reflects that school funding for the children of Missouri does not pass constitutional muster on either a “strict scrutiny” or “rational basis” test.

*Weinshenk v. State*, 203 S.W.3d 201 (Mo. banc 2006) is, we believe, dispositive and requires a reversal of the Judgment below on this Point. In *Weinshenk*, as here, the Missouri Constitution established a right. In *Weinshenk* it was a right to vote (Article I, Section 25, and Article VIII, Section 2); here, it is a right to public education set forth in Article IX, Section 1(a).

The Supreme Court in *Weinshenk* noted that –

“Due to the expansive and concrete protections of the right to vote under the Missouri Constitution, voting rights are an area where our state constitution provides greater protection than its federal counterpart.

See, . . . *State v. Rushing*, 935 S.W.2d 30, 34 (Mo. banc 1996) (‘Provisions of our state constitution may be construed to provide more expansive protections than comparable federal constitutional provisions.’); *State ex rel. J.D.S. v. Edwards*, 574 S.W.3d 405, 409 (Mo. banc 1978) (holding that

Missouri Constitution due process and equal protection clauses provide more protection than United State Constitution where United States Supreme Court precedent ‘dilute[s] these important rights.’)” 203 S.W.3d at 212.

Thus, because education is not enshrined in the United States Constitution, the 5-4 decision in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), relating to the level of scrutiny under the federal equal protection clause is different than the level of scrutiny to be applied under the “equal rights and opportunity” clause in Article I, Section 2 of the Missouri Constitution. It is completely different from the level of scrutiny and legal concepts to be applied when considering the adequacy and equity issues under the “general diffusion of knowledge . . .” provisions of Article IX, Section 1(a) of the Missouri Constitution. The majority in *Rodriguez* noted that in “*Brown v. Board of Education* . . . a unanimous Court recognized that ‘education is perhaps the most important function of state and local governments.’” p. 1295.

In *Weinshenk*, this Court in considering the framework for evaluating a challenge under Article I, Section 2, followed a two-step process:

“The first step is to determine **whether** the statute implicates a suspect class or **impinges upon a fundamental right explicitly or implicitly protected by the Constitution.** \* \* \* ‘If so, the classification is subject to strict scrutiny.’ \* \* \* If not, the classification will be subject to rational basis scrutiny.” *Id.*

“The second step is to apply the appropriate level of scrutiny to the challenged statute. In order to survive strict scrutiny, **a limitation on a fundamental right must serve compelling state interests and must be narrowly tailored to meet those interests.** \* \* \* ‘Any state **restriction** which specifically interferes with the exercise of a fundamental right is subject to strict scrutiny and **cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored** to effectuate only those interests.’ \* \* \* ‘. . . [T]he restriction must be necessary to serve a compelling state interest, and **may not go beyond what the state’s interest actually requires.**’” (pp. 210-211, emphasis added).

See also, cases from other states dealing with disparities in school funding and holding that education is a fundamental right and strict scrutiny applies – *Serrano v. Priest*, 557 P.2d 929 (Cal. 1977) (post *Rodriguez*); *Horton v. Meskill*, 376 A.2d 359, 373 (Conn. 1977); *Pauly v. Kelly*, 255 S.E.2d 859, 878 (W.Va. 1979); *Campbell County School District v. State*, 19 P.3d 518 (Wyo. 2001); *Claremont School District v. Governor*, 703 A.2d 1353, 1358 (N.H. 1997). Other states have reached the same result in granting relief with respect to school funding disparities by predicated the review upon the state’s education article. See, e.g., *Robinson v. Cahill*, 303 a.2d 273, 359 (N.J. 1973) (finding at that time it would “not pursue the equal protection issue); *Rose v. Council for Better Education*, 890 S.W.2d 186 (Ky. 1989).

And, in *Columbia Falls Elementary School District v. State of Montana*, 109 P.3d 257 (Mont. 2005), the Court focused on adequate funding – with equitable funding to be considered after there was adequate funding.

