APPEAL NO. SC 89139

IN THE SUPREME COURT
OF THE STATE OF MISSOURI

BOARD OF EDUCATION OF
THE CITY OF ST. LOUIS, et al.

Appellants

v.

MISSOURI STATE BOARD OF EDUCATION, et al.

Respondents

APPEAL FROM THE COLE COUNTY CIRCUIT COURT
STATE OF MISSOURI
Honorable Richard G. Callahan
Circuit Court Cause No.: 07AC-CC00488

APPELLANTS' BRIEF

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JURISDICTIONAL STATEMENT

This is an appeal from a Final Judgment entered by the Circuit Court of Cole County in favor of Respondents the Missouri State Board of Education et al. and Defendant-Intervenor Respondent the Special Administrative Board of the Transitional School District of the City of St. Louis and against Petitioner-Appellants the Board of Education of the City of St. Louis, et al. The judgment held, among other things, that Section 162.1100 of the Missouri Statutes, which purports to authorize the transfer of authority from the elected Board of Education of the City of St. Louis solely by a finding of unaccredited status of the St. Louis Public School District does not violate the constitutional rights of the Appellants. The Court further found that that the State Board of Education's decision to unaccredit the St. Louis Public School District was valid despite the failure of the State Board to follow its own rules and its reliance upon an invalid unpublished rule.

This appeal involves the question of whether Section 162.1100 of the Missouri Revised Statutes as applied in the manner implemented by the State Board of Education violates various provisions of the Missouri and Federal Constitution, including Article I, Sections 1, 3, 10, 25 and Article III, Section 40 of the Missouri Constitution as well as the Fourteenth, Fifteenth, Nineteenth and Twenty-Sixth Amendments to the United States Constitution. This appeal also involves the question of whether the State Board's decision to unaccredit the St. Louis Public School District was based on competent and substantial evidence or

was arbitrary and capricious. This action is one involving the validity of a Missouri statute. Accordingly, the Missouri Supreme Court has exclusive appellate jurisdiction pursuant to Article V, Section 3 of the Missouri Constitution.

STATEMENT OF FACTS

In 1998 the Missouri General Assembly enacted a statute that purported, under certain conditions, to transfer the authority of the elected Board of Education of the City of St. Louis ("Elected Board" or "Board of Education") to a body of three appointed officials. Section 162.1100, which by its terms applies only to the St. Louis Public School District, created a Transitional School District in the City of St. Louis for the purpose of facilitating the termination of the long standing Federal District Court supervision of the St. Louis Public School District (the "District"). Under Section 162.1100 the State Board of Education ("State Board") was given the authority to terminate the Transitional School District, which it did in 1999. Mo. Rev. Stat. § 162.1100.12 (2000). It was also authorized to reestablish the Transitional School District in order to allow the Transitional School District to fulfill its role of providing for a transition of the District from control and jurisdiction of the federal court desegregation order. Id. Section 162.1100 states that if the District should become unaccredited while the Transitional School District is in place, any powers granted to the Elected Board on or before August 28, 1998 would be vested with the Special Administrative Board of the Transitional School District. Mo. Rev. Stat. § 162.1100.3 (2000).

The State Board of Education assigns accreditation status to school districts in the State of Missouri. Mo. Rev. Stat. § 161.092(9) (2000). Thus, Section 162.1100 purports to provide a unique situation whereby the State Board of Education had the ability to transfer the control of the District from the Elected

Board to an appointed body by first reestablishing the Transitional School District and subsequently considering the accreditation of the District and finding the District to be unaccredited.

