IN THE SUPREME COURT OF MISSOURI

No. SC90236

JANE TURNER, et al.,

Plaintiffs/Appellants,

v.

SCHOOL DISTRICT OF CLAYTON, et al.,

Defendants/Respondents

ON APPEAL FROM THE CIRCUIT COURT
OF THE COUNTY OF ST. LOUIS
STATE OF MISSOURI
CAUSE NO. 07SL-CC00605

HONORABLE DAVID LEE VINCENT, III

SUBSTITUTE BRIEF OF RESPONDENT SCHOOL DISTRICT OF CLAYTON

KOHN, SHANDS, ELBERT,
GIANOULAKIS & GILJUM, LLP
Mark J. Bremer #24696
D. Leo Human #59787
One US Bank Plaza, 24th Floor
St. Louis, Missouri 63101
(314) 241-3963
(314) 241-2509 (fax)
mbremer@ksegg.com
lhuman@ksegg.com

Attorneys for Respondent
School District of Clayton

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Legislation

Other Authority

STATEMENT OF FACTS

I. Undisputed Facts Regarding Plaintiffs' Children's Attendance at Clayton Schools

A. Plaintiffs' Tuition Agreements

Plaintiffs are the parents of children who reside in the City of St. Louis School District ("City District") but attend schools in the School District of Clayton ("Clayton") pursuant to personal "Tuition Agreement[s]" signed by each plaintiff (Legal File ("LF") 479–506; *see also* Supplemental Legal File ("SLF") 3, ¶ 6; 102 n. 2; 103; 136 n. 3). As correctly acknowledged in plaintiffs' own words, "[Clayton] agreed to admit [plaintiffs' children] in exchange for tuition payments made by [plaintiffs]," and "had those agreements not been signed, [plaintiffs' children] would not have been allowed to attend [Clayton] schools" (plaintiffs' substitute brief ("pl. br.") p. 9; SLF 103). As further correctly acknowledged by plaintiffs in their petition below, their children "presently attend schools maintained by the School District of Clayton as 'Personal Tuition Students' pursuant to § 167.151, RSMo" (SLF 3, ¶ 6), the statute which authorizes public school districts to admit nonresident students upon payment of tuition.[1] In return for their "agree[ment] to pay the annual tuition," each Tuition Agreement (the appendix contains an example at A1) provides that plaintiffs' children will be enrolled at Clayton with the "same rights, privileges, duties and responsibilities as a [Clayton] resident."

[1] "The school board of any district, in its discretion, may admit to the school pupils not entitled to free instruction [*i.e.*, nonresidents] and prescribe the tuition to be paid by them . . .." R.S.Mo. § 167.151.1.

At all times relevant to this case, plaintiffs' children's attendance at Clayton schools has been pursuant to these Tuition Agreements. Prior to this lawsuit, and before making any inquiry regarding Clayton's position on the issues raised in the lawsuit, each plaintiff signed a Tuition Agreement for the 2007–2008 school year (LF 493–504). In early 2008, after suit had been filed (and after Clayton had moved for summary judgment) plaintiffs renewed their Tuition Agreements for the 2008–2009 school year (LF 480–492). In each case, the record shows that the agreements were signed without complaint or reservation of rights (*see* LF 480–504).

Unequivocally confirming that their children's attendance at Clayton has always been in consideration for and expressly conditioned upon plaintiffs' personal commitment to pay tuition, each Tuition Agreement recites that plaintiffs "wish to enroll their child in the District schools *on a tuition payment basis*," and that "the District is willing to enroll the child *as a tuition-paying student* subject to the terms and conditions set out herein" (A1; emphasis added). The Tuition Agreement states that plaintiffs "*agree to pay the annual tuition to the District*" and that "[t]he District agrees to enroll the child as a full-time *tuition-paying* student for the 2008–2009 [or 2007-2008] school year," and specifies two separate amounts for tuition (depending on grade level) and the timing of the required tuition payments (*id*.; emphasis added). It further provides that plaintiffs "may renew this Agreement from year-to-year until the child graduates from high school *unless* [*plaintiffs*] *have failed to pay tuition* in a timely manner," and concludes with a paragraph providing that "[t]his Agreement constitutes the entire agreement between [plaintiffs] and the District" (*id*. at A2; emphasis added).

B. Clayton's Decision Not to Accept City Students Pursuant to § 167.131

After plaintiffs entered into their 2007–2008 Tuition Agreements plaintiffs sent a letter requesting that Clayton look to the City District, and not to plaintiffs, for payment of their children's tuition as nonresident students attending Clayton schools (SLF 6). Plaintiffs based their request on R.S. Mo. § 167.131, which plaintiffs now call the "Unaccredited District Tuition Statute" and which is the basis for their claims in this case. In response to plaintiffs' request, Dr. Don Senti, Clayton's Superintendent, wrote a letter stating that Clayton would not be participating in transfer of students from the City District under § 167.131. The letter stated in part as follows:

> . . . The School District of Clayton has determined that it will not participate in the transfer of students from the Saint Louis Public Schools resulting from the unaccredited status of that district.
>
> The School District of Clayton will continue its established tuition policy under which your children are currently enrolled. Since the School District of Clayton is not participating in any transfer plan established under Section 167.131 RSMo, we will not able to contact the Saint Louis Public Schools on your behalf.

SLF 6.

The record shows that Clayton's decision was based on advice from state officials, Clayton's own past experience, and concerns about legal issues and the existing City-to-County student transfer program. Clayton and the other St. Louis County school districts received a letter dated April 24, 2007 from the Missouri Department of Elementary and

Secondary Education (DESE), signed by the Commissioner of Education, which stated in part as follows:

> As you know, the St. Louis Public School District will be classified as unaccredited on June 15, 2007; and the district will be administered by a new three-member transitional board.
>
> You have probably already been contacted by parents of students who live in the St. Louis Public School District to request transfer of their children to your district.
>
> I am hopeful that you will consider addressing these requests through the existing transfer program operated under the Voluntary Interdistrict Choice Corporation (VICC). Currently, VICC oversees more than 8,000 student transfers and has provided significant support for students and parents in the St. Louis area.

SLF 42; *see also* LF 262, ¶ 3. VICC is the entity which operates and administers the City-to-County voluntary student transfer program pursuant to the 1999 Settlement Agreement approved by the federal court in the St. Louis school desegregation case (SLF 115).

Clayton had decided some years earlier to accept students from the Wellston school district in St. Louis County after Wellston lost its accreditation (pl. br. 8–9). This ultimately proved to be financially problematic, however, in that Clayton failed to receive timely tuition payments from Wellston and found itself without effective collection

remedies (LF 261–262, ¶ 2). In 2006 Clayton stopped accepting any more new students from Wellston (LF 505).

Clayton decided not to accept unaccredited students from the St. Louis City District in part to avoid a recurrence of the problem it had had with Wellston, which would have been further exacerbated by the City District's stated position that it cannot and will not make tuition payments for such students (LF 261–262, ¶ 2). Also, the prior acceptance of unaccredited students from Wellston did not involve the legal risks of running afoul of desegregation obligations under the 1999 Settlement Agreement and otherwise that may have been posed by acceptance of unaccredited students from the City of St. Louis (*id*.). The prior acceptance of unaccredited students from Wellston also did not involve the programmatic deficiencies and legal risks stemming from the likely unavailability of services for students with special needs that was anticipated to be occasioned by the acceptance of St. Louis City District unaccredited students, all of whom, unlike Wellston students, resided outside the boundaries of the Special School District of St. Louis County (*id*.). Under all the circumstances, Clayton decided not to accept any students from the City District pursuant to § 167.131 (*id*.).

As noted, Dr. Senti's letter stated that Clayton would continue its established tuition program and asked plaintiffs to contact Clayton if they had any questions regarding their obligations under the Tuition Agreement (SLF 6). In the subsequent fall, plaintiffs' children were enrolled at and attended Clayton as "Personal Tuition Students" (SLF 3, ¶ 6). Soon after, this suit was filed.

II. The Proceedings Below

A. Proceedings in the Trial Court; Plaintiffs' Initial Change in Theory

Plaintiffs' petition, after acknowledging that their children already "attend [Clayton's] schools . . . *as 'Personal Tuition Students' pursuant to § 167.151*" (SLF 3, ¶ 6) (emphasis added), sought declarations that, because the City District had recently lost its accreditation, Clayton now "*must allow* the Pupils to attend [Clayton's] schools . . . *pursuant to § 167.131*," and that under the latter statute Clayton must therefore look to the City District (rather than plaintiffs) for payment of their children's tuition (SLF 5; emphasis added). In response, Clayton moved to dismiss and for summary judgment on the ground that the stated premise of plaintiffs' entire claim – that Clayton was under a mandatory obligation to allow ("must allow") City students to attend Clayton's schools pursuant to § 167.131 – failed as a matter of law for two separate reasons (LF 7–8). First, the motion contended, publicly funded transfers of students from the City District to Clayton (and to the other St. Louis County school districts) are the subject of specific and detailed provisions of Senate Bill 781 (1998) and the federal-court approved 1999 Settlement Agreement in the St. Louis school desegregation case, and those provisions govern and control such transfers to the exclusion of § 167.131 (SLF 10–20).[2] Clayton's

[2] The City District filed its own motion joining in and reiterating the argument that the case was controlled by SB 781, elaborating that the bill also contained specific governing provisions in the event the City District were to lose its accreditation (LF 263–264). The City District also raised additional independent grounds in support of dismissal and summary judgment (LF 263).

motion further contended that under the statutory scheme codified by Missouri's Safe Schools Act (1996), admission of nonresident students from an unaccredited district pursuant to § 167.131 is purely "discretion[ary]," and that plaintiffs' claim that Clayton "must" allow their children to attend under that statute therefore failed as a matter of law for this additional reason (SLF 20–26).

In response to defendants' motions, plaintiffs then took the position that the court need not "reach the issue" whether § 167.131 imposed a mandatory obligation upon Clayton to admit children from the City District (SLF 67). This was so, they argued, because it is undisputed that plaintiffs' children "already attend [Clayton]," and the tuition-payment requirements of § 167.131 therefore literally applied irrespective of whether the statute imposed a mandatory obligation upon Clayton to admit plaintiffs' children in the first instance (*id*.). Plaintiffs reasoned that the statute obligates an unaccredited district to pay tuition "for each pupil resident therein *who attends* an accredited school in another district of the same or an adjoining county," with the "tuition to be charged by the district *attended* and paid by the sending district" (SLF 73–74) (emphasis added; see also SLF 59–60), and that it was indisputable that plaintiffs' children in fact "attend[ed]" Clayton (*id*.). By this analysis, plaintiffs sought to circumvent defendants' various statutory arguments as to why, contrary to the premise of plaintiffs' petition, § 167.131 could not be interpreted or applied to impose a mandatory obligation upon St. Louis County districts to accept City students – an issue plaintiffs now announced need not be "reach[ed]" (SLF 67).