Clearly, the disparities in school funding summarized under “Equal Educational Opportunities and Equity” in the Statement of Facts, *supra*, do not pass constitutional muster under either Section 2 of Article I or Section 1(a) of Article IX.

### III.

#### **THE TRIAL COURT ERRED IN FAILING TO CONSIDER AND THEN REQUIRE FUNDING FOR FACILITIES AND EARLY CHILDHOOD EDUCATION AND FOR INCREASED FUNDING FOR TRANSPORTATION.**

Facilities and infrastructure for Missouri schools are not funded by the State. Early childhood education is not funded through the foundation formula nor as a categorical, but is limited to an underfunded grant program. Transportation costs are not funded through the foundation formula, and the state funding for transportation is grossly underfunded. These programs are part and parcel of the obligations of the State under Section 1(a) of Article IX, as well as under Section 2 of Article I. The trial court did not consider the State's duty to fund these programs.

##### **A. Facilities and Infrastructure.**

The State of Missouri at this time does not fund school facilities or infrastructure. The State, however, has previously provided funding for school facilities. See, e.g., *Laws of Missouri, 1913*, pp. 721-725, which became Section 11263, RSMo 1919, and later Section 163.111, and continued in effect until 1984; *Laws of Missouri, 1931*, p. 346, § 39, which continued in effect until 1974 when as Section 163.101, it was repealed; and *Laws of Missouri, 1947*, p. 370, which became Section 165.697, was amended in 1951 to provide additional facilities funding and was repealed in 1984.

Section 12 of SB380 in 1993 established a "School Building Revolving Fund." CEE Exh. 5, p. 5-6, App. Tab 9; now, as amended, Section 166.300.

From the record in this case, no significant funds have ever been placed in the School Building Revolving Fund. Furthermore, the School Building Revolving Fund requires repayment from local school districts. Districts having the most need for assistance in funding facilities, i.e., those with the lowest assessed valuation per pupil, are least able to raise sufficient funds to repay debt obligations.

In 1995, the General Assembly established the “State District Bond Fund” in the state treasury and provided that not more than \$7 million per year could be appropriated from the Gaming Proceeds for Education Fund to be used to fund only certain issuance and administrative costs of the Missouri Health and Educational Facilities Authority (“MOHEFA”) involved in handling bond issues for local school districts. See, Section 164.303, RSMo. Instead of the authorized \$7 million being appropriated, only \$495,926 was appropriated in fiscal year 2006 to the School District Bond Fund. See, Defendant Exh. 552; Sections 2.310 and 2.055 of C.C.S. for House Bill No. 2, First Regular Session, 93<sup>rd</sup> General Assembly (2005).

The lack of school facilities funding was not changed by SB287. While that legislation allows a small portion of the state operational funding to be reallocated by a school district for school facility needs, any such use is in effect a diversion of funds from monies that the SB287 funding formula has determined as being needed for current operating needs. CEE Exh. 6; App. Tab 10.

Dr. Robert Bartman, who was the Missouri Commissioner of Education from 1987 until in 2000, testified that there were substantial inadequacies and problems with school

facilities in Missouri. Tr. 1027-1035. During his tenure as Commissioner and going around the state, he observed that there were facilities needs that were not being met:

“There were instances where horrible classrooms, i.e., trailers were popping up different places because the space needs were demanding and the demographics of the districts were changing.” Tr. 1027.

Virtually all of the school administrators of the CEE Focus Districts, the CFES Focus Districts and the City of St. Louis testified with respect to school facilities and infrastructure needs, including new facilities and renovations or reconstruction, which cannot be met because of a lack of funds. Photographs which were admitted into evidence show some of the problems in the CEE Focus Districts. See, e.g., the following photograph exhibits:

Caruthersville 18 School District – CEE Exhs. 95-105

East Carter County R-2 School District – CEE Exhs. 497-537

Van Buren R-I School District – CEE Exhs. 450-472

East Newton County R-VI School District – CEE Exhs. 590-597,  
600-610, 612-626.

