SC92932

IN THE SUPREME COURT OF MISSOURI

BLUE SPRINGS R-IV SCHOOL DISTRICT, et al.,

Respondents/Cross-Appellants

vs.

SCHOOL DISTRICT OF KANSAS CITY, MISSOURI, et al.,

Appellants/Cross-Respondents

Appeal from the Circuit Court of Jackson County, Missouri
The Honorable Brent W. Powell, Circuit Judge

BRIEF OF STATE APPELLANTS

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JURISDICTIONAL STATEMENT

This appeal involves the validity of § 167.131,[1] as applied to students living within the School District of Kansas City and taxpayers living within the School Districts of Lee's Summit, Independence, and North Kansas City. This Court has exclusive jurisdiction pursuant to Art. V, § 3 of the Missouri Constitution.

[1] All references to the Missouri Revised Statutes are to RSMo 2000 unless otherwise specified.

STATEMENT OF FACTS

The Missouri State Board of Education voted in September 2011 to strip the Kansas City Public School District (KCPS) of its state accreditation, effective January 1, 2012. App. A53 (Joint Stipulations ¶14). That vote triggered the school transfer provision of §167.131, which mandates that "a school district that loses accreditation with the state board of education must pay tuition for any resident pupil who attends an accredited school in another district in the same or an adjoining county and sets the amount of tuition to be paid by the sending school." *Turner v. School District of Clayton*, 318 S.W.3d 660, 664 (Mo. banc 2010); App. A53 (Stipulations ¶15-16). Thus, any student living within the geographic boundaries of KCPS had the option to transfer to any public school in Jackson, Clay, Ray, Lafayette, Johnson, or Cass Counties starting January 1, 2012.

Before the change in accreditation took effect, seven taxpayers from the Jackson County school districts of Blue Springs R-IV, Independence 30, Lee's Summit R-VII, and Raytown C-2, as well the North Kansas City 74 School District in Clay County (Petitioner Districts) sued the State[2], arguing that

[2] The Petitioner Districts also brought claims against KCPS, all of which were resolved on summary judgment before trial and did not involve claims against the State. None of those rulings is the subject of this appeal.

§167.131's requirement to admit students from KCPS was an "unfunded mandate" in violation of the Hancock Amendment, Mo. Const. Art. X, §§ 16 and 21. LF 12-42. The taxpayers claimed that the tuition Petitioner Districts could charge KCPS under §167.131 was insufficient to cover the increased costs they would incur if forced to admit KCPS students. LF12-42.

The circuit court granted partial summary judgment to the Taxpayers, concluding as a matter of law that "Section 167.131 imposes a new duty upon Area School Districts." LF573; App. A10. However, the court found genuine issues of material fact as to the number of students who would transfer and the increased costs the receiving districts would incur to educate them. LF576; App. A13. After a two-and-a-half-day bench trial, the circuit court calculated and compared (a) the new costs each Petitioner District claimed it would incur to educate students who transferred from KCPS under §167.131, and (b) the amount of tuition each Petitioner District could recover from KCPS for those students. LF 601-03; App. A29-31. Both calculations relied exclusively on the results of a 15-minute telephone survey to predict the number of KCPS students who would transfer to each one of the Petitioner Districts, and accepted the number of transfer students and the increased costs of educating those students alleged by the Taxpayers. LF 599-603, App. A28-31. Based on its calculations, the court found that new costs would

exceed recoverable tuition in Lee's Summit, Independence, and North Kansas City but not in Blue Springs or Raytown. LF 601-03. App. A29-31.

School Funding and Expenditures.

Missouri's public school districts receive funding from four main sources: local, county, state, and federal. Tr. 502:21-24. State funding is distributed by the Department of Elementary and Secondary Education (DESE) according to the Foundation Formula, which drives more State funding to districts with less local funding in an effort to balance the amount of money that is spent on students across the State. Tr. 503:18-504:9; 504:19-505:8. The Foundation Formula is based on each district's "Average Daily Attendance" or "ADA." Tr. 146:4-21. Average Daily Attendance is equal to the number of hours each student is in attendance during the school year, divided by the total number of hours that the school is in session. Tr. 146:7-17; 506:5-8. Essentially, it is the average number of students who show up for school in that district each day. Tr. 506:11-21.

Each district's ADA is adjusted by a number of factors, including the percentage of their students, above certain thresholds, who qualify for three special programs: Free and Reduced Lunch program (FRL), Individual Education Programs (IEP), and Limited English Proficiency (LEP). Tr. 247:24-248:9. These adjustments are applied to calculate a Weighted ADA. Tr. 506:24-507:11. DESE then multiplies a district's WADA by the state

"adequacy target," which is the average amount of expenditures per student in those districts that receive 100% on their Annual Performance Review. Tr. 500:13-501:1. Finally, a portion of the district's local funding is deducted to determine the ultimate amount of state aid a district receives. Tr. 504:5-505:8.

The amount of money a school district spends per student on educational services each year is called its "Current Expenditures per ADA," a figure that is publically available on the Department of Elementary and Secondary Education's website. Tr. 160:16-161:12. Current Expenditures per ADA is the amount a district spends on instruction and support services, but not capital expenditures or debt service, divided by the district's ADA. Tr. 462:1. The average Current Expenditures per ADA across Missouri is $9,619.13. Tr. 161:16-17. As with any average, some districts spend more per student and some less. All of the Prevailing Taxpayers' Districts have Current Expenditure per ADA below the state average. Lee's Summit's Current Expenditures per ADA is $9,058. Tr. 161:13-15. Independence's Current Expenditures per ADA is $8,902. Tr. 461:6-21. North Kansas City's Current Expenditures per ADA is $9,508. Tr. 257:18-259:4. KCPS has a higher than average Current Expenditures per ADA of $14,566. Tr. 163:24-164:2. However KCPS's Current Expenditures per ADA is still substantially lower than some affluent districts like Clayton (around $20,000, Tr. 527:6-8),

or very small districts like Clark County K-8 (around $22,000, Tr. 527:22-528:1).

Although Lee's Summit's Executive Director of Business Services, Judith Hedrick, testified that she *assumes* students from schools with higher Current Expenditures per ADA are more expensive to educate on average, she could not say whether *every* school district that spends more money per student must therefore have students that are more expensive to educate. Tr. 202:19-25; 204:11-15. DESE Coordinator of School Financial and Administrative Services Roger Dorson testified that students in districts with higher Expenditures per ADA are not necessarily more expensive to educate than students in districts with lower Expenditures per ADA. Tr. 526:15-527:19. The amount of local tax money collected varies greatly from one district to the next. Tr. 503:18-25. One cannot assume that students living in the Clayton and Clark K-8 School Districts, for example, are somehow twice as expensive to educate as students living in Lee's Summit. Clayton and Clark K-8 just spend more money on their students. Tr. 528:2-6. Raytown Associate Superintendent Brian Blankenship corroborated Dr. Dorson's testimony:

> Q. So does that mean that any student that comes to the Raytown School District, that comes from a school district with a higher current

expenditure per ADA is going to be more difficult to educate in Raytown?

A. No, I don't believe it says that.

Q. So that number truly doesn't capture how difficult it is to educate a student?

A. How difficult it is to educate a student? No, I don't know that those two -- those two things correlate.

Tr. 440:3-25. Blankenship further testified that just because Clayton spends $10,000 more per student than Raytown does not mean that Clayton students are $10,000 more expensive to educate. Tr. 442:1-7. He further conceded that he could not assume that KCPS students were more expensive to educate than Raytown's students because KCPS had higher Current Expenditures per Student. Tr. 442:8-11.

Tuition Costs under § 167.131.