In response to plaintiffs' new theory predicated on the fact that their children

already attend Clayton, Clayton put the Tuition Agreements in evidence to establish that the children's attendance was expressly in consideration for and conditioned upon plaintiffs' personal commitments to pay the tuition (SLF 81–84). As a matter of substantive law, Clayton contended, plaintiffs could not accept the benefit of their children's attendance conferred by the Tuition Agreements without honoring their corresponding personal contractual commitments to pay (SLF 81–83). Clayton further contended, as a matter of settled principles governing claims for declaratory relief, that plaintiffs' invocation of their children's attendance pursuant to the Tuition Agreements rendered moot and nonjusticiable any statutory question as to who should pay the tuition, because the question of who should pay was definitively answered by the Tuition Agreements – which expressly required plaintiffs to pay (SLF 83–84).

Following further briefing, including an amicus curiae brief from VICC and its member districts (SLF 115–133; plaintiffs' response at SLF 134–137),[3] all parties'

[3] As more fully detailed in their brief and supporting affidavit, VICC's and its member districts' position was that the relief sought by plaintiffs "would undermine the remedial purpose of SB781," "would eviscerate the statutory scheme that provides a court-approved remedy for past illegal segregation," "would negatively impact students currently participating in the voluntary desegregation program," and "would place untenable burdens on" the City District and the eleven St. Louis County school districts continuing to accept new transfer students in the VICC program (SLF 115–133, *see especially* 116 & 119).

dispositive motions[4] were called for hearing on October 23, 2008. At the hearing, plaintiffs also sought and obtained leave to amend their petition to eliminate their previous request for a declaration that Clayton was under a mandatory obligation to admit their children. *Compare* SLF 5 *with* LF 526 (prayer of amended petition omits original petition's requested declaration that Clayton "must allow the Pupils to attend [its] schools"). Plaintiffs' amended petition, rather, alleged simply that their children already attend Clayton and that Clayton therefore pursuant to § 167.131 must look to the City District for payment of their children's tuition (LF 524, ¶ 6; LF 526).[5]

After full briefing and hearing arguments from all parties, Judge David Lee Vincent III on November 5, 2008 entered the amended final judgment granting defendants' motions for summary judgment, denying plaintiffs' cross-motion for summary judgment and dismissing the action (LF 529–530). Plaintiffs appealed Judge Vincent's ruling. They initially sought transfer to this Court prior to disposition by the Court of Appeals, but that request was denied by the Court in a January 27, 2009 ruling. Following that, the case was taken up by the Missouri Court of Appeals, Eastern District.

B. Proceedings in the Court of Appeals

In the Court of Appeals, plaintiffs' initial brief failed to make any mention of plaintiffs' Tuition Agreements. In response, Clayton pointed out plaintiffs' omission and

[4] Plaintiffs had filed a cross-motion for summary judgment (LF 448–449).

[5] The amended petition also added a new count II seeking restitution of the tuition paid by plaintiffs pursuant to the Tuition Agreements (LF 526–527).

once again put forth the same three arguments it had made to the trial court. Clayton argued first that plaintiffs' claim is defeated by plaintiffs' binding Tuition Agreements, which require plaintiffs themselves to pay tuition (and their claims are also therefore moot). Second, Clayton argued, § 167.131 does not apply in this case because the subject matter is specifically and comprehensively controlled by the provisions of Senate Bill 781 (1998) and the federal-court approved 1999 Settlement Agreement in the St. Louis school desegregation case entered into pursuant to SB 781. Finally, Clayton contended it was not under any mandatory obligation to admit plaintiffs' children pursuant to § 167.131 and, to the contrary, was expressly granted "discretion" whether to admit them under Missouri's Safe Schools Act of 1996.

In an opinion dated June 23, 2009, the Court of Appeals affirmed the judgment of the trial court. Judge Sherri B. Sullivan, with Judges Robert G. Dowd, Jr. and Clifford H. Ahrens concurring, wrote that, as a result of plaintiffs' Tuition Agreements, "[plaintiffs] are barred from claiming that someone else, other than they, are obligated to pay the tuition" (Court of Appeals opinion p. 6). Rather, the Court held, the Tuition Agreements "must be enforced as written" and the Court was "not at liberty to disregard [their] terms" (*id*., citing *Lake Cable, Inc. v. Trittler*, 914 S.W.2d 431, 436 (Mo. App. E.D. 1996) and *Alverson v. Alverson*, 249 S.W.2d 472, 475 (Mo. App. St.L. 1952)). The Court also noted that plaintiffs, through their Tuition Agreements, had agreed their children would be "*subject to the same rights, privileges, duties and responsibilities as a [Clayton] resident, non-tuition paying student*" and that plaintiffs could not accept that status "then

claim City District status for the Children 'out of the other side of their mouths . . .'" (*id*. at pp. 2 & 8) (emphasis original).

The Court further held that plaintiffs "cite no legal authority by which they have the power to order [Clayton] to bill someone else for their Children's tuition," and that plaintiffs had failed to show "that the St. Louis Public School District does not maintain any accredited schools in the City of St. Louis," as required for § 167.131 to apply (*id*. at pp. 7–8). The Court of Appeals then ordered the case transferred to this Court on its own motion pursuant to Rule 83.02 (*id*. at p. 9).

POINTS RELIED ON

I. The Decision Below Granting Summary Judgment for Defendants and Denying Plaintiffs' Motion for Summary Judgment Should Be Affirmed Because, as a Matter of Law and Undisputed Fact, Binding Tuition Agreements Signed by Each Plaintiff Expressly Direct That Plaintiffs Themselves Must Pay Their Children's Tuition, and Those Agreements Defeat (and Render Moot) Plaintiffs' Claims; Plaintiffs' New Argument That These Agreements Are Void Fails Because That Argument (1) Is Outside the Scope of Plaintiffs' Pleadings and Waived by Plaintiffs' Failure to Raise It at Any Time Below, (2) Is Barred by Estoppel, (3) Is Without Merit as a Matter of Law, and (4) Fails, in Any Event, to Support the Relief Plaintiffs Seek in This Case (This Point Is Responsive to Plaintiffs' Points IV and V).

Lake Cable, Inc. v. Trittler, 914 S.W.2d 431 (Mo. App. E.D. 1996)

Executive Board of Missouri Baptist Convention v. Windermere Baptist Conference Center, 280 S.W.3d 678 (Mo. App. W.D. 2009)

Computer Sales Intern., Inc. v. Collins, 723 S.W.2d 450 (Mo. App. E.D. 1986)

Weinstein v. KLT Telecom, Inc., 225 S.W.3d 413 (Mo. banc 2007)

II. The Decision Below Should Alternatively Be Affirmed Because, as a Matter of Law, R.S. Mo. § 167.131 Does Not Apply in This Case in That the Subjects of Publicly Funded Student Transfers Between St. Louis City and County and the Effect of Any Loss of Accreditation by the City District Are Specifically and Comprehensively Governed by the Subsequent Provisions of Senate Bill 781 (1998)

and the 1999 Desegregation Settlement Agreement, Which Are Inconsistent With § 167.131, Particularly as Interpreted by Plaintiffs (This Point Is Responsive to Plaintiffs' Points II and V).

Senate Bill 781 (1998)

Smith v. Missouri Local Government Employees Retirement System, 235 S.W.3d 578 (Mo. App. W.D. 2007)

Campbell v. Tenet Healthsystems, DI, Inc., 224 S.W.3d 632 (Mo. App. E.D. 2007)

Moats v. Pulaski County Sewer Dist. No. 1, 23 S.W.3d 868 (Mo. App. S.D. 2000)

III. The Decision Below Should Alternatively Be Affirmed Because, as a Matter of Law, Clayton Is Under No Mandatory Obligation to Admit Plaintiffs' Children Under § 167.131 in That § 167.131 Contains No Mandatory Language and, to the Contrary, Under Missouri's Safe Schools Act (1996) and R.S. Mo. § 167.151.1 the Decision is Committed to District "Discretion" (This Point Is Responsive to Plaintiffs' Points III and V).

R.S. Mo. §§ 167.151 & 167.020 (2000)

Yellow Freight Systems, Inc. v. Mayor's Commission on Human Rights of the City of Springfield, 791 S.W.2d 382 (Mo. banc 1990)

Wimberly v. Labor and Industrial Relations Commission of Missouri, 688 S.W.2d 344 (Mo. banc 1985)

Citizens Bank and Trust Co. v. Director of Revenue, State of Mo., 639 S.W.2d 833 (Mo. banc 1982)

ARGUMENT

Plaintiffs, whose children have spent years at Clayton schools by virtue of contractual Tuition Agreements signed by each plaintiff, now claim that their children's tuition for the last two years must be paid by the City District, and not by them personally. They base this claim on § 167.131, which plaintiffs call the "Unaccredited District Tuition Statute." After plaintiffs learned that Clayton disagreed with their position and would not accept their children pursuant to § 167.131 (for reasons described at pp. 3–5, above), plaintiffs elected to continue sending their children to Clayton on a "tuition-paying" basis pursuant to their Tuition Agreements. That should be the end of this case – plaintiffs expressly agreed to pay their children's tuition themselves – as the opinion of the Court of Appeals makes clear.

Now, to avoid that compelling conclusion, plaintiffs resort to making a brand new contention in this Court, never made in any court below, that their Tuition Agreements are unenforceable (pl. br. 36, agreements should be "terminated" for a "failure of consideration"). So, after switching theories in the trial court to premise their § 167.131 claim on the simple fact that their children already attend Clayton schools pursuant to the tuition contracts (*see* pp. 1–3, above), they now make yet another new contention (in an effort to escape from their explicit contractual commitments to pay) that the very contracts upon which they premise their claim are void and unenforceable. As a result, under plaintiffs' latest framing of their position, the contracts must be valid for purposes of plaintiffs' first essential premise (so their children can attend Clayton) but invalid for purposes of their second essential premise (so they can avoid payment). Apart from the

multiple legal, factual and procedural bars to plaintiffs' belated claim of contractual invalidity (point I.B.), their entire position now collapses because it improperly depends on the mutually inconsistent propositions that their contracts are both valid and invalid. As put by the Court of Appeals below (in response to plaintiffs' inconsistent statements regarding residency status), plaintiffs in this Court are again speaking "out [of both] side[s] of their mouths" (Court of Appeals opinion p. 8).