Columbia 93 School District – CEE Exhs. 140-168

Crane R-III School District – CEE Exhs. 194-209

Worth County R-III School District – CEE Exhs. 282-293

Willow Springs R-IV School District – CEE Exhs. 314-333

St. Elizabeth R-IV School District – CEE Exhs. 561-568

Diamond R-IV School District – CEE Exhs. 684-703

A brief description with respect to each photograph is set forth in the Exhibit Index in the Appendix at Tab 16.

Particularly severe school facility problems are reflected in the testimony and in the record with respect to the Caruthersville 18 School District (Dr. Thiele, Tr. 1331-1339 and Tr. 1374-1379) (both before and after the tornado), and the East Carter County R-II School District (Dr. Hager, Tr. 2436-2471, 2528-2538, 2542-2544), as well as the Van Buren R-I School District (Dr. Lindsey, Tr. 2303-2313) and the East Newton County R-VI School District (Ms. Vest, Tr. 3191-3215).

East Carter is an example of problems faced by many school districts. The District school facilities are located at Ellsinore – a conglomeration of buildings and building add-ons. The number of students in the K-12 District is increasing and had an average daily attendance of 817.46 in 2005-06, but with very few commercial businesses in the District with the largest employer being a saw mill with perhaps 10 employees, a lot of unemployment and meth labs. Tr. 2419-2492; CEE Exh. 493. The oldest, and still the most substantial building, is a 1939 WPA constructed building which is now used as an elementary school. Tr. 2439. Many of the facility expansions, building add-ons and renovations, including some electrical wiring, **have been done by high school building trades classes.** Tr. 2441, 2443 – 2445, 2451, 2460-2461. Half of the high school was built on a lease-purchase basis. Tr. 2465. The East Carter District in the 2005-06 school year had a total assessed property valuation of \$24,094,230 (CEE Exh. 493), which because of the 15% debt limit in Section 26(b) of Article VI of the Missouri Constitution limits the debt that can be incurred to \$3,614,134, even if such a 15% debt obligation



would be approved by the requisite majority of the voters in the District. Such amount also would not be enough to build a new elementary school or a new high school.

Dr. Hager, the East Carter Superintendent, testified that the “lack of adequate facilities in your school district” prevents his district from “providing a general diffusion of knowledge and intelligence to the kids in his school district.” Tr. 2531.

As Commissioner of Education, Dr. Robert Bartman directed that a facilities survey be conducted. Questionnaires were sent to the 524 Missouri school districts, and responses were received from 398 of those school districts. The results of the school facilities survey were announced in February 2000. The survey reflected that 25% of the school facilities in Missouri were 50 years or older, that 64% of the school facilities were 30 years or older, and that a total of \$3,311,699,063 in costs were projected as being required to make needed improvements and construction in the 398 responding districts. Dr. Bartman concluded that the estimated costs received from the survey were low and that substantially more funds than indicated by the survey would be needed. He also indicated that he hoped the survey would raise awareness of the school facilities problems in Missouri so that a state program would be initiated and funded by the State to address those problems. The 2000 school facilities survey is the only statewide survey or study of school facilities in Missouri. CEE Exhs. 42, App. Tab 20, and 43; Tr. 1027-1035.

Dr. Dan Keck, a Professor at St. Louis University, testified as an expert witness that school facilities do positively affect and improve student outcomes. He also analogized studies in the business sector concluding that better working environments

result in better production by employees to a better environment for children in schools resulting in better student outcomes. Tr. 3747-3751; CEE Exh. 402.