When students transfer to a new district under Section 167.131, the receiving school district may charge the unaccredited school district tuition equal to "the per pupil cost of maintaining the district's grade level grouping which includes the school attended." §167.131.2. The cost of maintaining each grade level grouping is "all amounts spent for teachers' wages, incidental purposes, debt service, maintenance and replacements." *Id.* "Per

pupil cost of the grade level grouping shall be determined by dividing the cost of maintaining the grade level grouping by the average daily pupil attendance." *Id.*

Prior to trial, the State and the Prevailing Taxpayers stipulated to the per-pupil costs of maintaining their districts' grade level groupings. Tr. 14:17-15:17. For Independence, those costs are:

K-5: $9,391/student

6-8: $9,357/student

9-12: $10,255/student

The per-pupil costs of maintaining the Lee's Summit's grade level groupings are:

K-6: $9,339/student

7-8: $9,339/student

9-12: $10,869/student

The per-pupil costs of maintaining North Kansas City's grade level groupings are:

K-5: $10,845/student

6-8: $11,248/student

9-12: $11,186/student

App. A53-54 (Stipulations ¶¶ 19-21).

Patron Insights Report

Unlike the *Turner/Breitenfeld* case in St. Louis, the record in this case contains no evidence that any identifiable KCPS student has ever actually transferred to any of the Petitioner Districts under §167.131. At the time of trial, August 8, 2012, KCPS had been unaccredited for more than seven months, during which time KCPS students had a legal right to transfer to any of the dozens of school districts in Jackson and its surrounding counties. Yet, the record contains no evidence that any KCPS students actually transferred during those seven months. At most, the record reflects one KCPS student had filled out the paper work necessary to transfer to Lee's Summit for the 2012-13 school year, Tr. 230:25-231:5; sixty students had filled out paper work to transfer to North Kansas City, Tr. 280:16-281:7; 306:9- 307:16; and Independence had received an unidentified number of inquiries from KCPS parents. Tr. 491:4-494:11.

The only evidence Prevailing Taxpayers offered at trial as to the number of KCPS students the Petitioner Districts expected to transfer is the Patron Insights Report compiled from a 15-minute telephone survey of 600 randomly-selected families with school-aged children living within KCPS boundaries. Although each of the Petitioner Districts' financial officers relied entirely on the Report's predictions, its author, Kenneth DeSighardt, testified that it was "impossible to judge" from the results of his survey, conducted in

April, how many students would actually transfer five months later at the start of the school year. Tr. 137:22-138:24.

The structure of the Patron Insights survey was relatively simple. DeSieghardt[3] gave the parents taking his survey (Surveyed Parents) nine criteria for choosing schools and asked them to pick the three most important criteria to them. Tr. 104:18-105:3. He then asked Surveyed Parents to give letter grades based on those three criteria to six particular districts: Blue Springs, Lee's Summit, Independence, North Kansas City, Raytown, and KCPS. Tr. 105:5-14. Although §167.131 permits KCPS students to transfer to *any* school district in Jackson, Clay, Ray, Lafayette, Johnson, or Cass Counties, DeSieghardt did not ask Surveyed Parents to grade any other districts, and the only districts he referenced by name anywhere in the survey were KCPS and the five Petitioner Districts who commissioned the survey. Tr. 102:13-103:17. He did not ask Surveyed Parents if they could name any other school districts. Tr. 104:6-10. He did not mention any other school districts parents could legally send their children to under §167.131 or even how many school districts there are in Jackson and its adjoining counties. Tr. 103:20-104:5. DeSieghardt doesn't know how many districts

[3] DeSieghardt authored the survey but did not conduct the actual telephone calls himself. Tr. 114:14-18.

there are in Jackson and its five adjoining counties himself. Tr. 103:20-104:2.

After 18 questions specifically naming KCPS and the five Petitioner Districts—a tactic that he admits "more than likely" made those districts "freshest in the participants' minds," Tr. 115:14-18—DeSieghardt asked Surveyed Parents "what districts of those we talked about or any other of which you are aware do you consider to be the leading district" as to each of their top three criteria. Tr. 107:6-21. For example, if the respondent said the percentage of graduates who go on to a two- or four-year colleges was the most important criteria, DeSieghardt asked that respondent which district she *believed* had the greatest percentage of graduates go on to two- or four-year colleges. Tr. 107:13-21. Lee's Summit scored the highest in this category, with 31% of Surveyed Parents identifying it as the leading district in terms of college entry. App. A69 (Petitioner Ex. 2 at PET 0017). Blue Springs scored the second highest with 20% of Surveyed Parents identifying it as the leader in terms of college entry. *Id.* DeSieghardt did not ask Surveyed Parents the basis for their beliefs or provide them any objective data as to which districts actually are the leaders when it comes to each of the nine criteria because having correct data "would have biased the questionnaire…. Our intention was to find out how they viewed the petitioner districts in Kansas City, Missouri right now based on the information that they had available, that they had gathered on their own via the image of

those districts and those kinds of factors." Tr. 108:4-13. DeSieghardt admits that *he* does not know which area districts are the leaders in each of his criteria or even if his client districts are among the leaders. Tr. 107:22-108:3. He is not concerned with whether the Surveyed Parents' impressions are correct, however, because "[i]t wasn't intended to be a final exam." Tr. 108:25-110:7.

For each of these "leading district" questions, the printed copy of the survey read to Surveyed Parents over the phone listed KCPS, the five Petitioner Districts, "other," and "don't know" below each question with check boxes next to each answer for the surveyor to check off the respondent's choice. Tr. 113:14-21. The box marked "don't know" has the words "DON'T READ" next to it in all caps, but DeSieghardt insists that was merely a typographical error and the surveyors would know not to read *any* of the choices out loud. 114:3-8. He conceded, however, that if the questioner did name the six districts after reading the question, Surveyed Parents might be more inclined to choose one of the previously named districts than come up with one on their own. Tr. 116:19-24.

At the end of the survey, DeSieghardt asked Surveyed Parents "Of the school districts we have been discussing or any other district in the area that you are familiar with, which one would be your first choice for your children, if you were given the option to enroll in a school district other than Kansas

City, Missouri School District at no tuition cost." Tr. 123:11-21. He never asked, "Are you going to transfer your child?" As with the "leading districts" questions, this question was followed by checkboxes for each of the Petitioner Districts, KCPS, "other," and "don't know"—with the words "DON'T READ in all caps next to "don't know." Tr. 123:22-124:6. This, too, was a typo according to DeSieghardt. Tr. 124:7-8. There was no box for "I'm not going to transfer," according to DeSieghardt, because that answer would fall under "Other." Tr. 125:2-13. He did not ask whether Surveyed Parents considered sending their children to a private, parochial, or charter school rather than another public school. Tr. 121:6-13.

Although he asked parents "about the percentage likelihood of them making – ultimately making that decision," Tr. 81:3:14, DeSieghardt testified that he did not ask if parents had made any inquiries about transferring or taken any affirmative steps to do so. Tr. 125:14-126:2. He dismisses the idea that parents who have already taken affirmative steps to transfer—such as calling other districts to inquire or even filling out the necessary paperwork—are more likely to go through with the transfer than those who simply said they would during his 15-minute phone survey, "because with additional information, they could make a decision down the road. Our intent was to say at this moment in time with the information that you have available to you, what do you believe your—the step you would take is. Would you—what's the

likelihood that you would make that decision to transfer." Tr. 135:15-21. He had not taken any steps since April to check whether the responses to his survey correspond with actual transfers as of August 2012. Tr. 126:20-127:9.

When the survey was complete, DeSieghart's extrapolated the results to all school-aged children living in the KCPS District. The 600 households surveyed by DeSieghardt had at least 1184 school-aged children. Tr. 127:14-25. He testified these 1184 students are statistically representative of the 32,173 school-aged children living in (but not necessarily attending) the KCPS area as of the 2010 Census. Tr. 127:20-128:5. Based on the percentage of the 1184 students whose parents indicated they would more likely than not transfer *if the opportunity arose*, DeSieghardt calculates that a total of 7,759 KCPS students—about one quarter of the school-aged population—*will* transfer to one of the five Petitioner Districts at some indefinite point in the future. Tr. 128:1-8. Of that number, DeSieghardt predicts that 2,291 *will* transfer to Lee's Summit, Tr. 97:17-18; another 1,002 *will* transfer to Independence, Tr. 97:19-20; and 2,035 *will* transfer to North Kansas City, Tr. 89:19-94:17.