The 1999 Desegregation Settlement Agreement and Senate Bill 781

In 1998 the General Assembly enacted Senate Bill 781, codified in Chapter 162. The effectiveness of some of that legislation was conditioned upon the settlement of federal court litigation that supervised the St. Louis Public Schools for nearly two decades. Ex. 15 at 2. Senate Bill 781 provided several funding mechanisms designed to replace a portion of the funding previously ordered by the federal district court on the condition that on or before March 15, 1999 the state attorney general notify the revisor of statutes that a "final judgment" had been entered in the federal desegregation litigation and that the voters of the City of St. Louis pass a local sales tax for the support of programs under the settlement agreement. Ex. 15 at 2. The voters authorized the Desegregation Sales Tax in the City of St. Louis on February 2, 1999.[1] See Ex. 200. The settlement agreement in Liddell, et al. v. Board of Education of the City of St. Louis et al. was approved by the Federal District Court on March 12, 1999 ("1999 Settlement Agreement"). Ex. 15. In addition to providing for funding of programs created under the 1999 Settlement Agreement, Senate Bill 781 established a Transitional School District

[1] The voters also authorized the Elected Board to issue bonds for the purpose of air conditioning school buildings on November 7, 2000. See Ex. 201.

to implement specific provisions of the legislation for a period during which the settlement negotiations of the parties to the federal desegregation litigation remained in progress.[2] Pursuant to the terms of the 1999 Settlement Agreement

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[2] As stated by Section 162.1100, the Transitional School District was created to:

> [H]ave the responsibility for educational programs and policies determined by a final judgment of a federal school desegregation case to be needed in providing for a transition of the educational system of the city from control and jurisdiction of a federal court school desegregation order, decree or agreement and such other programs and policies as designated by the governing body of the school district.

Under Section 162.1100.5, as well as the Desegregation Settlement Agreement and the federal district court order approving the Settlement Agreement, the Transitional School District was also created to put the desegregation sales tax on the ballot in the City of St. Louis. Mo. Rev. Stat. § 162.1100.5; Ex. 14; Ex. 15. When Section 162.1100 was enacted in 1998 the legislature included a provision authorizing the State Board of Education to terminate the Transitional School District at any time, and to "cause the reestablishment of the transitional school district at any time upon a determination that it is necessary for the transitional district to be reestablished to accomplish the purposes established in this section." Mo. Rev. Stat. § 162.1100.12 (2000).

and its authority under Section 162.1100 the State Board eliminated the Transitional School District and transferred all powers granted to it to the Elected Board of Education of the City of St. Louis in June of 1999.[3]

In addition to providing funding for the 1999 Settlement Agreement programs and creating the Transitional School District, Senate Bill 781 provided for changes in the makeup of the Elected Board of Education of the City of St. Louis. Specifically, the Act reduced the term of board members from six to four years and reduced the number of board members from twelve to seven. Mo. Rev. Stat. § 162.601 (2000).

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[3] Ex. 14 Pursuant to Section 18 of the 1999 Settlement Agreement the parties contractually agreed that "all programs and policies set forth in the Agreement are the sole responsibility of the elected City Board" and that "the Transitional District shall have no responsibility or authority to carry out any such programs or policies . . . ." The Settlement Agreement further provided that "After the sales tax becomes effective, the State Board agrees, at any time prior to July 1, 1999, to make a determination that the Transitional School District of the City of St. Louis has accomplished the purposes for which it was established and is no longer needed." Ex. 14.

Actions of the New Board of Education Majority in 2003

In 2003 the St. Louis Public School District was facing both the retirement of its long-time superintendent, Dr. Cleveland Hammonds, as well as severe financial shortfalls caused in part by a reduction in state funding of education statewide. Under Senate Bill 781's provisions altering the size of the Elected Board, 2003 was the one and only year in which a majority of the members of the Board would be elected in a single election and in that year's election four members of the seven-member board were elected. Downs Test. 35-36 (9/25/07). The slate of board members that won the election in 2003 were all supported by the Mayor of the City of St. Louis, and all had substantial financial backing for their school board election. Id.

The newly elected board majority replaced the retiring superintendent with a private management firm to oversee the operations of the District. William Roberti, CEO of Alvarez and Marsal, the private business firm contracted by the Elected Board to "turnaround" the District, became interim superintendent and, while not certified pursuant to Section 168.081 and 5 CSR 80-800.220, the State Board allowed his tenure and waived the certification requirement. Downs Test. 38-39 (9/25/07).