Dr. Keck also supervised a more detailed facilities survey for the Columbia 93 School District. His testimony, the testimony of Dr. Jacque Cowherd, Deputy Superintendent at Columbia, and reports in evidence reflect that the Columbia District, which may be better off than many had sweeping school facilities needs. Those needs were estimated to have a cost of at least \$295 million, an amount which would be above the Columbia district's unused constitutional bonding capacity. These facilities studies included work by Dr. Keck, personnel of the Columbia 93 School District and an engineering firm. The studies were not made for purposes of this case. There are 153 temporary (i.e., trailer or modular) classrooms, none of which have restroom facilities. Such temporary classrooms cause many school buildings to exceed their design capacity. Of the 19 elementary schools in Columbia, only six are air conditioned, and parts of Hickman High School and Douglass High School/Alternative School are not air conditioned. At least three of the schools in Columbia were originally built more than 90 years ago. Many school buildings have multiple additions. See testimony of Dr. Keck and Dr. Cowherd (Tr. 3696-3790 and 3842-3925); and CEE Exhs. 134, 135, 138, 139, 401, 404, 770 and 771.

Missouri case law has made it clear that Section 1(a) of Article IX places the duty to fund buildings and infrastructure upon the State of Missouri, rather than upon Missouri school districts. See, *Normandy School District v. Small*, 356 S.W.2d 864, 871 (Mo. banc 1962), the Court held –

“In Missouri the property of school districts acquired from public funds is the property of the State, not the private property of the school district in which it may be located, **and the school district is a statutory trustee for the discharge of a governmental function entrusted to the State by our Constitution.**” (emphasis added).

See also, *School District of Oakland v. School District of Joplin*, 102 S.W.2d 909 at 915 (Mo. 1937); *City of Edina to Use of Pioneer Trust Company v. School District of City of Edina*, 267 S.W.112 (Mo. banc 1924), public school property was a part of state government, rather than under the control of school districts; and the Memorandum Opinion and Judgment of January 15, 1993, in the Appendix, Tab 2, App. 48-49.

Sadly, the State of Missouri is one of the few states that has tried to wash its hands from its responsibility to fund school buildings and infrastructure.

## **B. Early Childhood Education.**

Early childhood education has been authorized in Missouri for three and four year olds for handicapped children since 1973, and has been required since 1990.

Section 162.670, RSMo.

For many years, many school districts in Missouri have provided early childhood educational programs for three and four year olds who are not in a special education category. Many have been for “at risk” children and have been funded through Federal Title I monies, through what is sometimes referred to as the “House Bill 1519 Early Childhood Project,” adopted in 1998 (CEE Exh. 225, Section 313.835, RSMo), district funds, grants and other sources. School districts are also required to provide programs

relating to younger children pursuant to the provisions of Sections 178.691, RSMo through 178.699, RSMo which were adopted in 1985. Other than the program for handicapped children, there has been no overall funding program established by the State for early childhood education.

In 2004, the General Assembly created by statute the “Coordinating Board for Early Childhood” which is charged with developing a “comprehensive statewide long-range strategic plan for a cohesive early childhood system. . . .” Section 210.102, RSMo. And, in 2006, the General Assembly adopted House Bill 1511, which is now codified as Section 161.210, RSMo. Section 161.210 has directed DESE to “develop standards for high-quality early childhood education no later than June 30, 2007.”

The State Board of Education’s *Strategic Plan* of January 2006 (CEE Exh. 792) sets forth five “Key Outcomes” for education in Missouri. The second of the “Key Outcomes” is titled – “Increased percentage of children entering school ready to succeed” (pp. 25-36). The *Strategic Program* points out the need for high quality early childhood programs, including early childhood educational programs needed for children entering school being ready to succeed. Governor Blunt in his 2007 State of the State Address stated that “early childhood education is a great investment for the future.” (CEE Exh. 783, p. 5).