Of the 1184 students reflected in the survey, 414 currently attend private or parochial schools. Tr. 128:17-24. Another 133 attend charter schools, and another 21 are homeschooled. Tr. 129:2-5. That leaves 575—a little less than half of the 1184—who actually attend KCPS. Tr. 129:6-14.

But when DeSieghardt calculated the number of students who *will* transfer from KCPS to one of the Petitioner Districts, he based his calculation on *all* 32,173 students living within KCPS's boundaries, not just the 16,000 or so who currently attend KCPS schools. Tr. 130:5-18. Based on the make-up of the 1184 students whose parents were surveyed, 2,800 of the students DeSieghart predicts will transfer into Petitioner Districts are currently enrolled in *private or parochial* schools. Tr. 132:9-133:15. Thus, for DeSieghart's predictions to be accurate, *thousands* of parents who currently send their children to Catholic or college preparatory schools will soon decide to send their children to public schools instead.

Before this case, DeSieghardt had only conducted surveys to predict school-related elections results, but he had never designed—and had no experience with—surveys to predict the actual number of people who will show up at the polls or take a particular action in the future. Tr. 100:22-101:4; 102:2-5; 137:8-21. When asked whether "it's impossible to judge from these survey results in April how many students will actually transfer five months later at the start of the next school year," Mr. DeSieghardt eventually conceded, "I think we have—in answer to your question and referencing the—referencing my deposition earlier, that's a true statement." Tr. 137:22-138:3.

Capital Outlays vs. Debt Service

The Prevailing Taxpayers introduced evidence that the tuition formula in §167.131 provides no reimbursement for new capital expenditures necessitated by the influx of thousands of new students from KCPS. Tr. 153:8-22; 253:10-254:13; 279:21-24. These capital expenditures consist principally of mobile classroom units and corresponding furniture, fixtures, and equipment. Tr. 153:18-22. While the tuition formula in §167.131 doesn't reimburse for new capital expenditures, it does allow the receiving district to include its debt service. Tr. 154:11-20; 253:10-20; 279:25-280:1. Dr. Dorson explained how §167.131 substitutes debt service for capital outlays in the tuition formula:

> Q. . . . And I notice on this list and the petitioner districts have asked each of their witnesses about this, this [tuition formula] doesn't include capital expenses; is that right?
>
> A. That's correct.
>
> Q. It does include debt services. What does debt services mean?
>
> A. Generally speaking, it's the amount of principal and interest paid on general obligation bonds.

Q. When you say general obligation bonds, what does that mean?

A. Bonds that are issued by the district usually for the construction of school buildings or whatever.

Q. This is money that the school district has borrowed in the past?

A. Yeah. They ask the patrons of their district to allow them to issue that, you know, so they can get money to build.

Q. So this tuition formula, though it doesn't provide for capital expenses, does allow the receiving district to charge Kansas City, the resident district, for debts that the receiving district incurred earlier; is that right?

A. That's correct.

Q. Money that was incurred earlier to educate other students?

A. That would be correct.

Q. Debt that was not incurred to educate the incoming students under 167.131?

A. Initially, yes.

Tr. 524:13-525:19. Thus, even though the district cannot include the cost of *new* buildings to house new transfer students in its tuition calculation, it can charge KCPS for *old* buildings it has been using to educate existing students over the last 10 or 20 years. Tr. 280:2-6. The greater the District's outstanding debt, the more tuition it can charge for each KCPS transfer student.

Based on DeSieghardt's prediction that 2,291 KCPS students will transfer to Lee's Summit, Executive Director of Business Services Judith Hedrick calculated the capital outlays for new buildings, furniture, fixtures, and equipment necessary to educate KCPS transfer students at $2,164,328. Tr. 195:15-196:1. Divided by 2,291 expected transfer students, the increased costs for capital outlays that cannot be included in that student's tuition is $944.71 per transfer student. However, the tuition calculation worksheet Ms. Hedrick used to determine how much tuition Lee's Summit is allowed to recover from KCPS shows that $1,637.73 of the tuition price is the per-student cost to service Lee's Summit's outstanding debt—nearly $700 *more* per student than what the district will pay in new capital costs. App. A103 (Petitioner's Exhibit 34 at LS 0027). The Prevailing Taxpayers introduced no evidence that their outstanding debt somehow increases simply because students transfer into their districts. Nor did they offer any evidence that the debt service portion of the tuition formula will go to pay for any other

purpose. Thus, $1,627.73 of Lee's Summit's tuition rate, reflecting debt incurred in previous years to educate students that have long since graduated, is more than sufficient to offset the $944.71 in per-student capital outlays that is not included in the §167.131 tuition formula.[4] Indeed, Lee's Summit receives a net *increase* in revenue of almost $700 per student that transfers from KCPS.

Independence Deputy Superintendent Dale Herl calculated the capital outlays for new buildings, furniture, fixtures, and equipment necessary to educate KCPS transfer students at $465,615. Tr. 481:10-15; App. A96 (Petitioners' Exhibit 22). Divided by 1,002 transfer students expected by Mr. DeSieghardt, the increased costs for capital outlays is $464.69 per transfer student that cannot be included in that student's tuition. The tuition calculation worksheet Mr. Herl used to determine how much tuition

[4] Dr. Dorson testified that tuition paid under §167.131 must be placed into accounts that may not be used for capital expenditures. Tr. 541:9-542:25. However, the circuit court ruled that the for Hancock purposes, "[t]he test is whether §167.131 imposes actual increased costs on Area School Districts. The proper method to determine this is to compare revenue (tuition reimbursement payments) to actual costs (the financial impact to Area School Districts)." LF 606-07.

Independence is allowed to recover from KCPS shows that $885.48 of the tuition price is the per-student cost to service Independence's outstanding debt[5]. App. A98-99 (Petitioner's Exhibit 27 at IND 0019-20). Thus, even after all the new capital expenses Mr. Herl anticipates, Independence will realize a net increase to its revenue of $421 per student who transfers from KCPS.

North Kansas City Chief Financial Officer Paul Harrell calculated the capital outlays for new buildings, furniture, fixtures, and equipment necessary to educate the 2,035 KCPS students Mr. DeSieghardt predicts will transfer at $1.8 million. Tr. 270:6-15. Divided by 2,035 expected transfer students, the increased costs for capital outlays that cannot be included in that student's tuition is $884.52 per transfer student. The tuition calculation worksheet Mr. Harrell used to determine how much tuition Independence is allowed to recover from KCPS shows that $2,026.17 of the tuition price is the

[5] Mr. Herl did not calculate this figure for the court, but lines 5100, 5200, and 5300 of the tuition worksheet he used show Independence's outstanding principal and interest to be $11,100,778. Divided by the District's ADA of 12,536.48, the cost to service Independence's debt is $885.48 per-student. App. A98-99 (Petitioner's Exhibit 27 at IND 0019-20).

per-student cost to service North Kansas City's outstanding debt[6]. The district will receive a net *increase* in revenue of $1,141.65 per student even after incurring new capital expenditures.

Special Costs

Prevailing Taxpayers introduced evidence purporting to show that KCPS students will cost more to educate than students in their home districts because KCPS has a higher percentage of students qualifying for the three programs that DESE uses to increase a district's state funding. Of the students *attending* KCPS schools, 95.9% qualify for FRL statues, 12.4% qualify for IEPs, and 23.5% qualify for LEP status. App. A108 (Petitioners' Ex. 45 at RT 0005). Prevailing Taxpayers assume the same percentages would apply to the populations of 7,759 students who Mr. DeSieghardt predicts will transfer into their districts. *Id.*; Tr. 444:11-445:12. For example, they assume 7,441 (95.9%) of those 7,759 incoming students will qualify for FRL status, App. A108 (Petitioners' Ex. 45 at RT 0005); Tr.

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[6] Mr. Harrell did not calculate this figure for the court either, but lines 5100, 5200, and 5300 of the Tuition Worksheet he used show North Kansas City's outstanding principal and interest to be $35,739,722.65. App. A105-06 (Petitioner's Exhibit 41 at NKC 0034-35). Divided by the District's ADA, the cost to service North Kansas City's debt is $2,026.17 per student.