The 2003 and 2005 Loan Agreements

As State funding continued to be reduced and the Board operating fund surplus was eliminated in the 2003-2004 school year, the newly Elected Board entered into an agreement with the State Board and others amending the 1999

Desegregation Settlement Agreement. Pursuant to the August 21, 2003 amendment to the Desegregation Settlement Agreement ("2003 Loan Modification Agreement") the State Board as well as the other parties to that settlement agreed that the Board of Education could borrow up to $49.5 million during the 2004 fiscal year from the Section 10 Capital Account (the "Account") established pursuant to the 1999 Desegregation Settlement Agreement. Ex. 24, Tab 13. Under the 2003 Loan Agreement the State contractually authorized the Elected Board to carry debt past the current financial year in its operating budget and to repay this large sum over a period of six years beginning on June 30, 2005.[4] Pursuant to the 2003 Loan Agreement the Board borrowed a total of $47,100,057.00 from the Account during the 2004 fiscal year. The federal district court approved the amendment on August 21, 2003. Ex. 24, Tab 13.

The parties, including the State Board, again modified the agreement in 2005 ("2005 Loan Modification Agreement") to extend the repayment schedule established in the 2003 Loan Agreement to allow the District additional time to repay the loan. See Ex. 24, Tab 14. Both of these agreements were signed by the parties to the 1999 Settlement Agreement, including the State Board, and approved by the federal district court. Ex. 24, Tabs 13 & 14. This borrowing by

[4] State law requires all borrowing from funds be repaid in the same fiscal year. Mo. Rev. Stat. § 165.011.2 (2000).

its terms caused the District to carry a substantial negative fund balance from the 2004 fiscal year to the present.

The Superintendent Position from 2003 to 2006

As Mr. Roberti was coming to the end of his one-year term as interim superintendent of the District, the Board of Education began a search for a new superintendent. Herschend Test. 217 (10/2/07). The Board identified a nationally known superintendent, Dr. Rudy Crew, as a viable and preferred candidate for the position. Herschend Test. 218 (10/2/07). However, after an offer had been extended to Dr. Crew, he withdrew his name from consideration at the last minute to accept a position with the Miami School District. Herschend Test. 218-19 (10/2/07). The Board responded by selecting Dr. Floyd Crues, a long-time administrator for the District, to serve as an interim superintendent. Herschend Test. 219 (10/2/07). After only a few months, Dr. Crues became ill and went on long-term medical leave. The Board then hired another interim superintendent, Dr. Pamela Hughes, as it continued its search for a permanent superintendent for the District. Herschend Test. 220 (10/2/07). During her tenure, Dr. Creg Williams was interviewed and selected as a permanent superintendent. He resigned from his position in July of 2006, at which time Dr. Diana Bourisaw was selected by the Board as an interim superintendent. Herschend Test. 221 (10/2/07); Downs Test. 60-61 (9/25/07).

The 2006 Board of Education Election

On April 4, 2006, a few months before Dr. Williams' resignation, two new board members were elected, Peter Downs and Donna Jones, both Plaintiff-Appellants in this litigation. Ex. 202; Downs Test. 52-53 (9/25/07). Mr. Downs and Ms. Jones are residents and taxpayers in the City of St. Louis and are both parents of children attending school in the District. Downs Test. 53 (9/25/07). They decided to run for the Board of Education out of concern over decisions regarding instruction and curriculum in the District being made by the prior Board of Education which had overseen the District since 2003. Downs Test. 46-50 (9/25/07). Mr. Downs chose to run for a position on the Elected Board out of concern about the quality of education being provided in the District and because of a general sense that the prior school board was divorced from what was happening in the schools. Downs Test. 35-36 (9/25/07). Downs and Jones defeated two members of the prior majority elected in 2003. Downs Test. 52 (9/25/07). Thus, only two board members that were elected in 2003 remained sitting after the April 2006 election.