Dr. Kathy Thornburg, an expert on early childhood education in Missouri, testified for the Plaintiffs. Dr. Thornburg became a full professor at the University of Missouri – Columbia in 1982, was appointed to the Missouri Coordinating Board for Early Childhood, is the Director of the Center for Family for Policy and Research at UMC, was

the lead person doing the statutorily required evaluation of the Missouri Early Childhood Project, and from 2000 to 2002 was President of the National Association for the Education of Young Children. Her testimony established that a quality early childhood education program which is available to all at-risk children is essential for those children to have the opportunity to succeed in school and later in life. Early childhood education needs to be provided for other children, as well. Tr. 1595-1671, and CEE Exhs. 217-223, 225, 227 and 228. (CEE Exh. 219 is in the Appendix, Tab 26). No Missouri school administrator and no DESE personnel testified to the contrary.

We incorporate here by reference the authorities and arguments with respect to early childhood education which are set forth in the *Amici* Brief of Citizens for Missouri's Children and the Missouri Child Care and Resource and Referral Network.

### **C. Transportation.**

School districts must provide transportation for students who live more than three and one-half miles from school and may provide transportation for all students. State aid is to be paid with respect to all students who live one mile or more from the school. The Missouri State Board of Education and the Missouri Department of Elementary and Secondary Education have adopted a myriad of requirements with respect to student transportation. Sections 163.161 and 167.231, RSMo; CEE Exhs. 405 through 411; testimony of Tyler Laney at Tr. 1777-1792.

School transportation costs are separately funded by the State apart from the basic school foundation formula. Section 163.061, RSMo, provided until 1993 that an amount not greater than 80%, and from 1993 forward, an amount not greater 75% of the

allowable transportation costs would be paid by the state. SB287 in its “state adequacy target” assumes that all “local effort” revenues will be devoted to the “state adequacy target,” without any consideration of the source of funds to make up the shortfall between what the local district costs actually are and the state funding for such costs. CEE Exh. 412, Tab 30 of the Appendix, reflects the last data available at the time of trial, the “2004-2005 Payment for 2003-04 Cost”:

“Total Allowable Cost”	\$328,192,930
“Total Cost Eligible for State Aid”	\$277,874,759
“Total Entitlement”	\$189,603,663
“Total Aid Paid”	\$153,058,492
“Appropriation Reduction Amount”	19.801791%
“Percent Eligible Cost Paid by State Aid”	54.7%

Further computations from this data reflect –

Percent Total Allowable Cost Paid by State Aid	46.33%
Shortfall Between Total Allowable Cost and Total Aid Paid	\$175,134,438
Shortfall Between Total Cost Eligible for State Aid and Total Aid Paid	\$124,816,267

Some of the school districts in Missouri cover large geographical areas, with the size of the districts ranging up to 507.9 square miles. The following CEE Focus Districts are noted:

<b><u>District</u></b>	<b><u>Student Enrollment (2005-2006)</u></b>	<b><u>Square Miles</u></b>
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Eminence R-1	275	333.71
Willow Springs R-IV	1,341	310.24
Van Buren R-I	535	308.51
East Carter County R-II	847	281.39
Worth County R-III	379	272.67
East Newton County R-VI	1,616	206.46

CEE Exhs. 28 and 995.

Clearly, in more sparsely-populated areas, the per pupil transportation costs would be higher than the transportation costs on a per pupil basis in a more densely-populated area. See, e.g., the testimony and documentary evidence with respect to Van Buren R-I (Dr. Jeffrey Lindsey, Tr. 2276-2279 and 2357-2359, and CEE Exhs. 431 and 445). In more sparsely-populated areas, the situation is further exacerbated in many areas by a low assessed property valuation per pupil.

#### IV.

**THE TRIAL COURT ERRED IN DISMISSING THE HANCOCK AMENDMENT CLAIMS BASED UPON SECTIONS 16, 21 AND 23 OF ARTICLE X OF THE MISSOURI CONSTITUTION INASMUCH AS THE STATE WITH RESPECT TO SCHOOL DISTRICTS HAS REDUCED THE STATE-FINANCED PORTION OF THE COSTS OF EDUCATIONAL PROGRAMS AND HAS REQUIRED NEW PROGRAMS WITHOUT FUNDING THOSE PROGRAMS.**

