IN THE MISSOURI SUPREME COURT

BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, et al.,	)	
Appellants,	)	
v.	)	**Case No. SC89139**
MISSOURI STATE BOARD OF EDUCATION, et al.,	)	
Respondents.	)	

Appeal from the Circuit Court of the Cole County
The Honorable Richard G. Callahan, Judge
Circuit Court Case No. 07AC-CC00488

State Respondents' Brief

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Introduction

In 1998, after decades of federal court supervision and court-ordered funding in the desegregation lawsuit involving the St. Louis City School District ("District"), the General Assembly passed Senate Bill 781 ("SB781") (included in Respondents' Appendix ("Resp. App.") at A-75). The purpose of SB781 was, in part, to generate the $60 million per year in increased school funding for the District that would be needed to replace court-ordered funding, and thereby facilitate a settlement of that long-running lawsuit.

In addition to these funding provisions, SB781 contained many other interconnected and carefully balanced provisions. One such provision created a Transitional School District ("TSD"), in order to facilitate certain aspects of a settlement. *See* SB781, codified in part at §162.1100.1 and .5.[1] The TSD was given boundaries identical to, and was created to co-exist with rather than replace or control, the District. *Id*. But, the General Assembly also decided that, if performance in the District were to deteriorate substantially following a settlement, a pathway for change must be provided. Therefore, the General Assembly decided that, if the District "loses its accreditation from the state board of education," most (but not all) of the authority and control over the District – historically assigned to and exercised by the Board of Education of the City of

1 Unless otherwise noted, all statutory citations are to the statute in its currently effective form, published in RSMo 2000 or RSMo (Cumm. Supp. 2007), as the case may be.

St. Louis ("City Board") by Section 162.621.1 – would be transferred to the governing body of the TSD, referred to as the Special Administrative Board ("SAB"). *See* SB781, codified in part at §§ 162.621.2 and 162.1100.3.

Of course, neither the City Board nor any of its members raised any constitutional challenges to Section 162.1100 in 1998, when it was passed. Instead, the City Board used SB781 as it was intended to be used, and soon reached a settlement of the desegregation lawsuit with the State and all other parties (the "Deseg Settlement"). The Deseg Settlement expressly referenced many of the changes enacted by SB781, including not only SB781's amendments to the education funding statutes but also an express acknowledgment of the "change of control" provisions in SB781 that had been codified at Sections 162.621.2 and 162.1100.3.

Over the next decade, the District benefitted enormously from the extraordinary funding provided for by the Deseg Settlement and by the statutory amendments enacted in SB781. Through those years, every City Board member – as well as every candidate for that office and every voter picking from among such candidates – knew (or is deemed to have known) that the General Assembly already had decided to take control over the District away from the City Board if the District lost its accreditation. The City Board not only knew it, the City Board acknowledged those provisions in the Deseg Settlement itself. And no one suggested they were unconstitutional.

On June 4, 2008, however, all of that changed. The City Board, together with some – but not all – of its members ("City Board Members") (collectively, "Appellants"),

filed the present lawsuit. Appellants sought to prevent the "change of control" provisions (which SB781 had enacted and which the District had acknowledged in the Settlement) from being triggered by the District's imminent loss of accreditation. The State Board of Education ("SBOE") had declared the District "unaccredited" on March 22, 2007, but stayed the effective date of its determination until June 15, 2007. Appellants' lawsuit – and their immediate application for TRO – sought either to have the SBOE's decision vacated, or to have Section 162.1100[2] declared unconstitutional so that no "change of control" would occur when the District's loss of accreditation decision became effective on June 15, 2007,

After extensive evidence, briefing and argument, the Circuit Court denied Appellant's application for the TRO on June 14, 2007, holding that the SBOE's decision was supported by "substantial and competent evidence" and that the SBOE had been neither arbitrary nor capricious. L.F. 827. Accordingly, the District lost its accreditation on June 15, and the SAB assumed the powers, duties and authority that were transferred to it from the City Board by operation of Sections 162.621.2 and 162.1100.3.

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2 For reasons never made clear, Appellants failed to challenge Section 162.621.2, the principle "change of control" statute. It is this Section, and not Section 162.1100, which vests with the SAB upon the District's loss of accreditation the City Board's broad management and control powers over District, thus raising doubt as to whether the relief Appellants sought would have prevented the harm they asserted even if they had prevailed. This is discussed in detail in Points III and VI, infra.

Even though the City Board and its members had known for a decade that most of their power and authority over the District was contingent upon the District maintaining its accreditation, Appellants refused to give up efforts to re-take control of the District. After the SAB had intervened to protect its interests, Appellants filed an Amended Petition invoking everything from common law conversion/replevin to the "Source of All Power" clause of Article I, Section 1, of the Missouri Constitution. L.F. 64-65, 108. Appellants tried their case in September and October of 2007. When all was said and done, however, despite their many dozens of pages of briefing, hundreds of pages of transcript and thousands of pages of exhibits, Appellants failed to prevail on even one of the 27 separate counts pled in the Amended Petition.

Specifically, the Circuit Court rejected each of the Appellants' 17 (or perhaps 18) separate constitutional challenges to Section 162.1100. Now, Appellants have abandoned all of these claims, save three: Point Relied On I – Voters' Rights Claims, Point Relied On II – City Board Members' Procedural Due Process Claim, and Point Relied On III – "Special Law" Claim. The Circuit Court's Judgment specifically addressed each of these, though Appellants had barely mentioned them, and rejected them as wholly unsupported.

The Circuit Court also rejected Appellants' efforts to claim (a) that Section 162.1100 was never properly "triggered" due to alleged defects in the Governor's appointment of a Chief Executive Officer to the SAB, and (b) that Section 162.1100

somehow violated the Deseg Settlement. Appellants have abandoned all of these claims, and they are not before the Court.

Relating to the SBOE's decision to declare the District "unaccredited," the Circuit Court rejected each of the Appellants' constitutional and statutory attacks on the process used, *e.g.*, (a) claims that the SBOE's accreditation rule, 5 CSR 50-345.100, is unconstitutionally vague, or (b) claims that DESE's data gathering policies and procedures violated equal protection. Appellants also have abandoned each of these claims.

Finally, the Circuit Court exhaustively considered, and properly rejected, Appellant's common law claim that the SBOE's accreditation decision should be vacated because the SBOE reached it in an arbitrary or capricious manner. The Circuit Court held:

> Based upon the facts presented at trial, the credibility of the witnesses presented to the Court, and the totality of the circumstances facing the SBOE, this Court finds that SBOE's decision was reasonable, that it was amply supported by the facts, and that it was neither arbitrary nor capricious.

Cir. Ct. Op. at 2.[3]

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3 The Circuit Court's Opinion is cited so often throughout State Respondents' Brief that the Opinion has been reproduced in Respondents' Appendix for the Court's convenience even though it is also in the Appellants' Appendix. It is the first document in State

Despite this holding and the Circuit Court's 60-page analysis of the facts and law, Appellants have not abandoned this claim. Thus, in Point Relied On IV, Appellants seek a review of this claim – in addition to the constitutional claims in Points I-III – under the deferential *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976), standard of review. Under that standard, or any other, the Circuit Court's decision must be affirmed.[4]

Respondents' Appendix so the page citations herein will correspond both to the page in the Opinion and the page in the Appendix.

4 Appellants also raise, in Points Relied On V and VI, respectively, claims that the Circuit Court erred (a) in finding that the Appellants had neither pled (nor had standing to assert) any claim under Chapter 536, and (b) in rejecting Appellants' claim that the City Board continued to have sole authority to exercise substantial and essential "retained powers" even under the "change of control" provisions in Sections 162.621.2 and 162.1100.3. Accordingly, these Points are addressed in Sections V and VI, below, and the Circuit Court's decision in these respects should be affirmed as well.

STATEMENT OF FACTS

Rule 84.04(c) requires an appellant to provide the Court a "fair and concise statement of the facts relevant to the questions presented without argument." In this case, Appellants' Statement is neither fair nor concise. Due to the breadth of the evidence submitted at trial, as demonstrated by the Circuit Court's 61-page Judgment, much of which is dedicated to recounting the evidence at trial, the State Respondents respectfully refer the Court to the Findings of Fact in the Circuit Court's Opinion, pp. 1-30, in lieu of submitting their own counter-statement. Where facts are relevant to the arguments raised by Appellants, they are set forth in the Respondents responses below, together with citations to the record. [5]

5 Citations to the testimony of witnesses who testified at trial will be to the Trial Transcript, Volume I (September 25, 2007) and Volume II (October 2, 2007), as follows: "Tr. II at __," or "Tr. I at __." All exhibits admitted to evidence have been lodged with the Clerk of the Supreme Court in bound volumes separated by the party offering them. Petitioners offered seven separate volumes ("Pet. Vols. I-VII") and the State Defendants offered three separate volumes ("Def. Vols. I-III"). Citations to these exhibits are made by number, followed by a parenthetical identifying the volume in which that exhibit may be found, *e.g.*, Exh. 14 (Pet. Vol. I) at p. __, or Exh. 263 (Def. Vol. III) at p. __.

ARGUMENT

I. The Circuit Court properly rejected Appellant's "voters' rights" claims because the General Assembly, <u>not</u> the voters, determines the powers of a school board and may change those powers as it deems appropriate. More important, every voter since 1998 is deemed to have known – in casting votes for City Board members – that a substantial part of the powers previously exercised by the City Board would be transferred to the TSD – immediately, automatically, and as a matter of law –if the District lost its accreditation.

(Responds to Appellants' Point Relied On I)

The Circuit Court rejected the "voters' rights" claims brought by Appellants Downs, Jones Wessling and Jackson (*i.e.*, the City Board Members) on the grounds that each of these voters had the same rights to vote after the enactment of Section 162.1100 as they did before. Cir. Ct. Op. at 49. Moreover, nothing in Section 162.1100, or in its effect when the District lost its accreditation, "nullified any election, disenfranchised any voter or prevented any candidate from seeking a position on the City Board." Cir. Ct. Op. at 50. In addition, the Circuit Court held that not only did Section 162.1100 not dissolve the City Board when the District lost its accreditation, the City Board continued to have important and ongoing obligations with respect to the District even after the "change of control." *Id.* Finally, the Circuit Court held that, because the General Assembly acts with plenary authority in creating school boards, assigning powers and duties to them, and providing for the people to elect their members, the General

Assembly was free to change these attributes at any time. Cir. Ct. Op. at 50-51. Appellants' novel legal theory is so utterly devoid of merit (and even logic), the Circuit Court's determination may be affirmed on any or all of these grounds, or on any of several other grounds. *See Ledbetter v. Director of Revenue*, 950 S.W.2d 656, 659 (Mo. banc 1997) ("In a court-tried case, we are to sustain the judgment of the court if the result was correct on any tenable basis [because] the concern is the correctness of the trial court's result, not the route taken to reach it.")

A. The General Assembly has plenary authority to establish school districts and vest such powers with them, and upon such conditions, as it deems appropriate.

First, and foremost, school districts are wholly creatures of statute, created by the General Assembly to do its bidding. *Committee for Educational Equality v. State*, 878 S.W2d 446, 457 (Mo. banc 1994) ("[s]chool districts are creatures of state law established to carry out governmental functions"). The United States Supreme Court recognized long ago that political subdivisions such as school districts are "created as convenient agencies for exercising such of the governmental powers of the state, as may be entrusted to them," and "the 'number, nature and duration of the powers conferred upon (them) . . . rests in the absolute discretion of the state." *Sailors v. Board of Educ. of Kent County*, 387 U.S. 105, 108 (1967) (emphasis added) (*quoting Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907)).

Even the right to vote for school board members, the solitary basis for Appellants' claims, comes only from the General Assembly as there is no constitutional right to vote for school board members. *Sailors*, 387 U.S. at 111 ("State can appoint local officials or elect them or combine the elective and appointive systems as was done here"). In the present case, Appellants' right to vote for City Board Members is established by Section 162.601 – which was amended by the same SB781 that enacted Section 162.1100.

Appellants assert that Article I, Section 1 operates as a check or brake on the General Assembly's authority. App. Brief at 55. Appellants have it backwards. When the General Assembly establishes school districts, enumerates their powers, and provides for the election of their board members, the General Assembly is acting pursuant to Article I, Section 1. *Three Rivers Junior College Dist. of Poplar Bluff v. Statler*, 421 S.W.2d 235, 238 (Mo. banc 1967) (absent a clear constitutional restraint, the General Assembly "is vested in its representative capacity with all the primary power of the people"). Appellants have provided no Missouri authority for their novel assertion that, having once established a school board and its powers, the General Assembly is forever stuck with its initial parameters for fear of violating voters' expectations. App. Brief at 56-57.

B. Even if voters' expectations limit the General Assembly's plenary authority, those expectations must have been limited, in turn, by SB781

which was enacted in 1998 long before any Appellant ran for the school board.

Appellants forcefully argue that the voters' expectations are established by the law in force at the time they voted. *See* App. Brief at 51-52. Specifically, Appellants cite to Section 162.621 to show that those voters who elected Appellants Wessling, Jackson, Downs and Jones did so with the expectation and desire that, as City Board Members, these Appellants would "exercise generally all powers in the administration of the public school system therein." App. Brief at 52 (*quoting* §162.621.1). But, if the voters' thoughts and desires were created by – or at least informed by – by subsection 1 of Section 162.621, then it stands to reason that the thoughts and desires of those same voters electing those same Appellants must also have been created by – or at least informed by – subsection 2 of the very same statute, which states:

> "the powers granted in subsection 1 of this section shall be vested, in the manner provided in section 162.1100, in the special administrative board of the transitional school district containing the city not within a county if the school district loses its accreditation from the state board of education."

§162.621.2 (emphasis added). These voters must have been equally aware of – and informed by – Section 162.1100.3 (providing the "manner" in which the "change of control under Section 162.621.2 is carried out, and effect a similar transfer of powers granted to the City Board by other statutes) which was in force nearly a decade prior to the election of all four of the Appellant City Board Members.

Appellants' argument that the General Assembly is prohibited by the expectations of the voters – formed on the basis of the statutes in force at the time of that election – from ever changing the powers of the City Board cannot prevail when the potential for a such a change was clearly stated in the same law. Every voter in 2006 and 2007 who elected Appellants Downs, Jones, Wessling and Jackson[6] must have known (or is deemed to have known) that the elected City Board would only exercise the broad power to control the District unless and until the District lost its accreditation, at which time control would pass to the SAB and the City Board's powers would be greatly diminished. Accordingly, what happened to the City Board on June 15, 2007, was not a "post hoc nullification" of the voters' legitimate expectations as Appellants claim. Instead, using Appellants' argument, the change of control was absolutely consistent with – and a fulfillment of – voters' expectations and, given the District's loss of accreditation, anything short of this change of control would have been unlawful.

C. Appellant's reliance on the *Tully* decision is inapposite because *Tully* was not decided on similar facts and, when similar facts have arose, *Tully* was not extended even in its own jurisdiction.