444:11-445:12. As one witness explained, "It assumes that all the students that are coming in would be at the same demographic level" even if they are currently attending expensive private schools. Tr. 445:10-12. Based on that assumption as to the percentage of students qualifying for FRL, IEP, and LEP status, the Prevailing Taxpayers calculate it will cost their districts $1,922.48 more per student to educate students from KCPS than those from their own districts. App. A97 (Petitioners' Ex. 22 at IND 0003).

Mr. DeSieghardt's predictions on the number of students who will transfer was based on the *entire* population of 32,000 school-aged children living within KCPS boundaries, not just the 16,000 who actually attend KCPS schools. Tr. 135:5-18. Prevailing Taxpayers assume that the 16,000 students living in the district but attending expensive private or parochial schools will qualify for FRL, IEP, and LEP status in the same percentages as the students who attend KCPS schools. Thus, for the Taxpayers' extra costs calculations to be reliable, 95.9% of the 2,800 students DeSieghardt determined are currently attending *private or parochial schools*—likely at great cost to their families—nonetheless qualify for Free and Reduced Lunch status *due to poverty*. Tr. 132:9-133:15.

Prevailing Taxpayers introduced no evidence or testimony supporting this assumption. On the contrary, the only evidence they offered contradicts

their assumption. As Blue Springs Chief Financial Officer Kim Brightwell testified:

> Q. And you followed that assumption when making your numbers?
>
> A. When he arrived at the 1,690 for our school district.
>
> Q. And you have no reason to assume that's correct?
>
> A. I have reason to assume that it is correct from his survey. That's the number we used.
>
> Q. That's the number you used, but you have no -- you have no reason -- you have no way of knowing that every student in the Kansas City School District that lives within that residence that does not go to a Kansas City school is at that same percentage of IEP, free reduced lunch or LEP?
>
> A. Like the 95.9 percent that's free and reduced from Kansas City, that's the percentage you're talking about.
>
> Q. Yes.

A. I have no reason -- yes.

Q. You have no way of knowing that that number for those just going to Kansas City schools is equal to that same number of students regardless going to a private school or parochial school?

A. Right, that 95.9% is based on the Kansas City School District ADA.

Q. But, in fact, less than half of the students that your numbers say will cause you to incur free reduced lunch, IEP and LEP costs will actually require those costs? Or we actually have numbers that capture that they will require those costs.

A. Based on the free and reduced lunch count for the Kansas City School District, yes.

Tr. 360:9-361:20.

Moreover, in calculating Petitioner Districts' increased costs per student based on the percentages of KCPS students classified as FRL, IEP, or LEP, Prevailing Taxpayers made no record and introduced no evidence as to the percentage of their own Districts' students who fall into each

classification. Thus, the Record does not indicate, and the circuit court did not calculate, the *difference* between the percentage of KCPS students who qualify for free and reduced lunch and the percentage of their own resident students who do.

Changes in State Requirements and District Funding Since 1980.

The Prevailing Taxpayers offered no evidence and made no Record as to how much of their districts' Current Expenditures per ADA, or the increased costs they anticipate from accepting transfer students, are actually mandated by the State of Missouri as opposed to the Petitioner Districts' own pedagogical choices. On the contrary, the Prevailing Taxpayers included in their calculations a number of expenditures that are *not* required by the State. For example, Lee's Summit Business Officer Judith Hedrick testified that she included smart boards when calculating the cost of admitting transfer students even though the State does not require them. Tr. 215:20-216:20. She acknowledged that her cost estimates included her superintendent's salary and the actual salaries received by Lee's Summit teachers even though the State does not require a district to have a superintendant and its minimum salary requirements for teachers are much lower that what Lee's Summit actually pays. Tr. 218:7-9. She even included in her calculations the cost of maintaining the district's sports teams,

computer labs, and audio-visual equipment even though none of those expenses is mandated by the State. Tr. 218:10-17.

The Circuit Court's Fee Award

In the affidavit submitted with the prevailing Taxpayer Petitioners' fee application, Petitioners' counsel states that the billing records attached to his affidavit "do[] not contain time spent solely on pursuing Mark Cromwell and James Bradshaw's Hancock claim. . . . [or] time spent pursuing the Area Districts' claims for declaratory judgment and injunctive relief against Respondent School District of Kansas City." App. A110 (Martin Aff. ¶ 4). He further states that "[t]he removal of time spent solely on pursuing Mark Cromwell and James Bradshaw's Hancock Amendment claim resulted in a reduction of a substantial number of time entries and deduced the total amount of fees sought." App. A110 (Martin Aff. ¶ 5).

Nonetheless, the billing records include compensation for counsel's time preparing for and attending district board meetings and for multiple conference calls and other correspondence with the district superintendents regarding the status of the litigation. For example, the third time entry on the billing statements attached to counsel's affidavit includes the following:

01/13/2012	. . . Arrange telephone conference call among superintendents of client districts and attorney; draft correspondence to superintendents of client districts

advising of same. Conference call with district representatives regarding status of litigation. . . .

App. A112 (Martin Aff. Ex. A at 1).

It is not clear from the time sheets whether "district representatives" includes both the District Petitioners *and* the prevailing Taxpayer Petitioners or just the District Petitioners. In the previous entry, however, the conference call with district representatives was "[a]rrange[d] . . . among superintendents of the client districts and attorney," which suggests that the call was *only* with the Districts themselves and not the Taxpayers. Moreover, there are other entries that specifically address the taxpayers. For example, one entry from May 18, 2012 reads as follows:

05/18/2012 Review motion to stay all proceedings; ***conference with Lee's Summit Taxpayers regarding status of litigation***; review and revise reply briefs.

App. A129 (Martin Aff. Ex. A at 18).

The problem is exacerbated by the use of block billing, in which all the legal work performed by each lawyer in a single day is recorded in one time entry showing only the total hours worked. For example, the time entry for April 10, 2012 includes tasks performed at least in part for the prevailing Taxpayer Petitioners (in italics) as well as tasks performed *solely* for the Petitioner Districts (underscored):

04/10/2012 E-mail correspondence with Dr. Todd White[7] regarding board presentation; draft presentation for board; ***telephone conference with Mr. Phil Holloway[8] regarding status of litigation***; prepare for North Kansas City Board Meeting regarding status of litigation; appear at board meeting; ***review and revise correspondence with State Board of education***.

App. A124 (Martin Aff. Ex. A at 13) (emphasis added). The above time entry indicates a total 3.70 hours worked, but it does not indicate what portion of those 3.70 hours was spent speaking with Mr. Holloway and corresponding with the State Board, and what portion of that time went to preparing for and attending Petitioner District's board meeting.

The circuit court also awarded fees for counsel's press conferences and media contacts. For example, the time entry for February 10, 2012 shows 3.70 hours spent as follows:

04/10/2012 Prepare for scheduling conference; telephone conference with counsel for Clayton School District;

[7] Dr. White is the superintendent of the North Kansas City School District.

[8] Mr. Holloway is a taxpayer in the North Kansas City School District.

communications with media contacts regarding status of litigation; review scheduling order.

App. A116 (Martin Aff. Ex. A at 5) (emphasis added). The court granted the Prevailing Taxpayers fees for all 3.7 hours

In its response to Taxpayers' fees application, the State submitted a annotated copy of Petitioners' counsel's affidavit and billing records highlighting (a) services that appear to have been performed *exclusively* for parties other than the prevailing Taxpayer Petitioners, and (b) non-legal work like drafting press releases and fielding questions from the media. App. A112-45. The total amount of the time entries that include either non-compensable services or legal services performed for clients other than the prevailing Taxpayer Petitioners total 239.05 hours at a blended rate of $49,229.00.

The circuit court awarded $174,492 in attorneys' fees, the full amount requested by the Prevailing Taxpayers, finding them "reasonable and appropriate considering the complex issues raised in this case, the quality of the legal work observed by the court, and the successful outcome for Prevailing Taxpayers." App. A43.

POINTS RELIED ON

1. The circuit court erred by entering judgment for the Prevailing Taxpayers because they failed to state a claim on which relief can be granted in that §167.131 merely shifts financial responsibilities between local subdivisions and is therefore not a new mandate for Hancock Amendment purposes.