Evidence was presented in this case of a number of violations of the provisions of Sections 16 and 21 of the Hancock Amendment. We note the following which are of particular importance:

1. Transportation Costs. Section 163.161, RSMo, now provides for “**seventy-five percent**” of a District’s allowable transportation costs to be reimbursed by the State. See also, 5 CSR 30-261 (CEE Exhs. 405 and 406). Prior to August 28, 1993, Section 163.161, RSMo, provided for “**eighty percent**” of the District’s allowable transportation costs to be reimbursed. The reduction of the percentage of allowable transportation costs is a violation of Article X, Section 21. Furthermore, the continuing reduction of the percentage of transportation cost reimbursements constitutes a violation of Article X, Section 21, as do the increasing mandatory equipment requirements imposed by the state for which no additional funding is provided by the State. See findings of underfunding of transportation and other educational programs reported by the State Auditor in Report No.



2003-36, dated April 16, 2003, which is in the record as CEE Trial Exhibit 37. See also, CEE Trial Exhibits 407 through 419 and the underfunding of transportation cost reimbursements for particular school districts set forth in CEE Trial Exhibits 750, 86, 131, 192, 254, 277, 311, 356, 445, 494, 559, 587, 645, 681 and 720.

2. Outstanding Schools Act. The Outstanding Schools Act portion of Senate Bill No. 380 imposed performance standards and other accountability standards which were not required prior to 1993. Those requirements have increased over the years, with the academic proficiencies now required by the State becoming greater and greater each year. The record is replete with evidence that there are increased costs that are required to be expended in order that students may become more proficient. The record also reflects that the provisions of the Outstanding Schools Act have drastically increased the administrative costs of school districts.

Senate Bill 380 also provided increased funding, but the problem is that while school district costs have continued to increase, the old Senate Bill 380 formula ceased to be fully funded, with there being a funding shortfall of approximately \$900 million a year. See, e.g., CEE Trial Exhibit 34 and the testimony of Dr. Robert Bartman and Harold Caskey. That underfunding carries over under the Senate Bill 287 formula. Because the costs of funding the Outstanding Schools Act have not been fully

funded, there is a violation of Article X, Section 21, of the Hancock Amendment.

See the Appendix, Tabs. 6-8, for copies of Sections 16, 21 and 23 of the Missouri Constitution. See also, the “Drafters’ Notes” with respect to Section 21 of the Hancock Amendment,<sup>21</sup> which in pertinent part provide:

“It was the drafters’ intent that the words ‘activity’ or ‘service’ be **broadly defined to require that the state pay for all costs mandated by state law or state directives after November 4, 1980.** This section requires reimbursements to local units for new costs from all state mandates requiring action after November 4, 1980. This section also prohibits the state from requiring any new or expanded activities by local governments **without full state financing, or from shifting the tax burden to local government.** The phrase ‘required by existing law’ is used to clarify the authority of the state to require local governments to increase their activities up to standards established by existing law without additional reimbursement. However, **‘new’ administrative interpretation of existing law would require reimbursement.** It was intended that the legislature implement this section through appropriate legislation,

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<sup>21</sup> A copy of the “Drafters’ Notes” is at LF\_307-319. Those “Notes” are proper for this Court to consider in interpreting the Hancock Amendment. *Keller v. Marion County Ambulance District*, 280 S.W.2d 301, 303 (Mo. banc 1991).

**including appropriations to cover the costs for mandated activity or service.”**

\* \* \*

“It was the drafters’ intent that the sentence ‘The state is hereby prohibited from reducing the state financed portion of the costs of any existing activity or service required of counties and other political subdivisions’ be broadly construed to mean all activities or services performed by local government as a result of the state constitution, state statute, or state regulation, e.g., public, elementary, and secondary schools as defined by law. This provision does not guarantee, for example, that the proportion of state expenditures paid to a specific school district cannot be reduced. It does mean, however, that the proportion of state funding going **to school districts, statewide, for public, elementary, and secondary education shall not be reduced.** Future mandated programs shall be fully funded. It seeks to obviate any temptation the state might have to fund a new mandated program (e.g., rapid transit) by shifting funds from a previously mandated program (e.g., education).”