The Reestablishment of the TSD and the Special Advisory Committee Report

Superintendent Dr. Creg Williams resigned in July 2006 and the two remaining board members from the 2003 slate immediately called for the state to intervene in the St. Louis Public School District. Downs Test. 60-61 (9/25/07). Within two weeks of Dr. Williams' resignation, at its July 27, 2006 meeting, the State Board established a special advisory committee task force (the "Special

Advisory Committee") to evaluate the St. Louis Public School District and prepare a report to the Commissioner of Education and the State Board of Education advising them of the challenges facing the District and providing recommendations for improvement. Ex. 58; Herschend Test. 189-90 (10/2/07). The Special Advisory Committee's report was issued on December 17, 2006 and was formally considered by the State Board at its January 11, 2007 meeting. Ex. 269; Ex. 72; Herschend Test. 192 (10/2/07). The report analyzed its view of public perception, District leadership, academic performance and financial performance and status of the District. Ex. 269.

The Special Advisory Committee's report stated that the then current status of the District required State Board assistance in addressing deficiencies and working with the Elected Board. The Report also recommended that in the event the State Board decided the District should be unaccredited, the State Board could first vote to reestablish the Transitional School District pursuant to its authority to do so under Section 162.1100, which was enacted as a part of Senate Bill 781. Ex. 72. Specifically, the report suggests that if the State Board decided to pull the District's accreditation, the Advisory Committee recommended "that DESE appoint under Mo. Rev. Stat. § 162.1100 a transitional board, but only if the three appointing authorities can agree on who the three persons should be . . . ." Ex. 72.

The process for the reestablishment of the TSD by the State Board and the transfer of powers to an appointed board under Section 162.1100 provided a

mechanism by which the State Board could affect an immediate transfer of power from the Elected Board to an appointed board.

This legislative scheme is unique to the St. Louis Public School District, because all other school districts have to be found and remain unaccredited for a period of two years pursuant to Section 162.081, at which time the district itself ceases to exist and lapses.[5]

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[5] Mo. Rev. Stat. § 162.081.1. Once a district has been classified as unaccredited for two successive school years by the State Board of Education, its corporate organization lapses. Id. Prior to lapsing, the Department of Elementary and Secondary Education shall conduct a public hearing within the district to: a) review any plan by the district to return to accredited status, or b) offer any technical assistance that DESE can provide. Mo. Rev. Stat. § 162.081.2 (2000). If a district lapses, Section 162.081 provides that the State Board may then: a) appoint a special administrative board to retain the authority granted to a board of education for operation of all or part of the district; b) attach the district to another district or districts, or c) establish one or more school districts within the territory of the lapsed district, subject to certain restrictions. Mo. Rev. Stat. § 162.081.4 (2000). Section 162.081.9(1) also provides that, upon a school district being unaccredited by the State Board, the governing body is required to develop a plan to be submitted to the voters of the school district to divide the school district if the district cannot attain accreditation within three years of the initial declaration

On February 15, 2007 the State Board voted 5-2 to reestablish the Transitional School District. App. A12; Herschend Test. 196 (10/2/07).

The State Board's MSIP Rule and DESE's UYAPR Manual

Pursuant to its published rule, the State Board classifies Missouri school districts as "accredited," "provisionally accredited" or "unaccredited" based on the criteria commonly known as the Missouri School Improvement Program or "MSIP" Standards. Ex. 1. The standards are further classified into three categories: (1) Resource Standards; (2) Process Standards; and (3) Performance Standards. Ex. 1. A document incorporated into the State Board's MSIP Rule titled the "Standards and Indicators Manual" provides descriptions of the individual standards in each of the three categories.[6] Ex. 2. The Resource Standards consist of requirements regarding programs of study which must be offered, class size and assigned enrollment, support and administrative staff, professional certification, and planning time. Ex. 1, 2. The Process Standards consist of a wide variety of standards including standards regarding instructional design and practices, testing, professional development, use of library media

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that such district is unaccredited. Such a plan shall be presented to the voters of the district before the district lapses.

[6] Hereinafter, the State Board's Rule at 5 CSR 50-345.100 and the Standards and Indicators Manual which is incorporated therein by reference shall be collectively referred to as the "State Board's MSIP Rule".

sources, student guidance programs, differentiated instruction and supplemental programs, school services, adoption of a district-wide Comprehensive School Improvement Plan (CSIP), and school safety, to name just a few. Ex. 1, 2. The Performance Standards include standards addressing MAP testing, college preparation and placement, placement in advanced or vocational classes, and general academic achievement. Ex. 1, 2.

