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 TAXPAYER RESPONDENTS

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JURISDICTIONAL STATEMENT

Article V, § 3 of the Missouri Constitution provides "[t]he supreme court shall have exclusive appellate jurisdiction in all cases involving the validity of a treaty or statute of the United States, or of a statute or provision of the constitution of this state, the construction of the revenue laws of this state, the title to any state office and in all cases where the punishment imposed is death." Mo. Const. art. V, § 3. The Supreme Court has exclusive jurisdiction over an appeal that involves a challenge to the validity of a statute. *Watts v. Lester E. Cox Med. Centers*, 376 S.W.3d 633, 637 (Mo. banc 2012) (citing Mo. Const. art. V, § 3).

Here, the issue on appeal is whether a Missouri statute, RSMo § 167.131, is unconstitutional under the Hancock Amendment to the Missouri Constitution. This issue falls squarely within the exclusive appellate jurisdiction of this Court granted in Article V, § 3 of the Missouri Constitution.

STATEMENT OF FACTS

The New Unfunded Mandate Presented by RSMo § 167.131

As it was originally written, and as it existed in 1980, RSMo § 167.131 addressed the issue of Missouri school districts that only educated students between Kindergarten and 8th grade ("K-8 districts"). *See* RSMo § 167.131 (1974). The statute stated that children who resided in K-8 districts could attend the high school of a school district in the same or an adjoining county and that the resident district would pay tuition to the receiving school. *Id*. In 1993, the language of RSMo § 167.131 was revised to refer to any district that "does not maintain an accredited school", rather than to any district "that does not maintain an approved high school." Following the 1993 amendments to § 167.131, the Missouri Department of Education and Missouri school districts continued to interpret the statute to apply only to K-8 districts. *Turner v. Sch. Dist. of Clayton*, 318 S.W.3d 660, 674-75 (Mo. 2010) (Breckenridge, J., dissenting).

It was not until the St. Louis Public School District lost its accreditation in 2007 that anyone (Jane Tuner) claimed that the statute gave students residing in unaccredited districts an unconditional right to transfer to accredited schools. This Court, in ruling on Ms. Turner's claim, imposed for the first time a new requirement on the Area School Districts involved in this appeal (the Blue Springs, Independence, Lee's Summit, North Kansas City, and Raytown School Districts). This Court held that RSMo § 167.131 requires accredited school districts to admit and educate students of all grade levels who reside in an unaccredited school district and who choose to transfer. *Turner*, 318 S.W.3d

660. Prior to this Court's *Turner* decision, the Department of Education did not enforce any requirement on the Area School Districts to admit mass numbers of students residing in unaccredited school districts, and no Missouri school district was ever required to comply with such a requirement.

The new mandate imposed by § 167.131 and the *Turner* decision is the first mandate ever imposed by the State on the Area School Districts to educate students for which they cannot receive either (a) State aid; or (b) tuition that covers *all* of the costs associated with educating a particular student. It is the first mandate for which the Area School Districts cannot get complete payment for the costs of compliance.

In 1980, there were only two other limited statutory requirements to admit students who did not meet residency requirements. Those limited exceptions were found in RSMo § 167.121 and RSMo § 167.151. Under the 1980-version of § 167.121, the commissioner of education (or designee) had the ability to place students in another district where the other district was "more accessible", and the sending/resident district was required to pay tuition to the receiving district. The receiving district had the ability, under the 1980-version of § 167.121, to calculate and establish tuition rates in an amount that captured all of the costs of educating the out-of-district student attending due to accessibility issues. The only limitation placed on the amount of tuition that could be charged by the receiving district was that tuition could not exceed the "pro rata cost of instruction." *See* RSMo § 167.121 (1979).

Under the 1980-version of § 167.151, parents who owned property in a local district could send their child to that district and receive a credit on the tuition payment in the amount of school tax paid. The 1980-version of § 167.151 placed no restrictions on the tuition amount that could be charged by the receiving district. Very few students transferred under § 167.121 and § 167.151, and the statutes did not cause a mass transit of students from one school district to another. Further, under those statutes, receiving school districts had the authority to calculate and establish tuition rates using any formula they deemed would accurately capture all of the costs of educating out-of-district students. *See* RSMo § 167.121 (1979); RSMo § 167.151 (1963).

In addition to § 167.121 and § 167.151 there is only one other statute that permits students who cannot meet residency requirements to attend a district's schools - RSMo § 167.020. Section 167.020 excludes several classes of students from the residency requirements. However, that statute was not passed until 1996, well after the passage of the Hancock Amendment and the 1993 amendments to § 167.131. Further, school districts receive specific state funding for students who are excepted from the residency requirements pursuant to § 167.020. Tr. 515:17-516:9; *see also* Missouri Department of Elementary and Secondary Education Guidelines for Student Residency Status Reporting, available at http://dese.mo.gov/divadm/govern/documents/sf-Guidelines-for-Reporting-Student-Residency-Status.pdf (explaining the difference between "Resident I" and "Resident II" students for purposes of counting students in Average Daily Attendance numbers for receipt of State funding).

Loss of Accreditation of the Kansas City, Missouri Public School District

On September 20, 2011, the Missouri State Board of Education reclassified the Kansas City Public School District ("KCPS") as "unaccredited". App. A47, ¶ 14. KCPS became unaccredited on January 1, 2012, the date when the State Board of Education's decision went into effect. *Id.* On December 21, 2011, KCPS's Board of Education adopted a policy entitled, "Transfer of Students to Accredited School Districts in Jackson or Adjoining Counties." KCPS's Transfer Policy states that:

a. KCPS will only pay tuition for KCPS students who "have attended a KCPS school for the two academic semesters immediately preceding the request for transfer" (excluding students enrolling or enrolled in kindergarten);

b. KCPS will not "consider tuition requests from the receiving district" until after a KCPS student has been admitted to the receiving district;

c. If KCPS disagrees with the tuition request by the receiving district, it will only pay "its assessment of appropriate tuition to the receiving district";

d. In the event of a dispute about the amount of tuition, KCPS will only pay the receiving district KCPS's per pupil ADA State allocation ($3,733);

e. KCPS will not pay tuition upon enrollment, but rather will make tuition payments on a "monthly basis beginning the month immediately following the student's admittance to the receiving district";

f. KCPS will not provide transportation for KCPS students to any accredited school; and

g. KCPS will reimburse four school districts for transportation costs on a monthly basis. Those school districts eligible for monthly transportation reimbursements are North Kansas City 74 School District, Independence 30 School District, Raytown C-2 School District, and Center 58 School District.

App. A52, ¶ 9; App. A55-58.

The Patron Insight Survey and Report

In March and April 2012, Patron Insight, Inc. conducted a telephone survey of head-of-household residents of the Kansas City, Missouri School District with school-aged children. App. A77-79. The purpose of the survey was to determine how many students would transfer to each of the Area School Districts if their parents did not have to pay tuition. *Id*. The telephone study was developed and directed by Mr. Kenneth DeSieghardt, the CEO of Patron Insight. Mr. DeSieghardt has 31 years of experience designing and executing successful patron research for school districts, municipalities and other government entities, companies serving international, national and local markets, and not-for-profits. LF 311-312; App. A73-76. His firm has provided research

services to 73 different public school districts in Missouri, Kansas, Iowa, Arkansas, North Dakota and Nevada, gathering data from patrons, staff members, and students and helping school districts to better understand the needs, expectations and preferences of those they serve. *Id*. Patron Insight has used a variety of research processes in serving school districts, including telephone surveys, on-line surveys, focus groups, and one-on-one interviews. *Id.*

Mr. DeSieghardt prepared a report which describes and explains the results of the Patron Insight study ("the Patron Insight Report"). App. A77-115. The Report states that Patron Insight conducted 600 interviews with randomly selected KCPS residents who are the head-of-household and have at least one school-aged child. *Id.* Due to the large size of the survey group, the survey produced results at the 95% confidence level, meaning that the results contained in the Patron Insight Report are within 4% of what they would be if all KCPS residents with school-aged children had participated in the study. The study's primary objectives were to: (1) determine to which districts (if any) the respondent parents would transfer their children; and (2) to determine how the availability of transportation and the possible reaccreditation of KCPS would impact parents' transfer decisions. *Id.*

As fully described in the Patron Insight Report, a highly conservative approach was taken when calculating the number of transfers. App. A77-115; Tr. 81:3-84:24. Parents were asked how likely they were to transfer their students to another district if they did not have to pay tuition. *Id*. The survey results reflect only 90% of the students

whose parents said they were 100% likely to transfer, only 75% of the students whose parents said they were 75%-99% likely to transfer, only 50% of the students whose parents said they were 50%-74% likely to transfer, and none of the students whose parents said they were less than 50% likely to transfer. *Id.* Parents were also asked whether their transfer decision would be impacted by the fact that they might be required to provide transportation for their student(s) or by the fact that a future reaccreditation of KCPS would cause their student(s) to lose eligibility to attend an outside district. *Id.* The survey results do not include students whose parents said that these factors would make them "somewhat less likely to transfer" or "much less likely to transfer." *Id.*

Under this conservative methodology, the Patron Insight Report concludes that a total of 7,759 students residing in KCPS would transfer to one of the five Area School Districts if their parents did not have to pay tuition. App. A77-115. Each of the Area School Districts would have to admit several hundred to a couple thousand additional students. *Id.* Specifically, the report states that 23% of the parents indicated they would transfer their student(s) to Lee's Summit School District (for 2,291 students total), 18% of the parents indicated they would transfer their student(s) to North Kansas City School District (for 2,035 students total), 14% of the parents indicated they would transfer their student(s) to Blue Springs School District (for 1,690 students total), 8% of the parents indicated they would transfer their student(s) to Independence School District (for 1,002 students total), and 6% of the parents indicated they would transfer their student(s) to Raytown School District (for 741 students total). *Id.* Other parents (11% of the

respondent parents) indicated that they would transfer their student to a different school, but that they did not know to which school district they would pick. *Id.*

The Patron Insight Report is the only information available regarding the likely number of non-resident students that will transfer to the Area School Districts if RSMo § 167.131 is enforced against those Districts. The State Appellants did not retain an expert or conduct a survey concerning the anticipated number of student transfers from KCPS to the Area School Districts. The type of information and data included in the Patron Insight Report is the type of information and data that the Area School Districts typically use in planning and budgeting for upcoming school years. Tr. 386:8–390:6. If this Court upholds § 167.131, and non-resident students are permitted to transfer to the Area School Districts, then the Area School Districts would use the information and data contained in the Patron Insight Report to determine anticipated costs associated with their increased enrollments (*i.e.*, how many additional classrooms must be constructed, furnishings and equipment needed for the new classrooms, and how many additional teachers and staff members must be hired). *Id.*; LF 356-405.

Increased Costs to the Area School Districts

For each non-resident student that transfers to the Area School Districts, the Districts will incur the costs explicitly recognized in the RSMo § 167.131.2 tuition calculation formula. The formula recognizes that, for each student that transfers, a school district will incur the following categories of costs: teachers' wages, incidental purposes, debt service, maintenance and replacements. RSMo § 167.131.2. Financial officers

employed by each of the five Area School Districts calculated the tuition rate that their District would charge for each grade level grouping using the tuition calculation formula and testified as to that amount at trial. Tr. 154:6-155:4; 253:10-256:24; 321:7-323:15; 398:24-401:18; 464:9-465:5. The financial officers referred to the category of costs that could be included in tuition as costs "inside the tuition formula." For each KCPS student that transfers, the Area School Districts will incur the following costs which are "inside the tuition formula":

Blue Springs	Elementary School: $12,288 Middle School : $12,621 High School: $13,668
Independence	Elementary School: $9,391 Middle School: $9,357 High School: $10,255
Lee's Summit	Elementary School: $9,339 Middle School : $9,339 High School: $10,869
North Kansas City	Elementary School: $10,845 Middle School : $11,248 High School: $11,186
Raytown	Elementary School: $13,837 Middle School : $13,921 High School: $14,819

App. A25; App. A47-48, ¶¶ 18-22.

For each non-resident student that transfers to the Area School Districts, the Districts will also incur costs "outside the tuition formula" - additional costs, above and beyond the costs recognized in the RSMo § 167.131.2 tuition calculation formula. These costs include: (1) capital expenditures for mobile classrooms and/or for additional furniture, fixtures, and equipment; and (2) additional costs associated with students who

are on the free and reduced lunch program (FRL), with students who are disabled and have individualized education plans (IEPs), and with students who are limited English proficient (LEP). Tr. 158:16-196:1; 256:1-271:19; 324:7-343:11; 401:11-415:16; 465:12-481:15. The Area School Districts have a limited amount of available capacity at some of their schools, but the Districts would be unable to accommodate the number of non-resident transfer students reported in the Patron Insight Report with their current number of school buildings and classrooms. *Id.* The Area School Districts would have to acquire and install mobile classrooms in order to accommodate the anticipated number of non-resident transfer students. *Id.* In regard to furniture, fixture, and equipment costs ("FFE"), the Area School Districts' standard classroom setup requires each classroom to be equipped with bookcases, file cabinets, and tables, and each student must have a desk and chair. *Id.* Additionally, the standard classroom setup requires each classroom to be equipped with technology, such as wiring for Internet access and projectors. *Id.*

Financial officers at each of the Area School Districts were able to estimate how many non-resident students at each grade level grouping would transfer to their schools by applying the KCPS Core Data grade level percentages to the total number of non-resident students that would transfer to their individual districts. *Id.* Using these grade level estimates, the officials were able to determine how many mobile units they would have to acquire and install for each grade level grouping, the costs associated with acquiring and installing the mobile units, and what their FFE costs would be for each grade level grouping. *Id.* The Area School Districts would incur in the range of

$465,615 to $3,901,730 in capital expenditures due to non-resident student transfers from KCPS. App. A128-137.

In order to raise the amount of money needed for capital expenditures to accommodate non-resident transfer students, the Area School Districts would have to seek and obtain voter approval for further bonded indebtedness. LF 356-405. The Area School Districts cannot issue bonds for capital expenditures without voter authorization. *Id*. RSMo § 167.131 does not permit the Area School Districts to include capital expenditures in their non-resident student tuition rates. Thus, the Area School Districts would never be able to recover the capital expenditures they would have to make to accommodate non-resident transfer students from KCPS. *Id*.