\* \* \*

“This section was drafted to prevent a shift in tax burden, either directly or indirectly from state to local responsibility.” (pp. 5-6, emphasis added).

The Hancock Amendment was adapted (with very few changes) from the Headlee Amendment<sup>22</sup> to the Michigan Constitution which was adopted by on November 7, 1978, and became effective at midnight on December 22, 1978. This Court has recognized the Michigan source of the Hancock Amendment. See, e.g., *Scholle v. Carrollton School District*, 771 S.W.2d 336, l.c. 338 (Mo. banc 1989). Because the Hancock Amendment comes from Michigan, the precedents by the Michigan courts of the Headlee Amendment are important in Missouri. *State ex rel. Philipp Transit Lines, Inc. v. Public Service Commission*, 552 S.W.2d 696, 700 (Mo. banc 1977).

In this case Appellants seek a declaratory judgment with respect to the unfunded mandates – not a decision which indicates that school districts are free to not provide the activities required under the unfunded mandate. In *Durant v. State of Michigan*, 566 N.W.2d 272 (Mich. 1997), the court considered the underfunding of special education by the state to local school districts. The *Durant* Opinion was decided after *Ft. Zumwalt School District v. State*, 896 S.W.2d 918 (Mo. banc 1992). Special briefing was ordered by the Michigan Supreme Court (566 N.W.2d 646) to submit briefs with respect to the *Ft. Zumwalt* decision. The majority in *Durant* declined to follow *Ft. Zumwalt* though the dissent embraced *Ft. Zumwalt*. 566 S.W.2d at 290 and 293. *Durant* concluded that Michigan’s equivalent of Missouri’s Section 23 gave “the Court the duty and authority to enforce . . . in the way that would most effectuate the balances struck by the people in the

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<sup>22</sup> The Headlee Amendment is found in Article IX, Sections 25 through 31, Michigan Constitution, as amended in 1978.

Headlee Amendment,” and then concluded that “[d]eclaratory relief coupled with an award of damages is appropriate in this case. . . .” pp. 284-285.

This Court in *Taylor v. State*, 247 S.W.3d 546, 548-49 (Mo. banc 2008), in a case involving the unfunded mandate provisions of Hancock, pointed out that “. . . section 23 authorizes declaratory relief but does not mention other forms of relief. . . .” This Court then went on to state:

“Inherent in the courts’ power to enter a declaratory judgment, however, is the power of the court to enforce the judgment through other forms of relief where **a party acts contrary to a court’s declaratory judgment.**”

(emphasis added).

Appellants are entitled to declaratory relief with respect to Hancock issues – and are, as well, entitled to recover their attorneys’ fees and costs under the provisions of Section 23 of Article X.

**V.**

**THE COURT ERRED IN ALLOWING MESSRS. SINQUEFIELD, SCHOCK AND SMITH TO INTERVENE AS DEFENDANTS OVER THE OPPOSITION OF ALL OF THE OTHER PARTIES AND IN LATER REFUSING TO DISMISS THEM AS PARTIES INASMUCH AS THEIR ONLY ALLEGED STANDING IS AS TAXPAYERS AND ONLY PLAINTIFFS ALLEGING THAT AS TAXPAYERS THEY ARE HARMED BY ACTIONS OF DEFENDANTS HAVE STANDING.**

This lawsuit was commenced on January 6, 2004. LF\_1. On June 14, 2006, the case was set for trial starting on January 3, 2007. LF\_2620.