It should also be noted that, contrary to strident assertions in their brief, plaintiffs' claim has nothing to do with vindicating the interests of any City children, nor does it seek to vindicate the interests of any City parents other than themselves (and perhaps some others who could afford Tuition Agreements). The consequences of what plaintiffs seek would be this: (1) City residents who wished to attend Clayton pursuant to Tuition Agreements could no longer do so (because, under plaintiffs' theory, such agreements would be void) and, (2) plaintiffs themselves would collect a windfall by recovering the tuition payments they made while their children attended Clayton. Plain and simple, this is nothing more than a suit by a select group of adults who want to recover money they previously agreed to (and did) pay.

As established below, plaintiffs' claim must fail, and the judgment should be affirmed, because the very contracts that permit their children's attendance at Clayton schools specify that attendance is tied to each plaintiff's individual commitment to pay tuition; their belated change in theory in this Court to avoid the payment obligations under their Tuition Agreement fails for at least four independently sufficient reasons (point I). In addition, their claim fails because § 167.131 does not apply to the City of St.

Louis; Senate Bill 781 (1998) and the federal-court approved desegregation Settlement Agreement entered pursuant thereto specifically, comprehensively and exclusively govern both the publicly-funded transfer of City students to public school districts in St. Louis County (including Clayton) and the effect of any loss of accreditation by the City District (point II). Finally, plaintiffs' claim must fail because admission pursuant to § 167.131 would be in any event "discretion[ary]," thus fully authorizing Clayton's decision not to allow plaintiffs' children (or any City children) to attend pursuant to that statute (point III).

I. The Decision Below Granting Summary Judgment for Defendants and Denying Plaintiffs' Motion for Summary Judgment Should Be Affirmed Because, as a Matter of Law and Undisputed Fact, Binding Tuition Agreements Signed by Each Plaintiff Expressly Direct That Plaintiffs Themselves Must Pay Their Children's Tuition, and Those Agreements Defeat (and Render Moot) Plaintiffs' Claims; Plaintiffs' New Argument That These Agreements Are Void Fails Because That Argument (1) Is Outside the Scope of Plaintiffs' Pleadings and Waived by Plaintiffs' Failure to Raise It at Any Time Below, (2) Is Barred by Estoppel, (3) Is Without Merit as a Matter of Law, and (4) Fails, in Any Event, to Support the Relief Plaintiffs Seek in This Case (This Point Is Responsive to Plaintiffs' Points IV and V).

Standard of Review

Review of the summary judgment below is *de novo*. *ITT Commercial Finance v.*

Mid-Am. Marine, 854 S.W.2d 371, 376 (Mo. banc 1993). Summary judgment must be affirmed if any theory justifies the ultimate holding, even if that theory was not relied on by the trial court. *Zafft v. Eli Lilly & Co.* 676 S.W.2d 241, 243 (Mo. banc 1984) ("An order of summary judgment will not be set aside on review if supportable on any theory."); *Kilventon v. United Missouri Bank*, 865 S.W.2d 741, 743 (Mo. App. W.D. 1993) ("If the judgment can be sustained under any theory, we must do so even if the trial court reached the correct result for the wrong reasons."). Here, the material facts are undisputed and the case turns on issues of law. As discussed below, there is no legal basis for plaintiff's requested declarations and the trial court's judgment should be affirmed.

In their point V, plaintiffs also challenge on appeal the denial of their motion for summary judgment. Plaintiffs' motion was properly denied for the same reasons that defendants' motions were properly granted, and those reasons are discussed in this point I and in points II and III below.

A. The Binding Tuition Agreements Signed by Each Plaintiff Expressly Direct That Plaintiffs Themselves Must Pay Their Children's Tuition, and Those Agreements Defeat (and Render Moot) Plaintiffs' Claims.

The Tuition Agreements signed by each plaintiff absolutely preclude the relief they have sought in this case. In their Tuition Agreements plaintiffs "agreed to pay the annual tuition to the District" (*e.g.*, A1). In exchange, Clayton "agree[d] to enroll" plaintiffs children (*id.*). Plaintiffs themselves acknowledge that this was the arrangement: "[Clayton] agreed to admit [plaintiffs' children] in exchange for tuition payments made

by [plaintiffs]," (pl. br. 9; SLF 103) and that their children "presently attend schools maintained by the School District of Clayton as 'Personal Tuition Students' . . ." (SLF 3, ¶ 6). Under these agreements the question posed by this lawsuit – who should pay the tuition? – is unequivocally answered. That obligation falls squarely on *plaintiffs*.

The Court of Appeals reasoning on this point is correct and may be adopted by this Court. As held there, a binding contract "must be enforced as written" (Court of Appeals opinion p. 6, quoting *Lake Cable, Inc. v. Trittler*, 914 S.W.2d 431, 436 (Mo. App. E.D. 1996)). Furthermore, a court "is not at liberty to disregard the terms of the contract between Appellants and Clayton School District for payment of tuition, even where there may be a statutory alternative for payment" (*id*., citing *Alverson v. Alverson*, 249 S.W.2d 472, 475 (Mo. App. St.L. 1952) & *Edmondson v. Edmondson*, 242 S.W.2d 730, 735 (Mo. App. K.C. 1951)). Plaintiffs request to be treated as City residents contradicts their contractually negotiated agreement to be accorded the same status as Clayton residents (*id*. at p. 7) and would result in Clayton receiving double payment (*id*. at p. 8). Thus, as held by the Court of Appeals, "Clayton's Tuition Agreements with [plaintiffs] say [plaintiffs] agree to pay the tuition for their Children, and that is as far as Clayton is required to look to see who is legally responsible for paying the bill" (*id*. at p. 7).[6]

[6] Furthermore, as also held by the Court of Appeals, plaintiffs' statutory claims are moot because the issues in this case are controlled by binding contracts (*id*. at p. 9). *See* 17A Mo. Prac. *Civil Rules Practice* § 87.01–2 (requiring a "justiciable controversy"),

Because the Tuition Agreements unequivocally defeat plaintiffs' claims, they have no choice but to argue – as they now do for the first time – that these agreements are voidable and should be "terminated" for a "failure of consideration" (pl. br. 36). This newly raised contention is meritless and barred as a matter of law for at least four independent reasons, as discussed next. Thus, based on the binding Tuition Agreements alone, plaintiffs' claims necessarily fail and the summary judgment below should be upheld.

B. Plaintiffs' New Argument That Their Agreements Are Void Fails for at Least Four Independently Sufficient Reasons.

Throughout these proceedings, including in their brief to this Court, plaintiffs have invoked their contractual status as students attending Clayton schools pursuant to Tuition Agreements to support their claims in this case. *See, e.g.*, plaintiffs' initial Petition (SLF 3, ¶ 6) ("All Pupils presently attend [Clayton] as 'Personal Tuition Students' pursuant to § 167.151, RSMo . . ."); plaintiffs' motion for summary judgment (LF 451, ¶ 8) (plaintiffs' children "attended" Clayton "at all times pertinent") and memoranda in

---

citing *State ex rel. Chilcutt v. Thatch*, 221 S.W.2d 172, 176 (Mo. banc 1949) (dismissing a declaratory judgment action as seeking an advisory opinion when declaration would hold only "academic interest"); *see also Local Union 1287 v. Kansas City Area Transp. Authority*, 848 S.W.2d 462, 464 (Mo. banc 1993) (trial court without jurisdiction to issue a declaratory judgment concerning "a situation that may never occur"); *County Court of Washington County v. Murphy*, 658 S.W.2d 14, 16 (Mo. banc 1983) (following *Chilcutt*).

support thereof (SLF 74 & 102) (children "attend" Clayton); and each of plaintiffs' briefs opposing summary judgment in the trial court (SLF 60 & 67) and on appeal (Court of Appeals brief pp. 5 & 26, and reply p. 11, and substitute brief in this Court pp. 8 & 38) (all stating that plaintiffs' children "attend" or "already attend" Clayton and relying on that fact to oppose summary judgment). It is equally clear, pursuant to these binding Tuition Agreements, that plaintiffs' children attend Clayton in exchange for each plaintiffs' "agree[ment] to pay the annual tuition" (*e.g.* A1).

Now, in an effort to avoid their contractual obligation to *pay*, plaintiffs argue for the first time that these contracts are voidable (pl. br. 36, agreements should be "terminated" for a "failure of consideration"). They do so after having already collected the benefit of their bargain by having their children attend Clayton schools for the past two school years, after repeatedly invoking that benefit in this case, and after expressly stating in their pleadings that they would "honor" their agreements (SLF 104; plaintiffs' Court of Appeals reply brief p. 10). Plaintiffs' new argument is without merit and should be rejected for multiple reasons.

Waiver and Failure to Plead

First, their new theory that the contracts are voidable was never raised in the trial court and should be disregarded for that reason. Plaintiffs' pleadings make no claim that their Tuition Agreements are void or should be "terminated" (*see* SLF 1–6, Petition; LF 523–528, Amended Petition). Compounding this failure to plead in their petition that the contracts should be terminated, plaintiffs never contended that the contracts "fail[]" in their arguments to the trial court (or even to the Court of Appeals). "On appeal, a party is

bound by the position taken in the trial court, and an appellate court will not convict the trial court of error on an issue which was not put before it." *Executive Board of Missouri Baptist Convention v. Windermere Baptist Conference Center*, 280 S.W.3d 678, 697 (Mo. App. W.D. 2009) (holding that unpled claim that an agreement should be rescinded was not presented to the trial court and could not be considered on appeal), quoting *Cremer v. Hollymatic Corp.*, 12 S.W.3d 363, 368 (Mo. App. W.D. 2000); *see also Lincoln Credit Co. v. Peach*, 636 S.W.2d 31, 36 (Mo. banc 1982) ("these contentions were not presented to the trial court and it has long been stated that this Court will not, on review, convict a lower court of error on an issue which was not put before it to decide"); *Sheehan v. Northwestern Mutual Life Insurance Company*, 103 S.W.3d 121, 130 (Mo. App. E.D. 2002) (argument waived "*by failing to bring it up on the summary judgment proceeding*") (emphasis in original); *D.E. Properties Corporation v. Food for Less, Inc.*, 859 S.W.2d 197, 201 (Mo. App. E.D. 1993) (failure to raise issue "on the motion for summary judgment" waives argument on appeal). Under Missouri law, as described in these cases, the failure to plead or argue in the courts below that their Tuition Agreements are void or "termina[ble]" prevents plaintiffs from raising that claim now.