In addition to capital expenditures, the Area School District will incur costs associated with students who are on the free and reduced lunch program (FRL), with students who are disabled and have individualized education plans (IEPs), and with students who are limited English proficient (LEP). Tr. 158:16-196:1; 256:1-271:19; 324:7-343:11; 401:11-415:16; 465:12-481:15. Missouri's education foundation formula recognizes that there are additional costs associated with education FRL, IEP, and LEP students. Accordingly, under the foundation formula, school districts receive a weighted ADA amount for FRL, IEP, and LEP students. Tr. 506:1-515:16. If at least 32% of total number of students enrolled in a district are FRL students, then school districts receive 1.25 of their per student ADA amount for the number of FRL students above the 32%

threshold. School districts receive 1.75 of their per student ADA for IEP students and 1.60 of their per student ADA for LEP students. *Id*.

According to the April 2012 Weighted ADA Report for the Kansas City, Missouri School District, which is published by the Missouri Department of Education on its website, 95.9% of KCPS students are FRL students, 12.4% of KCPS students are IEP students, and 23.5% of KCPS students are LEP students. LF 356-405. The financial officers calculated the Area School Districts' anticipated additional costs for non-resident FRL, IEP, and LEP students transferring from KCPS. *Id.*

First, the officers calculated approximately how many non-resident FRL, IEP, and LEP students will transfer to the Area School Districts by applying the KCPS Core Data percentages (95.9% - FRL, 12.4% - IEP, and 23.5% - LEP) to the total number of non-resident transfer students (7,759). LF 356-405. Approximately 7,441 of the total non-resident transfer students will be FRL students, approximately 962 of the total non-resident transfer students will be IEP students, and approximately 1,823 of the total non-resident transfer students will be LEP students. *Id*. Second, the officials calculated the weighted Average Daily Attendance (ADA) for each of these groups of students by multiplying the total number of students in each group (7,441 – FRL, 962 – IEP, and 1,823 – LEP) by the State weighting for each group (25% - FRL, 75% - IEP, and 60% - LEP). *Id*. Next, to conservatively calculate the additional amount that each of these groups will cost the Area School Districts, the officials multiplied the weighted ADA for each of the groups by the State ADA payment for KCPS students ($4,058.00). *Id*. This

is a conservative calculation because the Area School Districts are entitled to receive much more than the State ADA payment for KCPS students under Mo. Rev. Stat. § 167.131.2. *Id.*

Under this conservative calculation, non-resident FRL students will cost the Area School Districts an additional $7,548,774 per year, non-resident IEP students will cost the Area School Districts an additional $2,928,200 per year, and non-resident LEP students will cost the Area School Districts an additional $4,439,529 per year. LF 356-405; App. A128-137. In total, non-resident FRL, IEP, and LEP students will cost the Area School Districts an additional $14,916,503 per year. *Id.*

Finally, the officials calculated the additional costs that the Area School Districts will incur for a single incoming non-resident student by dividing the annual additional costs for each group of students ($7,548,774 – FRL, $2,928,200 – IEP, and $4,439,529 – LEP) by the total number of non-resident transfer students (7,759 students). LF 356-405; App. A128-137. The Area School Districts will incur $973 in additional FRL costs for every non-resident student that transfers, $377 in additional IEP costs for every non-resident student that transfers, and $572 in additional LEP costs for every non-resident student that transfers. *Id.* In total, the Area School Districts will incur additional costs of $1,922 for every non-resident student that transfers to their district due to FRL, IEP, and LEP costs. Each of the Area School Districts would incur over $1 million per year in additional FRL, IEP, and LEP costs due to transfers from KCPS. *Id.*

The additional costs associated with non-resident FRL, IEP, and LEP transfer students would not be fully recoverable under the method of calculation required by Mo. Rev. Stat. 167.131, even in future years. To calculate tuition rates under Mo. Rev. Stat. § 167.131, the Area School Districts must divide the cost of maintaining the grade level grouping by the average daily pupil attendance for the entire student body. Because the costs that are exclusively associated with the students transitioning from KCPS are divided by entire student population for purposes of calculating tuition as required by 167.131, the costs will be significantly diluted and never fully recovered by the Area School Districts. Tr. 343:1-5; 473:3-474:4.

Complete Lack of Funding for the New Mandate Presented by RSMo § 167.131

The State has made no appropriation to cover the increased costs imposed by the new requirement on the Area School Districts to admit non-resident students residing in unaccredited districts without any discretion to deny admission. There is no State funding available whatsoever to cover the costs associated with the § 167.131 mandate. App. A26-27; App. A48-49, ¶¶ 24-28. While the Area School Districts are permitted to count other students who do not meet residency requirements (such as orphaned students, homeless students, and students who have been placed in a residential care facility) in their Average Daily Attendance ("ADA") and to receive State funds for such students, students who transfer pursuant to § 167.131 may not be counted in a school districts' ADA. *Id.*

At trial, the State Appellants called a single witness: Dr. Roger Dorson. Dr. Dorson is the Coordinator of Financial and Administrative Services for the Missouri Department of Elementary and Secondary Education ("DESE"). Dr. Dorson admitted that there was no provision of State law or DESE regulation which would permit DESE to pay State aid to the Area School Districts for increased costs incurred as a result of admitting and educating § 167.131 transfer students:

> Q. Okay. Yesterday we heard testimony before you were here -- I'll represent to you that we heard some testimony from some of the taxpayers' witness that neither Kansas City public schools nor the petitioner districts under 167.131 will receive State aid for students in the transfer program. Is that correct?
>
> A. DESE has a program called Resident I and Resident II students. And Resident II students are students that attend -- that are resident students but attend school in another district and the resident district pays tuition. And in that case, the resident district does count those kids. So the ADA is counted in their ADA for State aid purposes.
>
> Q. Okay. So Resident I status is a student who lives in a district and attends school in that district?

A. That's correct.

Q. Resident II is a student who lives in the district but attends school in a different district?

A. That's correct, and the school district pays tuition.

Q. And the school district of residence pays tuition to the school district of attendance?

A. That's right.

Q. And the school district of residence for Resident II students, gets to count that student in its Average Daily Attendance; is that correct?

A. Well, they get the Average Daily Attendance from the district where the student attends. They -- the student -- the school district where the student is attending actually counts the attendance because that's where they're going to school.

Q. Checks off the box?

A. Yeah. And through the core data system, it flows back to the district of residence to be included.

* * *

Q. Good. Good, good. I have a few questions for you this afternoon. You were asked some questions

extensively about the foundation formula. Do you recall that?

A. Yes.

Q. And you referred to the statute a couple times or at least mentioned that there is a statute; correct?

A. Yes, uh-huh.

Q. Is it fair to say that you were referring to 163.011.

A. That's; the definitions, yes, uh-huh.

Q. And that's really the definitions and the method regarding the method of calculating State aid for public schools in Missouri?

A. Yes, uh-huh.

Q. Something that you're intimately familiar with; right?

A. Yes.

* * *

Q. (By Mr. Martin) Dr. Dorson, I'd like to ask you some questions about the definitions of some of the terminology that Mr. Hirth was asking you about, if I may.

A. Sure.

Q. Let's begin with No. 2 there, which is Average Daily Attendance. Do you see that, sir?

A. Yes, I do.

Q. And this is the definition of Average Daily Attendance for purposes of calculating the State funding for public schools?

A. Sure, it is.

Q. And it indicates, does it not, that you're using the number of resident pupils between the age of five and twenty-one; is that correct?

A. That's correct.

Q. And it has a definition of resident pupils, does it not, Dr. Dorson?

A. It does.

Q. And I think we know where this is going, don't we, Dr. Dorson?

A. Yes.

Q. Can you give us the definition of a resident pupil for purposes of calculating the Average Daily Attendance?

A. It is -- and without looking at this --

Q. And I will tell you, Roger, it starts at, for purposes of determining.

A. Okay. For purposes of determining Average Daily Attendance under this subdivision, the term resident pupil shall include all children between the ages of 5 and 21 who are residents of the school district. Can I stop there?

Q. That's fine. That's fine.

A. No, I meant -- and then it goes on to say that they have to be residents of the district.

Q. The point being --

A. Yes.

Q. -- for someone to count a student in their Average Daily Attendance under the statute, they are supposed to be a resident pupil?

A. That's what the statute says, yes.

Q. Now with respect to that program that you mentioned, Resident I, Resident II?

A. Yes.

Q. And I would ask -- you've indicated that it's been in existence for as long as you can recall; is that fair to say?

A. Yes.

Q. Now, the statute regarding State aid has changed since the time that you were talking about that the Resident II -- Resident II program went into effect?

A. It has, yes.

Q. Okay. And that Resident II program that you were indicating allows for Average Daily Attendance to be paid to an unaccredited district under 167.131 has never been approved by the State Board of Education; has it?

A. That's correct. I'm not aware that it has.

Q. And the Department of Elementary and Secondary Education doesn't have a policy that you're aware of regarding the Resident II program?

A. Doesn't an administrative rule or policy, yes.

Q. But we do have a statute that says that to count a student in Average Daily Attendance, they have to be a resident pupil?

A. That's what Section II says, yes.

Q. So when you say that under 167.131, Dr. Dorson, that Kansas City in this instance will get paid Average Daily Attendance that's actually counter to what it provides in Section II?

A. It's -- yes.

Q. And when you say that nobody has challenged that, are you -- you don't know whether that would be challenged in this instance involving the Kansas City School District; correct?

A. That's correct.

Q. So there's no legal authority that you're aware of that would allow the department to pay the Kansas City School District Average Daily Attendance in this situation?

A. All I know, Mr. Martin, is the Resident II student, Resident I student process has been in DESE for longer than I've been there. But if you're referring back to 163.011, no.

Q. And that is the statute for calculation of State aid at least provides us with the definition; is that correct?

A. That's correct.

Q. And there's no other?

A. That's correct.

Tr. 515:17-533:7.

Trial Court's August 1, 2012 Judgment and Order

On August 1, 2012, the trial court entered an order ruling upon a motion for summary judgment filed by the Taxpayer Respondents. LF 75-142. The Taxpayer Respondents moved for summary judgment on their Hancock Amendment claim (and on their claim for declaratory judgment against KCPS). The trial court granted the Taxpayer Respondents' motion for summary judgment on their Hancock Amendment claim in part and held that:

- RSMo § 167.131 imposes a new duty upon the Area School Districts.
- The State has not made an appropriation to compensate the Area School Districts for the mandates set forth in RSMo § 167.131.
- The results of the Patron Insight telephone survey provide definite evidence of the increase in student population Area School Districts can expect as a result of the unaccredited status of KCPS and the mandate of § 167.131.

LF 564-580. Due to the trial court's ruling on the Taxpayer Respondents' motion for summary judgment, only one issue remained for trial: whether the new activities required by § 167.131 imposed increased costs on the Area School Districts.

Pre-Trial Stipulations Entered into by State Appellants

Prior to trial, the State Appellants agreed to enter into a number of critical stipulations. Through the pre-trial stipulations, the State Appellants stipulated to two elements of the Taxpayer Respondents' Hancock Amendment claim: (1) that after the passage of the Hancock Amendment in 1980, the Area School Districts were required to perform new activities by § 167.131; and (2) that the State has not made and disbursed a specific appropriation to cover the increased costs the Area School Districts would incur in performing the new activities required by § 167.131.

The State stipulated to the following:

- The Area School Districts are under a statutory mandate, pursuant to Mo. Rev. Stat. § 167.131 and the Missouri Supreme Court's ruling in *Turner v. Sch. Dist. of Clayton*, 318 S.W.3d 660 (Mo. banc 2010), to admit students who reside within KCPS.
- The mandate to admit non-resident students residing in unaccredited school districts was created by an amendment to Mo. Rev. Stat. § 167.131 in 1993.
- The Missouri legislature annually appropriates unrestricted funds to the Missouri Department of Elementary and Secondary Education for distribution to the Area School Districts pursuant to the education foundation formula.
- Other than funds distributed under the foundation formula, the Missouri legislature has not made an appropriation or disbursement to the Area School Districts for the purpose of compliance with Mo. Rev. Stat. § 167.131.

- If the Area School Districts admit non-resident KCPS students, they will not receive any specific funding directly from the State of Missouri to finance the costs associated with admitting and educating KCPS students.
- The Missouri Legislature annually appropriates unrestricted funds to the Area School Districts pursuant to the education foundation formula. The Department of Elementary and Secondary Education does not permit the Area School Districts to include students attending its schools pursuant to Mo. Rev. Stat. § 167.131 in its Average Daily Attendance ("ADA") figures for state aid purposes.
- There is no provision of State law or regulation that allows the Area School Districts to include students who transfer to their schools pursuant to Mo. Rev. Stat. § 167.131 in their ADA figures for state aid purposes.
- The Area School Districts cannot issue bonds for capital expenditures, including for capital expenditures made to acquire and install mobile unit classrooms, without voter authorization.

App. A45-49.

Trial Court's August 16, 2012 Judgment and Order

The trial court found that RSMo § 167.131 is unconstitutional as to the Independence, Lee's Summit, and North Kansas City School Districts, but constitutional as to the Blue Springs and Raytown School Districts. In its judgment, the trial court adopted a calculation proposed by the State in closing argument to determine if the Area

School Districts would incur increased costs. The calculation compared the amount of tuition that the Area School Districts would charge to KCPS pursuant to the RSMo § 167.131 mandate (even though none of the Area School Districts have actually received any payment of tuition), to some of the costs that the Area School Districts would incur in educating KCPS students, in order to determine if the Area School Districts would have a net gain or net loss. This calculation resulted in a determination by the trial court that three of the Area School Districts would incur increased costs, but that Blue Springs and Raytown School Districts would not incur increased costs, even though none of the Area School Districts will actually receive any payment of tuition prior to compliance with the student transfer mandate. LF 590-614.

Due to the trial court's ruling on KCPS's Transfer Policy, the Area School Districts will not receive any funds from KCPS prior to admitting KCPS students. In the trial court's August 16, 2012 judgment, it ruled that § 167.131 does not require KCPS to make up-front tuition payments in the full amount established by the Area School Districts. The court ruled that KCPS may pay only its per-pupil ADA, in the form of monthly reimbursements, until the State Board of Education resolves any tuition disputes. Despite this ruling, the court "assumed that KCPS will pay Area School Districts … the tuition required by Section 167.131." LF 590-614.