   Breitenfeld v. Clayton School Dist., Case No. SC92653 (Mo. banc June 11, 2013) (Slip Opinion)

2. The circuit court erred by entering judgment for the Prevailing Taxpayers because they failed to prove that § 167.131 increases net costs to their school districts in that their projected increases in costs are based on a flawed and inherently speculative study, rather than on objective fact.

   Fort Zumwalt School Dist. v. State; 896 S.W.2d 918 (Mo. banc 1995)

   School Dist. of Kansas City v. State; 317 S.W.3d 599 (Mo. banc 2010)

3. The circuit court erred in entering judgment for the Prevailing Taxpayers because they failed to prove that § 167.131 increases their school districts' net costs in that their calculations are not based on the net increase between their Districts' and KCPS's percentage of students who impose increased costs due to poverty, disability, or limited English proficiency.

Fort Zumwalt School Dist. v. State; 896 S.W.2d 918 (Mo. banc 1995)

School Dist. of Kansas City v. State; 317 S.W.3d 599 (Mo. banc 2010)

4. The circuit court erred in entering judgment for the Prevailing Taxpayers because they failed to prove that § 167.131 increases their school districts' net costs in that the tuition formula includes debt service that more than exceeds new capital expenditures.

Fort Zumwalt School Dist. v. State; 896 S.W.2d 918 (Mo. banc 1995)

School Dist. of Kansas City v. State; 317 S.W.3d 599 (Mo. banc 2010)

5. The circuit court erred in holding that the districts were entirely absolved from complying with § 167.131 because the Art. X, § 21 does not render a statute invalid on its face based on future funding possibly being inadequate in that Art. X, § 21 excuses only duties and activities to the extent they are not funded.

Brooks v. State; 128 S.W.3d 844 (Mo. banc 2004)

6. The circuit court erred in finding that the taxpayers had proven a violation of Art. X, § 21, because the taxpayers did not meet their burden of proof in that they failed to prove what proportion of district funding the State was providing in 1980, what additional funding the State has currently appropriated, and the cost of additional State mandates imposed since 1980, and failed to prove what new or increased duties or activities the State has required since 1980 and

whether State funding, including but not limited to the "foundation formula," has increased enough to cover that cost.

Fort Zumwalt School Dist. v. State; 896 S.W.2d 918 (Mo. banc 1995)

School Dist. of Kansas City v. State; 317 S.W.3d 599 (Mo. banc 2010)

7. The trial court erred the amount of the taxpayers' attorneys' fees it awarded because the award was not "reasonable" under Art. X, § 23, in that the award included fees for legal services performed for the sole benefit of the Petitioner Districts as well as other non-compensable services such as issuing press releases.

Art. X, § 23

ARGUMENT

Standard of Review

> "[T]he decree or judgment of the trial court will be sustained by the appellate court unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law."… Issues of law, however, are reviewed de novo. … .

American Eagle Waste Industries, LLC v. St. Louis County, --- S.W.3d ----, 2012 WL 3106074 *5 (Mo. banc 2012), quoting *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976) (citations omitted).

1. The circuit court erred by entering judgment for the Prevailing Taxpayers because they failed to state a claim on which relief can be granted in that §167.131 merely shifts financial responsibilities between local subdivisions and is therefore not a new mandate for Hancock Amendment purposes.

To state a claim for relief under the Hancock Amendment, a taxpayer must show *both* (1) that the State requires a new or increased activity or service of a political subdivision, and (2) that the political subdivision

experiences increased costs in performing that activity. *Breitenfeld v. School Dist. of Clayton*, Case No. SC92653, at 13-14 (Slip Op. June 11, 2013) (citing *Miller v. Dir. of Revenue*, 719 S.W.2d 787, 788-89 (Mo. banc 1986)). In its partial summary judgment order, the circuit court erroneously concluded §167.131 satisfied the first prong as a matter of law. Citing the St. Louis County Circuit Court's judgment in *Breitenfeld v. School District of Clayton*, 12SL-CC0041, 07SL-CC00605 (May 1, 2012), the court ruled as follows:

> As Judge Vincent thoroughly and eloquently explained, a comparison of Section 167.131 before the Hancock Amendment was passed in 1980 and when the statute was amended in 1993 shows that a new activity, serving a new population, is required of a political subdivision by the State. *As a matter of law*, the Court finds that Section 167.131 as amended in 1993 imposes a new duty upon Area School Districts, and Area School Districts are entitled to summary judgment on this issue.

LF573 (emphasis added); *see also* LF604.

This Court has since reversed Judge Vincent's ruling in *Breitenfeld* and rejected the premise on which Judge Powell based his legal conclusions in this case. In its June 11, 2013 *Breitenfeld* opinion, this Court held that §167.131 "does *not* impose a new or increased activity or service as to the

provision of education for students eligible for section 167.131 transfers. Instead, it merely shifts the responsibility for an existing activity or service among local political subdivisions." Slip Op. at 23 (emphasis added). "The Hancock Amendment does not prevent this local-to-local shifting of responsibilities because the amendment is not intended to be applied to prevent a statute's reallocation of responsibilities among political subdivisions." *Id.* "Because section 167.131 imposes nothing 'new' or 'increased' for Hancock purposes as to the defendant school districts' provision of K-12 educational services, the trial court erred in determining that the statute creates an 'unfunded mandate' for providing educational services." *Id.*

The same reasoning applies to Judge Powell's ruling in this case. There is nothing "new"—for purposes of applying the Hancock Amendment—about KCPS, Blue Springs, Lee's Summit, Independence, North Kansas City, or Raytown providing eligible students in grades K-12 a free public education. "The mandate that has long existed for Missouri's school districts is to provide a free public education to all students who attend, even when the students are nonresidents who are permitted under statutory directives to attend an out-of-district school." *Id.* at 20. Because "there is not an alteration to a long-used formula and no mandate to take on a new responsibility, but only a continued responsibility for … an existing activity

according to a previously established formula, there is no Hancock violation." *Id.* at 14-15 (internal quotations omitted). After *Breitenfeld*, the Taxpayers cannot state a Hancock claim against the inter-district transfer provisions of §167.131 because the statute does not impose any new or increased activity or service on their school districts. The judgment in their favor should be reversed.

2. The circuit court erred by entering judgment for the Prevailing Taxpayers because they failed to prove that § 167.131 increases net costs to their school districts in that their projected increases in costs are based on a flawed and inherently speculative study, rather than on objective fact.

To satisfy the second prong of their Hancock claim, Prevailing Taxpayers had to prove their districts would experience increased costs from complying with §167.131. *Sch. Dist. of Kan. City v. State*, 317 S.W.3d 599, 611 (Mo. banc 2010). This Court's prior Hancock cases require "specific proof" of increased costs, which "cannot be established by mere common sense, or speculation and conjecture." *Sch. Dist. of Kan. City v. State*, 317 S.W.3d 599, 611 (Mo. banc 2010); *Brooks v. State,* 128 S.W.3d 844, 849 (Mo. banc 2004).

Unlike the *Breitenfeld* case in St. Louis, the record in this case contains no evidence that any identifiable KCPS student ever intended to transfer to

the Prevailing Taxpayers' districts under §167.131, let alone within the following month. At the time of trial, August 8, 2012, KCPS had been unaccredited for more than seven months, during which time KCPS students had a legal right to transfer to any of the dozens of school districts in Jackson or its surrounding counties. Yet, the record contains no evidence that *any* KCPS students had actually transferred during those seven months. At most, the record reflects one KCPS student had filled out the paper work necessary to transfer to Lee's Summit for the 2012-13 school year, sixty students had filled out paper work to transfer to North Kansas City, and an unidentified number of parents made inquiries to Independence. Though Lee's Summit and North Kansas City witnesses testified that they had sent invoices to KCPS for a combined total of 21 potential transfer students, the Prevailing taxpayers did not offer the invoices or any other documentation of parental inquiries into evidence.