Not until October 19, 2006, did Rex Sinquefield, W. Bevis Schock and Menlo Smith file their Motion to Intervene as Party Defendants. They alleged that they were taxpayers, but made no allegations that the school funding by the State was unconstitutional or otherwise unlawful. LF\_2773-2785. Their intervention was opposed in filings on November 2 by the State Defendants (LF\_3637-3694), CEE, et al. (LF-3445-3452) and CFES, et al. (LF\_3453-3456) on the grounds that applicants for intervention did not have standing and did not meet the legal requirements for intervention. On November 2, oral arguments were presented re the Motion to Intervene. On November 8, 2006, the day following the General Election, Judge Callahan entered an Order Granting Motion to Intervene under Rule 52.12(b) (permissive intervention), but finding that they were not permitted to intervene under Supreme Court Rule 52.12(a) (intervention of right) and stating that he “rejects the allegation that the State’s interest is not being adequately represented.” LF\_3836.

On November 16, 2007, the CEE Plaintiffs and CFES Plaintiff Intervenor filed an after-trial Motion to Amend Judgment in which they requested that the Court amend its Judgment to conclude and adjudge that the Defendant Intervenor Sinquefield, et al., were improvidently allowed to intervene in the case, that they do not have standing in the case, that Messrs. Sinquefield, et al., be dismissed from the case, and that their proposed Bill of Costs<sup>23</sup> should be denied. LF\_5422, *et seq.* On December 2, 2007, the Motion to Amend Judgment was presented to Judge Callahan. See, arguments set forth in December 2, 2007, Transcript filed herein. Judge Callahan after hearing arguments discussed the issue and his reasoning for allowing the Defendant Intervenor into the case (Tr. 20-23), indicated that “I don’t know that I would ever do it again” (Tr. 21), and overruled the motion (Tr. 22). LF\_43.

Throughout, the Defendant Intervenor has not cited any authority which holds that they have standing as taxpayers to intervene and participate as intervening Defendants in this case.

The Attorney General in his opposition to the intervention of Messrs. Sinquefield, et al., properly relied upon *State ex rel. Nixon v. American Tobacco, Inc.*, 34 S.W.3d 122 (Mo. banc 2000), and *State ex rel. Cooper v. Washington County Commission*, 848

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<sup>23</sup> Defendant Intervenor on October 30, 2007, submitted a Bill of Costs to the Cole County Circuit Clerk requesting the costs be taxed to the “St. Louis Public Schools” in the amount of \$206.45, to the “CFES” in the amount of \$32,215.75 and to the “CEE” in the amount of \$29,357.10, for a total of \$32,779.30. LF\_5346-5421.

S.W.2d 620, 622 (Mo. App. E.D. 1993) (“When a public officer is engaged in litigation to protect public rights, and the officer’s pleadings and procedure maintains that interest, a private person is not entitled to intervene.”) LF\_3687-3692.

The Defendant Intervenors should be dismissed from this case because of lack of standing. Allowing them into the case caused additional costs to all of the other parties and continues to cause additional costs.



## **CONCLUSION**

The Judgment of the trial court should be reversed and this Court should enter the Judgment which the trial court should have issued and this Court should retain jurisdiction. The CEE Appellants suggest that a Judgment along the lines suggested in Plaintiffs' Suggested Judgment submitted to the trial court (LF\_5650-5658; App., Tab 34, App. 824-832) should be entered.

Respectfully submitted,

BY

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### **CERTIFICATE OF COMPLIANCE**

The undersigned counsel hereby certifies pursuant to Rule 84.06(c) that this brief (1) contains the information required by Rule 55.03; (2) complies with the limitations contained in Rule 84.06(b); and (3) contains 30,589 words, exclusive of the sections exempted by Rule 84.06(b)(2) of the Missouri Supreme Court Rules, based on the word count that is part of Microsoft Word 2003. The undersigned counsel further certifies that the CD has been scanned and is free of viruses.

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## **CERTIFICATE OF SERVICE**

I certify that one paper copy of this Brief, a six-volume Appendix and one electronic copy on CD, as required by Missouri Supreme Court Rule 84.06(g), were served on each of the counsel identified below via U.S. Mail, postage prepaid, on January 26, 2009:

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