POINTS RELIED ON

1. The trial court's judgment concerning whether RSMo § 167.131 imposes a new mandate should be affirmed in that the Taxpayer Respondents proved that § 167.131 imposes a new requirement by the State to admit significant numbers of out-of-district students for which there is no State funding and for which the Area School Districts cannot recover their full costs through tuition, and this Court's decision in the *Breitenfeld* appeal is not dispositive of this appeal.

   Breitenfeld v. Sch. Dist. of Clayton, 399 S.W.3d 816 (Mo. 2013)

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

   City of Jefferson v. Missouri Dep't of Natural Res., 916 S.W.2d 794 (Mo. 1996)

   Neske v. City of St. Louis, 218 S.W.3d 417 (Mo. banc 2007)

   Turner v. Sch. Dist. of Clayton, 318 S.W.3d 660 (Mo. 2010)

2. The trial court erred by entering judgment in favor of the State Appellants on the Hancock amendment claim by Taxpayers of the Blue Springs and Raytown School Districts in that the Taxpayers proved that RSMo § 167.131 imposes increased costs on their districts.

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

3. The trial court erred by entering judgment in favor of the State Appellants on the Hancock Amendment claim by taxpayers of the Blue Springs and Raytown School Districts in that the trial court improperly conducted a net cost analysis.

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

City of Jefferson v. Missouri Dept. of Natural Res., 916 S.W.2d 794 (Mo. 1996)

4. The trial court erred by entering judgment in favor of the State Appellants on the Hancock Amendment claim by Taxpayers of the Blue Springs and Raytown School Districts because the Taxpayers proved that the State has made no appropriation to cover the costs associated with the § 167.131 mandate and that there is no State funding whatsoever available for such costs.

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

Fort Zumwalt Sch. Dist. v. State, 896 S.W.2d 918 (Mo. 1995)

Rolla 31 School District v. State, 837 S.W.2d 1 (Mo. banc 1992)

5. The trial court's judgment in favor of the Taxpayers of the Independence, Lee's Summit, and North Kansas City School Districts should be affirmed in that the Taxpayers proved that RSMo § 167.131 imposes increased costs on their districts.

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

6. The trial court's judgment in favor of the Taxpayers of the Independence, Lee's Summit, and North Kansas City School Districts should be affirmed in that the Taxpayers proved that the State has made no appropriation to cover the costs associated with the § 167.131 mandate and that there is no State funding whatsoever available for such costs.

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

Fort Zumwalt Sch. Dist. v. State, 896 S.W.2d 918 (Mo. 1995).

Rolla 31 School District v. State, 837 S.W.2d 1 (Mo. banc 1992)

7. The trial court's judgment in favor of the Taxpayers of the Independence, Lee's Summit, and North Kansas City School Districts should be affirmed in that the Taxpayers alleged that "new" activities are imposed by RSMO § 167.131, and thus they were not required to prove a decrease in the level of state funding from 1980 to present time.

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

Fort Zumwalt Sch. Dist. v. State, 896 S.W.2d 918 (Mo. 1995)

8. The trial court's judgment concerning the amount of the Taxpayer Respondents' attorneys' fees should be affirmed as to the Taxpayers of the Independence, Lee's Summit, and North Kansas City School Districts, and the case should be remanded so that attorney fees may be awarded in favor of the Taxpayers of the Blue Springs and Raytown School Districts.

Avanti Petroleum, Inc. v. St. Louis County, 974 S.W.2d 506 (Mo. App. 1998)

Berry v. Volkswagen Grp. of Am., Inc., 397 S.W.3d 425 (Mo. 2013)

Roberts v. McNary, 636 S.W.2d 332 (Mo. banc 1982)

Zweig v. Metro. St. Louis Sewer Dist., 2012 WL 1033304 (Mo. App. 2012)

ARGUMENT

Standard of Review

The applicable standard of review for the parties' appeal of the trial court's judgment on the Taxpayer Respondents' Hancock Amendment claim was explained by this Court in its recent *Breitenfeld* decision:

> The arguments on appeal regarding the constitutional validity of section 167.131 are afforded *de novo* review by this Court. *See Sch. Dist. of Kansas City v. State*, 317 S.W.3d 599, 604 (Mo. banc 2010).

A trial court's review of an award of attorneys' fees and costs is reviewed under an abuse of discretion standard. *W. Blue Print Co., LLC v. Roberts*, 367 S.W.3d 7, 23 (Mo. 2012).

1. The trial court's judgment concerning whether RSMo § 167.131 imposes a new mandate should be affirmed in that the Taxpayer Respondents proved that § 167.131 imposes a new requirement by the State to admit significant numbers of out-of-district students for which there is no State funding and for which the Area School Districts cannot recover their full costs through tuition, and this Court's decision in the *Breitenfeld* appeal is not dispositive of this appeal.

There are three elements of proof for Hancock Amendment challenges to new mandates (as opposed to existing mandates).[1] Before the trial court, the Taxpayer

[1] The State Appellants make arguments in their brief concerning the level of funding available to school districts in 1980 and present day. Such arguments evidence a

Respondents proved each of those three elements as to the Blue Springs, Independence, Lee's Summit, North Kansas City, and Raytown School Districts. A taxpayer challenging a requirement imposed by the State as a new mandate violative of sections 16 and 21 of the Hancock Amendment must show that: (1) after the passage of the Hancock Amendment in 1980, the State required a political subdivision to perform a new activity or service; (2) the political subdivision will experience increased costs in performing that activity or service; and (3) the State has not made and disbursed a specific appropriation to cover the political subdivision's increased costs. *City of Jefferson v. Missouri Dep't of Natural Res.*, 916 S.W.2d 794, 795-96 (Mo. 1996). The only contested issue in this appeal is whether the new mandate imposed by the 1993 amendments to § 167.131 will impose increased costs on the Area School Districts. The State entered into binding stipulations as to the first and third elements of the Taxpayer Respondents' Hancock

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misunderstanding of the Taxpayer Respondents' claim and of the operation of the Hancock Amendment. As will be more fully explained below, the Taxpayer Respondents' claim asserts that § 167.131 is unconstitutional in that it imposes new activities. The Taxpayers did not claim below that the activities described in their Amended Petition were "existing", and thus they never made any arguments concerning a decrease in the level of funding available to the Area School Districts, although they expressly reserve the right to amend their claim in the event this Court determines that the activities alleged in the Taxpayers' Petition were "existing" in 1980 and remands the case.

Amendment claim, and thus the parties did not present evidence concerning those elements at trial. Any argument by the State concerning the issues of whether § 167.131 imposes a new mandate and whether the State has appropriated any funds for the new mandate are inappropriate and must be ignored because the State is judicially estopped from arguing a lack of new activities or the existence of State funding on appeal. *See State v. Dillon*, 41 S.W.3d 479, 485–86 (Mo. App. 2000).

The Taxpayer Respondents successfully proved before the trial court that, through the 1993 amendments to RSMo § 167.131 and this Court's *Turner* decision, the State imposed new activities on the Area School Districts for which the Area School Districts are foreclosed from receiving State aid. The taxpayers in the *Breitenfeld* appeal were not successful in their attempt to prove that § 167.131 imposes new activities because they did not define their claim in a manner which distinguished the requirements of § 167.131 from other statutory requirements to admit students. Moreover, the *Breitenfeld* appeal is not dispositive of this appeal. It is well-established that Hancock Amendment challenges are specific to each political subdivision, and this Court must consider this appeal separate and distinct from the *Breitenfeld* appeal. *Brooks v. State*, 128 S.W.3d 844, 851 (Mo. 2004); *Breitenfeld*, 399 S.W.3d at 820.

On March 23, 2012, the Taxpayer Respondents moved for summary judgment on their Hancock Amendment challenge to RSMo § 167.131. LF 75-142. The Taxpayers' motion set forth in detail the legislative history of § 167.131 and explained that the operation of the statute as to the Area School Districts constituted an unfunded mandate

in that new activities were imposed for which no funding is available. *Id*. Even more critically, the Taxpayers proved before the trial court that § 167.131 was not an expansion of any pre-existing requirement to admit students in that the Area School Districts will receive no State funding for the new activities required by the statute. LF 564-580. In contrast to the *Breitenfeld* taxpayers, the Taxpayer Respondents' claim does not allege that § 167.131 is unconstitutional because it expands the number of students who are "eligible" to attend the District's schools or because it represents an expansion of the residency exceptions. The Taxpayer Respondents' claim is more precise and alleges that: (1) § 167.131 imposes a new requirement by the State to admit large numbers of out-of-district students; and (2) there is no funding available whatsoever for those new activities.

Before the 1980-1981 school year, accredited school districts were not required to admit non-resident students on a tuition basis. Under § 167.131 as it existed in 1980, school districts had discretion on whether to admit high school students who resided in a district without an "approved high school" and who had completed the work of the highest grade level offered in their resident district. *See* RSMo § 167.131 (1974). When the statute was amended in 1993, new activities were required of accredited districts. Under the current statute, accredited districts are required to admit non-resident students of all grade levels who reside in an unaccredited district regardless of whether they have completed the work of the highest grade level offered by their resident district. The Area School Districts were not previously responsible for the education of out-of-district students for whom no State aid would be received.

Via the 1993 amendments to RSMo § 167.131 and this Court's *Turner* decision, new activities were imposed on the Area School Districts. Under this Court's ruling in *Turner v. Clayton*, accredited districts may not deny admission to students from unaccredited districts for any reason. Before the 1993 amendments, school districts had discretion on whether to admit students residing in unaccredited districts who sought admission pursuant to the statute.[2] The Area School Districts are now *required* to educate students residing in unaccredited districts of all grade levels without any funding to cover the associated costs and they are only permitted to charge tuition in an amount that covers a fraction of the costs of compliance. In short, the Area School Districts are now required to admit out-of-district students from unaccredited districts without complete payment.

In its August 1, 2012 Judgment and Order, the trial court recognized the new activities imposed by § 167.131 and held that the statute imposed a new mandate on the Area School Districts. LF 564-580. Although the State Appellants had cited the narrow residency exceptions outlined in RSMo § 167.020 and argued that the Area School Districts were always required to admit "eligible" students, the Taxpayer Respondents were able to successfully show the fallacy in that argument. In their reply in support of

[2] In fact, in the intervening years between the 1993 amendments and the *Turner* decision, the State, including the Department of Elementary and Secondary Education, interpreted RSMo § 167.131 to allow accredited school districts to retain discretion as to whether or not to admit student transfers. *Turner*, 318 S.W.3d at 674-75.

their motion for summary judgment, the Taxpayer Respondents explained that a proper analysis of their Hancock Amendment claim could not consider the new activities required by § 167.131 alongside the residency exceptions, in that the Area School Districts receive funding for students who meet the residency exceptions. LF 232-300. The Taxpayers' claim centers on a simple allegation that the requirements to educate non-resident students from any unaccredited districts (not just K-8 districts) regardless of grade level and the highest grade level completed is new **and unfunded**, and not that the Area School Districts are being required to educate additional eligible students. The trial court recognized that the State's arguments concerning "eligible students" misconstrued the Taxpayers' claim and correctly held that § 167.131 imposes new activities for which no State funding is available, thus imposing an unconstitutional unfunded mandate.[3] LF 564-580.

The State Appellants have repeatedly argued before this Court that the *Breitenfeld* decision is dispositive of this appeal and that the analysis employed by the Court in its *Breitenfeld* decision is applicable to this appeal. In their brief, the State Appellants do

[3] If this Court determines that the new requirement alleged by the Area School Districts was pre-existing at the time the Hancock Amendment was passed (*i.e.* that the Area School Districts were under a pre-existing requirement to educate out-of-district students for which no State funding is available or appropriated), then the Taxpayers should be given the opportunity on remand to demonstrate that the State has improperly reduced the State financed proportion of the costs associated with that requirement.

not acknowledge or address the specific new activities alleged by the Taxpayer Respondents in their Amended Petition, or the complete lack of funding for the activities required by § 167.131. The State Appellants have utterly failed to explain why those activities are not "new" and why Judge Powell's ruling that those activities are new is flawed. They have also failed to explain why the complete lack of a State appropriation or State funding does not violate the Hancock Amendment. Rather, the State Appellants have relied solely on this Court's *Breitenfeld* decision in arguing that § 167.131 does not impose any new activities. However, the Court's *Breitenfeld* decision has no dispositive effect on this appeal.

As this Court expressly recognized, its *Breitenfeld* decision is limited to § 167.131 "as it is applied to the … school districts involved in [that] case." *Breitenfeld*, 399 S.W.3d at 820. Hancock Amendment claims are binding only on the political subdivision(s) whose taxpayers brought and successfully proved (or failed to prove) the claim. *See Brooks*, 128 S.W.3d at 851 (holding that the Conceal and Carry Act was unconstitutional as to four counties which presented testimony regarding anticipated activities and costs in implementing the Act, and enjoining the State from enforcing the Act "only to the extent it constitute[d] an unfunded mandate imposed on those counties"). This Court's June 11, 2013 opinion is binding only as to the Clayton School District and the St. Louis Public School District. The Court made no findings in its June 11th opinion regarding the constitutionality of § 167.131 as to the Area School Districts, and that

opinion does not address the specific merits of the Taxpayer Respondents' Hancock Amendment claim.

a. While the school districts involved in the *Breitenfeld* appeal failed to prove that RSMo § 167.131 imposes new activities, the Taxpayer Respondents met their burden of proving that RSMo § 167.131 imposes new activities.

The downfall of the *Breitenfeld* taxpayers was that they failed to show the critical differences between the requirements imposed by RSMo § 167.131 and the requirements imposed by RSMo § 167.020. They were not able to show this Court: (1) why the requirements imposed by § 167.020 pass Hancock Amendment muster but the requirements imposed by § 167.131 do not; and (2) why an analysis of their claim must be limited to a simple determination as to whether the requirement to educate out-of-district students for whom no State funding is available (and not "eligible students") has changed since 1980. The Taxpayer Respondents made arguments before the trial court concerning both of these issues, and the trial court found in favor of the Taxpayers on the issue of whether § 167.131 imposes new activities. In recognition of the trial court's sound analysis, the State stipulated before trial that the 1993 amendments to the statute imposed new requirements such that the issue of whether § 167.131 imposed new activities was not an issue at trial and neither party presented any evidence at trial concerning that element of the Taxpayers' claim. App. A48-49; App. A26-27.