To prove the number of students whose parents *will*—not *may*—take them out of their current schools and enroll them in another district across town or in another county at some indefinite future date, the Prevailing Taxpayers relied exclusively on a 15-minute telephone survey of 600 randomly-selected families with school-aged children living within the KCPS boundaries. The survey's author, Kenneth DeSieghardt of Patron Insights, usually helps school districts discern what issues are most important to their

constituents and what initiatives they are likely to support. He has conducted telephone surveys to predict the outcome of bond issues and other up-or-down votes affecting school funding. In those instances, his purpose was to determine the *percentage* of voters who would vote yes and the *percentage* of voters who would vote no. The survey he conducted in this case, however, was the first in which he had ever attempted to predict the *actual number* of voters who will turn up at the polls.

The Patron Insights Report is speculative at best, and even DeSieghardt conceded that it is "impossible to judge" from the results of a survey in April how many students will actually transfer five months later at the start of the school year. Tr. 137:22-138:3. But even if we could rely on the results of a properly conducted telephone survey to predict actual transfers, DeSieghardt's survey was fundamentally flawed in a number of ways that necessarily skew its results in favor of his clients.

First, of the dozens of eligible public school districts in Jackson, Clay, Ray, Lafayette, Johnson, and Cass Counties to which KCPS students may transfer under §167.131, the only districts DeSieghardt named for Surveyed Parents were Blue Springs, Lee's Summit, Independence, North Kansas city, and Raytown, the five districts who paid him to conduct the survey. He did not offer Surveyed Parents the names of any other districts in the six-county area or ask Surveyed Parents whether they could name any other districts.

Mr. DeSieghardt doesn't even know how many districts parents have to choose from.

And he didn't simply mention his client districts off-handedly. Rather, he asked Surveyed Parents 15 pointed questions—more than a third of the total number in the survey—about how well those particular districts performed in terms of the criteria Surveyed Parents thought most important when choosing a school for their children. The only other district whose performance DeSieghardt asked them to grade was KCPS. Given its unaccredited status, Surveyed Parents would presumably assess its performance as worse than his five clients'. He conceded on cross examination that his early questions about the five Petitioner Districts "more than likely" made those districts "freshest in the participants' minds" when he subsequently asked them "what districts of those we talked about or any other of which you are aware do you consider to be the leading district" as to each of the criteria on which they had just graded the Petitioner Districts' performance. Tr. 115:14-18. DeSieghardt testified that he didn't restrict Surveyed Parents' choices when picking the leading district (or later when asking what district they would choose for their child), but the printed version of the survey read to Surveyed Parents over the phone suggests otherwise. That document lists KCPS, the five Petitioner Districts, "other," and "don't know" below the "leading district" question, with check boxes next

to each answer. Only the box marked "don't know" has the words "DON'T READ" next to it in all caps.

Even assuming the "leading district" question really was open-ended, DeSieghardt does not know how many other districts in the six-county area Surveyed Parents could even name, if any, because he made no effort to gauge the breadth of their knowledge or the basis for their belief. Given the objective nature of the criteria—e.g., graduation rate, college entry rate, MAP scores—there should be a definitive answer as to which school district is, in fact, the leader in each criterion, but DeSieghardt doesn't know which districts those are, or even if the Petitioner Districts are among them. Since no more than 31% of Surveyed Parents identified any one District as having the highest percentage of students who go on to college App. A69 (Petitioner Ex. 2 at PET 0017), it's safe to say Surveyed Parents don't know which districts are the actual leaders in each criterion any more than DeSieghardt does.

Despite Surveyed Parents' obvious lack of correct information, DeSieghardt did not provide the correct answers to Surveyed Parents to see if that would affect their choice because that would have "biased the questionnaire." Tr. 108:4-8. DeSieghardt testified that it doesn't matter whether Surveyed Parents could correctly identify which district sent the highest percentage of its students on to college because his survey "wasn't

intended to be a final exam." Tr. 108:25-110:7. All he was hired to do was "find out how [Surveyed Parents] *viewed* the petitioner districts in Kansas City, Missouri right now based on the information that they had available, that they had gathered on their own via the *image of those districts*." Tr. 108:4-13 (emphasis added). In other words, the Patron Insights Report was not intended to be anything more than a survey of parental prejudices about school districts in the Kansas City area.

Once he had ascertained which of the districts—of those that Surveyed Parents could actually name—had the best image in their minds' eyes, DeSieghardt asked, "Of the school districts we have been discussing or any other district in the area that you are familiar with, *which one would be your first choice for your children, if you were given the option to enroll* in a school district other than Kansas City, Missouri School District at no tuition cost." Tr. 123:11-21. He did not tell the Surveyed Parents, or ask if they knew, that they had already had that option for more than three months by the time he asked in April 2012. Nor did he ask whether they had taken any affirmative steps during those three months to effectuate a transfer or even prepare to effectuate one. And despite paying lip service to "any other district in the area that you are familiar with," the printed script for this question was also followed by the same "typographical error" as the leading districts question: checkboxes for each of the Petitioner Districts, KCPS, "other," and "don't

know," with the words "DON'T READ in all caps only next to "don't know." Tr. 123:22-124:6. There was no box for "I'm not going to transfer," which apparently was to be recorded as "Other." Tr. 125:2-13. Nor did DeSieghardt ask whether Surveyed Parents considered sending their children to a private, parochial, or charter school instead of a public school.

But most importantly, DeSieghardt never asked parents, "Are you going to transfer your child to another school?" or "What district are you going to transfer you child to?" Rather, he asked which district "would be your first choice for your children, if you were given the option to enroll," Tr. 123:11-21. DeSieghardt did not ask if parents had made any inquiries about transferring or taken any affirmative steps to do so. Tr. 125:14-126:2. Instead, he asked what is "the percentage likelihood of [you] making – ultimately making that decision." Tr. 81:3:14. He dismisses the idea that parents who have already taken affirmative steps to transfer—such as calling other districts to inquire or even filling out the necessary paperwork—are more likely to go through with the transfer than those who simply state during a 15-minute phone survey what district would be their "first choice" to send their children too if they had the option "because with additional information, they could make a decision down the road. Our intent was to say at this moment in time with the information that you have available to you, what do you believe your—the step you would take is. Would you—what's the

likelihood that you would make that decision to transfer." Tr. 135:15-21.

Even assuming the repetition of the Petitioner Districts' names in the survey did not bias its results in favor of those districts, DeSieghart's extrapolation of the survey results to all school-aged children living in the KCPS District is internally inconsistent at best. The 600 households surveyed by DeSieghardt had at least 1184 school-aged children. Tr. 127:14-25. He assumes these 1184 students are statistically representative of the 32,173 school-aged children living in the KCPS area as of the 2010 Census. Tr. 127:20-128:5.

Based on the percentage of the 1184 whose parents indicated their "first choice" given the option to transfer, DeSieghardt calculates that a total of 7,759 KCPS students—about one quarter of the school-aged population—*will* transfer to the five Petitioner Districts at some point in the future. Tr. 128:1-8. But here his assumptions lead to strange results. Of the 1184 students in the survey, 414 attended private or parochial schools. Tr. 128:17-24. Another 133 attended charter schools, and another 21 were homeschooled. Tr. 129:2-5. That leaves 575—a little less than half of the 1184—who actually attend KCPS. Tr. 129:6-14. But when DeSieghardt calculated the number of students who *will* transfer from KCPS to one of the Petitioner Districts, he based his calculation on the full 32,173 living with the KCPS, not just the 16,000 who actually attend KCPS schools. Tr. 130:5-18.

Based on the make-up of the 1184 students surveyed, DeSieghart's analysis predicts that approximately 2,800 students currently enrolled in private or parochial schools are going to leave those institutions and travel across town to attend public school in one of the five petitioner districts. Tr. 132:9-133:15. Not only is that number incredible, it calls into question the Districts' assumptions that KCPS students are more expensive to educate. See Point 3 below at 46.