Appellants do not provide any Missouri authority for their novel "voters' rights" claims. Instead, Appellants rely on *Tully v. Edgar*, 664 N.E.2d 43, 46 (Ill. 1996), even

6 In fact, by the time Appellants Wessling and Jackson were elected, the District already had been declared unaccredited and the change of control was imminent.

though Appellants never cited *Tully* to the Circuit Court. Notwithstanding Appellants' breathless citations to, and quotations from, *Tully*, that case is of no relevance to the present circumstances. There, the Illinois legislature changed the Board of Trustees for the University of Illinois from an elected office to an appointed office effective on January 1, 1996. *Id*. at 300. To accelerate the change over, the legislature declared that the terms of every trustee, regardless of when each was elected, would end on "the second Monday in January, 1996." *Id*. at 300-01. On this basis, the Court determined that the trustees had been "effectively remove[d] from office," *id*. at 301, and held that this violated the rights of the voters who had elected them. The challengers conceded that the legislature could alter the nature of the office and how its holders are chosen, contesting only that the legislature could not do so in the middle of a term. *Id.* at 303.

Obviously, the facts in *Tully* bear no resemblance to the present facts. There, the legislature had truncated the terms of officeholders after their election and, though the challengers theoretically could have then been appointed, they were in imminent danger of being put out of office. Here, no member of the City Board lost their office nor were their terms of office shortened in the slightest. In *Tully*, the legislature made no changes to the board of trustees' powers. Here, the General Assembly enacted in SB781 a contingent "change of control," transferring nearly all of the City Board's powers to the SAB upon the occurrence of a future event uncertain to occur. Finally, and most importantly, in *Tully* no voter or trustee had any cause to believe that the trustees elected in the November 1994 elections would serve anything other than their entire statutory 6-

year terms. Here, every voter and every City Board Member has been on notice since 1998 that the City Board exercised its control over the District only for so long as the District remained either "accredited" or "provisionally accredited." Accordingly, *Tully* offers this Court no relevant guidance.

A year after deciding *Tulley*, the Illinois Supreme Court faced a situation much more closely resembling the present case and refused to follow *Tulley*. In *East St. Louis Fed. of Teachers v. East St. Louis Sch. Dist. No. 189 Fin. Oversight Panel*, 687 N.E.2d 1050 (Il. 1997), the Illinois Supreme Court evaluated a statute that allowed for an elected school board member to be removed from office mid-term. The Court upheld the statute, distinguishing *Tully* on the "crucial distinction" that the act in *Tully* was enacted after the trustees were elected, whereas the act allowing school board member removal had become effective before any of the current school board members were elected. *Id*. at 755-78. With *Tully* inapposite, the Court fell back on fundamental principles of law every bit as applicable in Missouri as in Illinois:

> A school board as an entity is a governmental agency, or "municipal corporation," created by the legislature and subject to its will. *Cronin v. Lindberg*, 360 N.E.2d 360 (1976). Offices created by statute are wholly within the control of the legislature, "which may at pleasure create or abolish them, modify their duties, shorten or lengthen their terms, increase or diminish the salary or change the mode of compensation." *Hughes v. Traeger*, 106 N.E. 431 (1914).

East St. Louis Fed. of Teachers, 687 N.E.2d at 577.

Similar conclusions have recently been reached in other jurisdictions. In *Shook v. District of Columbia Fin. Resp. and Mgmt. Asst. Auth.*, 132 F.3d 775, 778-79 (D.C. Cir. 1998), Court of Appeals for the D.C. Circuit held that an act allowing an appointed "control board" to assume the powers of the elected school board did not violate voters' rights because the right "to vote for a Board of Education, granted by Congress, can be taken away by Congress." The Ohio Court of Appeals, too, recently rejected the *Tully* decision and held voters' rights were not violated where an appointed board had assumed powers previously exercised by an elected school board. *East Liverpool Educ. Ass'n v. East Liverpool City Sch. Dist. Bd. of Educ.*, ___ N.E.2d ___ , 2008 WL 2609701 (Ohio App. June 30, 2008) (relying on *Barnesville Educ. Assoc. OEA/NEA v. Barnesville Exempted Village Sch. Dist. Bd. of Educ.*, 2007 WL 745095, *7-8 (Ohio App. Mar. 6, 2007) (unpublished) (rejecting *Tully* because decade-old "statute gave [school board members] and the voters notice that an appointed Commission could supplant certain board functions" and holding that "[o]nce statutorily granted, these [school board] powers are not forever fixed and immutable").[7]

Accordingly, Appellants' "voters' rights" claims cannot succeed. There is no basis for them in Missouri law, and such claims run contrary to fundamental principles that the General Assembly may create such school districts as it deems appropriate, imbue them with such powers as the General Assembly sees fit, and re-distribute those

7 The *Barnesville* decision is included in Resp. App. at A-150.

powers when circumstances demand. The only case relied upon by Appellants was decided on materially different facts and has not been extended to facts similar to the present case either in its own jurisdiction or elsewhere. Therefore, this Court should affirm the Circuit Court's decision rejecting Appellants' "voters' rights" claims.

II. The Circuit Court properly rejected Appellant City Board Members' due process claims because a school board member does not have a "property interest" in his or her elected office and, even so, Appellants did not lose their offices. Appellants have no individual property interest in powers vested with the City Board as a whole and, if they did, whatever right Appellants acquired by election was taken subject to the "change of control" provisions enacted in 1998 in SB781. Finally, Appellants received far more process than any which might have been "due" under either the Missouri or federal constitution.

(Responds to Appellants' Point II)

The Circuit Court properly rejected Appellants' state and federal claims that the 'change of control" provisions in Section 162.1100 deprived them of a protected property interest without due process of law. Obviously, the City Board's claims could never have survived *State ex rel. Brentwood v. State Tax Comm'n*, 589 S.W.2d 613, 615 ("school districts, as creatures of state . . . are not persons within the meaning protections of due process … and cannot charge the state with violations of due process"). Accordingly, only the Appellant Board Members are pursuing claims before this Court. This Circuit Court's decision should be affirmed on it own reasoning, or on any one of the following independent bases.

First, this Court has never recognized a property interest in an elected office, and should not do so now. Second, even if Appellants had a property interest in their offices,

nothing in Section 162.1100.3 (or Section 162.621.2) deprived them of those positions, which they still hold. Third, Appellants' claim that they have been "effectively removed" from office depends upon their mistaken assertion that "they" have been stripped of power when, in fact, those powers were vested in the City Board, not its individual members. Fourth, whatever property interest the Appellants acquired by virtue of their elections was limited by the pre-existing "change of control" provisions in SB781, such that Appellants' expectations of power were limited by the knowledge it would be divested if the District lost its accreditation. Finally, Appellant City Board Members had ample – and actual – notice of the impending "change of control," and Appellants not only had an opportunity to be heard at all critical junctures, they were heard in fact through their representative, the District Superintendent, and in pre-deprivation administrative and judicial processes. Each of these grounds is independent of the others, and each is a sufficient basis affirm the Circuit Court.

A. The City Board Members have no protected property right in their offices under Missouri or federal law.

The Fourteenth Amendment's due process clause provides, "…nor shall any state deprive any person of life, liberty or property without due process of law…." U.S. Const. amend XIV, § 1. *See also* Mo. Const. art. I, § 10. Procedural due process cases under either the federal or state constitution involve a two-part analysis: identification of constitutionally-protected liberty or property interest deprived by state action; and, if one exists, examination of whether the "procedures attendant upon deprivation of that interest

were constitutionally sufficient."[8] *Jamison v. Dep't of Soc. Servs., Div. of Family Servs.*, 218 S.W.3d 399, 405 (Mo. banc 2007).

"Property interests are not created by the [U.S.] Constitution, 'they are created and their dimensions are defined by existing rules or understandings that stem from an independent source, such as state law.'" *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 540 (1985) (quoting *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972)). Missouri has long held that elected offices vest no property interest in the officeholder. *State ex rel. Kansas City v. Coon*, 296 S.W. 90 (Mo. banc 1926), provides "that an office is not a grant or a vested right arising from contract, that it is not property in the rigid sense than [sic] an ox or an ass or land is property." 296 S.W. at 96. Later, *State ex rel. Conran v. Duncan*, 63 S.W.2d 135 (Mo. banc 1933), declares that while nomination to an office "may be a valuable right…it is not property. Even after appointment or election, a public office is not property." 63 S.W.2d at 143. Further, *State ex inf. McKittrick ex rel. Ham v. Kirby*, 163 S.W.2d 990 (Mo. banc 1942), the most-recent Missouri case to treat this subject, reiterates, "…a public office is not property in the constitutional sense and the right to be appointed to a public office is not a natural or property right within the protection of the due process clause." 163 S.W.2d at 995.

In their argument, the Appellant City Board Members urge this Court to overrule its long-standing precedent and declare a new property right for elected officeholders.

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8 The federal and state due process clauses are identical, and historically have not been analyzed separately by this Court. *See Jamison*, 218 S.W.3d at 405, n.7.

App. Brief at 72. The City Board Members claim that changes in procedural due process jurisprudence since the controlling Missouri cases were decided allows this Court to declare the new right they seek. App. Brief at 64-73. In support, the City Board Members point to decisions from other jurisdictions which hold that an elected public officeholder can possess a constitutionally-significant property right in their office. *Id.* These decisions, however, are flawed.

For instance, in *East St. Louis Fed'n of Teachers v. East St. Louis Sch. Dist.*, 687 N.E.2d 1050 (Ill. 1997), the Illinois Supreme Court interprets federal law to hold that, though "school board members as individuals have no property or liberty right to their offices secured by the federal due process clause, an elected official may have a property right in his office if such an interest is given to him under state law." 687 N.E.2d at 1060 (citing *Snowden v. Hughes*, 621 U.S. 1, 7 (1944)). The court went on to examine Illinois law and found that the state secures a property right in elected school board membership. *Id*. at 1061. As Appellants urge this Court to do, the Illinois court based its decision on an expanded understanding of what constitutes property. *Id*. However, in so deciding, the Illinois court failed to acknowledge binding U.S. Supreme Court precedent precluding that result.

"[F]ederal constitutional law determines whether [a property] interest rises to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause." *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 757 (2005) (quoting *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9 (1978)) (emphasis omitted). *See also Franzwa*

v. City of Hackensack, ___ F.Supp.2d ___, 2008 WL 2704220, *5 (D. Minn. July 3, 2008). In *Taylor and Marshall v. Beckham*, 178 U.S. 548 (1900), and *Snowden*, the U.S. Supreme Court held that "an elected political official does not have a property right in his office, and accordingly that the due process clause of the fourteenth amendment affords him no protection when a state…seeks to remove him from the position." *Brown v. Perkins*, 706 F.Supp. 633, 634 (N.D. Ill. 1989). In particular, *Snowden* states:

> More than forty years ago this Court determined that an unlawful denial by state action of a right to state political office is not a denial of a right of property or of liberty secured by the due process clause…[w]e reaffirm it now.

Snowden, 321 U.S. at 7. The District Court in *Brown* observed that, because of a "new approach to property rights" developed in the years since *Taylor* and *Snowden*, "lower courts…have assumed, without citing the earlier Supreme Court cases, that 'an elected official who is entitled to hold an office under state law'" does have an interest in that position protected by the Fourteenth Amendment. *Brown*, 706 F.Supp. at 634 (emphasis added) (citing *Crowe v. Lucas*, 595 F.2d 985, 993 (5th Cir. 1979) and *Gordon v. Leatherman*, 450 F.2d 562, 565 (5th Cir. 1971)).

More recently, however, the United States Court of Appeals for the Second Circuit examined this issue and decided it could not ignore *Taylor* and *Snowden* as other courts have done. In *Velez v. Levy*, 401 F.3d 75 (2nd Cir. 2005), concerning an elected school board member removed from office ostensibly for cause, the Second Circuit followed the

precedent laid out by the U.S. Supreme Court. "[W]hile intervening cases may cast a shadow over *Taylor* and *Snowden*, "it is [the Supreme] Court's prerogative alone to overrule one of its precedents." *Velez*, 401 F.3d at 87 (citing *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997)). Accordingly, the *Velez* court appropriately determined that the removed school board member had "no constitutionally cognizable property interest" in her elected office. *Velez*, 401 F.3d at 87 (citing *Burks v. Park*, 470 F.2d 163, 165 (6th Cir. 1972); *Rabkin v. Dean*, 856 F.Supp. 543, 549 (N.D. Cal. 1994); *Sweeney v. Tucker*, 375 A.2d 698 (Pa. 1977)). Like *Velez*, this Court also should decline the City Board Members' invitation to ignore U.S. Supreme Court precedent, and should defer to the *stare decisis* effect of its own previous rulings on this subject.

B. Appellants claim an individual property right in powers that were vested in the City Board as a whole, and not in individual members.

The Appellant City Board Members readily admit – as obviously they must – that nothing in Section 162.1100 (or Section 162.621.2) actually deprived them of their offices, which they still hold. Instead, they claim to have been "effectively removed" from their offices because substantially all of the City Board's powers have been transferred to the SAB by operation of the "change of control" provisions in Sections 162.261.2 and 162.1100.3. App. Brief at 59. This argument ignores the fact that the City Board continues to have the authority – and the obligation – to fulfill auditing and public reporting functions. §162.621.2. More important, Appellants' argument ignores that the City Board retains the obligation to resume full control over the District as soon as the TSD has fulfilled its purposes and is dissolved by the SBOE. *Id*.; §162.1100.3.

Thus, Appellants' "constructive discharge," or "effective removal" claim is exposed for what it is: an unsupported assertion that each of them has an individual property interest in the continuous and uninterrupted exercise of the powers outlined in Section 162.621. Here, Appellants are simply wrong on the law. The powers set forth in Section 162.621.1 were never vested in individual members of the City Board. Instead, they were vested in the Board as a whole. §162.621.1 (the "board of education shall have general and supervising control . . . and shall exercise generally all powers"). Of course,

no Appellant can base a constitutional claim on the loss of something he or she never had.[9] On this basis, alone, the Circuit Court may be affirmed.

C. If Appellants acquired property rights through their elections to the City Board, Appellants took those rights subject to the "change of control" provisions enacted by SB781 nearly a decade before their elections.

This Court need not decide the federal law issue of whether election to a political office creates a property interest, regardless of the intellectually stimulating debate swirling about that topic generally in recent years. Nor does this Court need to resolve Appellants' logically suspect assertions that (a) each of them may assert an individual

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9 Nor may the Appellant Board Members collectively assert a due process claim for the loss of the City Board's powers. Acting collectively, there is no difference between the Appellant School Board Member and the City Board itself. It is settled law that school boards, as such, are not protected by constitutional due process and equal protection provisions. *Brentwood*, 589 S.W.2d at 615 ("school districts . . . are not persons within the meaning protections of due process … and cannot charge the state with violations of due process"); *Committee for Educational Equality*, 878 S.W2d at 450 n. 3 (school districts cannot assert equal protection claims against the state). Thus, the City Board's due process claims, *see* Amended Petition at L.F. 75-76, ¶¶ 140-53, were rejected by the Circuit Court and have been abandoned on appeal by Appellants.

property right in powers that were vested with the City Board as a whole, or (b) they may assert a deprivation of a property right merely by virtue of a change in their office's statutory powers and duties. Merely for the sake of argument and ease – and to eliminate any federal law questions and thus, perhaps, an unnecessary and time consuming certiorari petition – this Court may simply assume that Appellants can demonstrate a constitutionally protectable property interest. Even so, Appellants' claims must still fail because any property right Appellants acquired by virtue of their elections in 2006 (Downs and Jones) and 2007 (Jackson and Wessling) must have been qualified by – or taken "subject to" – the "change of control" provisions enacted by SB781 in 1998. . *See generally Collins v. Morris*, 438 S.E.2d 896, 897 (Ga. 1994) ("an official takes his office subject to the conditions imposed by the terms and nature of the political system in which he operates"); *Gordon*, 450 F.2d at 565. Indeed, the "change of control" provisions enacted in SB781 are not only statutes, and thus knowledge of them is imputed to Appellants, but the City Board's own Deseg Settlement expressly acknowledges them.[10]

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10 The Deseg Settlement was a document of great importance to the City Board and its members in 2006 and 2007, as it formed the basis of their litigation against the State seeking hundreds of millions of dollars more under the Settlement. After years of expensive and time-consuming litigation, the City Board lost their case and the Circuit Court declared that the State proved had complied with every one of its financial commitments in the Deseg Settlement. *See Board of Education v. State*, 229 S.W.3d 157, 167-68 (Mo. App. 2007).