The Taxpayers Respondents do not complain that they are being required to educate additional students. Public school districts are regularly required to educate additional students when additional students meet either the residency requirements or the residency exceptions (and public school districts receive funding for such students). Rather, the Taxpayer Respondents assert that § 167.131 imposes new specific requirements on the Area School Districts for which no State funding is available. LF 12-59. It is those new requirements, coupled with the lack of State funding or adequate tuition, that must be considered by this Court when analyzing the propriety of the trial court's August 1, 2012 Judgment and Order.

In *Turner v. Sch. Dist. of Clayton*, 318 S.W.3d 660 (Mo. 2010), this Court determined that the legislature's 1993 amendments changed the existing law and imposed a new activity on accredited school districts. This Court's holding was based on the fact that the "prior version of § 167.131.2 provided 'but no school shall be required to admit any pupil.'" *Id*. at 669. This Court reasoned that, when the legislature removed that language, it also removed school districts' discretion to deny admission. *Id*. (citing *Cox v. Dir. of Revenue*, 98 S.W.3d 548, 550 (Mo. banc 2003) ("[w]hen the legislature amends a statute, that amendment is presumed to change the existing law.")). Due to the 1993 amendments and this Court's *Turner* decision, the Area School Districts are now required to admit large numbers of students who reside in an unaccredited district, without receipt of any corresponding State funding. *Id*. Prior to the 1993 amendments and the *Turner* decision, these requirements simply did not exist. *Id*.

In its *Breitenfeld* decision, this Court recognized the long-standing requirement that a student must be a resident of a school district in order to attend:

> "The right of children, of and within the prescribed school age, to attend the public school established in *their district* for them is not a privilege dependent upon the discretion of any one, but is a fundamental right, which cannot be denied, except for the general welfare." *State ex rel. Roberts v. Wilson*, 221 Mo. App. 9, 297 S.W. 419, 420 (1927) (emphasis added), citing *Lehew v. Brummell*, 103 Mo. 546, 15 S.W. 765 (1891). And *State ex rel. Halbert v. Clymer* indicated the deference given to district boundaries by courts, as it discussed that "[w]hile [a public education] statute must be liberally construed, ... it would not be right to permit children living in districts whose taxpayers have neglected or refused to maintain schools to have the benefits free of charge, of schools in districts wherein the taxpayers have burdened themselves to erect schoolhouses, employ competent teachers, and maintain schools." 164 Mo. App. 671, 147 S.W. 1119, 1120 (1912).

Breitenfeld, 399 S.W.3d at 829 (emphasis in original).

Indeed, eligibility to attend a public school district has always been premised on the fact that the student lives within the district. In an attempt to downplay the significant new activities imposed by § 167.131, the State Appellants (both in *Breitenfeld* and here) cited the limited exceptions under State law where students who meet residency

exceptions are permitted to enroll in a district's schools (homeless children, children enrolled in a court-ordered interdistrict transfer program, and children placed in residential care facilities). However, the residency exceptions do not support an argument that the Area School Districts were always required to admit significant numbers of out-of-district students without any State funding for two reasons.

i. In 1980, the Area School Districts were not required to admit significant numbers of non-resident students on a tuition basis and they were permitted to establish tuition rates to cover all the costs associated with students attending on a tuition basis.

The activities imposed by § 167.131 are distinct from the activities imposed by 167.020 because the requirements imposed by § 167.020 fall under a completely different funding scheme. The Area School Districts *receive specific funding* under § 167.020 for homeless children, children enrolled in a court-ordered interdistrict transfer program, and children placed in residential care facilities who attend their schools.[4] Tr. 515:17-516:9;

[4] During the deposition he gave in connection with the *Breitenfeld* case, Dr. Roger Dorson, the State Board's Coordinator for Financial and Administrative Services, explained that school districts are authorized to count these categories of students in their Average Daily Attendance (ADA) and thus receive state funding for these students. LF 296-297. Thus, the requirement for state funding is met with respect to these students. As fully explained below, there is no legal authority for school districts to count § 167.131 transfer students in their ADA, or for the State Board to pay

LF 296-297. The residency exceptions included in § 167.020 add additional categories of students who will be considered "resident" students for state aid purposes and who may be counted in average daily attendance numbers. *Id*. Simply stated, the § 167.020 residency exceptions require school districts to educate additional students *for which state aid is received*. By direct contrast, § 167.131 requires districts to educate additional students for which ***no*** *state aid is received*. The new requirements imposed by § 167.131 do not represent a continuation of any previous requirement to educate non-resident students, because all previous requirements included State funding for each non-resident student admitted. Rather, § 167.131 represents a complete divergence from a long-standing statutory scheme. For the first time, § 167.131 requires school districts to educate students who do not qualify as residents, who do not meet any residency exemptions, and for whom no State funding will be received.

While it is true that Missouri children have a constitutional entitlement to a "gratuitous education", the Area School Districts have never been under a mandate to educate all "eligible" students without the receipt of State funding or full tuition payment. Rather, the Area School Districts have only operated under a mandate to educate all resident students or students meeting residency exceptions, for which they receive a State appropriation. *See* RSMo § 167.020.2. In the absence of the 1993 amendments to § 167.131, the Area School Districts would only be required to educate a non-resident if

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foundation formula funds for § 167.131 transfer students to either the Area School Districts or to KCPS.

that student either moved within the boundaries of one of the Area School Districts or met one of the residency exceptions. In either case, the Area School districts would receive State funding for such student because such student would be counted in its ADA. The Area School Districts were not required, under the law as it existed before the legislature's amendment of § 167.131 in 1993 and the *Turner* decision, to admit students who did not meet either the residency requirements or the residency exceptions for which no State funding could be received.

While this issue was not raised before the trial court, the Taxpayer Respondents will address the very limited exceptions contained in § 167.121 and § 167.151, as the Court mentioned those statutes in its *Breitenfeld* decision. As it existed in 1980, RSMo § 167.121 provided an extremely limited circumstance under which school districts may be required to admit students on a tuition basis. *See State ex rel. Pfitzinger v. Wasson*, 676 S.W.2d 533, 534 (Mo. App. 1984) (citing the full text of the 1979 version of RSMo § 167.121). Under the 1980 version of § 167.121, school districts were required to admit students if the commissioner of education (or designee) determined that a school in another district was "more accessible" and the sending/resident district was required to pay tuition to the receiving district. The receiving school district had the authority to set tuition in an amount it deemed appropriate according to a formula that captured all of its costs. *See id*. The only limitation placed on the tuition amount charged was that the tuition could not exceed the "pro rata cost of instruction." *See id*. Initially, the § 167.121 requirement is different from the § 167.131 requirement in that a receiving school district

was permitted to charge the full amount of the student's proportionate share of instructional costs, rather than the limited categories of charges permitted by § 167.131.2. Second, the § 167.131 requirement is different from the § 167.131 requirement in that § 167.121 did not require school districts to admit significant numbers of students. At most, a school district may be required to admit one to two students every couple years under the accessibility/transportation hardship in § 167.121. However, as proved by the evidence the Taxpayers presented at trial, the Area School Districts are each required to admit a minimum of 741 to 2,291 students under the § 167.131 mandate.

As to § 167.151, that statute provided only one limited circumstance under which school districts were required to admit students on a tuition basis. App. A68. Section 3 of the 1980-version of § 167.151 permitted parents who owned property in, and thus paid taxes in, a district to send their child to that district and to receive a credit on the tuition payment in the amount of school tax paid. *Id.* Again, under this statutory requirement to admit non-resident students, the receiving school district was permitted to establish the tuition fee (and was not limited to a restrictive tuition formula) and the receiving school district would be required to admit only very few numbers of students, if any. Section 2 of the 1980-version of the statute addressed orphan students and does not constitute a requirement to admit out-of-district students. Section 2 explicitly states that orphan children need only be admitted by a district "in which they have a permanent or temporary home without paying a tuition fee." *Id.* Orphan children living in a district are resident students for which the school district receives State funding.

A careful examination of § 167.121 and § 167.151 reveals that those statutes did not require the same type of activities required by § 167.131. Section 167.131 requires the Area School Districts to admit significant numbers of out-of-district students and to charge tuition according to a specific formula, rather than charging tuition for the total amount of the actual costs the receiving district incurs to educate the child. This requirement was completely unprecedented in 1980 and at the time § 167.131 was amended in 1993.

ii. The unfunded mandate at issue here was defined by the Taxpayers to be a new requirement imposed by the State to admit out-of-district students for which no funding is available, and not as an expansion of the requirement to admit "eligible" students or an expansion to the residency requirements.

As the Taxpayers explained to the trial court in support of their motion for summary judgment, this case is not about eligible students that are permitted to attend the Area School Districts, but rather it is about the new, unfunded activities required by the State that the Taxpayers alleged in their Amended Petition to be unconstitutional. LF 232-300. The fact that the Area School Districts are required to educate certain out-of-district students, such as homeless students, does not mean that the new activities alleged by the Taxpayers in this appeal were "continuing responsibilities." A new activity is, in simple terms, an activity that a political subdivision alleges it previously has not been required to perform. *Compare City of Jefferson v. Missouri Dept. of Natural Res.*, 863

S.W.2d 844, 848 (Mo. banc 1993) (municipalities were previously required to file waste management plan, but political subdivision alleged statute requiring municipalities to file new solid waste management plan meeting additional requirements imposed new activities), *with In re 1984 Budget for trial court of St. Louis County*, 687 S.W.2d 896, 900 (Mo. banc 1985) (decision of Judicial Finance Commission that county was obligated to pay attorney fees did not impose a new activity because county had appropriated funds for that specific activity - payment of attorneys' fees - before). Under Hancock Amendment precedent, a taxpayer has the power to define their claim, and the Taxpayer Respondents defined their claim as follows: § 167.131 is violative of the Hancock Amendment because the State imposed a new (not increased) requirement in § 167.131 to admit significant numbers of out-of-district students for which no funding is available and for which full tuition cannot be charged. The Taxpayers' carefully crafted claim does not allege that § 167.131 generally expands the students who are eligible to attend the Area School districts or constitutes a residency exception which adds to the exceptions contained in § 167.020.[5]

[5] As previously stated above, in footnote 3, in the event this case is remanded pursuant to a determination by this Court that the activities alleged by the Taxpayers were pre-existing, the Taxpayers should be permitted to demonstrate that the State has improperly reduced the State financed proportion of the costs associated with admitting and educating out-of-district students for which no funding is available and for which tuition must be charged to the sending district.

This Court cited to *Neske v. City of St. Louis*, 218 S.W.3d 417 (Mo. banc 2007) in its *Breitenfeld* decision. *Neske* mandates a ruling in favor of the Taxpayer Respondents in this case because their claim concerns new specific requirements imposed by § 167.131 for which they cannot receive State funding. A comparison of the alleged unfunded mandate in *Neske* to the alleged unfunded mandate here confirms the propriety of the trial court's August 1, 2012 Judgment and Order. In *Neske*, the City of St. Louis argued that a RSMo § 86.344, which required it to pay funds to public retirement systems in the amount determined by the retirement systems' boards of trustees, was unconstitutional because the amount the City was required to pay for the 2003-2004 fiscal year exceeded the amounts it was required to pay for the 1980-1981 fiscal year. *Id.* at 420-422. There had been no amendment to § 86.344, rather the costs of complying with the statute's mandate had simply increased over time. *Id.* The *Neske* Court held that the statute did not violate the Hancock Amendment because one of the essential elements of a Hancock claim – a new or increased activity – had not been satisfied. The Court found that the City "has been required to fund the [retirement systems] pursuant to an actuarial formula that has not changed since Hancock's adoption in 1981." *Id.* at 422. Unlike the taxpayers in *Neske* (and *Breitenfeld*), the Taxpayer Respondents' claim does not encompass "continued responsibilities", but rather concerns new responsibilities imposed by the 1993 amendments to § 167.131 and by this Court's *Turner* decision.

While the *Neske* and *Breitenfeld* taxpayers were only able to identify "continued responsibilities," the Taxpayer Respondents delineated new responsibilities in their

Amended Petition and arguments before the trial court. The Taxpayer Respondents successfully showed that, in 1993, the statute was amended to include new requirements that school districts admit significant numbers of non-resident students of all grade levels who reside in an unaccredited district in the same or adjoining county regardless of the highest grade level completed without any State funding. LF 564-581. The Taxpayers' claim is not that the residency exceptions have been impermissibly expanded, and their claim does not categorize § 167.131 as a residency exception. Rather, the Taxpayers' claim is that they are now required to admit students residing in an unaccredited district and have no discretion to deny admission (this requirement was recognized by this Court in its *Turner* decision) and that they will receive no State funding whatsoever for the admission and education of such students. This case is distinct from *Neske*, where a statutory obligation that existed before the Hancock Amendment was passed which imposed increased costs. Here, the Taxpayers claimed and successfully showed that the Area School Districts have been mandated to "take on a new responsibility" to admit significant numbers of students who do not meet the residency requirements or the residency exceptions and for which no State funding will be distributed.

b. The Hancock Amendment prohibits any new mandate that would result in increased taxes for local taxpayers; the analysis does not consider whether responsibilities are shifted between political subdivisions.

The State Appellants' brief relies heavily on an argument that the Hancock Amendment does not prohibit the State from shifting responsibilities between local school districts. While this axiom is true and was recognized by this Court in its *Breitenfeld* decision, a proper Hancock Amendment analysis does not consider whether responsibilities are shifted. This Court succinctly explained the prohibition of the Hancock Amendment as "preventing [the State] from circumventing the taxing and spending limitations intended by the Hancock Amendment by forcing political subdivisions to do the taxing and spending that the State cannot." *Breitenfeld*, 399 S.W.3d at 826. The only issue in this appeal is whether the State has required taxpayers of the Blue Springs, Independence, Lee's Summit, North Kansas City, and Raytown School Districts to bear an additional tax burden by requiring new activities without State funding. Whether responsibilities have been shifted between political subdivisions is wholly irrelevant.

c. Prior to trial, the State Appellants stipulated that RSMo § 167.131 imposes a new mandate, and they are judicially estopped from taking a different position in this appeal.