Estoppel

Second, even if plaintiffs had properly pled and asserted below their argument that the Tuition Agreements are void, they would be barred by estoppel from making such a contention for at least two distinct reasons. The first estoppel arises because plaintiffs cannot renounce their Tuition Agreements after having accepted the benefits of their bargains (and even extensively relying on those benefits in this litigation; *see* quotes and

citations at pp. 19–20, above). Obviously, where, as here, a contracting party seeks to invoke one provision of an agreement (here, one enabling enrollment and attendance of the students), he cannot ignore and remains bound by the remaining provisions of that agreement (which, here, expressly require plaintiffs to pay tuition). *See Computer Sales Intern., Inc. v. Collins*, 723 S.W.2d 450, 452 (Mo. App. E.D. 1986) (party cannot invoke benefit of contract without being also bound by corresponding obligation). Under these circumstances, a party is estopped to contend his contractual obligations are void. *Id*. Plaintiffs previously sought to distinguish *Computer Sales* by stating that it only stands for the "unremarkable proposition that one party to a contract cannot repudiate his obligations to the other party to the agreement and ask to be relieved of his remaining obligations," and that "[t]hat situation does not exist here" because plaintiffs will "honor" their personal tuition agreements (SLF 104). Now, however, plaintiffs' position has changed and they are claiming for the first time that the agreements should be "terminated" for a "failure of consideration" (pl. br. 36). Under plaintiffs' new position *Computer Sales*'s "unremarkable proposition" is precisely in point. Plaintiffs are estopped from repudiating their obligations under the Tuition Agreements after "acceptance of [its] benefits," and the judgment below may be upheld on that basis. 723 S.W.2d at 452.

Furthermore, plaintiffs previous statements that they would "honor" their Tuition Agreements gives rise to the second estoppel bar to their new contention. Estoppel principles prevent plaintiffs from now taking a position contrary their earlier statements in the trial court and Court of Appeals that they would "honor" the contract (SLF 104;

plaintiffs' Court of Appeals reply brief p. 10).[7] *See Sheppard v. East*, 192 S.W.3d 518, 524 (Mo. App. E.D. 2006) (plaintiff barred from "taking a position directly contrary to or inconsistent with another position previously taken"); *see also New Hampshire v. Maine*, 532 U.S. 742, 743 (2001) (judicial estoppel is often invoked to "prohibit[] parties from deliberately changing positions according to the exigencies of the moment"). Thus, for at least two separate reasons, plaintiffs are estopped from now contending that their Tuition Agreements should be terminated.

Lack of Merit

Third, apart from all the foregoing fatal deficiencies, plaintiffs' contention that the contracts are voidable because there has been a "failure of consideration" (pl. br. 36) is simply wrong, both as a matter of undisputed fact and as a matter of law. As a matter of undisputed fact, the mutual consideration provided is obvious from the face of the Tuition Agreements and from plaintiffs own words: "[Clayton] agreed to admit [plaintiffs' children] in exchange for tuition payments made by [plaintiffs]" (pl. br. 9), and "had those agreements not been signed, [plaintiffs' children] would not have been allowed to attend [Clayton] schools" (SLF 103). Plaintiffs' children have attended Clayton for years under the Tuition Agreements; they have undisputedly received the expressly stated benefit of their bargain (education at Clayton) which, in turn, forecloses any claim that the consideration for the Tuition Agreements has failed.

[7] Plaintiffs prior commitment to "honor" their agreements also defeats their suggestion that they have been "coerced" and "constrained" to sign the Tuition Agreements (pl. br. 34). No evidence in the record supports these belated and unpled suggestions.

Furthermore, as a matter of law, plaintiffs' argument that there has been a "failure of consideration" is without merit. It is well settled that "consideration must be measured at the time the parties enter into their contract and that the diminished value of the economic benefit conferred, or even a complete lack of value, does not result in a failure of consideration." *Weinstein v. KLT Telecom, Inc.*, 225 S.W.3d 413, 415–416 (Mo. banc 2007), citing *Union Pac. R. Co. v. KC Transit Co.*, 401 S.W.2d 528, 536 (Mo. App. K.C. 1966) ("If promisor gets what he bargained for, there is no failure of consideration although what he receives become less valuable or of no value at all."); *Vorchetto v. Sappenfield*, 14 S.W.2d 685, 686 (Mo. 1929) ("[I]t is well settled that because one suffers a disappointment in his bargain a failure of consideration does not arise . . . ."). Here plaintiffs' have received the benefit of their bargain – the education of their children by Clayton – and therefore cannot claim a "failure of consideration." Instead, their Tuition Agreements must be upheld as written.

The authority plaintiffs cite in support of their claim that the contracts should be "terminated" actually supports Clayton's position and confirms that plaintiffs' position is without merit as a matter of law. In *Adbar, LC v. New Beginnings C-Star*, 103 S.W.3d 799 (Mo. App. E.D. 2003) (cited at pl. br. 36), the court expressly held that a lease contract between the parties must *remain in force* despite plaintiff's claim that it should be set aside because of "commercial frustration." *Id*. at 802. Far from supporting plaintiffs' position, the Court actually stated that the doctrine of "commercial frustration" "should be limited in its application so as to preserve the certainty of contracts." *Id*. In any event, no showing of "commercial frustration" is or can be made in this case. The

only other authority plaintiffs cite to support their argument is *Sharp v. Interstate Motor Freight System*, 442 S.W.2d 939, 945 (Mo. banc 1969), but that case is completely inapposite. The issue there was how to interpret a particular contract term, and no party even claimed that the contract at issue was void or voidable.[8] Based on the undisputed facts and settled law, including authority cited by plaintiffs, the claim that the Tuition Agreements should be "terminated" is without merit.

Failure to Support Plaintiffs' Claim for Relief

Fourth and finally, even if the contracts were void (they plainly are not) this still would not entitle plaintiffs to any of the relief they seek in this lawsuit. Plaintiffs in this case have pled for both retrospective and prospective relief, but neither would be appropriate if their contracts were voided.

Plaintiffs' pled claim for retrospective relief, under their second count for restitution based on unjust enrichment, is unavailing if the contracts were void. This is so because plaintiffs cannot show "that it would be unjust to allow the defendant to retain

[8] The term at issue was a contractual reference to a "final [administrative] order." *Id*. The court held that that term must be interpreted with reference to federal statutes providing for review of administrative decisions "as if [those statutes] were expressly referred to or incorporated therein." *Id*. Nothing in that case concerns the voiding of a contract or otherwise supports plaintiffs' claim that they can escape their clear contractual obligations. Nor, unlike in *Sharp*, have plaintiffs in this case pointed to any contract term that references any statutory provision.

the [tuition payments]," which is an essential element of their claim. *Executive Board of Missouri Baptist Convention*, 280 S.W.3d at 697 (stating the elements of a claim for unjust enrichment and holding that plaintiff failed to show that it would be unjust for defendant to retain payments). Regardless whether the contracts at bar were valid, plaintiffs received the compensation they bargained for – their children have attended Clayton. It cannot be unjust for plaintiffs to pay and for Clayton to collect payment for the bargained-for services Clayton in fact provided. *Ryan v. Tinker*, 744 S.W.2d 502, 505 (Mo. App. S.D. 1988) (no injustice in defendant retaining money paid to it when plaintiff had received the benefit bargained for). On the contrary, the real injustice in this case would be if plaintiffs were permitted to renege on their bargain.[9]

To the extent that plaintiffs seek prospectively to void some unpled future Tuition

[9] Indeed, even if there were no contracts here, the law would permit Clayton to recover tuition payment for its services under *quantum meruit* or a similar theory. *Midwest Crane and Rigging, Inc. v. Custom Relocation's Inc.*, 250 S.W.3d 757, 760 (Mo. App. W.D. 2008) (*quantum meruit* claim lies where "plaintiff provided to the defendant materials or services at the defendant's request or with the acquiescence of the defendant, . . . the materials or services had reasonable value, and . . . the defendant, despite the demands of the plaintiff, has failed and refused to pay the reasonable value of such materials or services"), quoting *Olathe Millwork Co. v. Dulin*, 189 S.W.3d 199, 206 (Mo. App. W.D. 2006); *see also First Place, Inc. v. Douglas Toyota III, Inc.*, 801 S.W.2d 721 (Mo. App. S.D. 1990). There is simply no injustice in this outcome.

Agreement, that argument (apart from its procedural invalidity) also fails to support plaintiffs' claim for relief. If plaintiffs' hypothetically succeeded in prospectively voiding future Tuition Agreements, then there would be no such Agreements in place, their children would no longer attend Clayton, and the question of who should be paying their tuition at Clayton would not arise. In sum, even if plaintiff could belatedly establish (they cannot) that their Tuition Agreements were or are "termina[ble]" this could not justify any of the relief they seek against Clayton.

Finally, each of the above arguments is lent additional weight by consideration of the practical effect of plaintiffs' contention. If plaintiffs' Tuition Agreements were terminated based on a supposed "failure of consideration," it would mean that City residents (or other residents of unaccredited districts or districts at risk of deaccreditation) would no longer be able to contract to attend Clayton (or any other districts in an adjacent county).[10] By voiding their Tuition Agreements, plaintiffs hope to recover the tuition they already paid to Clayton, but the consequence of their argument would be to deny other City residents the freedom to attend county schools *even if* they were willing to pay. That is an absurd and untenable result that should manifestly be avoided.

Plaintiffs' new contention that their Tuition Agreements are void cannot save their

[10] Nor would plaintiffs or any other City residents be able to attend Clayton schools under § 167.131, because Clayton has already decided, based on the recommendation of DESE and prudential concerns, not to accept students pursuant to that statute (*see* point III, below).

claim for any one or more of the multiple reasons listed above, and summary judgment should be affirmed on the basis of plaintiffs' binding contractual obligation to pay the tuition they agreed to pay.

II. The Decision Below Should Alternatively Be Affirmed Because, as a Matter of Law, R.S. Mo. § 167.131 Does Not Apply in This Case in That the Subjects of Publicly Funded Student Transfers Between St. Louis City and County and the Effect of Any Loss of Accreditation by the City District Are Specifically and Comprehensively Governed by the Subsequent Provisions of Senate Bill 781 (1998) and the 1999 Desegregation Settlement Agreement, Which Are Inconsistent With § 167.131, Particularly as Interpreted by Plaintiffs (This Point Is Responsive to Plaintiffs' Points II and V).

As discussed above, summary judgment is reviewed *de novo* and the ruling below must be affirmed if any theory justifies the ultimate holding. Here, the material facts are undisputed and the case turns on issues of law.

The provisions of Senate Bill 781 (1998) and the federal-court approved 1999 Settlement Agreement in the St. Louis school desegregation case, which in turn was entered pursuant to SB 781, specifically and comprehensively govern the publicly-funded transfer of City students to public school districts in St. Louis County, including Clayton, and the effect of a loss of accreditation by the City District. These provisions are inconsistent with those of § 167.131 and therefore control to the exclusion of that statute.