L.F. 414-15, 426-27(Deseg Settlement) at §§ 16 and 18A (selected pages, including §§ 16 and 18A from the Deseg Agreement are found in Resp. App. at A-142).

Appellant City Board Members admit in their brief that, "[i]n order for a benefit to be considered a constitutionally protected 'property interest,' the aggrieved employee must show a 'legitimate claim of entitlement to it.'" App. Brief at 65 (citing *Stieg v. Pattonville-Bridgeton Terrace Fire Protection Dist.*, 374 F.Supp.2d 777, 786 (E.D. Mo. 2005). Appellants who were elected nearly a decade after SB781 became law cannot possibly demonstrate such a "legitimate claim of entitlement" to the exercise of control over the District after it lost its accreditation, and the Circuit Court may be affirmed on this ground alone.

D. Appellant City Board Members had actual and constructive notice, and Appellants had not only an opportunity to be heard but were heard, repeatedly, prior the "change of control" taking effect – more cannot be "due" under either the state or federal constitution.

"Under both the federal and state constitutions, '[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.'" *Jamison*, 218 S.W.3d at 405 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)). The Due Process Clause does not require a rigid set of procedures be applied in every case to assess compliance with this mandate. *Id*. (citing *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). Rather, the procedures required by the Constitution are flexible to

the situation at hand. *Matthews*, 424 U.S. at 335. Of course, it is "well-settled" that notice and an opportunity to be heard are at the root of this analysis. *Jamison*, 218 S.W.3d at 408 (quoting *Loudermill*, 470 U.S. at 542).

Notice: At the outset, Appellants are not at all clear about what event they claim they were not notified of. Reference to the Amended Petition is of no assistance on this point because the allegations setting forth the individual Appellants' procedural due process claim (Count XXVII) do not allege even a general, let alone specific, lack of notice. But, it can safely be assumed that the Appellants are not claiming a lack of notice of the "change of control" to the SAB because Sections 162.1100.3 and 162.621.2 provide ample constructive notice of this. It must, therefore, be assumed that Appellants' are claiming a lack of notice that the SBOE would be re-evaluating the District's accreditation during the 2006-07 school year.

As discussed in detail in Point IV below, the Appellant City Board Members knew, even before they were elected, that the SBOE would be evaluating the District's accreditation in 2006-2007. First, the SBOE's accreditation rule, 5 CSR 50-345.100 (the "Accreditation Rule")[11] plainly states that any district "designated as provisionally accredited twice sequentially" must be re-reviewed after three years.[12] The District was

11 Appellants offered the Accreditation Rule as evidence. Exh. 1 (Pet. Vol. I).

12 As discussed in detail in Section IV, below, two additional provisions of the Accreditation Rule, 5 CSR 50-345.100(5) (A) and (D), provided authority for the SBOE to conduct a re-review of the District in 2006-2007 – and thus acted as notice to Dr.

first designated "provisionally accredited" in 2000, following the "grace period" provided for under the terms of the Deseg Settlement. L.F. 415-15 (Deseg Settlement) at §16. The SBOE designated the District "provisionally accredited" for a second time in a row in 2003-04. *See* Exh. 259. Accordingly, Appellants were deemed to have had notice as early as 2004 that the District would be re-reviewed in 2006-07.

In addition to this constructive notice, overwhelming evidence at trial established that Appellants had actual notice of the District's re-review. Dr. Bourisaw, a recent DESE employee well-versed in accreditation and review procedures, was appointed by the City Board as Interim Superintendent in July, 2006. Tr. I at 108. Because the District faced a potentially devastating "up-or-out" situation under 5 CSR 50-345.100(8)(A), *i.e.*, after two provisional accreditations, the District's 3-year re-review either had to show enough improvement to merit full accreditation or the District would face the loss of accreditation altogether, Dr. Bourisaw immediately began corresponding with DESE and the SBOE seeking another year (or two) before the District would be re-reviewed. Exh. 63. Dr. Bourisaw's requests continued through, and even after, the SBOE's March meeting at which the District's accreditation status was voted upon. Exh.

Bourisaw and Appellants that the District would be re-reviewed. These provisions of the Rule were triggered by the District's failure to adequately implement a "comprehensive school improvement plan" ("CSIP"), as well as the District's deteriorating academic performance and financial stability.

250. As the agent of the City Board, see §168.211.2, notice to Dr. Bourisaw – actual and constructive – constitutes notice to the Appellant City Board Members as well

Finally, Appellants not only had constructive notice and notice to their agent, Dr. Bourisaw, they had actual and personal notice as well. Beginning at least in September of 2006, Dr. Bourisaw had warned the City Board that the SBOE would be making an accreditation evaluation for the District by the end of the school year. Exh. 254. Accordingly, there can be no doubt that the City Board Members knew, and were deemed to know, that the Accreditation Rule required that the District be re-reviewed in 2006-07.

Hearing: As with Appellants' lack of notice claim, it is impossible to tell where or on what issue the City Board Members believe they were denied a constitutional right to be heard. The "change of control" provisions enacted in 1998 by SB781 take effect automatically and immediately upon the District's loss of accreditation and the Governor's appointment of a Chief Executive Officer to sit on the SAB. §§162.621.2 and 162.1100.3. Thus, once the issue of accreditation was decided, the SBOE had no control over whether powers would be transferred. In fact, once the District lost its accreditation, there was no decision to be made before the powers would be transferred and thus no decisionmaker before whom to be heard. Accordingly, as with Appellants' notice argument, we have to assume that Appellants are arguing that they were deprived of a right to be heard on the issue of accreditation.

But Appellants were heard on the issue of accreditation. In November 2007, Dr. Bourisaw appeared before the SBOE for the purpose of arguing that the District

should not lose its accreditation. Free to present any of the Board's arguments, other than to repeat her calls that the SBOE simply stand down and delay its re-review of the District, *see* Exh. 250, p. 8, Dr. Bourisaw argued the City Board felt the District was "back on track." Exh. 66. No Appellant City Board Member asked to be heard by the SBOE individually, but all were heard through their representative and agent, Dr. Bourisaw.

Even more important, following the SBOE's declaration that the District was unaccredited, but prior to effective date on June 15, 2007, the Appellants had an opportunity to be heard on the issue of accreditation through the review procedure set forth in the Accreditation Rule. There, Appellants were entitled to a hearing before the Commissioner to show cause why he should recommend to the SBOE that it reconsider its determination. 5 CSR 50-345.100(9). Appellants availed themselves of this opportunity and, though they waived their right to a hearing, *see* Exh. 51, the City Board submitted extensive written legal and factual arguments showing why they believed the District should be accredited. *See* Exh. 24 (Pet. Vol. III). These arguments were rejected. Exh. 51.

In addition, prior to the "change of control" taking place on June 15, 2007, Appellants had an opportunity to adduce evidence and make arguments in the Circuit Court on the issue of whether the SBOE's accreditation decision was proper, as well as the issue of whether the change of control was lawful. The Circuit Court denied Appellants' application for a temporary restraining order. L.F. 828.

Accordingly, Appellant City Board Members not only had an opportunity to be heard, the Appellants were heard, repeatedly. First, their Superintendent made a presentation to the SBOE in November 2006 and provided other written submissions prior to the SBOE's March 2007 decision. Second, after the SBOE's decision but before its effective date, Appellants made extensive arguments in both administrative and judicial proceedings as to why the District should not lose its accreditation or have its powers vested with the SAB. More "process" hardly can be imagined, and the amount of process extended to Appellants far exceeded what could possibly have been due under the Missouri or federal constitutions.

III. The Circuit Court Properly held that Section 162.1100 does not violate the Missouri constitutional prohibition against "special laws" because the Missouri Constitution, which itself uses the phrase "city not within a county," recognizes the unique nature of St. Louis and the political subdivisions there, and because, even if no general exception exists for the use of that phrase, its use in Section 162.1100 was open-ended and reasonable under the circumstances.

(Responds to Appellants' Point Relied On III)

The Circuit Court rejected Appellants' "special law" claims to Section 162.1100 based on this Court's decision in *Jefferson County Fire Protection Districts Assoc v. Blunt*, 205 S.W3d 866, 872 (Mo. banc 2006), in which this Court expressly recognized that the General Assembly constitutionally may – and often must – use the phrase "city not within a county" when limiting the scope of legislation. Cir. Ct. Op. at 54. Appellants urge this Court to narrow *Jefferson County* and adopt a rule that would only permit the "city not within a county" phrase in a statute that deals with the City of St. Louis itself, *i.e.*, that specific political subdivision. Thus, Appellants' proposed rule would strike any statute using this phrase to identify a different type of political subdivision occupying all or a portion of St. Louis City, as well as any statute using this phrase to identify any other subject such as individuals, business or other non-governmental entities located in St. Louis City. Such a rule is neither workable, wise, nor true to the constitutional underpinnings that *Jefferson County* tried to preserve.

Accordingly, the Circuit Court's decision rejecting Appellants' "special law" claim should be affirmed.

A. Appellants have challenged the wrong statute.

Appellants claim that, when the General Assembly enacted Section 162.1100.3 to effect a "change of control" in the event the District lost its accreditation, it violated the "special law" prohibitions in Article III, Sections 40 and 41 of the Missouri Constitution by limiting this "change of control" only to a school district "in a city not within a county." App. Brief at 82. One of the fundamental flaws in Appellants' case is that they have challenged the wrong statute. Section 162.1100.3 does not grant the broad powers to manage and control the District to the SAB, nor does it take those powers from the City Board. The provision in SB781 that actually divests the City Board of its control over the District is Section 162.621.2, not Section 162.1100, and Appellants have not challenged the constitutionality of 162.621 even though it uses precisely the same limiting phrase that Appellants condemn with respect to Section 162.1100. Section 162.621.2 states:

> Except as otherwise provided in this subsection, the powers granted in subsection 1 of this section shall be vested, in the manner provided in section 162.1100, in the special administrative board of the transitional school district containing the city not within a county if the school district loses its accreditation from the state board of education.

[Emphasis added.]

The reference made to "powers granted in subsection 1" is to those powers granting "general and supervising control, government and management" over the District vested in the "board of education" by Section 162.621.1. The phrase "board of education," in turn, refers to the City Board as created by Section 162.571**,** which provides:

> Every city in this state, not within a county, together with the territory now within its limits, or which may in the future be included by any change thereof, constitutes a single metropolitan school district . . . . Except as otherwise provided in section 162.621, the supervision and government of public schools and public school property therein is vested in a board, to be known as "The Board of Education of ....." (in which title the name of the city shall be inserted).

§162.571.1 (emphasis added).

Thus, even if Appellants succeed in striking down Section 162.1100, it is not clear how, or even if, that would impact the "change of control" effected by Section 162.621.2, which they have not challenged. Moreover, if Appellants successfully broaden their attack to include other statutes in Chapter 162 that use the "city not within a county" identifier, it is not clear how Section 162.571, to which the City Board owes its very existence, survives. Fortunately, the best way out of Appellants' logical hole is for this

Court to reaffirm, as it has so often in the past, that there is nothing constitutionally suspect about statutes limited by phrase "city not within a county."

B. The Missouri Constitution is not offended by the phrase "city not within a county," which appears in the Constitution itself.

As noted in *Jefferson County*, this Court historically has refused to entertain "special law" attacks on statutes employing the "city not within a county" limitation. *Jefferson County*, 205 S.W.3d at 872 (declining to overrule *Zimmerman v. State Tax Commission of Missouri*, 916 S.W.2d 208, 209 (Mo. banc 1996**)).** The seminal case in this regard is *Boyd-Richardson Company v. Leachman*, 615 S.W.2d 46 (Mo. banc 1981). There, this Court noted that the City of St. Louis is "given specific recognition in Art. VI, §31, of the constitution of Missouri as being *sui generis*, a unique entity in a unique class." *Id*. at 52-53.

Nor do this Court's precedents support Appellants' suggestion that the rule permitting the use of the phrase "city not within a county" is limited to statutes dealing with the City of St. Louis as a political subdivision. In *Treadway v. State*, 988 S.W.2d 508, 511 (Mo. banc 1999), this Court upheld enhanced vehicle emissions and inspection statutes, even though the statutes were limited not just to the "city not within a county" but to the entire St. Louis metropolitan area. Nothing in these statutes addressed the City of St. Louis as such, yet this Court

readily applied the safe harbor originally established in *Boyd-Richardson*. *Id.* (citing *Boyd-Richardson* progeny).

Significantly, the Missouri Constitution itself uses the "city not within a county" limitation in several places. *See* Mo. Const. Art. V, Sec. 27 (allocation of expenses of former probate judges) and Art. III, Sec. 37(h) (identifying grant-eligible sewer and water districts). This evidences the people's understanding that St. Louis presents unique regulatory challenges, not just with respect to the City itself as a political subdivision, e.g., Article V, Section 27, but also with respect to the many other political subdivision, e.g., Article III, Section 37(h) (sewer and water districts) created by reference to the City.

A text search of the Revised Statutes of Missouri reveals hundreds, if not thousands, of uses of the phrase "city not within county." Time and again, the General Assembly has found it necessary to limit the application of a particular statute to – or exclude from its reach – persons, places, entities, institutions, events, and political subdivision (including but not limited to the City itself) in St. Louis City. Chapters 160 to 171, governing public elementary and secondary education, contain numerous such examples including, as noted above, Section 162.571 to which the Appellant City Board owes its very existence.

In deciding whether to maintain the *Boyd-Richardson* safe harbor, or narrow it to near extinction as Appellants suggest, it should be noted that the public policy concerns behind the "special law" are rarely, if ever, present. In

Jefferson County, this Court noted that "logrolling" had become a high art when special laws were permitted freely. *Jefferson County*, 205 S.W.3d at 869. Bills that only affect only one legislators' constituency draw little attention or debate from other legislators. *Id*. Because of the size of St. Louis, however, bills limited to that locality still involve a significant number of legislators, and more often than not, bills that address St. Louis (either as a political subdivision or as a location) raise issues of public policy important to engender interest and participation by legislators whose districts' are not directly impacted. Most notably, in this category, would be SB781. Though some of its provisions impact only the District, SB781 was hotly debated and required a keen political balance be struck to gain enough votes for passage.