Before the trial court in this case, the State Appellants entered into a binding stipulation that RSMo § 167.131 imposes a new mandate on the Kansas City Area Accredited School Districts and the State is now judicially estopped from asserting a different position on appeal. This stipulation by the parties was warranted given the trial court's determination that, prior to the passage of the Hancock Amendment, the Area

School Districts were not required to perform the new activities identified in their claim. The Taxpayer Respondents relied upon the State's stipulation in narrowing the issues for trial. Further, the State Appellants stipulated that the Accredited School Districts would not receive any funding from the State to finance the costs associated with educating non-resident students, and the Taxpayer Respondents introduced compelling evidence at trial that there is absolutely no funding available to cover the costs associated with the transfer of students from unaccredited districts to accredited schools. The State Appellants are bound by the position they took prior to trial that § 167.131 imposes a new mandate, and they are judicially estopped from taking a different position in this appeal.

Prior to the trial of this case, the State Appellants stipulated that: (1) "the mandate to admit non-resident students residing in unaccredited school districts *was created* by an amendment to RSMo. § 167.131 in 1993"; and (2) the Area School Districts would "not receive any specific funding directly from the State of Missouri to finance the costs associated with admitting and educating KCPS students." App. A48-49. The stipulation made by the State Appellants as to the factual issue of whether the 1993 amendment revised § 167.131 in a manner that created new mandates is binding. *See State v. Jones*, 539 S.W.2d 317, 318 (Mo. App. 1975) (stating that a "stipulation relating to some interest of the party which is wholly under his control, and in no way affects the procedure of the cause, is binding upon, and cannot be controlled by, the court", and holding that State could not be discharged from its pre-trial stipulation); *Griffin Contracting Co., Inc. v. Hawkeye-Sec. Ins. Co.*, 867 S.W.2d 602, 605 (Mo. App. 1993).

The Taxpayer Respondents rushed to trial in this matter in seven months because they knew that the issues of whether § 167.131 imposed new activities and whether the State had appropriated any funds for the new activities imposed by § 167.131 were ***undisputed***. Judicial estoppel prevents litigants from deriving a benefit by taking contradictory positions at different judicial proceedings. *See Shockley v. Director*, 980 S.W.2d 173, 175 (Mo. App.1998). Judicial estoppel has been utilized to prevent a party from taking contrary positions in front of the trial court and then before an appellate court. *See, e.g., State v. Dillon*, 41 S.W.3d 479, 485–86 (Mo. App. 2000). The purpose behind the principle of judicial estoppel "embodies the notions of common sense and fair play" and prevents litigators from luring an opposing party to rely on a stated position and then later revoking that position. *Egan v. Craig*, 967 S.W.2d 120, 126 (Mo. App. 1998). The State Appellants are estopped from reneging on their pre-trial positions, and this appeal must be ruled upon in accordance with the State's pre-trial stipulations.

d. The Taxpayer Respondents relied on the State Appellants' stipulation and, if the Court determines that the Taxpayer Respondents failed to prove that RSMo § 167.131 imposes new activities, then this case should be remanded so that the Taxpayer Respondents have a full and fair opportunity to present evidence concerning the new activity component of their Hancock Amendment claim.

In the event this Court decides to remand this case, the Taxpayer Respondents should be afforded a full and fair opportunity to consider and assert additional legal

theories. The Taxpayer Respondents would have presented additional evidence and presented additional claims at the trial court level in the absence of the State Appellants' stipulations. The Taxpayer Respondents proceeded at trial under the understanding that the State was not disputing the imposition of a new mandate (or the lack of funding). Accordingly, if the State Appellants are now permitted to change their position and dispute either the issue of a new mandate or the issue of lack of funding, the Taxpayer Respondents must be given the opportunity to craft and re-state their claims with full knowledge of the State's new positions.

2. The trial court erred by entering judgment in favor of the State Appellants on the Hancock amendment claim by Taxpayers of the Blue Springs and Raytown School Districts in that the Taxpayers proved that RSMo § 167.131 imposes increased costs on their districts.

The new activities required by RSMo § 167.131 impose three categories of costs on the Area School Districts: (1) costs that fall within the tuition formula (which the State has attempted to mandate that unaccredited districts finance); (2) higher per pupil costs that are associated with students residing in unaccredited districts and which may not be considered in calculating tuition under the § 167.131.2 formula; and (3) per pupil costs that fall outside the tuition formula, specifically costs for capital outlay. The Taxpayers of the Blue Springs and Raytown School Districts proved at trial that their districts would incur each of these categories of costs.

Per Pupil Costs that May be Included in Tuition

The plain language of RSMo § 167.131 establishes some, but not all, of the costs associated with complying with the statute. In crafting the tuition formula set forth in RSMo § 167.131.2, the legislature recognized certain per pupil costs that are associated with educating students. Under the tuition formula, accredited districts may charge the per pupil cost of maintaining a grade level grouping.[6] The cost of maintaining a grade level grouping may include, and may not exceed, the amounts spent for teachers' wages, incidental purposes, debt service, maintenance and replacements. Thus, in order to calculate non-resident tuition for an upcoming school year under § 167.131.2, accredited districts aggregate the amounts spent on teachers' wages, incidental purposes, debt service, maintenance and replacements during the previous year for each grade level grouping, and then divide that amount by the previous year's average daily attendance (ADA). By law, teachers' wages, incidental purposes, debt service, maintenance and replacements are costs that are associated with educating each student, and thus accredited districts are permitted to charge each non-resident transfer student for those costs.

Section 167.131 specifies its own costs of compliance by identifying the tuition amount that the legislature expected a receiving district would incur in educating transfer students. On its face, the statute acknowledges that receiving districts will incur a "per

[6] "Grade level grouping" refers to the elementary school grade levels, the middle school grade levels, and the high school grade levels.

pupil" cost for each student that transfers. In sworn statements, the superintendents of the Blue Springs and Raytown School Districts testified that their districts had not received any funds from the State to finance the costs associated with § 167.131 student transfers, and that they do not expect to receive any funding from the State in the event that they are forced to comply with § 167.131. LF 116-117; 124-125. A financial officer from Blue Springs testified that the District will incur $12,288 - $13,668, just in the per pupil costs recognized in the tuition formula. Tr. 321:7-323:15; App. A116-117. A financial officer from Raytown testified that the District will incur $13,837 - $14,819, just in the per pupil costs recognized in the tuition formula. Tr. 398:24-401:18; App. A127.

Higher Per Pupil Costs of Students

Residing in Unaccredited Districts that May Not be Included in Tuition

The testimony of the financial officers also proved that it is more expensive to educate a student residing in an unaccredited district, specifically students residing in KCPS, than it is to educate a student from one of the Area School Districts. Each year, the Missouri Department of Elementary and Secondary Education publishes the "per pupil expenditure amount" for all public school districts in the State. The evidence presented at trial showed that the Area School Districts, for the 2010-2011 school year,[7] spent $8,447 to $9,508 per student. App. A138-142. By contrast, KCPS spent $14,556 per student during the 2010-2011 school year. App. A143. KCPS students are simply

[7] The 2010-2011 school year was the latest information currently available during the time of trial.

more expensive to educate, partially due to the socio-economic status of KCPS students and the fact that a high percentage of KCPS students receive a free or reduced lunch and/or are limited English proficient. Tr. 160:16-165:7.

The § 167.131.2 tuition formula fails to account for the fact that KCPS students cost more to educate than the Area School Districts' resident students. Area School Districts must use their own costs in calculating tuition; they are not permitted to use KCPS's cost figures in calculating tuition. Tr. 164:21-166:7. This is especially problematic during the first year that the Area School Districts are forced to comply with § 167.131. During the first year that KCPS students transfer, the Area School Districts must calculate tuition using the per pupil costs of their own students – the additional per pupil costs of KCPS students will not be taken into account at all because the previous year's cost figures are being used and KCPS students did not attend in the previous year. Because the Area School Districts cannot use KCPS per pupil costs in the first year's tuition calculation, the tuition amount for those students is underestimated and costs of educating the more expensive students from KCPS will never be recovered. Tr. 343:1-5; 473:3-474:4.

The Taxpayers of the Blue Springs and Raytown School Districts proved at trial that, on average, it costs an additional $1,922 per pupil to educate students residing in KCPS. App. A128-137. With a minimum anticipated student transfer number of 1,690 students, Blue Springs will incur $3,248,180 in additional costs associated with educating KCPS students. App A100; App. A129. With a minimum anticipated student transfer

number of 741 students, Raytown will incur $1,424,202 in additional costs associated with educating KCPS students. App A100; App. A137.

Per Pupil Costs that May Not be Included in Tuition – Capital Expenditures for Mobile Classroom Units and Furniture, Fixtures, and Equipment

Finally, the testimony of the financial officers proved that, for each non-resident student that transfers to the Area School Districts, the Districts will incur additional costs, above and beyond both the costs recognized in the RSMo § 167.131.2 tuition calculation formula and the higher per pupil costs for KCPS students. The tuition formula does not permit the Area School Districts to include costs for capital outlay, which includes capital expenditures for mobile unit classrooms and furniture fixtures, and equipment (FFE) needed for the additional classrooms. Thus, the Area School Districts would never be able to recover, through tuition payments, the capital expenditures they will have to make to accommodate non-resident transfer students from KCPS.

The financial officers from Blue Springs and Raytown testified that their districts have a limited amount of available capacity and that the districts would be unable to accommodate the number of non-resident transfer students projected in Mr. DeSieghardt's Report with their current number of school buildings and classrooms. Tr. 324:7-343:11; 401:11-415:16. The Area School Districts will have to acquire and install mobile classrooms in order to accommodate the anticipated number of non-resident

transfer students.[8] *Id*. In regards to FFE costs, the Area School Districts' standard classroom setup requires each classroom to be equipped with bookcases, file cabinets, and tables, and each student must have a desk and chair. Additionally, the standard classroom setup requires each classroom to be equipped with technology, such as wiring for Internet access and projectors. LF 356-405.

Financial officers from each of the Area School Districts testified that they calculated approximately how many non-resident students at each grade level grouping would transfer to their schools by applying the KCPS Core Data grade level percentages to the total number of non-resident students that will transfer to their individual districts.[9]

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[8] Constructing mobile classrooms on existing school property is the most cost efficient and practical way of accommodating incoming KCPS students. The only other available option would be to acquire new real estate and build new school buildings. 179:6-180:13.

[9] The Blue Springs, Independence, North Kansas City, and Raytown School Districts group their grade levels as follows: K-5, 6-8, and 9-12. The KCPS Core Data grade level percentages show that 55% of KCPS students are in grades K-5, 22% of KCPS students are in grades 6-8, and 23% of KCPS students are in grades 9-12. The Lee's Summit School District groups its grade levels as follows: K-6, 7-8, and 9-12. The KCPS Core Data grade level percentages show that 63% of KCPS students are in grades K-6, 14% of KCPS students are in grades 7-8, and 23% of KCPS students are in grades 9-12. LF 356-405.

The finance officers testified that, using these grade level estimates, they were able to determine how many mobile classroom units they would have to acquire and install for each grade level grouping, the costs associated with acquiring and installing the mobile units, and what their FFE costs would be for each grade level grouping. Tr. 158:16-196:1; 256:1-271:19; 324:7-343:11; 401:11-415:16; 465:12-481:15. The Blue Springs School District will incur $3,901,730 in capital expenditures due to non-resident student transfers from KCPS, and Raytown will incur $1,163,109 in capital expenditures due to non-resident student transfers from KCPS. App. A128; App. A136.

a. The Patron Insight Report meets the well-established standard for the level of proof that is required under the Hancock Amendment for the "increased costs" component of the claim.

The Taxpayers of the Area School Districts have a low burden of proof with respect to proving increased costs resulting from RSMo § 167.131, and they met that burden of proof at trial through the Patron Insight Report and the testimony of Mr. DeSieghardt. The Missouri Supreme Court has established that taxpayers challenging a new mandate need only show, through testimony of anticipated costs (rather than through "mere common sense, or speculation and conjecture"), that the anticipated increased costs will be more than *de minimis*. *Brooks v. State*, 128 S.W.3d 844, 849 (Mo. 2004). The Hancock Amendment requires proof of ***anticipated*** costs, and the State Appellants' arguments which imply that the Area School Districts were required to attempt to comply

with the § 167.131 unconstitutional unfunded mandate and admit KCPS students in order to prove their Hancock Amendment claim are contrary to Supreme Court precedent.

In *Brooks*, the Missouri Supreme Court identified the type of evidence that must be supplied in order to succeed on a Hancock Amendment violation. "Testimony regarding anticipated activities and costs" establishes a Hancock Amendment violation. *Id*. However, "mere common sense, or speculation and conjecture" do not establish a violation because courts may not "presume increased costs resulting from increased mandated activity." *Id*.

In *Brooks*, taxpayers from various counties asserted a Hancock Amendment challenge to a concealed-carry law on the basis that the statute required local counties to issue permits, but the permit mandate was only partially funded. Sheriffs testified that their counties *would* expend $38 on fingerprint testing for each permit applicant. The Missouri Supreme Court found the evidence from the counties to be sufficient, stating that the testimony regarding "the costs … for … fingerprint analyses in all four counties … proves the Hancock violation on the merits of the case." *Id.* The Supreme Court did not take issue with the fact that the counties had not actually issued permits before bringing their challenge. Their costs associated with issuing permits were able to be projected, just as the costs associated with educating students residing in unaccredited districts are able to be projected.

The *Brooks* Court also identified the amount of increased costs that must be proven in an unfunded mandate case. A showing of anything more than "*de minimis*"

costs is sufficient to prove a Hancock Amendment violation. *Id.* ("plaintiffs need only show that the increased costs will be more than *de minimis*); *see also City of Jefferson v. Missouri Dept. of Natural Res.*, 916 S.W.2d 794, 795 (Mo. 1996) (proving increased costs "demands only greater than a *de minimis* increase"). The *Brooks* Court determined that the $38 cost associated with each concealed-carry permit was more than *de minimis*. 128 S.W.3d at 849.

The trial court correctly concluded that the Patron Insight report was "credible and reliable" evidence of the anticipated number of students that would transfer to the Area School Districts, and the trial court's judgment should be upheld in this respect. LF 601.

i. The State Appellants' attempts to challenge the accuracy and reliability of the Patron Insight Report fail.