A. SB 781 Contains Specific and Comprehensive Provisions, Particularly Tailored to the City and County of St. Louis, Controlling the Subject Matter of This Case, and Those Provisions Are Inconsistent With Plaintiffs' Urged Interpretation of § 167.131.

Both publicly funded student transfers between the City of St. Louis and school districts in St. Louis County and the legal effect of a loss of accreditation of the City District are exclusively governed by a specific and comprehensive statutory scheme enacted by Senate Bill 781 (1998). SB 781 was adopted by the General Assembly to provide a statutory framework for settlement of the St. Louis school desegregation case then pending in federal court. *Board of Educ. of City of St. Louis v. State*, 229 S.W. 3d 157, 159 (Mo. App. E.D. 2007) (SB 781 adopted "[i]n order to provide funding and a framework" for St. Louis desegregation settlement). The bill enacted numerous provisions designed to extensively reform public education in St. Louis.[11] It also enacted R.S. Mo. § 162.1100, which created the Transitional School District in St. Louis and defined the duties of the governing Special Administrative Board, including giving it the power to run the City District in the event that it lost accreditation. § 162.1100.3.

With respect to publicly funded student transfers, SB 781 enacted provisions that called for the "establish[ment]" of "an urban voluntary school transfer program within a

[11] For example, it restricted tenure of school principals in St. Louis, restructured elections for the City District's Board of Directors, and shortened their terms of office from 6 to 4 years, among many other provisions. R.S. Mo. §§ 160.400, 162.601, 168.221.

program area which shall include a city not within a county [namely, the City of St. Louis] and any school district located in whole or in part in a county with a population in excess of nine hundred thousand persons [namely, St. Louis County] which district chooses to participate." R.S. Mo. § 162.1060.1. This new section – § 162.1060, entitled "Metropolitan Schools Achieving Value in Transfer Corporation" – contains extensive provisions to implement a publicly funded program for the voluntary transfer of students residing in St. Louis City to school districts in St. Louis County. The section further makes clear that "[a]ll provisions of this section *shall be subject to* a settlement incorporated into a final judgment [by the federal court in the desegregation case], provided that the financial provisions of this section shall not be superseded by such settlement." § 162.1060.2(1) (emphasis added).

Underscoring the focus on a settlement agreement, SB 781 specifically provided that § 162.1060 would not go into effect unless a "final judgment" – defined to include a "consent judgment" and "settlement" – was entered by the federal court on or before March 15, 1999 which fully resolved the desegregation case, and the Missouri Attorney General by that date certified to the Revisor of Statutes that such a judgment had been entered. SB 781, § B; R.S. Mo. § 163.035 (1998). In compliance with this requirement, the federal court timely entered such a judgment and the Attorney General timely so certified to the Revisor of Statutes, thus enabling § 162.1060 and all other provisions of SB 781 to become effective as law. *See* "Revisor's Note" to §§ 163.035 & 162.1060. As contemplated by SB 781, the federal court's final judgment in the desegregation case expressly approved and incorporated a settlement agreement (hereafter the " Settlement

Agreement," which may be found at LF 37–174). *See Liddell v. Board of Educ. of the City of St. Louis*, 1999 WL 33314210, No. 4:72CV100, p. 9 (U.S.D.C. E.D. Mo. March 12, 1999) (approving and incorporating the Settlement Agreement) (included in record at LF 13–32) (Limbaugh, J.).

SB 781 and the 1999 Settlement Agreement were the product of extremely difficult and complex negotiations between many parties, including the U.S. Department of Justice, Governor Mel Carnahan, then Attorney General (and now Governor) Jay Nixon, the state's Board of Education and Department of Elementary and Secondary Education (DESE), teachers' unions, the St. Louis Public School District and its representatives, and two dozen St. Louis County school districts each with its own elected board, president, superintendent and legal representation. *Liddell* at pp. 1, 8, 14–15 (LF 13, 20, 25–26). The Settlement Agreement took three years of work to complete and was crafted with the benefit of advice from numerous financial and educational experts, student advocates, and all branches of government. *Id*. at pp. 2–3, 5–9 (LF 14–15, 17–21). The resulting product reflects the considerable efforts of all these parties and individuals. It has stood the test of time over a full decade and includes one of the most successful publicly funded voluntary interdistrict student transfer program in the nation. *See* the amicus brief of the Voluntary Interdistrict Choice Corporation (SLF 116–121) (discussing the history of the *Liddell* case and the implementation of the resulting settlement).

Significantly for present purposes, the Settlement Agreement – to which § 162.1060 "shall be subject" – contains numerous detailed provisions specifically,

comprehensively and exclusively governing the publicly funded transfer of students residing in St. Louis City to St. Louis County school districts. Whether in the statute, the Settlement Agreement or both, there are extensive provisions pertaining to such matters as the creation of a new corporate consortium of school districts to run the City-County transfer program (namely, VICC),[12] governance of the new entity,[13] eligibility of students to transfer,[14] funding and financial operations,[15] special education services for

[12] *E.g.*, R.S. Mo. §§ 162.1060.1 & .2(1); Settlement Agreement at pp. 56–57, ¶ 2 (LF 116–117); and certified copies of VICC's articles of incorporation and certificate of good standing (LF 175–181); *see also Board of Educ.* 229 S.W.3d at 160 n. 7 ("VICC . . . is a non-for-profit corporation operating the Voluntary Interdistrict Transfer Program").

[13] *E.g.*, Settlement Agreement at p. 56, ¶ 2 (LF 116) (adopting the "[g]overnance, representation and 'weighted' voting [requirements] as described for the statutory corporation in the last two sentences of R.S. Mo. § 162.1060.1").

[14] *E.g.*, Settlement Agreement at p. 57, ¶ 4 (LF 117) (also adopting the "eligibility" requirements of the earlier federal-court approved "1983 Settlement Agreement"); *see also* 1983 settlement agreement at pp. II-7 to II-8 & II-12 to II-13 (LF 198–199, 203–204).

[15] *E.g.*, R.S. Mo. §§ 162.1060.3 –.6; Settlement Agreement pp. 56–57, 62–65, ¶¶ 2 & 19–22.5 (LF 116–117, 122–125); *see also* § 162.1061 (2005) (entitled "Transfer corporations [metropolitan schools], computation of state aid").

transfer students with special needs,[16] vocational/technical education (including creation of a new metropolitan-wide "cooperative"),[17] transportation (including a new system of busing "zon[ing]"),[18] rights of participating transfer students and parents,[19] rights of participating school districts (including each County district's discretion in taking City students),[20] and procedures and tribunals for the assertion and resolution of claims and disputes.[21] Both in terms of specificity and comprehensiveness, there is absolutely no comparison between SB 781's statutory City-County student-transfer scheme and the general, older provisions of § 167.131 upon which plaintiffs' entire claim rests. SB 781's § 162.1060 and the statutorily incorporated Settlement Agreement were clearly intended to provide the sole mechanism for publicly funded transfers of students between school districts in St. Louis City and County, as their provisions expressly confirm.[22]

---

[16] *E.g.*, Settlement Agreement at pp. 63–65, ¶ 22 (LF 123–125).

[17] *Id*. pp. 22–33, ¶ 17 (LF 58–59).

[18] *E.g.*, *id*. p. 61, ¶ 16 (LF 121); § 167.1060.7 (authorizing transportation "zones").

[19] Settlement Agreement *passim* pp. 54-67 (LF 114–127).

[20] *Id.*; *see especially* ¶¶ A, 6, 7 & 10 (LF 114, 118, 119); R.S. Mo. § 162.1060.1.

[21] *E.g.*, Settlement Agreement at pp. 60 & 65–67, ¶¶ 15, 23 & 24 (LF 120, 125–127).

[22] *E.g.*, R.S. Mo. § 162.1060.2(1) (statutory transfer program covers "all" school districts in St. Louis City and County choosing to participate); Settlement Agreement p. 18, ¶ 12 (LF 54) ("[i]nterdistrict transfers" between St. Louis City and County to occur "as set forth in" the Settlement Agreement); p. 54, ¶ A (LF 114) ("*This Agreement* . . . enables

Inconsistencies With § 167.131

It is clear that, in multiple significant respects, the transfer program put in place by § 162.1060 and the Settlement Agreement is fundamentally inconsistent with § 167.131. For example, eligibility for City-to-County transfer under the SB 781 scheme – because it is part of a remedy for unconstitutional racial segregation in the City of St. Louis – is strictly limited to black students residing in the City. Settlement Agreement p. 57, ¶ 4 (LF 117). Publicly funded transfers under § 167.131, in contrast, are not so limited, which would defeat the essential remedial purpose of SB 781 and of the federal-court approved 1999 Settlement Agreement to which the statute is "subject."§ 162.1060.2.[23]

It is also clear under SB 781 and the Settlement Agreement that the decision whether to accept transfer students from the City lies wholly within the discretion of each

---

[transfer] by new eligible pupils in the future, *subject to* the terms and conditions stated below"); p. 57, ¶ 4 (LF 117) ("To be 'eligible' for transfer, pupils *must* meet [specified requirements]") (emphasis added).

[23] Plaintiffs' unsupported suggestion that if they prevailed the result would "promote integration" is nonsensical. As the VICC member districts explained in their amicus brief to the court below, if County districts were forced to take students pursuant to § 167.131, the inevitable result would be a corresponding decrease in their participation in the VICC transfer program, and a corresponding decrease in the number of black students attending County schools (SLF 123).

County district.[24] This stands in sharp contradiction to any urged interpretation of § 167.131 as creating a *mandatory* obligation on the part of County districts to accept City students. Again, the conflict would be irreconcilable, and § 167.131, at least as plaintiffs originally contended it should be interpreted (*see* pp. 5–6, above; *see also* their substitute brief at pp. 32–34), would plainly defeat the letter and spirit of the SB 781 statutory scheme.

The funding and financial provisions under the SB 781 scheme are likewise wholly different from and at odds with those found in § 167.131. *See e.g.*, R.S. Mo. §§ 162.1060.3–.6; Settlement Agreement pp. 56–57, 62–65 ¶¶ 2 & 19–22.5 (LF 116–117, 122–125); *see also* R.S. Mo. § 162.1061 (2006) (entitled "Transfer corporations (metropolitan schools), computation of state aid"). Under § 167.131, the district of residence is required to pay the "tuition" cost, whereas under SB 781 the State foots the bill. *Compare* §§ 167.131.1 & .2 *with* § 162.1060.3–.6 *and* § 162.1061. This is a crucial difference because a key purpose of SB 781 was to provide *more* financial resources to the City District in order to meet its various ongoing desegregation remedial obligations under the Settlement Agreement. *Board of Educ.*, 229 S.W.3d at 159; *Liddell*, *supra*, at pp. 1, 3, 5 & 7 (also at LF 13, 15, 17 & 19). But under § 167.131 (if it applied, which it

[24] *See, e.g.*, R.S. Mo. § 162.1060.1 (program includes each district which "chooses to participate"); Settlement Agreement p. 54, ¶ B (LF 114) ("a matter of complete lawful local autonomy"); p. 58, ¶ 7 (LF 118) (each district "*shall have the right* to determine its own level of acceptance of new transfer students (*if any*) each year") (emphasis added).

does not), just the opposite would occur: the City District's resources would be *depleted* by payment of tuition for City students transferring to the County. Again, the statutes conflict, and the salutary desegregation remedial purposes would be defeated if § 167.131 applied.