Accordingly, there has always been a firm basis for this Court's understanding that the "special law" prohibition in Article III, Section 40 of the Missouri Constitution is not offended by statutes limited to St. Louis. That basis is found in constitution's express acknowledgment that St. Louis exists in a class of which it is the sole member. That basis also exists in other provisions of the constitution that are limited in effect by the same "city not within a county" phrase. Appellants' contention that this Court should limit this rule only to statutes addressing the City of St. Louis as a political subdivision – but not other political subdivisions in the City such as the District – has no constitutional basis and is not workable.

C. Even under *Jefferson County*, Section 162.1100 is not "facially special."

It is important to note that Appellants' claim does not necessarily succeed even if this Court adopts their argument. If this Court limits (retrospectively) the *Boyd-Richardson* "city not within a county" safe harbor to statutes addressing St. Louis City as a political subdivision, Section 162.1100 would fall outside the safe harbor because, though it addresses a political subdivision in St. Louis City, it is not addressed to the City itself. Even without the safe harbor, Section 162.1100 can pass constitutional muster under the *Jefferson County* rubric.

Under *Jefferson County*, the threshold issue is whether the challenged statute is "facially special," *i.e.*, whether it restricts its operation "based upon close-ended characteristics, such as historical facts, geography, or constitutional status." *Jefferson County*, 205 S.W.3d at 870. By that definition, under these specific circumstances, the use of the phrase "city not within a county" in Section 162.1100 does not make that statute "facially special."

The key question is not whether there is or can be more than one city "not within a county." The key question in analyzing Section 162.1100, is whether there is or can be more than one school district in a "city not within a county." There are, at present, two school districts meeting that definition. When enacted in 1998, Section 162.1100.1 created a TSD in every "city not within a county," and provided that the boundaries of the TSD shall be the same as the boundaries of that of the city. Section 162.1100

recognizes – expressly and repeatedly – that the result of this is that there are two school districts now located in the "city not within a county," *i.e.*, the new TSD and the pre-existing (or regular) "school district." *See, e.g.*, §162.1100.1 (TSD to be responsible for such other programs "as designated by the governing body of the school district") and §162.1100.2(1) (one member of the governing body of the TSD "shall be appointed by the governing body of the district") and §162.1100.2(1) ("tax approved for the transitional district shall be assigned to the governing body of the school district").

Moreover, as Appellants point out in their Brief, there may be many more districts that meet the definition of being a school district "in a city not within a county" if the District lapses for failure to regain accreditation status. *See* §162.081.4 (upon lapse, the SBOE may "[e]stablish one or more school districts within the territory of the lapsed district"). Accordingly, the class upon which Section 162.1100 is open-ended because it may, in the reasonably foreseeable future, encompass more than the District and the TSD. In fact, Section 162.1100 may no longer encompass the District itself if the District ceases to exist through lapse.

D. The General Assembly's use of the "city not within a county" phrase in SB781 had a rational basis and was reasonably done.

Because Section 162.1100 is not "facially special," and thus is not presumptively unconstitutional, it survives scrutiny under Article III, Section 40, if the distinction it draws "is made on a reasonable basis." *Jefferson County*, 205 S.W.3d at 870. This

inquiry is no more exacting than a "rational basis" inquiry under equal protection analysis. *Id*. As discussed previously, SB781 enacted Section 162.1100 among many, many provisions that were assembled and agreed to in order to provide a basis for the settlement of the District's desegregation lawsuit. By 1998, the St. Louis desegregation lawsuit was the last such suit pending in Missouri. Because no other cases were pending, no other cases needed settling. This, alone, provides the rational basis necessary to justify the use of "city not within a county" in SB781.

Moreover, the General Assembly's reasonableness is also evidenced by the fact that it did not simply limit all of SB781 to St. Louis. Instead, it carefully distinguished sections that could be given statewide application and those sections that were so closely related to the potential desegregation settlement that they had to be restricted to St. Louis. For instance, changes to the foundation formula, *i.e*., Sections 163.011 and 163.031, which were intended to replace some of the loss of court-ordered funding that a settlement would cause by providing significant state funding increases for schools with substantial at-risk populations, were drafted to be effective statewide as soon as the St. Louis desegregation lawsuit was settled. *See* SB781, Section B (1998).

On the other hand, those provisions viewed by the General Assembly as necessarily intertwined with the end of federal court supervision in St. Louis were limited to school districts "in a city not within a county." One obvious example is Section 162.1060, in which the General Assembly sought to replace the highly popular and successful court-ordered, inter-district student transfer program that would be ending

with any settlement of the case. This program was uniquely designed to serve the needs of students in the District and the surrounding suburban school districts, and would have no application outside that context.

Perhaps even more important, at least from the standpoint of creating the necessary substitute for court-ordered funding, is Section 162.1100.5, which allowed the District – alone among Missouri's 425 school districts – to substitute a sales tax for an increase in property tax levy and thereby draw down significantly more state aid through increased "local effort." And, of course, the General Assembly limited the "change of control" provisions in Sections 162.621.2 and 162.1100.3 to the District as a way to create a pathway for change if performance deteriorated following a settlement.

Accordingly, the General Assembly's desire to facilitate a settlement of the only remaining desegregation case in the state, together with its careful differentiation between those provisions that could be given statewide effect and those that would be effective only in St. Louis, provide a more than reasonable basis for the distinctions drawn in Section 162.1100 and elsewhere in SB781, far surpassing what is needed to survive rational basis scrutiny.

It is worth noting the chaos that would ensue should this Court follow the Appellants' invitation to strike down Section 162.1100 and, subsequently, all statutes limited to a "city not within a county" other than statutes addressed solely to the City of St. Louis as a political subdivision. In the field of elementary and secondary education alone, St. Louis immediately would be cut adrift. For instance, as noted above, the City

Board itself would not exist because it was created in Section 162.571 solely by virtue of that phrase. The other provisions of SB781 targeted to transitioning away from federal court supervision such as Section 162.1060, providing a voluntary, inter-district transfer program, would also fall. Finally, every statute in Chapters 160-171, and Chapters 177 and 178, that uses the term "metropolitan district" would fall, because the definition of that term is limited to the District by use of the phrase "a city not within a county." §160.011(6). These would include provisions such as Section 164.071 which allows the City Board to levy taxes for school purposes, Section 164.141 which allows the City Board to issue certain bonds, Sections 165.161-301 which allow the City Board to keep money in banks and write checks and perform audits, Section 168.211 which allows the City Board to hire a superintendent, and Section 168.251 which allows the District to hire employees, to name only a few.

Accordingly, this Court should affirm the Circuit Court's decision rejecting Appellants "special law" claims. First, laws restricted on the basis of the "city not within a county" do not violate Article III, Section 40, because of constitutionally recognized need for the General Assembly to be able to respond to the unique environment of St. Louis and the many unique political subdivisions other than the City itself. Second, the use of "city not within a county" in Section 162.1100 and elsewhere in SB781 is not close-ended because the class of school districts potentially affected realistically could expand beyond just the City Board. Finally, the General Assembly's efforts to target

certain of the provisions in SB781, including Section 162.1100, to the City of St. Louis was reasonable and passes rationale basis review.

IV. The Circuit Court properly found that the SBOE's decision to classify the District as unaccredited was neither arbitrary nor capricious. The SBOE based its decision on valid criteria and objective information, including DESE's evaluation of the District's performance, and its failure to re-review the District under Resource and Process Standards was within its discretion. The SBOE's Performance Standards were well understood by school districts, and the District in particular. The fact that the UYAPR Manual – DESE's highly detailed exposition to school districts regarding evaluations under the Performance Standards – had not been separately promulgated was proper and, in any event, irrelevant to the overall reasonableness of the SBOE's decision. Finally, even now, Appellants offer no basis for believing that the SBOE's decision was anything but absolutely factually correct.

(Responds to Appellant's Point Relied On IV)

The Circuit Court, after reviewing hundreds of exhibits and hearing hours of testimony, concluded that the SBOE's decision classifying the District as "unaccredited" was supported by substantial and competent evidence, and was neither arbitrary nor capricious. Cir. Ct. Op. at 31, 34-38. Characterizing the evidence as "overwhelming," the Circuit Court held that Appellants failed to meet the "high and exacting standard" required to justify interfering with the SBOE's decision. Cir. Ct. Op. at 35, 36.

Now, Appellants ask this Court to overrule the Circuit Court's decision, arguing the following grounds: (1) that the SBOE failed to assess the District under the Resource and Process Standards which Appellants assert is required in the Accreditation Rule; (2) that the SBOE based its decision, in part, on the frequent changes of leadership and the dire financial condition in the District, which Appellants claim are not proper considerations under the SBOE's Accreditation Rule; (3) that the Performance Standards set forth in the Accreditation Rule, 5 CSR 50-345.100, are too vague to adequately inform the District what was required; and (4) that the SBOE's accreditation decision was "void" because it was based on an un-promulgated rule, *i.e.*, DESE's "Understanding Your APR Manual" (the "UYAPR Manual").[13]

As with most of Appellants' other points, this argument bears little relationship to what was argued at trial.[14] Nevertheless, none of Appellants' claims, nor the combined

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13 Appellants' Point Relied On IV falls far short of what is required by Rule 84.04(d), and thus preserves nothing for appeal. *Schmidt v. Warner*, 955 S.W.2d 577, 583 (Mo. App. 1997). By setting forth (and responding to) what Appellants seem to be arguing, the State Respondents should not be seen to have conceded that the Point is properly put.

14 As set forth in the Circuit Court's opinion, Cir. Ct. Op. at 34-35, Appellants challenged the SBOE's accreditation decision as "arbitrary and capricious" at trial on the following grounds: "(1) that the SBOE lacked any authority to address the District's accreditation until 2008-09 because the District had been reviewed in 2003-04; (2) that DESE required college placement information of the District that it does not require of

weight of these claims, provides a sufficient basis for this Court to overrule the Circuit Court's determination. Accordingly, this Court should affirm the Circuit Court's decision finding that the SBOE acted reasonably, and that the SBOE's decision to classify the District as "unaccredited" was neither arbitrary nor capricious.

A. The Standard of Review

Appellants take issue with the Circuit Court's determination that Appellants did not attempt to raise an "uncontested case" review under Section 536.150 in their Amended Petition and that Appellants would have lacked standing to do so even if they had attempted to raise such a claim. *See* Cir. Ct. at 33. As addressed in Point V, *infra*, the Circuit Court was correct. Regardless of how that issue is resolved, however, the Circuit Court's analysis of the SBOE's accreditation decision – as well as this Court's

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other districts, and DESE should have accepted the District's "mix-and-match" collection of data under that standard even though it was collected using two dissimilar methodologies; (3) that DESE should be estopped from advising the SBOE that the District did not meet the Career Education Standard because DESE mistakenly advised the District in December 2006 that it had met the Standard; (4) that the SBOE unlawfully initiated a state "takeover" of the District without the two-year "grace period" provided to other districts; and (5) that the SBOE should have excused the District's chronic and persistent poor performance because of the socio-economic demographics of its students." Each of these claims now has been abandoned.

review of the Circuit Court's decision – should be the same.[15] Whether construed as a common law claim for a declaratory judgment or an "uncontested case" review under Section 536.150, there is no material difference in the standards applied by the Circuit Court, or by this Court on appeal. Under either approach, the burden on the party seeking to disturb the administrative decision is very high. And, of course, the standard for disturbing a trial court's factual findings and legal conclusions following a bench trial is every bit as demanding.

In reviewing administrative decisions, courts are hesitant to "second guess" in the complex areas committed by law to agency discretion. Thus, the standard that administrative decisions will be upheld unless "arbitrary and capricious" is highly deferential.

> An administrative agency acts unreasonably and arbitrarily if its decision is not based on substantial evidence. Whether an action is arbitrary

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15 The distinction between common law claim and a Section 536.100 claim is still important, however. One reason is that it highlights what Appellants now tacitly concede in this Court, *i.e.*, that the mere fact that DESE's "Understanding Your APR Manual" had never been separately promulgated under Chapter 536 cannot be dispositive in an of itself. It is relevant, if at all, only as one factor to be considered in whether the SBOE's accreditation decision was arbitrary or capricious. Pled as a separate count in the Circuit Court, *see* Amended Petition at L.F. 8-9, ¶¶ 34-43, Appellants here raise it solely as one element of their arbitrary and capricious claim in their Point Relied On IV.

> focuses on whether an agency had a rational basis for its decision. Capriciousness concerns whether the agency's action was whimsical, impulsive, or unpredictable. To meet basic standards of due process and to avoid being arbitrary, unreasonable, or capricious, an agency's decision must be made using some kind of objective data rather than mere surmise, guesswork, or "gut feeling." An agency must not act in a totally subjective manner without any guidelines or criteria.

Missouri NEA v. Missouri State Bd. of Educ., 34 S.W.3d 266, 281 (Mo. App. 2000) (emphasis added) (citations omitted). Accordingly, a challenger raising an "arbitrary and capricious" claim must do more than simply argue an inadequate basis for a decision, the challenger must show "willful and unreasoning action, without consideration of and in disregard of the facts and circumstances." *Psychiatric Healthcare Corp. v. Department of Social Svcs.*, 100 S.W.3d 891, 904-05 (Mo. App. 2003).[16]

16 The Circuit Court specifically found, among other things, that the SBOE's decision was supported by "competent and substantial evidence." *Missouri NEA*, 232 S.W.3d at 645, points out that this standard applies only in contested case reviews. As noted, the Circuit Court's decision must be affirmed unless it was "arbitrary or capricious." Accordingly, Appellants' efforts to characterize certain evidence as "not competent" goes for naught. App. Brief at 101-103.

If the challenger fails to carry this burden in the trial court, and if – as here – the claims are rejected on the basis of the credibility of the witnesses and the persuasiveness of their testimony, the challenger's burden on appeal is even heavier:

> On appeal, the appellate court reviews the judgment of the circuit court, not the decision of the administrative agency . . . . Thus, the scope of appellate review is governed by Rule 73.01 as construed *in Murphy v. Carron*, 536 S.W.2d 30 (Mo. banc 1976). Accordingly, the appellate court reviews the circuit court's judgment to determine whether its finding that the agency decision was or was not unconstitutional, unlawful, unreasonable, arbitrary, capricious, or the product of an abuse of discretion rests on substantial evidence and correctly declares and applies the law.

Missouri NEA, 34 S.W.3d at 274-75. The appellate court must "view the evidence, and all reasonable inferences drawn therefrom, in the light most favorable to the judgment of the trial court." *Benton v. Dismuke*, 230 S.W.3d 10, 12-13 (Mo. App. 2007). Moreover, the reviewing court should not weigh the evidence unless "the record engenders a firm belief that the judgment is wrong." *State ex rel. Rice v. Bishop*, 858 S.W.2d 732, 737 (Mo. App. 1993).

B. Appellants mischaracterize the SBOE accreditation process and many of the essential documents relating to that process. The Accreditation Rule refers to one document for the relevant standards, the MSIP

Standards and Indicator Manual, and another "annual" document for the "appropriate scoring guides and procedures" of analysis, now known as the UYAPR Manual.