The State Appellants devote much of their brief to an attempt to discredit the accuracy of the Patron Insight Report. The State has attacked the report from every angle it can surmise. The trial court heard each of the arguments raised by the State concerning the accuracy and reliability of the Patron Insight Report, and determined in its discretion that the report met the "anticipated costs" standard of proof under the Hancock Amendment. The trial court also relied on the Patron Insight report in rendering its judgment. The Patron Insight Report is the only information available concerning the anticipated number of student transfers to the Area School Districts. LF 601. The State made no attempt to conduct its own study concerning the anticipated number of transfers. Rather than obtain its own expert and attack the credibility of the Taxpayers' evidence of

increased costs through a conflicting expert report, the State has simply attempted to undermine the methodology employed by Mr. DeSieghardt. Mr. DeSieghardt explained and justified the methodology behind his study before the trial court, and the trial court's determination that the report was sufficient evidence of increased costs should be upheld.

The Taxpayers made every effort to bring their Hancock Amendment claim to trial, and to final resolution, as soon as possible. They obtained an expert within weeks of filing their original Petition and completed the telephone survey in sufficient time to try the case on its original trial date of June 13, 2012. At a scheduling conference, the State argued that trial could not occur on June 13th because it needed time to retain an expert witness on the issue of anticipated transfers. The trial court postponed the trial date to August 6, 2012, specifically so that the State would have additional time to retain an expert witness. Although given the additional time to obtain an expert witness, the State chose not to retain one. Presumably, the State made a strategic decision not to retain an expert because it knew that, under any methodology, an expert would discover that the anticipated number of transfer students was significant.

At trial, Dr. Dorson testified that DESE also had failed to undertake any efforts to determine the anticipated number of student transfers. He testified that DESE had taken no steps to gather information concerning the student transfer numbers. Tr. 543:21-544:15. The State Appellants did not offer any evidence contrary to the Patron Insight Report at trial. The State had more than ample opportunity to gather evidence with which to challenge the Patron Insight Report, but they did not seize that opportunity. The trial

court found the Patron Insight Report to be "credible and reliable", in part, because "there is no other survey or report available to accurately predict or project the number of students that will transfer to the Area School Districts." LF 601. The trial court's assessment of the available evidence was sound and should not be overturned.

As to the State Appellants' specific attacks on Mr. DeSieghardt's methodology, Mr. DeSieghardt's trial testimony shows that each of those attacks lack merit and that his methodology was both reasonable and industry-accepted. Mr. DeSieghardt explained, in detail, that his extrapolation of the survey numbers to represent the entire population of students living in KCPS was highly conservative, because he specifically asked parents how likely they were to transfer their child and then discounted the transfer numbers based on their response. Tr. 81:3-83:18. The transfer numbers were further discounted based on parents' responses to questions concerning how transportation issues and possible reaccreditation of KCPS would affect their transfer decision. Tr. 83:19-85:2; 86:11-24; 91:6-98:23.

Mr. DeSieghardt's testimony shows that the questioning methodology employed during the telephone survey was appropriate and did not create any bias. He testified that parents were permitted to, and had a full opportunity to, identify *any* school district when they were asked to which district they would transfer their student if given the choice. Tr. 105:15-19, 117:20-118:7. Parents were also able to identify any school district when grading various school districts in particular performance areas. Tr. 106:1-10, 117:20-118:7. Mr. DeSieghardt testified that he did not quiz parents on their knowledge of to

which school districts they could potentially transfer their children under § 167.131 because "the evidence would suggest that they were well aware of the multiple districts. Tr. 104:3-17. In fact, parents *did* provide the names of other school districts in response to the question concerning to which district they would send their child and to questions concerning the performance areas. Tr. 116:12-18, 117:20-118:7.

The State attacks the length of the telephone survey and argues that the length of the survey was insufficient to accurately predict the number of student transfers. Mr. DeSieghardt explained at trial that the length of the survey was sufficient and that, in his professional experience, he has achieved a 95% accuracy rate with similar surveys. Tr. 136:3-138:10. He stated that he was "very confident that we will be within the [95%] margin of error when ultimately the transfer decision has to be made." 137:3-7.

Finally, Mr. DeSieghardt fully explained his reasoning behind asking parents about which performance factors they considered important when selecting a school and why that line of questioning did not sway the survey results. Mr. DeSieghardt testified that parents were questioned about "how they judge the performance of districts in the area" because it was critical to the study for him to understand "how individuals in this case, patrons, make decisions" and what "characteristics [and] functions they follow when they make a decision." Tr. 142:12-11. By contrast, providing parents with data regarding which districts performed well in various areas, or informing parents who were surveyed about the *Turner* decision and about their rights under § 167.131, as the State suggested should have been done, would have given the parents knowledge which they

did not previously have and would have improperly educated the parents who were surveyed. Tr. 107:6-108:13, 139:5-140:1, 111:4-21. Mr. DeSieghardt's testimony shows that the survey's opening questions concerning district performance gathered critical data concerning school choice which supported the results of the survey. The questions concerning district performance did not bias the results of the survey, and the State's suggestion that such questions created bias are directly contrary to Mr. DeSieghardt's testimony.

3. The trial court erred by entering judgment in favor of the State Appellants on the Hancock Amendment claim by taxpayers of the Blue Springs and Raytown School Districts in that the trial court improperly conducted a net cost analysis.

In reaching its August 16, 2012 judgment, the trial court did not consider binding Missouri Supreme Court precedent that requires the ***actual receipt*** of non-appropriated funds if they are to be considered in calculating increased costs for purposes of the Hancock Amendment. *City of Jefferson v. Missouri Dept. of Natural Res.*, 916 S.W.2d 794, 796 (Mo. 1996) ("*Jefferson II*"). In *Jefferson II*, this Court held that one local government (Jefferson City) had proven its claim of an unfunded mandate under the Hancock Amendment and did not have to comply with a new mandate because it had not actually received funds to cover its increased costs. By contrast, the *Jefferson II* Court also ruled that another local government (the City of Eldon) had failed to make its Hancock Amendment unfunded mandate claim because the City had actually received

funds to cover its increased costs. *Id*. at 796-97. Specifically, this Court held that: "Jefferson City need not comply with the mandate … until the state *actually reimburses* the city for its increased costs … [because] the mere prospect of a 'grant' to cover increased costs does not [defeat an Article X, § 21 violation]." *Id*.

The trial court's judgment is counter to the binding precedent established by *Jefferson II*, in that the Area School Districts have not actually received any funds whatsoever, appropriated or otherwise, that the trial court could consider in its calculation of increased costs. Furthermore, given the trial court's ruling that KCPS does not have to pay tuition before students are admitted to the Area School Districts, under *Jefferson II*, the Area School Districts need not comply with the new mandate of the student transfer statute.

The calculation employed in the August 16, 2012 judgment does not comport with Supreme Court precedent on the Hancock Amendment and that, even if the calculation correctly analyzed whether RSMo § 167.131 presents an unfunded mandate, the calculation contains several errors and does not conform to the evidence presented at trial. The calculation employed by the trial court is plagued with errors, and the methodology simply cannot be used to determine if RSMo § 167.131 presents an unfunded mandate for the Area School Districts.

a. The trial court erred in considering tuition to be charged by the Area School Districts because: (1) the tuition payments have not been

actually received by the Area School Districts; and (2) the potential tuition payments are not a "State appropriation."

The amount of tuition that the Area School Districts will charge to KCPS should not have been considered as offsets to the Districts' increased costs. The trial court's consideration of the potential tuition payments in its "increased costs" analysis was flawed in two respects.

First, this Court, in *Jefferson II* ruled that non-appropriated payments to offset increased costs must be actually received by a political subdivision before the political subdivision is compelled to comply with a new mandate. *Id*. at 796. In *Jefferson II*, the Court analyzed whether grants from the State could defeat a Hancock Amendment violation claim based upon a statutory mandate requiring counties and cities to develop new solid waste plans. More specifically, the Court analyzed whether the grant funds from the State could be considered in determining whether Jefferson City and Eldon would incur increased net costs, and thereby establish a violation of the Hancock Amendment. After reviewing whether the cities had actually received the grant funds, the Court ruled that Jefferson City, which had not actually received the grant funds, had established a Hancock Amendment violation, and that the City of Eldon, which had actually received the grant funds, failed to establish such a violation. Likewise, here the Blue Springs and Raytown School Districts have not received tuition payments from KCPS, and thus tuition payments may not be considered in the "increased cost" analysis as an offset.

A second problem with the trial court's consideration of the tuition charges is that there is no authority, either in the plain language of the Hancock Amendment or in prior Hancock Amendment cases, for including potential payments, or even actual payments, from third parties other than the State in an "increased costs" analysis.[10] Rather, as firmly established by prior Hancock Amendment cases, the trial court's task was to determine if the Area School Districts will incur increased costs (meaning simply more costs than they experienced before imposition of the mandate regardless of potential revenue from non-State sources) as a result of the § 167.131 mandate. This analysis cannot lawfully consider the tuition that the Area School Districts will charge to KCPS to be a "State appropriation."

b. Even if this Court finds that the tuition to be charged to KCPS may be considered as part of the "increased costs" analysis, the calculation used by the trial court was flawed in at least two respects.

Even if the Court finds that the tuition to be charged to KCPS may be considered as part of the "increased costs" analysis, an accurate "revenue vs. actual costs" calculation shows that § 167.131 presents an unfunded mandate. The "revenue vs. actual costs" calculation must be corrected in several respects in order to accurately and fairly reflect the costs that the Area School Districts will incur in educating KCPS students.

[10] Notably, in *Jefferson II*, the Court considered non-appropriated grant funds from the State, rather than funds from a third party.

On the revenue-side of the equation, the calculation assumes that the Area School Districts can charge KCPS for each of the costs recognized in the § 167.131.2 tuition formula, that the State Board of Education will approve the tuition amounts established by the Area School District's Boards, and that KCPS will pay the full amount of the tuition. On the expense-side of the equation, the calculation assumes that the Area School Districts will incur only three categories of costs: (1) the limited operating costs recognized in each of the Area School District's per pupil expenditure amounts; (2) the capital outlay expenditures the Districts will incur in accommodating KCPS students; and (3) the additional FRL, IEP, and LEP costs that the District will incur for each KCPS student who transfers.

The primary error in the calculation is that costs which are recognized on one side of the equation are not recognized on the other side. The per pupil expenditure shown in DESE's school finance data is based on each district's "total current expenditures." "Total current expenditures" include limited categories of costs that school districts incur: they include only instruction and support expenditures. "Total current expenditures" do not include many of the costs that are recognized by law in the § 167.131.2 formula. The law recognizes "all amounts spent for teachers' wages, incidental purposes, debt service, maintenance and replacements" as costs that receiving school districts will incur on a per pupil basis. However, "per pupil expenditures" do not capture many of these per pupil costs, the most significant cost being debt service. The calculation used in the judgment is flawed in that, on the revenue-side of the equation, it recognizes per pupil debt service

costs as costs that receiving districts incur (it assumes that the Area School Districts will incur per pupil debt service costs, and that they will charge KCPS for per pupil debt service costs). On the costs-side of the equation, however, it fails to recognize per pupil debt service costs as costs that receiving districts will incur (it assumes that the Area School Districts will not incur per pupil debt service costs).

The secondary error in the calculation is that it fails to fully account for one of the most critical pieces of evidence that the Taxpayers proved at trial – that KCPS students are, on average, more expensive to educate than the Area School Districts' resident students. The calculation only accounts for the additional FRL/IEP/LEP costs that are associated with KCPS students, and does not account for all the factors that make KCPS students more expensive to educate. Financial officers from each of the Area School Districts and Dr. Roger Dorson testified that part of what makes KCPS students more expensive to educate is that a much higher percentage of KCPS students are FRL, IEP, and/or LEP. There are several other factors that make KCPS students more expensive to educate than the Area School Districts' students, primarily the fact that KCPS students will be transferring from a failing and unaccredited school district.

The evidence presented at trial showed that each of the area school districts would incur approximately $1,922 in additional FRL/IEP/LEP costs for each KCPS student who transfers. App. A128-137. However, as shown in exhibits that were admitted at trial, and by the testimony of all the witnesses, the swing between KCPS's per pupil expenditures and the Area School Districts' per pupil expenditures is much more than $1,922. App.

A138-143. In fact, KCPS spent approximately $5,000 more per student in fiscal year 2011 than each of the Area School Districts. *Id*. This $5,000 amount is attributable to not only additional FRL/IEP/LEP costs, but also to a myriad of other factors including that KCPS has had to spend significant resources trying to improve its students' test scores such that it can meet State accreditation requirements. KCPS students will cost the Area School Districts, at a minimum, $5,000 per student more to educate than their resident students.

The first step in correcting the calculation used in the August 16, 2012 judgment is to add all of the per pupil costs, including debt service, to the cost-side of the equation. School districts annually incur significant debt service costs. This cost is recognized, by law, in the § 167.131.2 tuition formula on a per pupil basis. As each of the financial officers testified during trial, all costs that school districts incur are considered on a per pupil basis, because it is illogical and unfair to attribute a large cost to an individual student at the "tipping point." Tr. 391:3-392:3. Each student is responsible for his or her share of the district's costs, and KCPS students must pay their share if/when they attend an accredited school. If debt service is to be considered a basis for tuition payments on the revenue-side of the equation, then it must also be considered a cost that districts incur on the cost-side of the equation.

The second step in correcting the calculation used in the August 16, 2012 judgment is to use KCPS's per pupil expenditure (rather than the Area School Districts' per pupil expenditures) to calculate the costs associated with the 50.3% of the incoming

students that will be transferring from a Kansas City, Missouri Public School District school. Mr. DeSieghardt's report shows that 575 out of the 1,143 students represented in the survey (or 50.3% of the students) currently attend a Kansas City, Missouri Public School District school. App. A82. The cost to educate these students is most accurately reflected in KCPS's per pupil expenditure, as published annually on DESE's website. The full costs of educating students from the KCPS District (in addition to per pupil debt service costs and anticipated capital expenditures) must be subtracted from the tuition that the Area School Districts will charge.

By correcting the calculation used in the August 16, 2012 judgment, to the extent possible, it becomes clear that the Blue Springs and Raytown School Districts will incur significant net losses if they are forced to comply with the § 167.131 mandate. Blue Springs School District will incur a net loss of approximately $10.1 million and Raytown will incur a net loss of approximately $3.1 million. LF 636-637.

c. No Missouri Court has ever ruled that a third party payment can be used to support a net costs analysis like the one employed in the trial court's August 16, 2012 judgment.