The funding and financial provisions also conflict from the perspective of the County school districts like Clayton. Under SB 781 and the Settlement Agreement, the County districts, through VICC, have a reliable, dedicated and State-guaranteed funding source to reimburse them for the costs of educating transfer students from the City (SLF 122–124, 132). This stands in sharp contrast to § 167.131, which provides no assurance or guarantee that the sending district will be either willing or able to make timely tuition payments (*id*.; LF 261–262, ¶ 2). Indeed, as noted, the lack of such assurance or guarantee under §167.131 was seriously problematic for Clayton with respect to its original decision to accept unaccredited Wellston students and which, in turn, prompted Clayton's ultimate decision to stop taking any new students from Wellston (pp. 4–5).

Transportation is also treated inconsistently under the two statutory schemes. Under SB 781, VICC – using State revenues uniquely applicable to VICC, and employing a statutorily authorized and carefully devised busing "zoning" system which requires students living in designated areas of the City to attend designated County school districts – actually *provides* the transportation, and it does so for *all* transfer students, to *all* participating County districts, and at *no cost* to parents or to the City District. *See, e.g.*, R.S. Mo. §§ 162.1060.7; 162.1060.4; 162.1061(2); Settlement

Agreement pp. 18–20, 59, 61–62 ¶¶ 13, 16, 9, 20(3) (LF 54–56, 119, 121–122). Under § 167.131, in stark contrast, the *City* District, out of its *own* funds, would be required to *pay for* the cost of transportation of students transferring to *one* County district, and *without regard to the "zone"* where a student resides within the City (*see* DESE guidance, SLF 30, ¶ 7). Section 167.131, if it were to apply (it does not), would thus again be inconsistent with and defeat the important remedial purposes of SB 781 and the incorporated 1999 Settlement Agreement.

There are also inconsistencies between § 167.131 and the SB 781/Settlement Agreement scheme with respect to deaccreditation, as the City District demonstrated below (SLF 51). SB 781 contains provisions specifically addressing the effect of a deaccreditation of the City District. In contrast to the provision for the appointment of special administrative boards in other school districts, which allows for the imposition of such a board only when the district has remained unaccredited for two school years (R.S. Mo. § 162.081), the St. Louis-specific statute enacted by SB 781 provides for a special board to take over the City District immediately upon loss of accreditation. R.S. Mo. § 162.1100.3. As explained more fully by the City District, this portion of the SB 781 scheme, intended to provide an aggressive remedial scheme facilitated by direct state intervention, would be totally undermined if the special board was required to carry out its mandate while simultaneously paying tuition for its students to leave the district to attend a school in St. Louis County, as plaintiffs claim it must.

In the foregoing respects, among others, the provisions of SB 781 and the 1999 Settlement Agreement significantly conflict with those of § 167.131, particularly as

plaintiffs would have it interpreted and applied.[25] Based on the authorities discussed in the next section, plaintiffs' claim fails as a matter of law for this reason.

[25] By way of further example, the Settlement Agreement contains extensive provisions with respect to special education services for transfer students with special needs, including a provision specifically authorizing the City District "at [its] option" to insist, under certain circumstances, that a student requiring such services remain in the City District to receive the services there. *See* Settlement Agreement pp. 63–65 ¶ 22 (LF 123–125). Section 167.131, in contrast, contains no such provisions, affords no such "option," and otherwise fails to address the problem – fully resolved by the Settlement Agreement – that City residents do not reside within the boundaries of the entity (Special School District of St. Louis County) that is charged with the responsibility to provide special services for County resident students. The Settlement Agreement likewise comprehensively addresses vocational/technical education for transfer students (*e.g.* Settlement Agreement pp. 22–23 ¶ 17 (LF 58–59)), whereas § 167.131, in contrast, contains no such provisions. In further contrast, the Settlement Agreement contains carefully delineated remedial limitations and procedures, including mandatory binding arbitration, for the assertion and resolution of claims and disputes regarding the transfer of students from the City to the County. *See* Settlement Agreement pp. 65–66 ¶¶ 23–24 (LF 125–126). Those provisions, incorporated as law by § 162.1060.2, again hopelessly conflict with § 167.131 and, indeed, would foreclose judicial proceedings such as plaintiffs' lawsuit in the case at bar.

B. Under Missouri Law, the Comprehensive, Later-Enacted and St. Louis-Specific Provisions of SB 781 Including the Incorporated 1999 Settlement Agreement Must Prevail Over the Conflicting, Earlier and General State-Wide Provisions of § 167.131.

It is well settled that a specific, chronologically later statute must prevail over an earlier statute of general applicability. *Smith v. Missouri Local Government Employees Retirement System*, 235 S.W.3d 578, 582 (Mo. App. W.D. 2007) ("chronologically later statute . . . will prevail over an earlier statute of a more general nature, and the latter statute will be regarded as an exception to or qualification of the earlier general statute"); *Lett v. City of St. Louis*, 948 S.W.2d 614, 619 (Mo. App. E.D. 1996) (same); *Moats v. Pulaski County Sewer Dist. No. 1*, 23 S.W.3d 868, 872 (Mo. App. S.D. 2000) (same; especially true where later statute is more "detailed"); *see also*, *Shipman v. Dominion Hospitality*, 148 S.W.3d 821, 823 (Mo. banc 2004); *Laughlin v. Forgrave*, 432 S.W.2d 308, 313 (Mo. banc 1968).

It is equally well settled that where, as here, two statutes are inconsistent, regardless of their chronological order of enactment, the statute specifically addressing the subject matter will take precedence over the general statute. *Campbell v. Tenet Healthsystems, DI, Inc.*, 224 S.W.3d 632, 636 (Mo. App. E.D. 2007) (when statutes conflict, "the more specific statute controls over the more general"); *Smith v. Missouri Local Government Employees Retirement System*, 235 S.W.3d 578, 582 (Mo. App. W.D. 2007) ("the more specific provision must take precedence over the general"); *State ex rel. Fort Zumwalt School Dist. v. Dickherber*, 576 S.W.2d 532, 536–537 (Mo. banc 1979)

("specific," "definite," and "particular" statute prevails over "general" statute); *Laughlin v. Forgrave*, 432 S.W.2d 308, 313 (Mo. banc 1968) (when there is a "repugnancy," the "special [statute] will prevail over the general"). Furthermore, Missouri's statutory rules of construction specifically provide that a statute referring to a "county" – such as § 167.131, upon which plaintiffs' claim is predicated – will apply to the City of St. Louis only if such a construction is not "inconsistent with the evident intent . . . of some law specially applicable to such city." R.S. Mo. § 1.080.

Here, the St. Louis-specific, highly detailed provisions of SB 781 (1998) and the incorporated 1999 Settlement Agreement must prevail over the generally applicable earlier provisions of § 167.131 (which was enacted in 1931 and last amended in 1993). As demonstrated above, the SB 781 transfer scheme and remedial deaccreditation provisions are specifically tailored to St. Louis City (and County), and are fundamentally inconsistent with § 167.131 in numerous respects. Under the foregoing well-settled legal authority, plaintiffs' claim necessarily fails and the judgment should be affirmed.

C. Plaintiffs' Conclusory Arguments Challenging the Exclusive Applicability of the Comprehensive SB 781/Settlement Agreement Scheme Are All Unsupported and Without Merit.

Plaintiffs make no effort to come to grips with the numerous fatal inconsistencies and conflicts between SB 781 and § 167.131. They do not discuss how the SB 781 scheme's funding provisions, which use State funding to provide additional financial support to the City for remedial purposes, can be reconciled with § 167.131's funding provisions, which would siphon money away from the City. Plaintiffs do not consider

the County districts' rights under the SB 781 scheme to make their own determinations regarding participation in the transfer program and the acceptance of City students and their right to look to VICC for reliable and predictable cost reimbursement payments, all of which are fundamentally antithetical to § 167.131, at least as plaintiffs would have it interpreted and applied. Nor do plaintiffs address the fundamental conflict between the remedial deaccreditation scheme provided by SB 781 and their urged (but wrong) interpretation of § 167.131. Plaintiffs simply fail to grapple with these claim-defeating differences, or any of the other fatal inconsistencies between the two schemes.

Instead, plaintiffs assert the Court should simply apply both § 167.131 and the SB 781 scheme in their entirety, which plaintiffs say would "harmonize[ ]" the statutes (pl. br. 24). Again, plaintiffs make no attempt to explain how such a scheme would work in practice or how it could result in harmony, given the numerous inconsistencies discussed above. Indeed, contrary to plaintiffs assertion, it seems clear here that appropriate, harmonizing result would be for § 167.131 to continue to apply to districts not subject to specially applicable statutes on point, while SB 781 remains the exclusive authority applicable to the St. Louis City and County school districts.

Plaintiffs next assert that § 167.131 and SB 781 "are intended to cure distinct problems" (pl. br. 24). Plaintiffs suggest two "problems" that they argue are uniquely addressed by § 167.131. First, they argue that § 167.131 addresses the "narrow circumstance" in which a district loses accreditation (pl. br. 24). But that "narrow circumstance" is addressed even more comprehensively, and in much greater detail, by SB 781, in the provisions providing for the creation of a Special Administrative Board in

the case of deaccreditation (*see* p. 37 of this brief, above). Plaintiffs' suggested interpretation of § 167.131 runs directly counter to the central purpose of these provisions (which is to return the City District to accredited status) because, among other reasons, it would channel funds away from the City District and deprive it of resources needed for remedial obligations.

Second, plaintiffs assert that § 167.131 was enacted to "ensure vindication" of the Missouri constitution's guarantee of a free education (pl. br. 24–25). But that guarantee is not at issue here, nor is it affected by deaccreditation. Plaintiffs, like any City residents, can always obtain a cost free education for their children at the City's public schools.[26] To the extent plaintiffs' argument goes beyond the constitutional guarantee of a free education, and relies on a purported constitutional guarantee of education in an *accredited* public school (*see* pl. br. 27–28, 41), that argument is totally without legal support. There is no right to attend an "accredited" school to be found in Missouri's constitution. The constitution itself makes no reference to "accredited" schools – not surprisingly, since the statutory accreditation scheme was enacted decades after the constitution was ratified. Nor are there cases recognizing such a right, as demonstrated by the absence of any such authority in plaintiffs' own brief.