The General Assembly has assigned to the SBOE the duty to "[c]lassify the public schools of the state . . . and formulate rules governing the inspection and accreditation of schools preparatory to classification." §161.092(9). The SBOE has promulgated rules to implement this accreditation process at 5 CSR 50-345.100 ("Accreditation Rule"). In promulgating this rule, the SBOE incorporated by reference "the Missouri School Improvement Program (MSIP) Standards and Indicators Manual which is comprised of qualitative and quantitative standards for school districts." 5 CSR 50-345.100(1). These standards are "organized into three (3) sections – Resource Standards, Process Standards and Performance Standards." *Id*.

In 2006-2007, the SBOE and DESE were in the Fourth Cycle since the MSIP approach was developed.

In its Accreditation Rule, the SBOE delegates to DESE the task of analyzing Missouri school districts and assembling the information necessary for the SBOE's accreditation decisions.

> During each year, [DESE] will select school districts which will be reviewed and classified in accordance with this rule, including the standards, with the appropriate scoring guide and forms and procedures outlined in the annual MSIP.

5 CSR 50-345.100(2) (emphasis added).

The Rule's reference to the "appropriate scoring guides and forms and procedures" is a reference to DESE's annual "Understanding Your APR Manual." *See* Exh. 3 (Pet. Vol. I). The Rule refers to the UYAPR Manual as "the annual MSIP," *see* 5 CSR 50-345.100(2), because scoring guides based on comparisons to statewide performance averages must be changed or updated every year.

The UYAPR Manual is the document at the focus of Appellants' "un-promulgated rule" claims, which is addressed below. Though Appellants correctly point out that the UYAPR Manual was never separately promulgated, Appellants conveniently ignore the fact that, like the MSIP Standards and Indicators Manual, the UYAPR Manual is referenced – by form and purpose if not by precise name – in the SBOE's Accreditation Rule itself. *See* §536.021.2(3) (promulgated rule "may incorporate by reference only if the material so incorporated is retained at the headquarters of the state agency and made available to any interested person at a cost not to exceed the actual cost of the reproduction of a copy"). It was uncontested at trial that the UYAPR Manual is maintained by DESE and the SBOE and made available to all districts at no charge through DESE's website. *See* http://dese.mo.gov/divimprove/sia/msip/index.html.

The UYAPR Manual – referenced in the Accreditation Rules as the "annual MSIP" containing the "scoring guide and forms and procedures," 5 CSR 50-345.100(2) – describes in great detail precisely what information DESE uses and how to evaluate

performance under each of the Performance Standards set forth in the MSIP Standards and Indicators Manual. Recognizing that most Performance Standards are articulated in terms of scores that are either "high or increasing," the UYAPR Manual states that "[p]erformance standards will be evaluated using status and progress measures to determine if a standard is met." Exh. 3 (Pet. Vol. I) at p1. (emphasis added).

For a school district's "status" under a particular standard, an average of the school district's last five years' performance is compared to the performance of all districts around the state. *Id.* "Status" is judged "High1" if it equals or exceeds one standard deviation above the state mean, "High2" if 1/3 of the standard deviation above the state mean, and so on. *Id.* If the district's score is below one standard deviation below the statewide mean, the district's performance on that standard is judged "floor." *Id.* For a school district's "progress," the UYAPR Manual explains that year-over-year comparisons, rolling averages and the "3 over 2" method (*i.e.*, average of the last three years compared to the average of the first two years) are used, whichever is most favorable to the school district. *Id.*

The UYAPR Manual not only details how performance is evaluated for each Performance Standard, it also sets forth DESE's expectations for minimally adequate performance on each standard. *See* Exh. 3 (Pet. Vol. I) at p1 ("The detailed scoring guide for each performance standard are [sic] outlined in the section titled "SCORING GUIDES"). Finally, the UYAPR Manual sets forth DESE's expectations for aggregate

scores that reflect minimally acceptable performance for all standards that will be used to formulate accreditation recommendations. Exh. 3 (Pet. Vol. I) at p47.

EXAMPLE: In order to illustrate the role each document plays in this process, one claim regarding DESE's analysis of the District's performance that Appellants hotly contested at trial, *see* Cir. Ct. Op. at 22-28, (but which Appellants have now abandoned) was the Performance Standard for "Career Education Courses."

- The SBOE's Accreditation Rule incorporates by reference the MSIP Standards and Indicators Manual, which sets forth the following performance standard under the heading of "Career Preparation:"

  9.4*2 The percentage of credits taken by juniors and seniors in Department-designated vocational classes is high or increasing.

  Exh. 2 (Pet. Vol. I) (the MSIP Manual) at p.27.

- The SBOE's Accreditation Rule states that DESE will review districts' performance with the "appropriate scoring guides and forms and procedures" from the UYAPR Manual. 5 CSR 50-345.100(2).

- The "procedures" for evaluating Standard 9.4*2 (Career Education Courses), including the data DESE will use and the analysis it will perform, are described on page 12 of the UYAPR Manual. Exh. 3 (Pet. Vol. I) (UYAPR Manual) at p12, which states: "The percent of credits earned in career education courses is determined by dividing the <u>units of credit times enrollment in approved career education courses</u> by <u>grades 11 and 12 enrollment times credit[s] possible</u>, then

multiplying by 100." *Id*. (Emphasis in original). The underlined terms are then explained, and school districts are told where to report the relevant information in the Core Data system. *Id*.

- The UYAPR Manual also describes the calculations needed for the Career Education Course analysis, and gives detailed examples of how a district's average for Career Education Courses is calculated (career education enrollment times credits, divided by junior and senior enrollment times credits, times 100), as well as how a district's five-year average is calculated (adding each year's percentage together and dividing by 5). *Id*. at 13.
- The "appropriate scoring guide" for Performance Standard 9.4*2 is found at page 37 of the UYAPR Manual. Exh. 3 (Pet. Vol. I) at p37. This "scoring guide" is divided into separate scoring areas for "status" and "progress."
- Using the District's recent performance in the College Placement category, *see* Exh. 84 (Def. Vol. I) pp. 3, 6 (District's 2007 APR) (included in Resp. App. at A-129), the District earned "0" points for "status" (because its current 5-yr average of 11.4% was more than one standard deviation below the statewide mean), and "2" points for "progress" (only twice in the five previous years had the District had a year-over-year increase of 1% point or more). *Id*. Finally, given DESE's expectation that even marginal performance on this standard will generate a combined total of 4 "status" and "progress" points, DESE's evaluation of the District's data was that this Performance Standard was "not met." *Id*.

Whatever else may be said about the Accreditation Rule and DESE's role in reviewing school districts' performance and formulating accreditation recommendations, it bears repeating that DESE's role in the accreditation process is only advisory. The SBOE has expressly delegated to DESE the task of reviewing districts' performance, but Section 161.092(9) gives the SBOE, and only the SBOE, the power and the obligation to made accreditation decisions. It is free to ignore DESE's recommendations, evaluate a school districts' performance differently, and even has the authority to waive its own rules at any time. §161.210.

C. Appellants' claim that the SBOE was arbitrary and capricious for failing to evaluate the District under Resource and Process Standards mischaracterizes the nature of the District's review and ignores the plain language of the Accreditation Rule.

Nowhere in the Amended Petition do Appellants argue that the SBOE's decision should be vacated or reversed based on a failure to consider the District's performance under the Process and Resource Standards. Now, in the Supreme Court, Appellants give this argument center stage. But, even if Appellants' claim were part of this lawsuit, properly presented and preserved below, it cannot withstand scrutiny. DESE's 2006-2007 review of the District, on which the SBOE made its decision classify the District as unaccredited, was a limited re-review that was authorized, in fact required, by the Accreditation Rule. 5 CSR 50-345.100(8). Appellants' claim that the SBOE simply failed to consider the Resource and Process Standards in the District's re-review

distorts the complex and long-running sequence of circumstances that led to the District's loss of accreditation.

The District had regular, "full" review during the 2003-04 school year. During that review, DESE did review the District using the Resource and Process Standards, as well as the Performance Standards, and the SBOE designated the District "provisionally accredited" based on the results of DESE's analysis of all of these standards. *See* Exh. 267 (Def. Vol. III) (SBOE Minutes, September 9-10, 2004, attaching District's accreditation summary).

In its 2003-2004 review, the District received 7 of 11 possible points under the Resource Standards, and 18 of 38 possible points under the Process Standards. *Id*. at AGO3715. But, under the Performance Standards, the District received only 64 of a possible 100 points leading to DESE's recommendation, which the SBOE accepted, that the District be provisionally accredited. *Id*.

Ordinarily, having been reviewed in 2003-04, the District would not be due its next "full" review, until 2008-09. But, the SBOE requested that DESE conduct a re-review of the District under the Performance Standards in 2006-2007. Appellants challenged the SBOE's authority to order this re-review at trial, and the Circuit Court found that the re-review was not only authorized by the Accreditation Rule, it was required by that Rule. Cir. Ct. Op. at 38-40. Appellants have abandoned this claim on appeal. Nevertheless, a review of the grounds on which the Circuit Court rejected Appellant's now-abandoned claim are essential to an understanding of why Appellant's

late-arising claim concerning the Resource and Process Standards must be also be rejected.

The "provisional accreditation" designation given to the District by the SBOE in 2004 was the District's second such designation in a row. *Id*. at AGO3710. Subsection (8) of the Accreditation Rule states:

> A school district designated provisionally accredited twice sequentially . . . will be designated provisionally accredited for three (3) years at which time a re-review will be conducted. A district's accreditation designation may not be raised more than one (1) level during a re-review.
>
> (A) The board may lower a district's accreditation if a district fails to gain full accreditation after being designated provisionally accredited twice sequentially.

5 CSR 50-345.100(8) (emphasis added).

Under this provision, not only was the SBOE authorized to re-review the District in 2006-2007, it was required to do so. This re-review was also authorized by Section (5) of the Accreditation Rule which provides, in pertinent part:

> The [SBOE] may consider changing a district's classification designation after its regularly scheduled review or upon its determination that the district has:
>
> (A) Failed to implement its school improvement plan at an acceptable level;
>
> . . . .

(D) Altered significantly the scope or effectiveness of the programs, services or financial integrity upon which the original classification was based.

5 CSR 50-345.100(5).

At trial, the evidence concerning Subsection (5) of the Accreditation Rule was uncontested and overwhelming. The District admitted that it had no Comprehensive School Improvement Plan ("CSIP"), and thus it could hardly have been adequately implementing one. Tr. I at 148 (Dr. Bourisaw: City Board did not have a CSIP in December of 2006 despite having been provisionally accredited since 2000); Tr. I at 56 (Appellant Downs: there was no CSIP when he joined the City Board in 2006). Based on this evidence the Circuit Court held that SBOE's determination that 5 CSR 50-345.100(5)(A) justified a re-review in 2006-2007 was not "arbitrary and capricious."

In addition, the Final Report from the Commissioner's Advisory Committee[17] provided ample evidence that both the District's financial integrity and the effectiveness of its programs were deteriorating. Therefore, the Circuit Court properly found that the

17 Appellants are now claiming that the SBOE had no authority to empanel an Advisory Committee, though this claim too was not raised below. App. Brief at 102. Moreover, Appellants contend that the SBOE was "arbitrary and capricious" in considering the information in the Advisory Committee's Report even though it was that information, at least in part, that justified the SBOE decision to re-review the District in 2006-2007. These claims are addressed in the next subsection of this Point IV.

SBOE's determination that 5 CSR 50-345.100(5)(A) justified a re-review in 2006-2007 was not "arbitrary and capricious." Cir. Ct. Op. at 36-40.

The scope of the District's re-review was limited by the purposes of that review. Because it was the District's poor showing on the Performance Standards that resulted in the "provisionally accredited" designation in 2003-2004, and because no material change in the District's results under the Resource and Process Standards was likely after only three years, DESE's mid-cycle review of the District reasonably focused on the Performance Standards. Moreover, in light of the "up-or-out" nature of Subsection (8)(A), such that only a dramatic improvement in student achievement would justify the SBOE in awarding the District full accreditation, the SBOE necessarily focused its accreditation decision on the issue of performance as well.

Accordingly, this Court should reject Appellants' claim that the SBOE's determination was "arbitrary and capricious" merely because DESE did not review the District under the Resource and Process Standards. The SBOE had considered those Standards in the District's most recent "full" review and those Standards were not material to the decisions attendant to the District's re-review in 2006-2007.

D. The SBOE was not "arbitrary and capricious" for considering the Advisory Committee Report, and its information about the District's deteriorating performances and finances (as well as other facts such as the District's lack of stable leadership), because such information was relevant to the SBOE's decision to re-establish the TSD and order a re-review of the District for accreditation purposes.

At the outset, Appellants contend that the SBOE lacked authority to create an Advisory Committee to compile information about the District. App. Brief at 102. Besides the fact that this argument was never made to the trial court, and was not included in any Point Relied On thus preserving nothing for review, *Schmidt*, 955 S.W.2d at 583, appellants also misstate the underlying facts inasmuch as it was the Commissioner of Education, Dr. King ("Commissioner") who empanelled the Advisory Committee chaired by Frankie Freeman and William Danforth. Exh. 58 (Def. Vol. I) at p. 9.

The performance of the District was not a new concern for the SBOE in 2006-07. Mr. Herschend, President of the SBOE in March 2007 and a member of the SBOE for sixteen years (Tr. II at 184), stated that the District's performance had been at or below minimally acceptable levels since 1994. Tr. II at 191; Exh. 259 (Def. Vol. II) (DESE's Report to SBOE showing District's APRs for the nine years ending 2006-2007, reflecting performance scores low enough to merit loss of accreditation in six of the nine years).

The SBOE was also well aware of the District's financial troubles. *See* Exh. 268 (Def. Vol. II) (series of correspondence between Commissioner King and the SBOE,

from 2004 to present, detailing growing concern about the performance and financial viability of the District). The District had been experiencing severe financial difficulties, falling from a positive fund balance of $63 million at the end of June 2001, to a balance of negative $30 million on June 30, 2006; in essence spending in excess of $90 million more than it took in during that five-year period. Exh. 72 (Pet. Vol. V) at p. AGO4863 (the "Advisory Committee Report").

In July of 2006, following the "abrupt resignation" of then-Superintendent Creg Williams, the Commissioner appointed an Advisory Committee to advise him – as well as the SBOE and the community at large – regarding the issues confronting the District and possible remedies or responses under applicable statutes. Exh. 58 (Def. Vol. I) at p. 9. The purposes of the Advisory Committee, as set forth in its Final Report of this Advisory Committee, were to (1) "analyze SLPS academic performance," (2) "review the 1999 Desegregation Settlement Agreement, governance of the SLPS, and accreditation status," (3) "clarify the financial condition of the SLPS," (4) "clarify the primary concern of parents, community residents, and teachers concerning the governance and operations of SLPS," and (5) "consider possible state law concerning the State's involvement with SLPS." Exh. 72 (Pet. Vol. V) (Advisory Committee Final Report) at p. AGO4855. This Final Report was issued on December 17, 2006.

The Commissioner presented the Advisory Committee's Final Report to the SBOE at its meeting on January 11, 2007. Exh. 269 (Def. Vol. III) at p. 4 (SBOE January Meeting Minutes). The Advisory Committee's Report stated in no uncertain terms: "Our

committee believes that the schools exist to educate children; that the SLPS are not doing an adequate job; that the current crisis demands attention and that the majority of the St. Louis region would like a change." Exh. 72 (Pet. Vol. V) at p. AGO4870. The Advisory Committee recommended, first and foremost, that "[t]he State Board of Education decide on accreditation status of the SLPS. Subsequent actions depend on that decision." *Id.* The Advisory Committee also recommended that the SBOE, acting pursuant to Section 162.1100, re-establish an overlay district, or "transitional school district" ("TSD"), so that a TSD would be in position to assume responsibility for the operation and control of the District pursuant to Section 162.1100 should the SBOE declare the District "Unaccredited." *Id.* The SBOE took no immediate action on these recommendations. Tr. II at 193.