The trial court's judgment inherently ruled that the potential tuition payments constitute "State appropriations." However, there is no authority whatsoever for the proposition that potential payments from third party payers can qualify as "State appropriations" or be considered in the "increased cost" determination. Thus, the

judgment must be amended to the extent that it finds that Blue Springs' and Raytown's increased expenses can be offset by potential tuition payments from KCPS.

Brooks v. State, 128 S.W.3d 844, 848 (Mo. banc 2004) does not state, or even imply, that courts should conduct a net cost analysis in determining whether an unfunded mandate claim is valid. The trial court, in both its August 1, 2012 Order and its August 16, 2012 judgment compared this case to *Brooks.* Nevertheless, the *Brooks* opinion supplies absolutely no authority for the proposition that courts should conduct a net cost analysis when analyzing an unfunded mandate claim under section 21. In fact, the *Brooks* Court expressly reserved this question by stating, "In identifying plaintiffs' Hancock claims, it must be emphasized that the challenge is only to the inadequacy of the fee to fund the mandate. Plaintiffs do not challenge, and therefore this Court does not address, the issue raised by the dissent, that is, whether a fee can satisfy or obviate the requirement of article X, sections 16 and 21, that state mandates be funded by "full state financing." 128 S.W.3d at 848.

In *Brooks*, the Concealed-Carry Act did not provide for "state financing" to fund new activities and costs, but rather instructed sheriffs to "charge [applicants] a nonrefundable fee" to cover the costs that the county sheriff departments would incur in carrying out the Act. *Id*. Prior to *Brooks*, there had been some controversy as to whether "user fees" charged to individual citizens must be approved pursuant to a vote, or

whether section 22 of the Hancock Amendment[11] requires voter approval for user fees. *See Roberts v. McNary*, 636 S.W.2d 332 (Mo. 1982); *Keller v. Marion Cnty. Ambulance Dist.*, 820 S.W.2d 301 (Mo. banc 1991). *Keller* overruled *Roberts* in part, and found that organizations may shift the tax burden to the private users by charging "user fees" without obtaining prior voter approval. 820 S.W.2d at 304.

The *Brooks* Court was simply acknowledging the precedent established by the *Keller* Court when it stated: "if the fee can properly be used to fund the new activities and costs, which is the state's position, there is no unfunded mandate." *Brooks*, 128 S.W.3d at 848. In other words, the *Brooks* Court was acknowledging, pursuant to the precedent established by *Keller*, that the concealed-carry permit fee was a permissible "user fee" under section 22 of the Hancock Amendment that could be used to offset costs. If the user fee covered the counties' increased costs, then sections 16 and 21 could not be invoked by the taxpayers (because the taxpayers had consented that the fee was a

[11] Section 22 states: "Counties and other political subdivisions are hereby prohibited from levying any tax, license or fees, not authorized by law, charter or self-enforcing provisions of the constitution when this section is adopted or from increasing the current levy of an existing tax, license or fees, above that current levy authorized by law or charter when this section is adopted without the approval of the required majority of the qualified voters of that county or other political subdivision voting thereon." Mo. Const. art. X, § 22(a).

permissible "user fee" and because they had failed to raise the issue of whether a fee can meet the appropriation requirements of sections 16 and 21). *Id.*

In the view of the drafters of the majority opinion, *Brooks* was a case about whether a private "user fee" (which the Court had previously held to be permissible under the Hancock Amendment) was adequate to pay for the costs associated with the Concealed-Carry Act. The parties agreed and characterized the permit fee to be a section 22 "user fee", and thus the Court did "not address, the issue raised by the dissent, that is, whether a fee can satisfy or obviate the requirement of article X, sections 16 and 21, that state mandates be funded by 'full state financing.'" 128 S.W.3d at 848 (emphasis supplied). Chief Justice White, however, viewed the *Brooks* case as addressing that very issue head on, and he chose to address that issue in his dissenting opinion. Justice White stated: "**It is irrelevant whether the fee authorized** is constitutional or even **if it can be applied to cover part of the newly created costs**. The argument … is that the State's mandate is not fully funded by the State as Hancock requires." *Id.* at 853 (White, J. dissenting) (emphasis supplied).

4. The trial court erred by entering judgment in favor of the State Appellants on the Hancock Amendment claim by Taxpayers of the Blue Springs and Raytown School Districts because the Taxpayers proved that the State has made no appropriation to cover the costs associated with the § 167.131 mandate and that there is no State funding whatsoever available for such costs.

The language of sections 16 and 21 of the Hancock Amendment is plain and unambiguous. The State is required, by Missouri's Constitution, to provide "full state financing" for any new activities required by political subdivisions. Mo. Const. art. X, § 16. Any mandate that is not fully funded by the State is an unfunded mandate and unconstitutional. Further, the legislature is required to both make and disburse a "state appropriation" "to pay . . . for any increased costs." Mo. Const. art. X, § 21. The legislature must make a specific appropriation to cover the increased costs that are specific to the newly mandated activity.

The Missouri Supreme Court has affirmed that the language of the Hancock Amendment "means what it says" and requires the State to make a specific appropriation that fully funds any newly mandated activity. *Rolla 31 School District v. State*, 837 S.W.2d 1 (Mo. banc 1992). In *Rolla 31*, this Court determined whether the State could compel a school district to implement a federally-mandated preschool special education program without a specific fund allocation. The school district argued that forced implementation of the new program without complete funding violated the Hancock Amendment. In response, the State asserted that it had indirectly provided funding for the program by providing unrestricted funds to the district under the school foundation program. This Court disagreed with the State, recognizing that Rolla would have to shift some funding from the unrestricted funds away from current programs to cover the mandated program, leaving current programs with less funds. *Id*. at 7 (stating that, if a "local entity is required to use unrestricted funds to pay for a mandated program, it will

then be forced to raise additional tax money to pay for the programs previously supported by the unrestricted funds.").

The *Rolla 31* Court addressed the question of the type of appropriation required to avoid a Hancock Amendment violation in the context of new activities required by public schools. The Court provided a concrete example of which appropriations qualify as "specific appropriations." The State had partially funded the preschool special education program with an appropriation from the general fund and an appropriation set-aside in the school foundation fund, but the State Board required ten percent of the program costs to be paid out of local district monies. The Court determined that the two appropriations made by the State were "sufficiently specific" because they were expressly designated for funding special education programs for preschool-aged children. *Id*. However, the unrestricted foundation formula funds did not qualify as a "state appropriation." The Court stated that, "without a categorical appropriation for [the] specific purpose [of the preschool special education program] the unrestricted school funds do not meet [the specific appropriation] requirement." *Id*.

Rolla 31 removes any doubt as to the State's obligations with respect to RSMo § 167.131. The State must provide full funding through a specific appropriation to cover the costs of educating students from unaccredited districts. The State is prohibited from requiring the Area School Districts to use general foundation formula funds to cover the costs of complying with § 167.131. In order for the Area School Districts to be required to educate non-resident students who seek admission pursuant to § 167.131, the State

must make a "categorical appropriation" for the specific purpose of § 167.131 students and the costs associated with accommodating those students.

The State of Missouri has not provided "full state financing" or made any appropriation to cover the costs that the Area School Districts will incur in carrying out the new and expanded activities required by RSMo § 167.131. The State stipulated that: (1) other than funds distributed under the foundation formula, the Missouri legislature has not made an appropriation or disbursement to the Area School Districts for the purpose of compliance with Mo. Rev. Stat. § 167.131; (2) if the Area School Districts admit non-resident KCPS students, they will not receive any specific funding directly from the State of Missouri to finance the costs associated with admitting and educating KCPS students; (3) the Department of Elementary and Secondary Education does not permit the Area School Districts to include students attending their schools pursuant to Mo. Rev. Stat. § 167.131 in their ADA figures for state aid purposes; and (4) there is no provision of State law or regulation that allows the Area School Districts to include students who transfer to their schools pursuant to Mo. Rev. Stat. § 167.131 in their ADA figures for state aid purposes. App. A48-49. Dr. Dorson corroborated these stipulations through his trial testimony. Tr. 515:17-533:7.

a. The Hancock Amendment requires the State itself to pay for increased costs; payment from a third party is not a "State appropriation."

The State Appellants have argued that the tuition payment set forth in RSMo § 167.131.2 somehow obviates the State's obligation to make a specific appropriation, and

that the tuition payment qualifies as "full state financing" or a "state appropriation." This argument fails. The tuition payment is not a specific appropriation by the State and does not provide the funding mandated by the Hancock Amendment. *Rolla 31*, 837 S.W.2d at 7 (Mo. banc 1992) (holding that Art. X, § 21 "means what it says: it requires that the legislature make a specific appropriation which specifies that the purpose of the appropriation is the mandated program"). The language used in sections 16 and 21 of the Hancock Amendment refer to "*state* financing" and a "*state* appropriation." The Hancock Amendment clearly requires funding for new and expanded activities to be appropriated by the State.[12] There is no provision in the Hancock Amendment that permits the State to require a political subdivision to provide the necessary funding for a new or expanded activity and then seek reimbursement from a third party.

In *Brooks*, this Court considered whether implementation of a Concealed-Carry Act, which required county sheriffs to fingerprint and conduct criminal background

[12] In *Boone County Court v. State*, 631 S.W.2d 321 (Mo. banc 1982) (superseded by statute on other grounds), the Missouri Supreme Court expressly stated that one of the purposes of the Hancock Amendment is to "to eliminate the state's power to mandate new or increased levels of service or activity performed by local government without **state** funding." *Id*. at 325-26 (emphasis supplied). The Court noted that the official ballot title for the Hancock Amendment stated that it "Prohibits state expansion of local responsibility without **state** funding ...." *Id*. at 325 (also noting that courts may look to the title of an act when construing the section of the constitution to which it relates).

checks on applications for weapons permits, triggered the Hancock Amendment's prohibition on unfunded mandates. 128 S.W.3d at 846-47. The Concealed-Carry Act did not provide for "state financing" to fund new activities and costs, but rather instructed sheriffs to "charge [applicants] a nonrefundable fee" to cover the costs that the county sheriff departments would incur in carrying out the Act. *Id*. at 848. The majority opinion did not reach the issue of whether a "fee can properly be used to fund new activities and costs" because, due to the manner in which the Act was written, the fees collected had to be paid to a specific fund that could only be used for "the purchase of equipment and to provide training." *Id*. However, in his dissenting opinion, Chief Justice White acknowledged that, "Hancock requires the State, and only the State, to fully fund this mandate." *Id*. at 854 (White, J. dissenting).

Like the fee specified in the Concealed-Carry Act that did not constitute a State appropriation, the tuition payment specified in RSMo § 167.131 is not a State appropriation. The State cannot avoid its constitutional obligation to make an appropriation for the new mandates imposed by RSMo § 167.131 by requiring the Area School Districts to "finance the implementation" of the statute, and then seek reimbursement from a third party. *Id*.

b. When a taxpayer alleges that a "new" mandate has been imposed by the State, the taxpayer is only required to show that the State has failed to make an appropriation that covers the increased costs associated

with the new mandate, and proof concerning the level of funding in 1980 and present day is not relevant or required.

The Taxpayers were not required to present any evidence concerning the "program mandated by the State in 1980-81" or the ratio of state to local spending for the mandated program in that year and subsequent years, as the State Appellants argue. The State Appellants' argument is based on a complete misinterpretation of the Hancock Amendment. The Taxpayers have asserted their claim under both sections 16 and 21 of the Hancock Amendment, as those sections both require the State to provide full funding for any new activities imposed. As aptly stated by the *Brooks* court, those sections are "to the same effect." *Brooks*, 128 S.W.3d at 848. Neither section 16 nor section 21 require a taxpayer to prove historical funding figures for alleged *new* mandates. Rather, a taxpayer is only alleged to submit such evidence where they have alleged that the State has "reduc[ed] the state financed proportion of the costs of any existing activity or service." Mo. Const. art. X, § 21.

Section 16 of the Hancock Amendment prohibits the state from "requiring any new or expanded activities by counties and other political subdivisions without full state financing, or from shifting the tax burdens to counties and other political subdivisions." Section 21 expands on that requirement by specifically addressing two situations: (1) where the State reduces "the state financed proportion of the costs of any *existing* activity or service"; and (2) where the State imposes a "*new* activity or service or an *increase in the level* of any activity or service beyond that required by existing law." The distinction

between the requirements applicable to existing and new/increased activities was explained by the *Fort Zumwalt* court:

> …Section 21 prohibits unfunded mandates. To the extent that the state required local governments to perform activities and provided some funding of those activities on November 4, 1980, the first sentence of Section 21 prohibits the state "from reducing the state financed proportion of the costs" of the mandated activity. The second sentence of Section 21 prohibits the state from requiring local government to begin a new mandated activity or to increase the level of a previously mandated activity beyond its 1980–81 level unless the General Assembly appropriates sufficient funds to finance the cost of the new or increased activity.

Fort Zumwalt Sch. Dist. v. State, 896 S.W.2d 918, 921 (Mo. 1995).

The first sentence of section 21, which the State Appellants rely upon in their brief, is not applicable here. Section 167.131 imposes a new activity on the Area School Districts – it requires them to educate large numbers of non-resident students residing in unaccredited districts without any State funding. See *Turner*, 318 S.W.3d at 669 (acknowledging that § 167.131 was amended to require schools to admit non-resident students); *Rolla 31*, 837 S.W.2d at 7 (analyzing the preschool special education program under section 16 and the second sentence of section 21). Courts are only required to analyze the "state financed proportion of the costs" of a mandated program where that specific program was mandated before the enactment of the Hancock Amendment. In

cases such as this one, where a new activity is challenged, section 21 directs courts to evaluate whether the State has appropriated sufficient funds to finance the new activity.