[26] Plaintiffs' arguments also ignore an array of other publicly funded ("free") schools available to City residents. Under SB 781 and the Settlement Agreement, these include magnet schools and charter schools, as well as County schools pursuant to the VICC transfer program.

Plaintiffs' assertion that the SB 781/Settlement Agreement scheme somehow violates the Missouri and federal equal protection clauses (pl. br. 27) is equally without merit and is entirely discredited by the recent United States Supreme Court case discussing constitutional scrutiny of school desegregation schemes, *Parents Involved In Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 127 S.Ct. 2738, 2752 (2007). In that case, the Court reaffirmed the "compelling interest of remedying the effects of past intentional discrimination" by means of court-ordered desegregation decrees. *Id*. Here, under settled constitutional precepts, the SB 781/Settlement Agreement scheme is fully authorized as a federal court-approved remedy for an adjudicated *violation* of the Equal Protection Clause.

Plaintiffs' conclusory and unfounded arguments simply reinforce Clayton's fundamental point that the comprehensive and specific provisions of SB 781 and the Settlement Agreement cover the matters at issue in this lawsuit and must prevail over the inconsistent, older and less specific provisions of § 167.131, and that plaintiffs are unable to show otherwise.

III. The Decision Below Should Alternatively Be Affirmed Because, as a Matter of Law, Clayton Is Under No Mandatory Obligation to Admit Plaintiffs' Children Under § 167.131 in That § 167.131 Contains No Mandatory Language and, to the Contrary, Under Missouri's Safe Schools Act (1996) and R.S. Mo. § 167.151.1 the Decision is Committed to District "Discretion" (This Point Is Responsive to Plaintiffs' Points III and V).

As discussed above, summary judgment is reviewed *de novo* and the ruling below must be affirmed if any theory justifies the ultimate holding. The dispositive issues in this point are entirely issues of law.

The Safe Schools Act of 1996, prompted in part by the rape and murder of a 15-year-old student at McCluer North High School by a newly admitted intradistrict transfer student, codified for the first time in a single section (R.S. Mo. § 167.020) the requirements for admission to public schools in Missouri.[27] Previously, admission requirements were spread around in a number of separate statutory provisions that had

[27] For discussion of the history and purpose of the Act, *see* Susan Anderson, *The Safe Schools Act Protects Missouri Students*, 55 J. Mo. B. 264 (1999); Stanley Matthew Burgess, *Missouri's Safe Schools Act: An Attempt to Create a Safe Education Opportunity*, 66 U.M.K.C.L.R. 603 (1998). As these discussions indicate, a major purpose of the Act was to create predictable procedures for admission and transfer of students in the public school system and "allow[] administrators the ability to make knowledgeable decisions about the admission of potential pupils." Burgess at 618.

accumulated over the years. The purpose of § 167.020 was to comprehensively and exclusively set forth in one place all requirements for admission, whether by terms in that section itself or by explicit reference to other statutes. This section as enacted by the Safe Schools Act is now routinely regarded and referenced as the definitive authority on the requirements for admission to public schools under Missouri law. *Washington v. Ladue School Dist. Bd. of Ed.*, 564 F.Supp.2d 1054, 1058 (E.D. Mo. 2008) (§ 167.020 "was enacted for the specific purpose of delineating where children should attend school"); *Board of Educ. of City of St. Louis v. Elam*, 70 S.W.3d 448 (Mo. App. E.D. 2000) (upholding judgment against non-resident student's parents for submitting false paperwork in violation of § 167.020, and awarding district judgment for lost tuition while student was attending); DESE, *Residency* (June 22, 2009), http://dese.mo.gov/schoollaw/freqaskques/Residency.htm; *see also* the statute's title, "School *registration requirements* – waiver – application – violation, penalty," V.A.M.S. § 167.020 (emphasis added); and commentary cited in the note on the previous page. The section is now for all practical purposes the exclusive gateway for admission to any public school in Missouri.

Plaintiffs offer no opposition to this proposition. They only contend they need not address the §167.020 gateway requirements because their children "already attend [Clayton] schools" pursuant to plaintiffs' Tuition Agreements (pl. br. 30, 34). As a result, they say, the question of Clayton's statutory authority to decide whether to admit students pursuant to § 167.131 is not "germane" to this appeal and the Court is therefore "spared from resolving" the issue (*id*.).

Try as they might to avoid this issue though, plaintiffs cannot disregard the fact

that admission to Missouri schools is controlled by this orderly statutory scheme. Pursuant to this statutory scheme, Clayton decided, for prudential reasons and on the recommendation of DESE, not to accept City students under § 167.131 (*see* pp. 3–5, above). As demonstrated below, that was Clayton's decision to make in its "discretion" under the Safe Schools Act. Clayton further decided, however, that it would admit plaintiffs' children as "Personal Tuition Students" (SLF 3, ¶ 6), pursuant to their Tuition Agreements signed by plaintiffs, as independently authorized by the Safe Schools Act.[28] Thus, as will be seen, plaintiffs' claim that Clayton is required to treat their children as attending pursuant to § 167.131 is unsupported by and contrary to the Safe Schools Act and the enactments made thereby. As a matter of law the judgment may alternatively be upheld on this basis.

A. The Safe Schools Act Expressly Commits Admission in These Circumstances to District "Discretion" and Missouri's Department of Elementary and Secondary Education Has Confirmed that County Districts Have the "Authority to Accept or Reject" City Residents.

As noted, § 167.020 is a comprehensive legislative codification in a single section of the requirements for admission to Missouri's public schools. *See Washington*, 564 F.Supp.2d at 1058 and discussion and authority above at pp. 44–45. More specifically,

[28] Section 167.020.6 authorizes nonresident admission pursuant to 167.151 which, in turn, provides that a "district, in its discretion, may admit to the school pupils not entitled to free instruction and prescribe the tuition fee to be paid by them." § 167.151.1.

the starting place for any discussion of public school admission requirements is subsection 2 of § 167.020. Under that subsection, a student registering for school "*shall* provide" either "(1) Proof of residency in the district [or] (2) Proof that the person registering the student has requested a [hardship] waiver." R.S. Mo. § 167.020.2(1) & (2) (emphasis added). The remainder of § 167.020 refines this basic admission requirement and contains a complete list of exceptions to its general rule.[29] These exceptions pertain to, for example, homeless children, students transferred pursuant to court-ordered desegregation plans (*see* point II, above), and pupils assigned to another district by the commissioner of education. R.S. Mo. §§ 167.020.6 & 167.121. According to their terms, each exception either requires or permits a district to admit certain nonresident students. R.S. Mo. § 167.020.6.

Only one exception to the general residency requirement of § 167.020 could apply to allow plaintiffs' children to attend school in Clayton, and it is found in subsection 6. That subsection states that students admitted pursuant to § 167.151 are expressly

---

[29] By straightforward rule of construction, any requirement to admit a student under circumstances not expressly included in the statute's detailed provisions must be regarded as intentionally excluded. *Yellow Freight Systems, Inc. v. Mayor's Commission on Human Rights of the City of Springfield*, 791 S.W.2d 382, 387 (Mo. banc 1990) ("the express mention of one thing implies the exclusion of another"); *Groh v. Ballard*, 965 S.W.2d 872, 874 (Mo. App. W.D. 1998) (citing *Yellow Freight*'s "standard rule of statutory construction").

excepted from the requirement of showing residency. *See* § 167.020.6. Section 167.151 in turn begins with a provision stating that a school district may admit a nonresident student "in its discretion." § 167.151.1. The provision goes on to state that the admitting district may prescribe tuition to be paid by such nonresident students "except as provided in . . . [§] 167.131." *Id.* That is the only reference to § 167.131 in the Safe Schools Act scheme. No other exception to § 167.020's residency requirement mentions § 167.131 or could apply to the plaintiffs' situation, and plaintiffs have never alleged or argued otherwise. Thus, under the school "registration requirements" codified in § 167.020, admission of an unaccredited nonresident student pursuant to § 167.131 could only take place pursuant to § 167.151.1, which is specified to be "in [a district's] discretion."

Consistent with this reasoning, the Missouri Department of Elementary and Secondary Education has repeatedly issued official statements that recognize that admission pursuant to § 167.131 is discretionary. In March 2007, DESE issued a document titled "What Happens When a School District Becomes Unaccredited," which stated that accredited districts "may accept or reject transfer students from an unaccredited district" (SLF 27). On April 6, 2007, DESE addressed the City's situation, issuing "Questions & Answers about the Status of the St. Louis Public Schools and Student-Transfer Issues." That document stated: "Accredited districts . . . have the *authority to accept or reject* nonresident students based on their own policies and on their capacity" (SLF 29) (emphasis added). And, as noted, by letter dated April 24, 2007, DESE requested that each County district accept unaccredited City students only through the VICC program, again recognizing the discretion granted to accredited districts in this

matter and rejecting the existence of any mandatory requirement (SLF 42).

DESE's interpretation, which is entirely consistent with and corroborative of the statutory authority and analysis discussed above, should be followed here. *Wimberly v. Labor and Industrial Relations Commission of Missouri,* 688 S.W.2d 344, 348-350 (Mo. banc 1985) (courts "have a duty to respect legitimate policy choices made by [administrative agencies]"), quoting *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (deferring to Department of Labor's interpretation as "clearly set forth in a publication distributed to the states"); *Moses v. Carnahan,* 186 S.W.3d 889, 903 (Mo. App. W.D. 2006) (following *Wimberly* and *Chevron*).

In addition to all of the foregoing, the interpretation set out above is the only one possible because a contrary result would lead to absurd and untenable consequences that could not have been intended by the legislature. *Reichert v. Board of Educ. of City of St. Louis,* 217 S.W.3d 301, 305 (Mo. banc 2007); *Murray v. Missouri Highway and Transp. Com'n,* 37 S.W.3d 228, 233 (Mo. banc 2001). If plaintiffs were correct that the statute places a mandatory obligation on Clayton to accept City students, then there would be no limit to the potential influx Clayton might face. Conversely, there would be no limit to the number of students that could potentially abandon the City schools for Clayton and for any of the other nearly two-dozen accredited County districts. As recently put by the federal court in St. Louis, "[w]ere each child entitled to choose where to go to school, regardless of where that child lives, the structure of the public school system of the State would collapse into chaos. . . . Certain schools could no longer accommodate the numbers of students seeking to attend, while at the same time other schools would fail for

lack of students." *Washington*, 564 F.Supp.2d at 1058 (applying R.S. Mo. § 167.020). Fortunately, the statutory scheme does not require this absurd result. Instead, as spelled out above, the statutory scheme appropriately differentiates between discretionary and mandatory provisions, and admission of City students in this case is expressly discretionary.