Appellants claim that the SBOE was "arbitrary and capricious" because it considered the Community Advisory Committee's Report, which contained information on the District finances leadership (including the fact the District had six different Superintendents in a span of four years), *see* Exh. 72 (Pet. Vol. V) at AGO5035, which information Appellants contend was not relevant to the Performance Factors in the Accreditation Review.

First, Appellants have cited no authority – nor is there any – for their position that the SBOE must make its accreditation decisions with blinders on, or that it is required mechanistically to apply the Standards in a vacuum devoid of context. Such a rule of law, if it existed, would be the worst type of pubic policy in that decisionmakers

should be as informed as possible, and their decisions should be made with the fullest understanding of the surrounding circumstances and possible consequences. As long as the SBOE's decision was made on the basis of the Performance Factors set forth in the Accreditation Rule, and there is no evidence even suggesting that it was not, the mere fact that the SBOE was aware of other considerations does not render their decision arbitrary or capricious.

Moreover, Appellants' argument depends on its unsupported assertion that the only issue on which the SBOE considered the Community Advisory Committee's Report was the District's accreditation decision. Appellants' claim ignores the fact, however, as noted in the preceding point, that the information in that Report concerning the deteriorating finances and performance at the District was an essential part of the SBOE's determination that a re-review of the District was justified under the Accreditation Rule, 5 CSR 50-345.100(5)(A) and (D). Cir. Ct. Op at 38. Accordingly, this Court should reject Appellants' claim that the SBOE was "arbitrary and capricious" for considering the Community Advisory Committee's Report or the District's financial information and history of executive turnover contained therein.

E. The Performance Standards in the Accreditation Rule were not vague, the District knew precisely what was expected of it, and that application of those Standards by DESE was uniform and fair.

Appellants' Point Relied On IV, as part of its claim that the SBOE's decision was "arbitrary and capricious," states that "the MSIP standards, standing alone, are too vague

to adequately inform a district what is required for accreditation." App. Brief at 40, 89. The Point does not cite or even mention the state or federal due process constitutional provisions, nor use terms of art suggesting a constitutional claim such as "void for vagueness." The mere fact that such citations or expressions are used in the body of Appellants' brief does not overcome the failure to craft a proper Point Relied On. *Pruellage v. De Seaton Corp*., 380 S.W.2d 403, 405 (Mo. 1964) ("[t]he questions for decision on appeal are those stated in the points relied on; a question not there presented will be considered abandoned"). Accordingly, no constitutional claim regarding the supposed "vagueness" of the standards in the Accreditation Rule is preserved for review. Appellants had raised a constitutional "void for vagueness" claim in the trial court, *see* Amended Petition at ¶35, but that claim now has been abandoned.

Even if Appellants' Point Relied On IV is adequate to preserve a constitutional "void for vagueness" claim, the Circuit Court properly held that Appellants lacked standing to pursue such claims. "Vagueness" claims are grounded in constitutional due process protections, and the City Board has no due process rights. *Committee for Educational Equality*, 878 S.W2d at 450 n. 3 (a school district is not a "person" and has no constitutional right to due process); *Jackson County v. State*, 207 S.W.3d 608, 614 (Mo. banc 2006) (vagueness doctrine stems from due process clause and political subdivisions lack due process rights).

The Circuit Court also properly held that the individual Appellants could not make such "void for vagueness" claims because the Performance Standards did not apply to

them and thus it does not matter if they understand them or not. The Circuit Court found that the individual Appellants had "fail[ed] to allege or establish the deprivation of a liberty or property interest implicated by the enforcement of the MSIP standards." Cir. Ct. Op. at 53. The Circuit Court also found "[s]tudents and parents simply do not have a liberty or property interest implicated by the application of the MSIP process for the accreditation of school districts, nor any constitutionally protected interest in having the District labeled as 'accredited' when the facts clearly establish that the performance of the District has not earned that status." *Id*. Appellants provide no basis for overruling this determination. *See Fitzgerald v. City of Maryland Heights*, 796 S.W.2d 52, 56 (Mo. App. 1990) (deprivation of liberty or property interest required for due process claim).

Even though Appellants have abandoned their constitutional claim regarding "vagueness" (or if not abandoned then this Court should reject such a claim for lack of any protected interested on the part of any Appellant), Appellants have properly raised the issue of whether the alleged "vagueness" of the standards somehow rendered the SBOE's decision "arbitrary and capricious" for considering those standards. This argument, however, lacks any basis in fact or law and should therefore be rejected.

There was no evidence at trial that there was any confusion over the Peformance Standards nor the methods used by DESE to evaluate the District's performance. In fact, the opposite is true. Dr. Bourisaw, then District Superintendent, was a recent DESE employee with a high degree of understanding regarding the Performance Standards. Tr. I at 109-12. Her presentation to the City Board on September 2006, entitled "Focus on

Accreditation," shows no uncertainty in what the Performance Standards require. Exh. 254. The Office of Accountability, Assessment and Intervention in the District posted an accreditation overview on its website evidencing a high degree of understanding of Performance Standards. *See* Exh. 255 ("only Performance Standards will determine accreditation for Cycle 4"). Finally, the UYAPR Manual, described above, goes through the Performance Standards in great detail. Appellants insist that the UYAPR Manual cannot be considered because it was not separately promulgated. As explained in the next argument under this Section IV, Appellants' claim is simply wrong because the UYAPR Manual is not a "rule" and, even if it is, DESE's failure to promulgate the Manual provides no basis for overturning the SBOE's decision. For purposes of Appellants' "vagueness" argument, whether or not DESE should have separately promulgated the UYAPR Manual, the fact that its was not promulgated does not mean that the it did not exist or that the school districts (including the District) were not intimately familiar with its contents and provisions and the light it shed on the Performance Standards. The UYAPR Manual did exist and was widely considered to be the definitive authority. In arguing that this can now be ignored, Appellants are simply trying to bootstrap their "un-promulgated rule" argument – properly held by the Circuit Court not to be dispositive even if correct – into a dispositive argument under the guise of "vagueness." This Court should reject this argument and affirm the Circuit Court's decision finding that the Circuit Court was neither arbitrary or capricious.

F. DESE was not required to separately promulgate the UYAPR Manual, referenced in the Accreditation Rule. The UYAPR Manual is not a "Rule" because it lacks any intended "force and effect of law. It also meets the "inter-governmental manual exception" under the definition of "Rule" in Section 536.010(6)(c). Finally, even if it should have been separately promulgated, DESE's failure to do so does not render the SBOE's decision "arbitrary and capricious."

Even though the facts adduced at the trial show that the District's performance unquestionably merited a loss of accreditation, Appellants claim that the SBOE's accreditation decision was "arbitrary and capricious" because DESE's UYAPR Manual should have been separately promulgated as a "rule" using the "notice and comment" procedures in Chapter 536. The Circuit Court properly held that DESE's failure to separately promulgate the UYAPR Manual did not, in an of itself, render the SBOE's accreditation decision "arbitrary and capricious." Cir. Ct. Op. at 34. This holding should be affirmed.

Moreover, there are several independent and alternative grounds on which to affirm the Circuit Court's judgment. *Fix v. Fix*, 847 S.W.2d 762, 766 (Mo. banc 1993) (judgment in a bench-tried case that reaches a correct result will not be set aside even if the trial court gives a wrong or insufficient reason for its judgment). First, the UYAPR Manual is not a "rule" under Section 536.010 as it does not have, and was never intended to have, force and effect of law. Second, the UYAPR Manual is excluded from the

definition of "rule" under the "inter-governmental manual" exception. §536.010(4)(c). Finally, as explained more fully in Point V, *infra*, the City Board cannot invoke the protections of Chapter 536 in its relationship with the SBOE, and none of the individual Appellants have any standing to complain about DESE's Manual as it does not impact their rights, duties, liabilities or procedures.

The document at issue is the UYAPR Manual. Exh. 3 (Pet. Vol. I). DESE creates and distributes this manual to school districts to help them understand the APRs published by DESE. The UYAPR Manual sets forth the technical specifics of DESE's analysis for each of the Performance Standards set forth in the Accreditation Rule. It explains what data is relevant to which standards. It explains where and how that data is to be reported by the districts. Finally, the UYAPR Manual explains precisely how DESE "scores" the data, *i.e.*, the minimum level of performance that DESE expects based on continually adjusted analyses of results from all 524 school districts.

1. DESE did not need to promulgate the UYAPR Manual because it was incorporated by reference.

As noted above, the UYAPR Manual is not an unauthorized or unexpected interloper in the SBOE's accreditation process. Instead, it is specifically referenced by the SBOE in the Accreditation Rule at 5 CSR 50-345.100(2) ("appropriate scoring guides and forms and procedures outlined in the annual MSIP"). *See* §536.021.2(3) (promulgated rule "may incorporate by reference only if the material so incorporated is retained at the headquarters of the state agency and made available to any interested person at a cost not to exceed the actual cost of the reproduction of a copy"). It was uncontested at trial that the UYAPR Manual is maintained by DESE and the SBOE and is available to all districts at no charge through DESE's website. *See* http://dese.mo.gov/divimprove/sia/msip/index.html.

2. UYAPR Manual is NOT a Rule because it does not have "force and effect of law."

Section 536.010(6) provides that a "rule" means "each agency statement of general applicability that implements, interprets, or prescribes law or policy, or that describes the organization, procedure, or practice requirements of any agency." Courts have augmented this definition, however, as on its face it would seem to encompass nearly every statement an agency can make. *Baugus*, 878 S.W.2d at 42 ("Not every generally applicable statement or "announcement" of intent by a state agency is a rule"). Ultimately, the gravamen of the definition is whether the agency

statement has the "force and effect of law." *United Pharmacal Co. v. Missouri Bd. of Pharmacy*, 159 S.W.3d 361, 365 (Mo. banc 2005).

This Court summed up these principles in *Missouri Soybean Ass'n v. Clean Water Comm'n*, 102 S.W.3d 10 (Mo. banc 2003), upholding a challenged agency statement because:

> Rulemaking "involves the formulation of a policy or interpretation which the agency will apply in the future to all persons engaged in the regulated activity.". . . In distinguishing between rules and general statements of policy, it has been said that an agency statement is a rule "... if it purports in and of itself to create certain rights and adversely affects or serves by its own effect to create rights or require compliance, or otherwise to have the direct and consistent effect of law." Stated more simply, as explained by one federal court, "a properly adopted substantive rule establishes a standard of conduct which has the force of law."

Id. at 23 (emphasis added) (citations omitted).

The challenged UY-APR manual meets none of these criteria. It does not on its face purport to require conduct, create rights, or impose adverse affects. Instead, it is only what it purports to be – a "guide" that DESE puts out to explain the MSIP process and the Annual Performance Reports ("APRs") that DESE issues for every school district every year. If the APRs that DESE publishes have no legal effect, and they do not because only the SBOE can effect a change in accreditation, then surely a "guide" to help school

districts understand the APRs lacks any legal effect as well. Only the SBOE acts with any legal effect on the issue of accreditation, and DESE's analyses and conclusions are not binding on it.

Missouri NEA, 34 S.W.3d at 286-87, holds that DESE "guidelines" were not invalid even though they were not promulgated because they were not a "statement of policy or interpretation of law of future effect. The opinion notes that ultimate decision-making power rested with, and was exercised by, the SBOE. The SBOE can accept, reject or modify the recommendations made by DESE, so long as it does not act "arbitrarily or capriciously." *See also Branson R-IV School District v. LIRC*, 888 S.W.3d 717, 721 (Mo. App. 1994) (in prevailing wage case, department employees' preliminary wage calculations – calculated using complex formulae generally applied to all data – was not "rule" because only the LIRC could make the ultimate determination). On the basis of *Missouri NEA* and *Branson R-IV*, this Court should conclude that the UYAPR Manual is not a "rule," it did not need to be separately promulgated, and the SBOE's accreditation decision was not "arbitrary or capricious."

3. UYAPR Manual is NOT a Rule because it is an "inter-governmental manual" that does not affect the legal rights of the public or any part of the public.

Section 536.010(6) defines the term "rule" under the Missouri Administrative Procedures Act. Section 536.010(6) goes on to specifically exclude from the definition

of "rule," and thus exempt from the requirements of formal notice-and-comment rulemaking, the following:

> An intergovernmental, interagency, or intraagency memorandum, directive, manual or other communication which does not substantially affect the legal rights of, or procedures available to, the public or any segment thereof.

§ 536.010(6)(c).

There is no question that the District is an "agency" under Chapter 536, *State ex rel. Yarber v. McHenry*, 915 S.W.2d 325 (Mo. banc 1995). Just as obviously, DESE is also an "agency." Therefore, it is indisputable that the UY-APR manual is an "**inter**agency . . . memorandum, directive, manual or other communication." § 536.010(6)(c) (emphasis added). Ms. Kemna testified that she used the UY-APR to explain the District's preliminary APR results to them in November of 2006. Exh. 228 (Pet. Vol. VII) at p.1. That this is the intended and actual use is demonstrated by the fact that DESE makes the UY-APR manual available on-line adjacent to the DESE website where APRs are posted. *See* http://dese.mo.gov/divimprove/sia/msip/index.html.

The individual Appellants failed to adduce any evidence that any portion of the UYAPR Manual affects "the legal rights of, or procedures available to, the public or any segment thereof."[18] Seciton 536.010(6)(c). Nor could they as the UYAPR Manual is

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18 It is no accident that so many separate theories intersect right at this point. For example, recall that the individual Appellants cannot challenge the Performance

concerned only with accreditation, *i.e.*, a purely intergovernmental matter between the SBOE, DESE and the school districts.

Moreover, the UYAPR Manual does not itself even purport to establish the rights or procedures of school districts. Instead, it is only an aid to help them understand (1) the purely mechanical questions of how DESE prepares the specific data referred to in the Performance Standards, and (2) DESE's expectations, based on statewide performance data, of the minimally acceptable levels of performance with regard to any one Standard or the set of Performance Standards. The first is hardly a question of "determining legal rights or procedures," as there is no conceivable policy behind requiring DESE to formally promulgate its description of how to calculate a "percentage," i.e., A times B, times 100. The second purpose of the UYAPR Manual does not "determine legal rights or procedures" because the end product of the analysis described in the UYAPR Manual is merely a recommendation to the SBOE regarding accreditation, and is not an accreditation decision itself.

Standards on constitutional "vagueness" grounds because Appellants have no legitimate property interest in the application of the Standards. Nor can the City Board cannot bring an "uncontested case" review claim under Section 536.150 because it not a "person," while the individual Appellants cannot bring such a claim because the SBOE's accreditation decision did not "determine[e] their legal rights, duties or privileges." §536.150.1.