The State Board reviews each school district in the State every five years pursuant to a pre-determined schedule.[7] DESE requires school districts to electronically input data into its computer system annually and generates an Annual Performance Report ("APR") for each district. Bourisaw Test. 202 (9/25/07). DESE uses formulae not contained in the State Board's MSIP Rule to perform calculations and determine how many performance standards a school district has "met" or "not met" out of fourteen possible standards selected and analyzed by DESE. App. A15. DESE shares information about what data is utilized in performing these calculations with school districts through a document

[7] Bourisaw Test. 33 (10/2/07); Herschend Test. 211 (10/2/07). The District was formally reviewed in 2002-2003 and was designated provisionally accredited by the State Board after that process. Bourisaw Test. 57 (10/2/07).

titled “Draft Understanding Your Annual Performance Report” manual (dated 4/4/07) ("UYAPR Manual").[8] App. A7-A8. Ex. 3, 228.

The calculations utilized by DESE to determine whether standards are “met” are contained in the UYAPR Manual but not in any rule noticed and published by the State Board or DESE. See Ex. 2, 3. The requirement that a district must meet a certain number of these standards is only found in DESE’s UYAPR Manual, not the State Board’s MSIP Rule. Ex. 2, 3. The requirements that a district must achieve a certain number of “progress” and “status” points and must fall within a certain number of standard deviations of the statewide mean are only found in DESE’s UYAPR Manual, not the State Board’s MSIP Rule. Ex. 2, 3. The requirement that five years of data must be evaluated is found in DESE’s UYAPR Manual. Ex. 2, 3. The State Board’s MSIP Rule contains no provisions regarding the timeframe for reviewing a district. Ex. 3. Unlike the State Board's

[8] Exhibit 3 was introduced by the Plaintiff-Appellants and represents DESE’s Draft UYAPR Manual dated April 4, 2007. Exhibit 228 was introduced by the State Board Defendant-Respondents and represents DESE’s Draft UYAPR Manual dated October 3, 2006. DESE has never released a “final” version of the UYAPR Manual. As determined at the trial of this case, any differences between the April 2007 and October 2006 drafts are not relevant to the issues presented for the circuit court’s review of this matter. Kemna Test. 121 (10/2/07). All citations to the UYAPR Manual in this brief will cite to Exhibit 3.

MSIP Rule, which incorporates the Standards and Indicators Manual, the UYAPR Manual has never been noticed and published pursuant to Section 536.021 of the Missouri Statutes by either DESE or the State Board. App. A31-A32.

DESE's current methodology for evaluating school districts was first introduced in July 2006 as the "fourth cycle" of APR standards measures. Prior to the fourth cycle MSIP, DESE assessed school districts differently by using a point scale that included Resource and Process Standards, as well as Performance Standards. App. A13-A15; Kemna Test. 82 (10/2/07); Bourisaw Test. 116-117 (9/25/07). Beginning in the 2006 school year, DESE altered its focus of accreditation review from the three kinds of standards addressed in the State Board's MSIP Rule to only one, Performance Standards. App. A15; Kemna Test. 179-80 (10/2/07); Bourisaw Test. 26-27 (10/2/07). DESE did so without publishing a rule and without any changes being made by the State Board to its published MSIP Rule.

DESE's Review of the St. Louis Public Schools in 2006

The DESE UYAPR Manual states that a district must meet 6 of 14 performance standards to be "provisionally accredited." Ex. 3 at 47. DESE's December 1, 2006 APR for the District identified that 5 of its 14 standards were met, while another standard was still "undetermined," as indicated on the 12/1/06 APR by an asterisk. Ex. 70. Between the December 1, 2006 APR and the March 25, 2007 APR, the District was directed by DESE to provide data regarding Standards 9.4.2 and 9.4.3 under the UYAPR Manual. App. A21-A22, 24; Ex. 24,

Tab E at 1-4. Such data requests are not contained in any Rule and had not been required of other school districts in the state. Bourisaw Test. 113-14 (9/25/07).