In Superintendent Senti's letter to plaintiffs, Clayton exercised its statutory discretion by declining to admit any City students pursuant to § 167.131 (SLF 6). Under the statutory authority set out above, that decision was expressly within the authority of the district and necessarily defeats plaintiffs' contention that their childrens' attendance at Clayton must be pursuant to § 167.131. The judgment should alternatively be affirmed on this basis.

B. Plaintiffs' Interpretation of Missouri's Safe Schools Act and § 167.151.1 Is Contrary to Well-Settled Law Regarding Statutory Construction, Self Defeating and Otherwise Without Merit.

In response to this straightforward facial reading discussed above, plaintiffs assert that § 167.151.1 "excepts [§ 167.131] from its ambit" and, specifically, from the "discretion" phrase at the beginning of the provision (pl. br. 31). But this cannot be a proper reading of the "except" clause at the end of the provision. It is well-settled in Missouri that "qualifying words [and] phrases," such as the "except" clause in § 167.151.1, "are to be applied to the words or phrase immediately proceeding and are not to be construed as extending to or including others more remote" – the so-called "last antecedent rule." *Citizens Bank and Trust Co. v. Director of Revenue, State of Mo.*, 639

S.W.2d 833, 835 (Mo. banc 1982) (defining the "last antecedent rule," "long recognized in Missouri"); *Thompson v. Committee on Legislative Research*, 932 S.W.2d 392, 395 (Mo. banc 1996) ("The 'last antecedent rule' requires that qualifying phrases are applied to the phrase immediately preceding."); *Rothschild v. State Tax Com'n of Missouri*, 762 S.W.2d 35, 37 (Mo. banc 1988); *see also* Black's Law Dictionary 1360 (8th ed. 2004) ("rule of the last antecedent" provides that "qualifying words or phrases modify the words or phrases immediately preceding them and not words or phrases more remote").

Following this settled rule, it is clear that the "except" clause in § 167.151.1 pertains solely to the immediately preceding language regarding the prescription of tuition fees, not to the "discretion" language earlier in the provision. Properly so construed, § 167.151.1 quite sensibly means that when a district, "in its discretion," elects to admit a nonresident student pursuant to §167.131, the unaccredited sending district is obliged to pay the tuition as prescribed in that statute.

Apart from violating the foregoing well-settled, common sense principle of statutory construction, plaintiffs' urged interpretation is self-defeating. Section 167.151.1 is the only provision in the Safe Schools Act scheme that would permit the admission of nonresident pupils pursuant to § 167.131, and plaintiffs have not shown otherwise. Thus, when they argue that § 167.151.1 should be interpreted to exclude § 167.131 "from its ambit" (pl. br. 31), their argument goes too far. If § 167.131 pupils are excluded from admission under § 167.151.1, then they are excluded from admission entirely, because there is no reference to § 167.131 in the Safe Schools Act other than through § 167.151.1. Plaintiffs offer no answer to this point and do not suggest any method by which

plaintiffs' children could be admitted under the statutory scheme. Plainly, the only statutory provision which would permit admission of nonresident students pursuant to § 167.131 cannot reasonably be interpreted to exclude those students from its ambit. The obvious solution to this untoward result is to give § 167.151.1 its facially apparent and sensible meaning, namely, that nonresident students may indeed be admitted pursuant to § 167.131 "in [the district's] discretion."

Plaintiffs also argue that Clayton's interpretation is "illogical" because, according to them, § 167.121 (which provides for reassignment of individual pupils to another district if transportation to their home district schools presents an "unusual or unreasonable" hardship; § 167.121.1) is treated the same as § 167.131 under the Safe Schools Act scheme and, plaintiffs say, admission pursuant to the former section should not be discretionary (pl. br. 33). Plaintiffs' argument rests on a mistaken premise; the distinction between the treatment of § 167.121 and § 167.131 in the Safe Schools scheme could not be sharper. As noted above, § 167.131, on which plaintiffs' claim rests, is not mentioned anywhere in the Safe Schools "gateway" statute, § 167.020. It is referenced *only* in § 167.151.1. In direct contrast, § 167.121 (the reassignment provision) is cited directly in § 167.020 as an exception to the general residency requirements. *See* § 167.020.6 (stating the standard admission requirements "shall not apply to . . . a pupil attending a school pursuant to sections 167.121 . . ."). There is no reference in § 167.020 to district "discretion" to admit reassigned § 167.121 students, as there is in § 167.151.1. Indeed, the legislature's careful *inclusion* of § 167.121 directly in § 167.020 itself further supports the conclusion that the legislature's *omission* of a direct cite to § 167.131 in

§ 167.020, so that § 167.131 can be invoked only indirectly through the "discretion[ary]" provisions of § 167.151.1, must be regarded as intentional. *See Yellow Freight Systems, Inc.*, 791 S.W.2d at 387; *Groh*, 965 S.W.2d at 874.[30]

Plaintiffs' remaining arguments do nothing to undermine this conclusion. In fact, they do not address § 167.151.1 or the Safe Schools Act at all. Plaintiffs discuss the legislative history of § 167.131 in an attempt to distinguish *State ex rel. Burnett v. School Dist of City of Jefferson*, 74 S.W.2d 30 (Mo. banc 1934), which held the predecessor of § 167.131 to be non-mandatory, and to show that the section now purportedly imposes a mandatory admission requirement. Even if plaintiffs were correct in their analysis (they are not, as discussed below), it would merely show that § 167.131 and the Safe Schools Act scheme are fundamentally inconsistent (the former claimed to be mandatory whereas the latter is expressly "discretion[ary]"). And if that were the case, the Safe Schools Act scheme must prevail over § 167.131 because the Safe Schools Act is the more recent statute and was specifically enacted to exclusively and comprehensively govern

[30] Furthermore, even if plaintiffs were correct that admission under § 167.121 was only possible through § 167.151.1's "discretion[ary]" procedure, this would not defeat Clayton's argument. Plaintiffs assert that this result is "illogical," but they cite no authority or record evidence for the point. In fact, in the rare cases where a student is reassigned from one district to another pursuant § 167.121, there is nothing illogical about seeking agreement by the districts involved. That is what one would expect to occur.

admission to Missouri's public schools. *See Smith v. Missouri Local Government Employees Retirement System*, 235 S.W.3d 578, 582 (Mo. App. W.D. 2007) ("chronologically later statute . . . will prevail over an earlier statute of a more general nature, and the latter statute will be regarded as an exception to or qualification of the earlier general statute") and authorities and analysis at pp. 39–40, above.

In any event, plaintiffs' position that § 167.131 should be interpreted to impose an unstated mandatory obligation to admit students is without merit. As confirmed by its title and content, the statute is directed towards the obligations of districts without accredited schools, which are required to pay tuition and provide certain transportation if their residents are attending another district pursuant to the statute (the section's full title reads: "District without accredited school shall pay tuition and provide transportation – rate." V.A.M.S. § 167.131.). The provision on which plaintiffs rely, which states that pupils "shall be free to attend the school of his or her choice," prevents *sending* districts under the statute from restricting the choice of their residents. This is the only thing the phrase could have meant when enacted, as is made abundantly clear by the following clause that was added at the same time: "no school shall be required to admit any pupil." 1935 Mo. Laws 352; *see also* Op. Atty. Gen. No. 59, McNabb, 5-19-60 (discussing the "shall be free" clause and applying it only to the sending district). This longstanding interpretation of the statute harmonizes the provisions of §§ 167.131 and 167.151, giving meaning to each of their provisions. The "shall be free" phrase plainly applies to students' rights *vis-à-vis* sending districts, while receiving districts retain the statutory "discretion" provided by § 167.151.1. Plaintiffs' arguments offer no reason why this

harmonizing and eminently sensible result should not prevail.

In response to this well established statutory history, plaintiffs rely solely on a 1993 amendment to the statute deleting the "no school shall be required" clause. Plaintiffs describe this amendment as "telling," and argue that it "filled that void" and "suppl[ied]" the mandate that did not previously exist (pl. br. 32). But nothing in the *removal* of this language can be regarded as "supplying" an unexpressed mandatory duty that was not present before. Under *Burnett*, of which the legislature was presumptively aware when it made its amendments, that clause was a mere superfluity, adding nothing to the meaning of the section, thus justifying (and even warranting) its deletion.

Plaintiffs' unsupported arguments only make it clearer than ever that Clayton retains statutory "discretion" to accept or reject students from unaccredited districts and the judgment below was correct and should be affirmed. Despite plaintiffs' attempt to avoid this issue, Clayton's decision not to allow the pupils to attend pursuant to § 167.131 was a sound exercise of this statutory discretion, and defeats their claim. The judgment below was correct and should be affirmed for this additional reason.

CONCLUSION

For the foregoing reasons, the trial court's decision to grant defendants' motions for summary judgment and to deny plaintiffs' motion was correct and the judgment below should be affirmed. It is further respectfully submitted that the opinion of the Court of Appeals below was well reasoned and correct and is suitable for adoption by this Court.

KOHN, SHANDS, ELBERT,
GIANOULAKIS & GILJUM, LLP

_____
Mark J. Bremer #24696
D. Leo Human #59787
One US Bank Plaza, 24th Floor
St. Louis, Missouri 63101
(314) 241-3963
(314) 241-2509 (fax)
mbremer@ksegg.com
lhuman@ksegg.com

Attorneys for Respondent
School District of Clayton

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief includes the information required by Rule 55.03 and complies with the limitations contained in Rules 84.06(b). According to the word count feature of Microsoft Office Word, this brief, from the Table of Contents through the Conclusion, contains 16,059 words. The undersigned further certifies that the electronic copy of this brief filed herewith on CD-ROM has been scanned for viruses and is virus free.

_____

CERTIFICATE OF SERVICE

The undersigned certifies that one copy of the foregoing and one electronic copy of the foregoing on CD-ROM were delivered by hand this 24th day of August, 2009, to Elkin L. Kistner, Jones, Haywood, Bick, Kistner & Jones, P.C., 1600 South Hanley Road, Suite 101, St. Louis, MO 63144, attorney for plaintiffs, and Richard B. Walsh, Jr., Lewis, Rice & Fingersh, LC, 500 N. Broadway, Suite 2000, St. Louis, MO 63102, attorney for respondent Transitional School District of the City of St. Louis.

_____

APPENDIX

Table of Contents

[Appendix materials not included in electronic version.]