The State Appellants' reliance on the first sentence of section 21, and on increases in the level of State funding to the Area School Districts since 1980, is misplaced. Increases in State funding to the Area School Districts since 1980 are irrelevant. Such increases would only be relevant if the Court was considering a pre-Hancock mandate (an "existing" mandate). In evaluating whether section 167.131 violates the Hancock Amendment, the Court cannot consider whether increases in State funding may be sufficient to cover the Area School Districts' costs of compliance with section 167.131, but rather must determine if the "General Assembly [has] appropriate[d] sufficient funds to finance the cost of the new or increased activity." *Fort Zumwalt Sch. Dist.*, 896 S.W.2d at 921. This approach is also the only logical one given that the money appropriated by the State under the foundation formula is appropriated for, and is based upon the average daily attendance of, resident students of the Area School Districts and is not appropriated in any way for students transferring pursuant to § 167.131.

c. There is no legal basis for the State to pay foundation formula dollars to either the Area School Districts (or to KCPS) for students that transfer pursuant to § 167.131.

There is no statutory authority for the State to pay foundation formula dollars to either the Area School Districts (or to KCPS) for KCPS students who transfer pursuant to the statute. RSMo § 163.011(2), which describes the method for calculating state aid to

school districts, requires that students both reside in and attend a district to qualify for funding. KCPS students who transfer to one of the Area School Districts will reside in one district and attend another district. No school district will be able to collect foundation formula funds for such students under § 163.011(2).

At trial, the State Appellants attempted to show that the foundation formula somehow provides a funding mechanism for KCPS transfer students. This argument ignored the clear residency and attendance requirements set forth in § 163.011(2).[13] Moreover, the State's only witness, Dr. Dorson, admitted that there is no statutory mechanism by which DESE is permitted to pay receiving school districts funds for students who transfer pursuant to § 167.131. Tr. 515:17-533:7.

d. The State Appellants stipulated that the State has not appropriated any funds to cover the costs associated with the § 167.131 mandate.

Prior to trial, the State Appellants entered into a binding stipulation that the Area School Districts would "not receive any specific funding directly from the State of Missouri to finance the costs associated with admitting and educating KCPS students." App. A49. The stipulation made by the State Appellants as to the factual issue of whether the State had appropriated any funds to cover the costs associated with the activities required by § 167.131 is binding. *See State v. Jones*, 539 S.W.2d 317, 318 (Mo.

[13]Although statutory provisions are made for payment under the formula for other categories of non-residents, no such provision is made for students transferring pursuant to 167.131. LF 296-97.

App. 1975); *Griffin Contracting Co., Inc. v. Hawkeye-Sec. Ins. Co.*, 867 S.W.2d 602, 605 (Mo. App. 1993). Just as with the State's stipulation concerning the issue of whether § 167.131 imposes new activities, the State Appellants are now judicially estopped from taking a different position on appeal. Given the stipulation, there can be no dispute that the Taxpayers proved the third element (the "no State appropriation" element) of their Hancock Amendment claim.

5. The trial court's judgment in favor of the Taxpayers of the Independence, Lee's Summit, and North Kansas City School Districts should be affirmed in that the Taxpayers proved that RSMo § 167.131 imposes increased costs on their districts.

Just like the Taxpayers of the Blue Springs and Raytown School Districts, the Taxpayers of the Independence, Lee's Summit, and North Kansas City School Districts proved that their districts would incur three categories of costs associated with admitting and educating students residing in KCPS. Financial officers from each of the Districts testified concerning the costs that they would incur which are explicitly recognized in the § 167.131.2 tuition formula. Tr. 154:6-155:4; 253:10-256:24; 464:9-465:5. Independence will incur between $9,391 and $10,255 for each student that transfers, Lee's Summit will incur between $9,339 and $10,869 for each student that transfers, and North Kansas City will incur between $10,845 and $11,248 for each student that transfers. App. A47-48; App. A25-26. The financial officers also testified that their Districts will incur a cost of $1,922/student for each student who transfers from KCPS, in that those students are more

expensive to educate. Tr. 158:16-196:1; 256:1-271:19; 465:12-481:15. Finally, the financial officers testified that their districts will incur costs for capital expenditures for mobile classroom units and for furniture, fixtures, and equipment. *Id*. Specifically, Independence will incur $465,615 in capital expenditures, Lee's Summit will incur $2,164,328 in capital expenditures, and North Kansas City will incur $1,809,979 in capital expenditures. App. A130-134. The trial court determined that each of the categories of costs presented by the Taxpayers at trial would, in fact, be incurred by the Area School Districts. LF 597-603. The State failed to present any contrary evidence at trial to show that the costs identified by the Taxpayers were incorrect or over-stated. Thus, the trial court's finding that the Taxpayers of the Independence, Lee's Summit, and North Kansas City School Districts would incur increased costs as a result of the § 167.131 mandate should be affirmed.

6. The trial court's judgment in favor of the Taxpayers of the Independence, Lee's Summit, and North Kansas City School Districts should be affirmed in that the Taxpayers proved that the State has made no appropriation to cover the costs associated with the § 167.131 mandate and that there is no State funding whatsoever available for such costs.

The Taxpayers of the Independence, Lee's Summit, and North Kansas City School Districts proved at trial the third and final element of their Hancock Amendment claim – that the State has failed to make an appropriation to cover the increased costs associated with the new activities required by § 167.131. As fully explained above, in point 4, the

Taxpayers proved that there is no State funding whatsoever available for § 167.131 transfer students. Dr. Dorson admitted that there is no statutory mechanism by which DESE would be authorized to pay funds to the Area School Districts for students who transfer from unaccredited districts. Tr. 515:17-533:7. Even without the aid of Dr. Dorson's admission, the trial court was able to determine that the State has not made any appropriation to fund the costs associated with § 167.131. LF 564-580. The Hancock Amendment demands that: (1) payments be actually received by a political subdivision before it complies with a new mandate; and (2) the State, and only the State, fund any new mandates that it imposes on political subdivisions. There is no language in the Hancock Amendment, and no case law, that indicates that potential payments from third parties may be considered in a Hancock Amendment analysis.

a. Even if this Court determines that tuition payments from an unaccredited district qualify as an "appropriation by the State" or "State funding", the Taxpayers proved that the tuition formula is flawed in several respects and that any tuition payments would not cover the per pupil costs associated with transfer students.

The Taxpayers proved at trial that it is more expensive to educate a KCPS student than it is to educate a student from one of the Area School Districts. However, the § 167.131.2 tuition formula fails to account for the fact that KCPS students cost more to educate than the Area School Districts' students. Area School Districts must use their own cost figures, as opposed to KCPS's cost figures, in calculating tuition. This error in

the tuition formula causes the tuition amount to be grossly underestimated, especially in the first year when transfers occur. In the first year of transfers, the additional per pupil costs of KCPS students will not be taken into account at all. The Taxpayers also proved that the Area School Districts will incur capital expenditures for mobile classroom units and for furniture, fixtures, and equipment. However, these costs are not recognized on the § 167.131.2 tuition calculation formula. Due to these two glaring flaws in the tuition formula, the Area School Districts would never be able to recover the full amount of costs they incur as a result of § 167.131 transfers via tuition payments.

7. The trial court's judgment in favor of the Taxpayers of the Independence, Lee's Summit, and North Kansas City School Districts should be affirmed in that the Taxpayers alleged that "new" activities are imposed by RSMO § 167.131, and thus they were not required to prove a decrease in the level of state funding from 1980 to present time.

As fully explained above in point 4(b), the State Appellants' argument that the Taxpayers "failed to meet their burden of proof" because they did not establish the level of funding and activities in 1980 to present day must be rejected. A taxpayer is only required to submit such evidence where they have alleged that the State has "reduc[ed] the state financed proportion of the costs of any existing activity or service." Mo. Const. art. X, § 21. Here, the Taxpayers alleged that new activities are imposed by § 167.131, and thus their burden of proof was to show that: (1) new activities are imposed by § 167.131; (2) that the Area School Districts will incur increased costs as a result of the

new activities; and (3) that the State has failed to make an appropriation to cover the increased costs. The issue in this case is whether the State has appropriated sufficient funds to finance the cost of the new activities alleged by the Taxpayers, and not whether the State has reduced the state financed proportion of the costs of some activity required in 1980. Accordingly, the Taxpayers met their burden of proof by establishing that § 167.131 imposes new activities which cause the Area School Districts to incur three new categories of costs for which there is no State funding available (and for which a full tuition payment may not be charged).

8. The trial court's judgment concerning the amount of the Taxpayer Respondents' attorneys' fees should be affirmed as to the Taxpayers of the Independence, Lee's Summit, and North Kansas City School Districts, and the case should be remanded so that attorney fees may be awarded in favor of the Taxpayers of the Blue Springs and Raytown School Districts.

The trial court properly exercised its discretion when it reviewed the fee application of the Taxpayers and when it awarded attorneys' fees and costs to the Taxpayers of the Independence, Lee's Summit, and North Kansas City School Districts. As fully explained above, the trial court's judgment should be reversed as to the Hancock Amendment claim by the Taxpayers of the Blue Springs and Raytown School Districts, and this case should be remanded so that the trial court may award attorneys' fees and costs to those Taxpayers. The State faces a high burden of proof in arguing that the trial court's award of attorneys' fees should be reduced, and the State has failed to meet that

burden. The trial court thoroughly reviewed the Taxpayers' fee application and determined that the full amount of fees requested by the prevailing Taxpayers would be awarded. The State has cited no reason to justify altering the trial court's fee award to a lower amount, and it has not shown that the trial court abused its discretion.

"The trial court is deemed an expert at fashioning an award of attorneys' fees and may do so at its discretion. To demonstrate an abuse of discretion, the complaining party must show the trial court's decision was against the logic of the circumstances and so arbitrary and unreasonable as to shock one's sense of justice." *Berry v. Volkswagen Grp. of Am., Inc.*, 397 S.W.3d 425, 430-31 (Mo. 2013) (citation omitted). The State has attacked categories of attorneys' fees without any explanation as to why the award of those fees was "against the logic of the circumstances" or "so arbitrary and unreasonable as to shock one's sense of justice." The trial court heard the same arguments concerning the award of attorneys' fees that the State now makes on appeal, and decided to award fees and costs in the full amount sought by the prevailing Taxpayers. App. A42-44. The trial court's decision should not be overturned.

a. The trial court correctly held that each of the expenses included in the Taxpayers' fee application were reasonable and compensable.

Section 23 of the Hancock Amendment provides that prevailing taxpayers "shall receive from the applicable unit of government [their] costs, including reasonable attorneys' fees incurred in maintaining such suit." Mo. Const. art. X, § 23. In addition to costs and attorneys' fees, this provision entitles prevailing taxpayers to reimbursement for

all reasonable expenses in successfully pursuing their Hancock claim. *See Avanti Petroleum, Inc. v. St. Louis County*, 974 S.W.2d 506, 513 (Mo. App. 1998) (prevailing Hancock Amendment plaintiff is entitled to reasonable "expenses" in pursuing the litigation); *Roberts v. McNary*, 636 S.W.2d 332, 338 (Mo. banc 1982) (same); *Zweig v. Metro. St. Louis Sewer Dist.*, 2012 WL 1033304, *9 (Mo. App. 2012) (same).

In their fee application, the prevailing Taxpayers of the Independence, Lee's Summit, and North Kansas City School Districts produced billing statements showing that the amount of reasonable attorneys' fees incurred in prosecuting their claim was $174,492.00. App. A43. The Taxpayers also produced billing statements showing that the total amount of expenses they incurred in prosecuting their claims was $24,902.08. *Id*. The State Appellants do not attack either of these amounts as unreasonable. In fact, there can be no argument that such amounts are unreasonable given that counsel for the Taxpayers represented multiple different parties, prosecuted this case over a 10-month time period, retained an expert witness to conduct a study of the number of transfer students, prepared a dispositive motion, prepared significant evidence and multiple witnesses for trial, tried the case over a three-day time period, and prepared multiple post-trial motions.

The State Appellants take issue with the fact that the trial court awarded fees for "counsel's time preparing for and attending district board meetings and for multiple conference calls and other correspondence with the districts superintendents regarding the status of the litigation." As the trial court recognized, it is impossible to prosecute a

Hancock Amendment claim without extensive communication with officials and employees of the affected political subdivisions. It is those officials and employees, and not the taxpayers, who have access to financial information and other information necessary to prove the claim. Further, in prosecuting a Hancock Amendment claim, counsel cannot meet their professional responsibilities and duties without providing current and ongoing information to the affected political subdivision. While it is the taxpayers that are financially burdened by unconstitutional unfunded mandates, it is the political subdivisions that must actually prepare for and perform new mandates. It would have been grossly irresponsible and possibly malpractice for the Taxpayers' counsel to fail to respond to requests for information by the Area School Districts' superintendents.

The trial court considered evidence regarding the time the Taxpayers' counsel spent specifically prosecuting the claims of the prevailing Taxpayers, counsel's hourly rates, and the expenses incurred. The trial court was provided with detailed billing statements and which accurately described each of the activities undertook by counsel in preparing and prosecuting the prevailing Taxpayer's Hancock Amendment claim, which necessarily included entries for communicating and consulting with officials and employees of the Area School Districts. The trial court found that the prevailing Taxpayers' request for attorneys' fees and costs was "reasonable and appropriate considering the complex issues raised in this case, quality of the legal work observed by the Court, and the successful outcome for the Prevailing Taxpayers." App. A43. Accordingly, the trial court awarded the full amount of attorneys' fees and costs sought

by the prevailing Taxpayers. Given all of the factual findings made by the trial court, this Court cannot say the trial court's award was arbitrary, unreasonable, or an abuse of discretion.

CONCLUSION

For the foregoing reasons, the trial court's judgment holding RSMo § 167.131 to be unconstitutional as to the Independence, Lee's Summit, and North Kansas City School Districts should be upheld, its judgment awarding attorneys' fees and costs incurred in prosecuting the Hancock Amendment claim of the Taxpayers of the Independence, Lee's Summit, and North Kansas City School District should be upheld, its judgment holding RSMo § 167.131 to be constitutional as to the Blue Springs and Raytown School Districts should be reversed, and this case should be remanded so that the trial court may award attorneys' fees and costs incurred in prosecuting the Hancock Amendment claim of the Taxpayers of the Blue Springs and Raytown School Districts.

Dated: July 31, 2013.

Respectfully submitted,

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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 24,133 words as calculated pursuant to the requirements of Rule 84.06(b)(2).

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I hereby certify that the foregoing was filed with the Court electronically via Missouri CaseNet, and served upon the below individuals through the Court's electronic service system, on July 31, 2013:

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