Accordingly, the UYAPR Manual meets the "intergovernmental manual" exclusion to the definition of "rule" because it does not affect the affect "legal rights of, or procedures available to, the public or any segment thereof." Section 536.010(6)(c). *See Kent Co. v. Dept. of State Police*, 609 N.W.2d 593, 583 (Mich. Ct. App.) ("alternative site criteria" are not a "rules" but an inter-governmental communication that did not affect public's rights, even though tax dollars would ultimately be spent, because entire transaction was between governmental units). This defeats the Appellants' claim that DESE was required to separately promulgate the UYAPR Manual and no purpose would have been served by doing so. As mentioned above, a key part of the purpose of the UYAPR Manual is the scoring guides, updated at least annually to reflect the most recent statewide performance data.

4. Even if DESE should have separately promulgated the UYAPR Manual, its failure to do so cannot render the SBOE's decision "arbitrary and capricious."

The power to classify school districts for accreditation purposes is specifically granted to the SBOE and to no other entity. § 161.092(9). Neither DESE nor the Commissioner of Education has such authority. In its Rule, the SBOE states: "The State Board of Education will assign classification designations of unaccredited, provisionally accredited, and accredited based on the standards of the MSIP." 5 CSR 50-345.010(3). From among the thousands of possible indicators of performance, the SBOE chose indicators of academic performance it felt were the most important, and these are spelled

out in the Standards and Indicators Manual, also referenced in the Accreditation Rule. Exh. 2 (Pet. Vol. I) at 27-28. The Accreditation Rule then delegates to DESE the job of reviewing the school districts "with the appropriate scoring guides and forms and procedures outlined in the annual MSIP," *i.e.*, the UYAPR Manual. 5 CSR 50-345.010(2).

DESE then tracks 14 separate measurements in six different categories (DESE actually tracks 20 measurements, but six are "bonus" measures as to which any failure to achieve is not scored against a district), evaluates each district's performance under those measures as compared with statewide results, and grades each district accordingly. *See* Exh. 84 (Def. Vol. I) pp. 1-3 (District's March 2007 APR) (included in Resp. App. at A-129). The UYAPR Manual merely explains this process.

Appellants claim that the UYAPR Manual is "void" if it should have been promulgated and was not. Appellants rely on cases for this proposition in which the agency that failed to promulgate the rule is the same agency whose decision is being reviewed. *See Missouri Division of Family Services v. Barclay*, 705 S.W.2d at 518 (Mo. App. 1985) ("income maintenance manual" was "rule" so Division's decision relying on manual was void); *Tonnar v. Missouri State Highway Trans. Comm'n*, 640 S.W.2d 527 (Mo. App. 1982) ("right of way manual" was "rule" so value set by Commission with manual voided).

Appellants then assert that – not only must the UYAPR be "void" – the SBOE's accreditation decision must necessarily be "void" too. This is the "leap" in Appellants'

argument for which there is neither logic nor law, and this is the "leap" the Circuit Court refused to take. None of Appellants' cases actually hold that the failure of one agency to promulgate can render a decision of another agency, superior to the first, also void. On the other hand, Respondents cite to clear authority for the proposition that, where final decisionmaking authority rests with one agency, the fact that the recommendations or other related work of a subordinate agency should or might have been promulgated is irrelevant, so long as the decisionmakers' decision is justified. *Missouri NEA*, 34 S.W.3d at 286-87 (affirming SBOE decisions notwithstanding that DESE guidelines were rules); *Branson R-IV School District*, 888 S.W.3d at 721 (prevailing wage). Accordingly, this Court should conclude that the UYAPR Manual is not a "rule," it did not need to be separately promulgated, and the SBOE's accreditation decision was not "arbitrary or capricious."

First, Appellants nowhere explain what "void" means with respect to a document that, in the main, describes how calculations are performed. Does that mean that those calculations now cannot be done until the UYAPR Manual is promulgated? Or does it mean that they can only be performed some different way than the UYAPR Manual describes.

Second, if by "void," the Appellants mean that DESE's recommendation to the SBOE regarding the District's accreditation is not binding, then – as the Circuit Court held – this does not provide a basis to overrule the SBOE's decision as DESE's recommendation is never binding on the SBOE. Appellants have conceded, many times and in many ways,

that DESE's mechanistic application of formulae to data sets is not binding on the SBOE. Dr. Bourisaw's presentation to the SBOE in November 2006, in which she pleaded with the SBOE to declare the District accredited even though its performance was inadequate, evidences an understanding that DESE's number-crunching – and even the Standards themselves – were not binding on the SBOE. Not only did Dr. Bourisaw make the argument that the SBOE should excuse the District's failure to achieve adequate performance under Standards due to the socio-economic status of many of the District's students, Appellants claimed in the trial court that the SBOE was "arbitrary and capricious" for rejecting that claim. Amended Petition at L.F. 61, ¶ 87; Cir. Ct. Op. at 44. Having beseeched the SBOE in November 2006 to ignore DESE's analysis and recommendations, Appellants simply cannot now be heard to argue that DESE's analysis and recommendations are binding – legally OR practically – on the SBOE. Within the limitation that it not act "arbitrarily" or with "caprice," the SBOE can make whatever classification decisions it feels is supported by the facts and the Accreditation Rule regardless of whether that decision departs from DESE's statistical analysis.

5. **Finally, Appellants' arguments ignore the overwhelming evidence before the SBOE that the District was failing under the Performance Standards, and the question – while difficult because of the stakes involved and deeply committed and passionate people on all sides of the question – was not a close**

call. To this day, despite the unceasing parade of avoidances, excuses and alleged legal defects, Appellants have failed even to cast even a doubt as to whether the SBOE's decision was absolutely correct as a matter of fact.

At trial, Appellants tried to create the impression that the SBOE's decision was a "close call" by calling into question DESE's conclusions with respect to two Performance Standards so that, if they succeeded on both of their factual claims, Appellants argued that DESE would have had to recommend (and the SBOE would have had to declare) the District be "provisionally accredited" again. This tactic, however, never took into account the "up-or-out" provision in 5 CSR 50-345.010(8)(A) for districts (such as the District) that had been "designated provisionally accredited twice sequentially."

It should not be missed that Appellants have never claimed, argued or asserted – far less proved – that the District's achievement levels had improved so much from 2003-2004 to merit full accreditation. In fact, there are numerous admissions that the trends were to the contrary.[19]

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19 Though not part of the 2006-07 APR presented to the SBOE prior to its decision in March of 2007, the District's MAP test scores on the tests given in the spring of 2007 earned a "Not Met" designation for all six of the MAP Test categories, demonstrating further deterioration in performance. Exh. 266 (Def. Vol. III) pp.1-3 (included in Resp. App. at A-140); Tr. II, at 158-59.

Even if the SBOE was willing to extend another "provisionally accredited" classification to the District, and thus Appellants' efforts to show that DESE was wrong with respect to two Performance Standards were at least relevant, the Circuit Court properly held that Appellants' proof fell far short of showing any error under either standard, and Appellants have abandoned those claims in this Court.

The evidence at trial showed that the DESE personnel went to great lengths to assist the District in making sure that it was getting as much credit as it was legitimately entitled to receive. But the evidence also showed that, notwithstanding Appellants' claims and assertions, the performance data presented to the SBOE on March 22, 2007, were accurate and sufficient for the SBOE to conclude, without acting arbitrarily or capriciously, that the District should be unaccredited. *See Fears v. Iowa Dept. Human Services*, 382 N.W.2d 473, 476 (Iowa App.) (medicaid manual should have been promulgated, but failure to do so did not void agency decision when decision could be justified apart from the manual).

All of this performance data – with or without DESE's recommendations – together with the Performance Standards themselves, is the sort of objective basis that is the very antithesis of an "arbitrary and capricious" decision. *See* Exh. 84 (Def. Vol. I) (District's 2007 APR and DESE recommendations) (included in Resp. App. at A-129); Exh. 87 (Def. Vol. I) (selected data from District's 2007 mid-cycle review) (included in Resp. App. at A-137); Exh. 267 (Def. Vol. II) (District's 2004 accreditation data and DESE recommendation) (included in Resp. App. at A-160). The record before the

Circuit Court left no room for doubt – and absolutely no basis to conclude that the SBOE had acted on the basis of "mere surmise, guesswork, or 'gut feeling' . . . . [or] in a totally subjective manner without any guidelines or criteria," *Missouri NEA*, 34 S.W.3d at 281, to justify a finding that the SBOE's decision was arbitrary or capricious.

V. The circuit court correctly determined that Appellants' never asserted a claim for an "uncontested case" review under Section 536.150, and lacked standing to assert such a claim even if they had tried.

(Responds to Appellants' Point Relied On V)

Appellants continue to assert in this Court that their claims regarding the SBOE's decision to classify the SBOE as "unaccredited" should be construed as claims under Section 536.150 for an "uncontested case" review. App. Brief at 131. The Circuit Court properly rejected this argument on the simple ground that nowhere in Appellants' 65-page, 29-count, 352-paragraph Amended Petition do Appellants even mention Section 536.150, or any other claim for relief under that chapter. Instead, Appellants' Amended Petition "repeatedly invokes Section 537.020, the general declaratory judgment statute, as the basis for the review [they] seek." Cir. Ct. Op. at 4. Taking Appellants at their word, the Circuit Court rejected Appellants' arguments that they had meant to invoke Section 536.150 all along. Cir. Ct. Op. at 33. The Circuit Court's decision on this point should be affirmed.

"Under Missouri pleading rules, to state a claim, a petition must invoke substantive principles of law entitling the plaintiff to relief and allege ultimate facts informing the defendant of what the plaintiff will attempt to establish at trial." *Charron v. Holden*, 111 S.W.3d 553, 555 (Mo. App. 2003) (emphasis added) (citing *Bracey v. Monsanto Co., Inc.*, 823 S.W.2d 946, 951 (Mo. banc 1992)). Appellants seek relief from their failure ever even to mention Section 536.150 in their Amended Petition by arguing that *Williamson's Estate v. Williamson*, 380 S.W.2d 333 (Mo. 1964), and *Mathews v. Pratt*, 367 S.W.2d 632 (Mo. 1963), entitle them to a liberal construction of their Amended Petition. While this may be an accurate reading of the cases, no "liberal construction" of the Amended Petition can turn it into something that it is not.

Moreover, as the Circuit Court also held, Appellants could not have raised a Section 536.150 claim even if they had tried. Section 536.150 provides a means for judicial review of administrative decisions that are not otherwise reviewable, but only for administrative decisions "determining the legal rights, duties or privileges of any person." §536.150. "For a party to have standing for review under § 536.150, the agency action must directly affect the private rights of the person seeking judicial review." *State ex rel. Christian Healthcare of Springfield, Inc. v. Dep't of Health and Senior Svcs.*, 229 S.W.3d 270, 278 (Mo. App. 2007) (emphasis added).

Section 536.150, and in fact all of the judicial review provisions in Chapter 536, are the product of Article V, Section 18 of the Missouri Constitution, which provides for judicial review of administrative decisions that "affect private rights." In *May Dep't*

Stores Co. v. State Tax Comm'n, 308 S.W.2d 748 (Mo. 1958), this Court held that Section 536.150 "clearly comprehends only decisions involving individual rights and interests; this is indicated by the use of such terms as 'any person,' the 'revocation of a license,' and 'such person.'" *Id*. at 756. Thus, without more, it would seem clear that the City Board could not invoke Section 536.150 because it is not a person. *See also* §536.100 (appeal from a contested case limited only to "person who . . . who is aggrieved by a final decision"). But specific authority from this Court's precedents also compels this result.

In *St. Francois County Sch. Dist. R-III v. Lalumondier*, 518 S.W.2d 638 (Mo. banc 1975), this Court faced a situation nearly identical to the present case and held that a school district may not seek judicial review of an administrative decision under Section 536.150. *Id*. at 643. Even though the district may have a direct and "vital interest" in an administrative proceeding, this Court held that a school district is not a "person" within the meaning of Section 536.150 and it could not assert a "private right" of the sort protected by the constitutional provision guaranteeing judicial review of administrative decisions. *Id*. Under *Lalumondier*, the Circuit Court properly held that City Board could not have asserted a Section 536.150 claim, even it had attempted to do so, and the Circuit Court's decision should be affirmed.

The individual Appellants, too, would have lacked standing to assert a Section 536.150 claim had they tried to raise one. Though they are "persons," and thus are at least in the general class of litigants protected by Section 536.150, the individual

Appellants lacked standing because the SBOE's accreditation decision had no "direct affect" on their "legal rights, duties or privileges." *Christian Healthcare*, 229 S.W.3d 278. The Appellant City Board Members, as individuals, offered no evidence that the SBOE's accreditation decision determined any of their rights. And those Appellants who allegedly are children in the District offered no evidence of any kind on any issue at trial. Even if these "Student Appellants" had offered evidence, they could not have established a personal, private right relating to the accreditation decision-making process. It cannot be said that a child has a "right" to have his or her school district be given this or that accreditation classification. This is not to say that board members or parents or even students are not "interested" in the accreditation process involving the schools, or that the District's loss of accreditation did not have any effect in the day-to-day lives of Appellants. But that sort of anecdotal impact is a far cry from the "direct impact" on a person's "legal rights, duties or privileges" that is required to have standing under Section 536.150.

Accreditation is entirely a matter between the SBOE, DESE and the school district involved. It is an administrative classification – nothing more. Moreover, it is a retrospective classification, a grade of sorts, given on the basis of events that have already occurred, rather than something such as a license or permit that is sought from and granted by the administrative agency in anticipation of applicant's future conduct. Of course, the General Assembly has determined that certain accreditation classifications

will have certain consequences, but those are the consequences of accreditation, not the accreditation itself.

But this does not leave the City Board without an avenue by which to contest the SBOE's decision to revoke the District's accreditation. The State Respondents have never urged, and do not now urge, that Appellants' failure to raise – and lack of standing to assert – a Section 536.150 claims should leave them with no judicial review at all.

In *State ex rel. Sch. Dist. of Independence v. Jones*, 653 S.W.2d 178, 189 (Mo. banc 1983), this Court held that, even where a school district lacks standing to seek judicial review under Section 536.150, the district is entitled to pursue a common law judicial review of an administrative decision under the Declaratory Judgment Act if the administrative decision had a substantial impact on the school district's interests.

Whether Appellants knew it or not, this is the claim that their Amended Petition asserts, and it is to this claim that the Circuit Court properly applied the "arbitrary or capricious" standard. Accordingly, the Circuit Court's decision should be affirmed.

VI. The Circuit Court properly decided that, when the District lost its accreditation, all of the City Board's powers with respect to the District (excluding auditing and public reporting) vested solely in the SAB pursuant to Sections 162.621 and 162.1100. The phrase "as of August 28, 1998"—which was not enacted by the General Assembly in SB781 – does not restrict the powers vested in the SAB and, even if it did, plebicites occurring subsequent to that date merely fulfilled conditions precedent to a specific exercise of long-held powers to levy, collect and spend taxes, and thus did not constitute new grants of such powers.

(Responds to Appellants' Point Relied On VI)

The Circuit Court held that, when the District lost its accreditation on June 15, 2007, all powers of the City Board were vested with the SAB, save only "auditing and public reporting" powers that the City Board would retain and exercise concurrently with the SAB. Cir. Ct. Op. at 50, 58-59. This holding was faithful to the plain language of SB781, as well as the intent of the General Assembly, and should be affirmed.