Finally, whatever DeSieghardt's calculations show, they are based on a fundamentally flawed assumption that an off-the-cuff response of a parent during a 15 minute telephone survey is an accurate prediction of what that parent will actually do several months later after more comprehensive research both on all area schools and on the costs and consequences of what could be just a temporary transfer if KCPS regains accreditation soon. There is nothing in the record to suggest that it is. To believe DeSieghardt's predictions will come to pass, we would have to assume either (a) that the uniformed impressions—some might say prejudices—of the parents he surveyed as to the relative strengths of forty or more public schools districts in the greater Kansas City Area were completely accurate, or (b) that the parents he surveyed had already finished all the research they would need to do before deciding where to send their children to school, or (c) that they didn't care that strongly about where they sent their kids to school. None of

those scenarios is plausible. Even DeSieghardt admitted that if it were his child, he would do more research and would need more than 15 minutes' thought before making such an important decision. Tr. 136:8-21. It is unreasonable to assume parents living within KCPS's boundaries are any different.

While acknowledging the "legitimate concerns by the State that the results of the Report may have been influenced by specifically naming" the five districts that hired Patron Insights to conduct its telephone survey, the circuit court nonetheless found the Report "credible and reliable" in predicting "the number of students that will transfer" to each of the Taxpayers' districts. LF601; App. A36. There is no substantial evidence in the record to support the court's judgment because its calculations were based on an inherently speculative survey rather than the actual number of students who had taken some affirmative step to transfer. The Prevailing Taxpayers have not met their burden to show their districts' increased costs from KCPS transfer students exceed what they can recover from KCPS in tuition. The judgment in favor of the Prevailing Taxpayers should be reversed.

3. The circuit court erred in entering judgment for the Prevailing Taxpayers because they failed to prove that § 167.131 increases their school districts' net costs in that their calculations are not based on the net increase between their Districts' and KCPS's percentage of students who impose increased costs due to poverty, disability, or limited English proficiency.

The Prevailing Taxpayers argued—and the circuit accepted—that each student who transfers will add $1,922 to the Petitioner Districts' costs because a greater percentage of KCPS's students than Petitioner Districts' students are classified as Free and Reduced Lunch status (FRL), have special education needs (IEP), or have Limited English Proficiency (LEP). Generally speaking, the Taxpayers are correct that students in these three classifications may require more resources to educate. But the Taxpayers made two fundamental errors when calculating *how much more* it will cost their districts to educate transfer students in each of these classifications.

First, the Taxpayers—and the circuit court—assumed that the students transferring into Petitioner Districts will qualify for FRL, IEP, and LEP status at exactly the same percentages as the students currently enrolled in KCPS schools. Because 95.9% of the KCPS students qualify for Free and Reduced Lunch status, for example, Taxpayers assume that 95.9% of the

transfer students they expect will also qualify for FRL status. That might be a reasonable assumption if every student who transferred to one of the Petitioner Districts actually transferred from a KCPS school. But that's not what DeSieghardt testified would happen.

DeSieghardt extrapolated the results of his survey to the entire school-aged population *living within* KCPS boundaries (about 32,000 students), not just those currently *attending* KCPS schools (about 16,000). That means about half of the 7,759 students he predicts will transfer to the Petitioner Districts—about 3779 of them—are currently enrolled somewhere other than KCPS schools. Indeed, DeSieghardt conceded that if his calculations are accurate, approximately 2,800 of the students he predicts will transfer into the Petitioner Districts' schools are currently attending *private or parochial schools*. It would seem highly unlikely that 95.9% of the students at expensive private schools in Kansas City *live in poverty*.

Yet, that is exactly the assumption that Petitioner Districts' chief financial officers have made when calculating that 95.9% of DeSieghardt's 7,759 transfer students will qualify for Free and Reduced Lunch status. There is no evidence in the record to support that assumption. Nor is there any evidence to suggest that 12.4% of *all* transfer students will have disabilities and 23.5% will have limited English proficiency simply because those are the percentages of students enrolled in KCPS schools with IEP and

LEP classifications. Those percentages may be accurate as to the 3,779 students DeSieghardt says will transfer *from KCPS schools*, but the Prevailing Taxpayers made no record as to what percentage of the other 3,780 students from private, parochial, and charter schools will qualify for FRL, IEP, and LEP status.

Second, the Taxpayers further inflated their increased costs projections by using the *gross* percentage of KCPS students who qualify for FRL, IEP, and LEP status rather than the *net* percentage by which KCPS *exceeds* the Petitioner Districts. By using KCPS's full percentages rather than just the difference between KCPS's percentages and their own, Prevailing Taxpayers effectively doubled the cost increase for their own percentage of students in each classification.

The tuition formula in §167.131 is based on the receiving district's per-student cost to maintain its grade level groupings. The Taxpayers argued that the formula is insufficient to cover the increased cost of educating KCPS students because the costs to maintain the Petitioner Districts' grade level groupings would increase due to the higher percentage of transfer students with FRL, IEP, and LEP classifications. That, too, may have been a reasonable assumption *if* the Taxpayers had compared KCPS's percentage of FRL, IEP, and LEP students with the Petitioner Districts' percentages and based their increased cost calculations on the *difference* between those

percentages, i.e., on the amount by which the KCPS percentages exceeded the Petitioner Districts' percentages. But that is not what they did.

Unless each of the Petitioner Districts has *zero* resident students who qualify for FRL, IEP, and LEP status, some portion of their current per-pupil cost to maintain their grade level groupings reflects the increased cost of educating *their own* FRL, IEP, and LEP students. If KCPS and the Petitioner Districts had the same percentages of students in each classification, then the Petitioner Districts' per-pupil cost to maintain their grade level groups would not change with the addition of KCPS students. Only if the students who transfer have a *higher* percentage of FRL, IEP, and LEP students will the Petitioner Districts' per-pupil cost to maintain their grade level groupings increase. And even then, the "increase" will only be the *difference* between KCPS and Petitioner Districts' percentages of FRL, IEP, and LEP students, not KCPS's entire percentage.

The Taxpayers—and therefore the circuit court—never calculated the difference between the districts' percentages because the Taxpayers introduced almost no evidence concerning the percentage of Petitioner Districts' students with FRL, IEP, and LEP needs. The CFO from Independence testified that the percentage of students with FRL status at *one* of his district's schools—Blackburn Elementary—was 40%. Tr. 496:12-15. He did not testify as to the percentage of all Independence School District

students who qualify for FRL status, nor for IEP or LEP. The CFOs from Lee's Summit and North Kansas City gave no testimony and introduced no documentary evidence as to what percentages of the students in those districts have FRL, IEP, and LEP classifications. Without that information, the circuit court could not calculate the increased costs for Petitioner Districts to educate incoming transfer students because the court did not know how many *more* KCPS students than Petitioner Districts' students would require those extra resources. The burden to provide that evidence was on the Taxpayers, and they failed to do so.

Taxpayers' calculation of increased costs per transfer student due to FLR, IEP, and LEP status has absolutely no support in the record. Accordingly, there is no substantial evidence to support the circuit court's conclusion that each of DeSieghardt's 7,759 transfer students would cost an extra $1,922, and no substantial evidence to support the circuit court's calculations of § 167.131's financial impact on Petitioner Districts.

4. **The circuit court erred in entering judgment for the Prevailing Taxpayers because they failed to prove that § 167.131 increases their school districts' net costs in that the tuition formula includes debt service that more than exceeds new capital expenditures.**

The circuit court accepted the Prevailing Taxpayers' argument that §167.131 increases the Petitioner Districts' net cost because it does not include funds for capital improvements necessary to house incoming transfer students. However, as Dr. Dorson testified, the tuition formula in §167.131 *does* include the per-student cost of servicing the Petitioner Districts' outstanding debt. Tr. 524:13-525:19. The district's outstanding debt was incurred long before the transfer and does not increase with each new student. Unlike the instruction and support services portion of the tuition formula, the debt service portion is not tied to any new cost caused by the transfer student. Rather, that money is available to offset any new capital expenditures the receiving district may incur to house incoming students.

For example, Lee's Summit calculates it will cost $944.71 per student to build and equip mobile classrooms to house the 2,291 new students Mr. DeSieghardt predicts will transfer to Lee's Summit. Those costs aren't built into the tuition formula so Prevailing Taxpayers claim it is an unfunded mandate. But the tuition formula in §167.131 allows Lee's Summit to recover $1,637.73 from each of those 2,291 transfer students based on its *own* outstanding debt. Not only is there no net increase in costs, Lee's Summit comes out ahead nearly $700 per student! The same is true in Independence. Although new capital improvements will cost the district $464.69 per student, Independence may recover $885.48 per student from KCPS based on

Independence's existing debt, a $421 profit per student. In North Kansas City, the profit is $1,141.65 per student even after incurring new capital expenditures.