A. Appellants challenged the wrong statute.

As noted above, in Sections I and III of this brief, the principle statute effecting the "change of control" from the City Board to the SAB is Section 162.621.2 – one which Appellants have not challenged and which does not contain the "on or before August 28, 1998," phrase upon which Appellants construct their entire "retained powers" claim.

Thus, even if Appellants' arguments succeed, and Section 162.1100.3 is struck down or construed as they suggest, Appellants' so-called "retained powers" will still be transferred to the SAB by operation of Section 162.621.2, which states:

> Except as otherwise provided in this subsection, the ["general and supervising control, government and management"] powers granted in subsection 1 of this section shall be vested, in the manner provided in section 162.1100, in the special administrative board of the transitional school district containing the city not within a county if the school district loses its accreditation from the state board of education. . . . The board of directors of the school district shall, at all times, retain auditing and public reporting powers.

§ 162.621.2 (emphasis added).

B. Appellants have admitted that the General Assembly intended to prevent the City Board from having any role in controlling the District.

The "change of control" effected by Section 162.621.2 – with no limitation by date or other anything else other than the express retention of auditing and public reporting powers – is to be conducted "in the manner provided in" Section 162.1100.3, which provides:

> In the event that the school district loses its accreditation, upon the appointment of a chief executive officer, any powers granted to any

existing school board in a city not within a county on or before August 28, 1998, shall be vested with the special administrative board of the transitional school district containing such school district so long as the transitional school district exists, except as otherwise provided in section 162.621.

§162.1100.3 (emphasis added).

Thus, the "manner" referred to in Section 162.621.2 is "upon the appointment of chief executive officer" and only for "so long as the transitional school district exists." *Id.* And, completing the inter-dependency of these two statutes, the "except as otherwise provided in section 162.621" refers to the limited powers of auditing and public reporting that Section 162.621.2 provides the City Board "shall, at all times, retain." §162.621.2.

Compelled by the plain language of these sections, the Circuit Court's decision also was consistent with the General Assembly's intent – manifestly evident when Sections 162.1100.3 and 162.621.2 are read together, as they must be – that the management and control of the District was to be taken from the City Board if the District lost accreditation. Even the Appellants have specifically admitted this dispositive fact in their brief, stating:

Under Section 162.1100 and 162.621.3 [sic], the Elected Board is only left with limited auditing and public reporting powers. The legislature's decision to leave the Elected Board with superficial and undefined authority and oversight monitoring does not detract from the clear intent and effect to

> prevent the Elected Board members from having any role in the management and supervision of the District. The Elected Board has been divested of all governing and management powers with regard to the district and has been rendered effectively powerless.

App. Br. At 60 (emphasis added) (citations and footnote omitted).

Despite this concession,[20] Appellants' Point Relied On VI claims that the City Board retains substantial governing and management powers, *i.e.*, the powers to collect and spend the District's sales taxes and such other funds necessary to pay the debt service on the November 2000 school bonds for air conditioning schools. App. Brief at 135-42. Respectfully, this Court should reject this argument solely on the ground of Appellants' concession set forth above. Even if Appellants' claim survives their admission, however, it cannot survive analysis, and this Court should affirm the Circuit Court on any of the following grounds.[21]

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20 Appellants' Brief is not the first time Appellants have admitted the scope and effect of SB781's "change of control" provisions. *See* L.F. 414-15 (Deseg Agreeement) at §16 (City Board bargained for, and State agreed, to a 2-yr forbearance on any DESE recommendation that the District be unaccredited so that such a recommendation, which was anticipated in early 1999, would not immediately divest the City Board of control over the District). *But see also* Deseg Settlement at § 18(b) (City Board concedes that "Transitional School District may be reestablished as permitted by state statute").

21 In addition to the arguments below, the State Respondents adopt and incorporate by

C. Appellants' construction violates rules of grammar and construction and frustrates the obvious intent of the provisions.

"The primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to the intent if possible, and to consider the words in their plain and ordinary meaning." *Holtcamp v. State*, ___ S.W.3d ___, 2008 WL 2929997, *2 (Mo. banc. July 31, 2008). Further, "[t]he provisions of a legislative act are not read in isolation but construed together, and if reasonably possible, the provisions will be harmonized with each other." *Bachtel v. Miller Co. Nursing Home Dist.*, 110 S.W.3d 799, 801 (Mo. banc 2003). If the "statutory language is clear, unambiguous, and admits of only one meaning, there is no room for construction and the legislature is presumed to have intended what the statute says." *Corvera Abatement Tech., Inc. v. Air Conservation Comm'n*, 973 S.W.2d 851, 858 (Mo. banc 1998).

The General Assembly's intent in SB781 is clear. The City Board would continue to have and exercise all of the powers necessary to the "general and supervising control, government and management" of the District. §162.621.1. But, if the District lost its accreditation, those powers would be transferred to the SAB, except for auditing and public reporting. §162.621.2. This transfer would occur "in the manner provided for in section 162.1100," *i.e.*, "upon the appointment of a chief executive officer."

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reference the Intervenor-Respondent's argument in response to Appellants' Point VI. *See* Intervenors' Brief at 9-20.

§162.1100.3. All other powers of the City Board, granted by statutes other than Section 162.621.1, also would be vested in the SAB by virtue of Section 162.1100.3. No holes, no seams, no ambiguities.

Appellants' effort to the destroy this simple scheme – and defy the obvious intent of the General Assembly – rests entirely upon their unsupported assertion that the General Assembly intended to limit the powers taken from the City Board in such a way that the general management and control of the District would be allocated between the SAB and the City Board. To accomplish this end, Appellants rely on that portion of Section 162.1100.3 which states:

> [A]ny powers granted to any existing school board in a city not within a county on or before August 28, 1998,[22] shall be vested with the special administrative board[.]

§162.1100.3 (emphasis added). Thus, Appellants' statutory construction argument asserts that the General Assembly's use of the "on or before" phrase excludes from those

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22 Appellants ignore the fact that phrase "on or before August 28, 1998," on which they so heavily rely, was not even in SB781 as enacted. It was added later by the Revisor of Statutes. The Truly Agreed and Finally Passed SB781 provides, instead, that "any powers granted to any existing school board in a city not within a county on or before the effective date of this section shall be vested in" the SAB. Resp. App. at A-75 (emphasis added).

powers transferred to the SAB any powers granted to the City Board after August 28, 1998.

Other than the fact that it serves their strategic purposes, it is hard to see what Appellants' construction has to recommend it. It certainly has no faith or allegiance to the plain language of the provision. For instance, Appellants' argument only succeeds if Section 162.1100.3 is read as though the words "granted" or "created" were inserted immediately before the "on or before" phrase on which Appellants rely. But those words are not there. The word "granted" is in the statute, but it is too far from Appellants' phrase to produce the meaning Appellants assert.

In addition, if this one part of this one sentence was intended to serve the lofty and important purpose of allocating powers between the SAB and the City Board – and thereby limit what would otherwise be an unlimited transfer of powers – one would expect the General Assembly to have used words or phrases of limitation such as "other than . . .," or "except for . . .," or "provided that . . ." But, again, that language is missing from the statute.

Even if Appellants' statutory construction claim was faithful to the plain language of the statute, which it is not, Appellants' construction does nothing to further any legislative intent that is reasonably evident in the language of SB781. For instance, Appellants do not explain why, rather than a complete "change of control," the General Assembly would want to allocate power between the City Board and the SAB, with the resulting potential for chaos and inefficiency that such a bifurcation could produce. Nor

do Appellants explain why, if the General Assembly desired such an allocation of powers, it would choose the seemingly arbitrary method of distributing powers based upon the date the powers were granted. Finally, Appellants fail to explain why, if an allocation of powers by date of grant was so important, the General Assembly did not add that same limitation to Section 162.621.2, the provision that transferred all of the fundamental "general and supervisory control" powers to the SAB. Instead, Section 162.621.2 transfers those powers to the SAB without any limitation other than to reserve to the City Board continuing powers relating to auditing and public reporting. Appellants' silence on these important questions of legislative intent speaks far more plainly to the lack of merit in Appellants' statutory construction than any written argument ever could.

D. Respondents' alternative construction is consistent with the plain language of the statute, the rules of construction and the General Assembly's intent.

Respondents offer an alternative construction of the "on or before" phrase in Section 162.1100.3 that is true to the language of the statute. Moreover, this alternative construction does no violence to the General Assembly's intent, does not create the potential for mischief and chaos, and makes sense in the overall construction of SB781. As noted above, Appellants' construction – besides frustrating the obvious intent of the General Assembly and leading to wholly unnecessary chaos – depends upon the phrase

"on or after August 28, 1998," modifying the word "granted," which appears several words earlier. Thus, Appellants' construction violates the "last antecedent rule."

This Court has "long recognized [the] 'last antecedent rule,' which instructs that: 'relative and qualifying words, phrases, or clauses are to be applied to the words or phrase immediately preceding and are not to be construed as extending to or including others more remote.'" *Rothschild v. State Tax Commission of Missouri*, 762 S.W.2d 35, 37 (Mo. banc 1988).

Applying this maxim to the "on or before" phrase relied upon by Appellants, it is immediately apparent that the "on or before" phrase is simply an additional way of identifying the school board from which powers are to be taken, and not a limitation on the word "granted."

> [A]ny powers granted to any existing school board in a city not within a county on or before August 28, 1998, shall be vested with the special administrative board[.]

§162.1100.3 (emphasis added).

This construction furthers the evident "change of control" purpose of Section 162.1100.3, rather than frustrating that purpose as Appellants' construction would do. First, Section 162.1100.3 identifies the "school board" from which powers are being taken by its location, *i.e.*, "in a city not within a county." Then, because the "change of control" provision may not be triggered for many years, if ever, the General Assembly added a second identifier to avoid any uncertainty about which school district would lose

powers if there were multiple school boards and districts in the City of St. Louis (which is more than a theoretical possibility, *see* Argument Section II, *supra*) at that point in the future. Accordingly, the "last antecedent rule" provides a reasonable construction under which Section 162.1100.3 first identifies the "school board" that will be divested of powers by its location at a definite place ("city not within a county"), and then further identifies that school district by its existence at a definite time ("on or before the effective date of this statute").

This construction, besides being consistent with rules of grammar and the General Assembly's obvious intent, has the additional virtue of explaining why this identifying phrase is present in Section 162.1100.3 but missing from Section 162.621.2. If the phrase at issue in Section 162.1100.3 is an additional identifier for the school board from which powers are being taken, as the "last antecedent rule" suggests it is, there would have been no need to include that identifier in Section 162.621 because that entire section deals only with the City Board. There was no potential for future uncertainty, and thus no need for the additional identifier. Appellants ignore the difference between Sections 162.1100.3 and 162.621.2 because that difference is inconvenient to Appellants' argument. But, a construction that harmonizes the various provisions of SB781 is preferable to a construction that ignores differences it cannot reconcile. *Bachtel*, 110 S.W.3d at 801.

E. Regardless of which construction is adopted, Appellants' claim must fail because the City Board was granted the supposedly "retained powers" when it was created, long before 1998.

Finally, even assuming that Appellants' construction is adopted and Section 162.100.3 does not transfer to the SAB any powers that were granted after August 28, 1998, Appellants' claim still fails. After asserting a list of "retained powers" in the Circuit Court that far exceed the alphabet Appellants used to identify them, *see* Amended Petition at ¶ 96(listing powers (a) through (hh)), Appellants again have abandoned most of these claims before this Court. Now, Appellants only claim two "retained powers," the power to collect and spend the desegregation sales tax approved by the District voters in 1999, as well as the power to spend such additional funds as are necessary to service the debt from the bond issuance approved by the voters in November 2000. Because the City Board both had and used these powers long before 1998, however, and indeed was vested with those powers at its inception, Appellants' argument fails even if this Court adopts their unnecessarily awkward statutory construction argument.

Section 126.621 vested with the City Board the power to "levy taxes authorized by law for school purposes." §126.621.1(4). Appellants assert, without explanation or authority, that the power to "collect" such taxes must have some genesis separate from the power to levy. This is incorrect. The power to levy a tax includes any additional powers, such as collection, to effectuate the express power. *See Lewis Co. C-I Sch. Dist. v. Normille*, 431 S.W.2d 118, 121 (Mo. 1968) (properly levied taxes in four previously

separate districts created an entitlement for the subsequent, unified school district to collect the levied taxes).

Appellants repeatedly emphasize the fact that the deseg sales tax and the authorization for a bond issuance to purchase air conditioners were approved by District voters in February 1999 and November 2000, respectively. From this, Appellants conclude that the power to "collect" the sales taxes and such other taxes necessary to pay off the bondholders was "granted" to the City Board by the voters at these elections. Similarly, Appellants claims that the power to "spend" these moneys for such purposes also was "granted" to the City Board by the voters at these elections. Appellants are simply wrong.

Appellants' argument confuses the grant of the power with the fulfillment of a condition precedent to a particular exercise of that power. The power to levy taxes (and the obviously necessary power to collect taxes so levied), as well as the power to spend district money for school purposes including debt service, are basic and fundamental powers belonging to every school board. These powers were granted to the City Board at its inception by Section 162.621.1 – and, when the District lost its accreditation, these powers were vested in the SAB by Section 162.621.2. The mere fact that plebicites were conditions precedent to a specific exercise of these powers is irrelevant.[23] *See Ring v.*

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23 Moreover, it was the TSD, not the City Board, that SB781 authorized to levy the sales tax, *see* § 162.1100.5, and it was the TSD, not the City Board, that put the sales tax before the voters. *See* Exh. 200. Thus, Appellants' argument that the TSD lacks

Metropolitan St. Louis Sewer Dist., 969 S.W.2d 716, 718 (Mo. banc 1998) (Mo. Const. Art. X, Sec. 22(a), assures "taxpayers will be free of increases in local taxes unless the voters approve those increase [sic] in advance").

Finally, it should be noted that Appellant's concession that the General Assembly had a "clear intent and effect to prevent the Elected Board members from having any role in the management and supervision of the District," App. Br. At 60, ignores the single most important power that the City Board retains by virtue of SB781. This power is, in effect, a reversionary interest in the management and control of the District. Section 162.621.2 provides that "powers [vested in the SAB] shall immediately revert to the board of directors of the school district for any period of time for which no transitional school district containing the city not within a county is in existence." §162.621.2. *See also* §162.1100.3 and 12. The General Assembly never planned for the "change of control" envisioned by SB781 to be permanent. Instead, the statutes envision a return to local control as soon as the SAB has fulfilled its purposes. Appellants, therefore, have a statutory duty to be prepared to exercise this management and control when it reverts to the City Board.

CONCLUSION

For all of the foregoing reasons, the State Respondents respectfully urge this Court to affirm the judgment of the Circuit Court.

. Respectfully submitted,

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authority to collect or spend a tax that the TSD, itself, levied, is absurd.

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CERTIFICATE OF SERVICE

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Certificate of Compliance with Rule 84.06

The undersigned hereby certifies that the foregoing Brief complies with the limitations set forth in Rule 84.06(b) and that the number of words in the Brief is 22,063. The undersigned relied on the word count feature of Microsoft Office Word 2003 to arrive at that figure.

The undersigned also certifies that the labeled disc filed concurrently herewith, has been scanned for viruses and is virus-free pursuant to Rule 84.04(.b).

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