When the circuit court calculated each district's net cost increase, it assumed the debt service portion of the tuition formula was an actual expense that district would incur as a result of the transfer. But that figure is simply the receiving district's pre-transfer debt divided by its pre-transfer ADA. It is not a new expense at all, but an approximation of what that district has traditionally borrowed per student for its prior capital improvements. Based on the evidence provided by the Prevailing Taxpayers at trial, that approximation is more than sufficient to cover the new capital outlays each of the Districts' financial officers calculated. Thus, the circuit court erred by including each district's projected capital expenses in its net cost calculation without backing out the profit each district makes from the debt-service portion of the tuition formula in §167.131.

5. The circuit court erred in holding that the districts were entirely absolved from complying with § 167.131 because the Art. X, § 21 does not render a statute invalid on its face based on future funding possibly being inadequate in that

Art. X, § 21 excuses only duties and activities to the extent they are not funded.

The circuit court treated Art. X, § 21 as a basis for holding that a statute was invalid on its face—at least during a period in which tuition might not cover all possible costs under the statute. But that is not how the provision should be read.

The concept embodied in Art. X, § 21 is that there should be correspondence between what the State requires and what the State ensures is paid for without local funding. The provision speaks of maintaining "proportions" and of not going "beyond" prior requirements. It is tied to costs that someone must bear—either the State or the local taxpayer (either through higher taxes or through forgoing services paid for by local funds that must be redirected). It cannot fairly and should not, as a policy matter, be read to allow a political subdivision to refuse to do anything just because the State has not (yet, anyway) provided the funding to allow the political subdivision to do everything.

That conclusion is consistent with *Brooks v. State*, a Hancock case challenging a provision of Missouri's concealed carry law mandating that local sheriffs' departments run background checks and issue permits. 128 S.W.3d 844 (Mo. banc 2004). Essentially, the case came down to "whether the provision for a sheriff's fee of up to $100—assuming the fee is otherwise

constitutional—is ***sufficient to fund the increased*** costs" of background checks. *Id.* at 850. Based on evidence of increased costs in four counties, this Court said there would be an "unfunded mandate" in those four counties and thus excused compliance—but only to the extent the costs imposed could not be covered by the funds provided. *Id.* at 851. That approach makes eminent sense. If the legislature comes up short in providing revenue, political subdivisions should still be required to do what they can with the revenue they are given, not entirely avoid their statutory responsibility.

Here, the Taxpayers attempted to show that even if they could absorb the costs of educating a few transfer students, the costs to educate *thousands* of students might exceed the tuition their districts could charge. As discussed above, their calculations were wrong. But assuming they had been correct, the Taxpayers' argument boils down to this: if the tuition payments a district will receive under §167.131 would cover the increased costs for educating 1,000 transfer students but not 1,001, the Districts have no obligation to accept the first 1,000. In other words, if they can imagine some circumstance in which the law would violate the Hancock Amendment, then they don't have to comply with that law at all. Theirs is a facial challenge masquerading as an as-applied challenge. This Court's decision in *Brooks* makes it clear that just because costs may exceed funding in *some instances* does not excuse compliance in all instances including those where costs do

not exceed funding. If there is some number of transfer students the Petitioner Districts could educate and still remain in the black after receiving tuition, then the Districts have an obligation to accept that many students. They cannot reject the first 1,000 simply because the 1,001st will push them into the red.

6. The circuit court erred in finding that the taxpayers had proven a violation of Art. X, § 21, because the taxpayers did not meet their burden of proof in that they failed to prove what proportion of district funding the State was providing in 1980, what additional funding the State has currently appropriated, and the cost of additional State mandates imposed since 1980, and failed to prove what new or increased duties or activities the State has required since 1980 and whether State funding, including but not limited to the "foundation formula," has increased enough to cover that cost.

This Court's prior Hancock cases have repeatedly emphasized that the Constitution imposes a considerable burden on taxpayers seeking to invoke the "unfunded mandate" provision. Most recently, the Court said:

> As this Court noted in *Fort Zumwalt*, to establish a violation of section 21, plaintiffs "must present evidence to establish the program mandated by the state in 1980–81 and the ratio of state to local *612 spending for the mandated program in that year" and further prove "costs of the mandated program in each subsequent year and the ratio of state to local spending for the mandated program in each subsequent year." 896 S.W.2d at 922.
>
> It is well-settled that the calculation of a mandated program's costs "may not include any discretionary expenditures a district undertook that went beyond the state mandate" and requires that plaintiffs clearly distinguish "resources directly committed to the state mandates ... from those not so dedicated." *Id*. (emphasis added). "Providing these factors for 1980–81 and each subsequent year ... require[s] sophisticated budgetary evidence and economic expertise."

School Dist. of Kansas City v. State, 317 S.W.3d at 612.

The Prevailing Taxpayers made no effort to satisfy the requirements of *Kansas City* and *Fort Zumwalt*. They provided the trial court with no "sophisticated budgetary evidence," nor with "economic expertise." We simply cannot divine, based on what the taxpayers presented to the circuit court, whether the increase in State funding to Petitioner Districts since 1980 has been sufficient to cover the costs of all the post-1980 mandates and at the same time maintain the proportion of funding promised by Art. X, § 21.

7. The trial court erred in the amount of the taxpayers' attorneys' fees it awarded because the award was not "reasonable" under Art. X, § 23, in that the award included fees for legal services performed for the sole benefit of the Petitioner Districts as well as other non-compensable services such as issuing press releases.

Attorneys' fees are recoverable under Missouri law only when specifically authorized by statute, the constitution, or a contract between the parties. *Lucas Stucco & EIFS Design, LLC v. Landau*, 324 S.W.3d 444, 445 (Mo. banc 2010). "'[T]he fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates.'" *Berry v. Volkswagen Group of Am., Inc.*, --- S.W.3d ----, 2012 WL 2094490, at *2 (Mo. App. W.D. June 12, 2012) (quoting *Hensley v.*

Eckerhart, 461 U.S. 424, 437 (1983)). The trial court is considered an expert on attorneys' fees and may make an award within its sound discretion. *Howard v. City of Kansas City*, 332 S.W.3d 772, 792 (Mo. banc 2011). Where a party is unsuccessful on some of its claims, a "trial court may attempt to identify specific hours that should be eliminated or may simply reduce the award to account for a prevailing party's limited success." *Trout v. State*, 269 S.W.3d 484, 489 (Mo. App. W.D. 2008).

If this Court does not reverse the circuit court's judgment on any of the above grounds, Prevailing Taxpayers are entitled to reasonable attorneys' fees and costs for prosecuting *their* Hancock claims. They are not entitled to any fees or costs incurred by *other parties* sharing the same counsel. Based on the affidavit and billing records of Petitioners' counsel, however, it appears that a substantial amount of the legal work for which the Prevailing Taxpayers were awarded fees was actually performed for the Petitioner School Districts. These entries are highlighted in yellow in the State's Appendix. App. A112-45. It also appears that the prevailing Taxpayer Petitioners recovered fees for non-compensable work, such as counsel's press releases. These entries are highlighted in blue in the State's Appendix. The total amount of the time entries that include either non-compensable services or legal services for clients other than the prevailing Taxpayer Petitioners total 239.05 hours at a blended rate of $49,229.00. The circuit court erred in

awarding this portion of the fees requested by the Prevailing Taxpayers, and its total fee award of $174,492 should be reduced to $125,263.

CONCLUSION

For the foregoing reasons, the trial court's judgment releasing Lee's Summit, Independence, and North Kansas City from the requirements of § 167.131 should be reversed.

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06

The undersigned hereby certifies that this brief complies with the limitations set forth in Rule 84.06(b) and contains 12,799 words as calculated pursuant to the requirements of Rule 84.06(b)(2).

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