The "undetermined" standard was Performance Standard 9.4.3, which, according to the State Board's MSIP Rule, is met when "[t]he percent of students who attend postsecondary education within six months of graduating is high or increasing." ("Postsecondary Education Standard"). See Ex. 2 at 27. After submission of the data, DESE advised that it questioned the postsecondary education data submitted by the District on the basis that there was a significant improvement in the data for 2004 and 2005 over prior years, and therefore found that the District did not meet this standard. Kemna Test. 87-89 (10/2/07); Ex. 24, Tab E at 1-2. The District explained that the improvement occurred because the District hired National Student Clearinghouse ("NSC") to track its graduates. See Ex. 24 at Attachment 6. NSC is a national company with a national database/network capable of matching District graduates with their enrollment in a college or university. Bourisaw Test. 201-03 (9/25/07). DESE responded by requiring more detailed individual student information for the prior five years, 2001 to 2005. DESE representatives asserted at trial that they required additional information because there was a "change in methodology" with regard to how the data was collected. Bourisaw Test. 37-39 (10/2/07). No rule specifies that a district may not change its method of collecting data. The additional information requested by DESE included graduate name, graduation programs listing each student, placement type, race, gender, birth date, name of college attended and city

and state of college attended. Bourisaw Test. 184-85 (9/25/07); Ex. 24, Tab E at 1. Despite repeated requests by the Elected Board, the process for the submission of this additional data was not outlined by DESE until February 1, 2007 and included a February 28th deadline. Bourisaw Test. 184-86 (9/25/07).

Since this type of individual student data had never been required before the Elected Board was unable to locate sufficient numbers of graduates from contact sheets for 2002, 2003, or 2004 which would have contained at least some of the demanded information. Ex. 24, Tab E at 2. An attempt was made to contact over 4,000 graduates in the four-week period to reconstruct the follow-up summaries. Ex. 24, Tab E at 2. Given the high mobility of a large portion of the St. Louis population, and the fact that nearly six years had passed since some of the students graduated, contacting the graduates or a close relative proved difficult. Id. Some of the data requested was submitted to the State on the February 28th deadline. Bourisaw Test. 185-86 (9/25/07). The District requested an extension to continue collecting data, but that request was denied. Bourisaw Test. 211 (9/25/07).

As to Performance Standard 9.4.2, between the December 1, 2006 and March 5, 2007 APRs DESE also reconsidered the District's performance with regard to the Career Education Course Standard, which is met when "[t]he percent of credits taken by juniors and seniors in Department-designated vocational classes is high or increasing." See Ex. 2 at 27. DESE's December 1, 2006 APR for the District indicated that this standard had been "met" pursuant to DESE's

calculations. However, between the December 1, 2006 and the March 5, 2007 APRs DESE changed the numbers it used in calculating that standard for the District's Annual Performance Report without explanation to the District and the number of courses decreased. The District was notified by DESE on March 21, 2007 (one day before the State Board's decision to unaccredit the District) that the District no longer met the Career Education Course Standard. Bourisaw Test. 33-35, 41 (10/2/07). At trial, DESE representatives cited duplication of career course numbers of Clyde C. Miller Career Academy as the reason for the change in status. Kemna Test. 110-20 (10/2/07). District representatives, however, had entered the data into DESE's computer system for this high school according to the specific instructions provided by DESE staff. Bourisaw Test. 165-67 (9/25/07).

On March 5, 2007 DESE produced a revised APR which indicated that the District had then met only 4 of DESE's 14 performance standards under the UYAPR Manual calculations. Ex. 84. The March 5, 2007 APR indicated that Standards 9.4.2 and 9.4.3 had not been met. However, with respect to Standard 9.4.2, the Career Education Course Standard, according to DESE's March 5, 2007 APR for the District the percent of credits earned in career education courses increased from 10.4% in 2005 to 11.4% in 2006. Ex. 87. Similarly, with respect to Standard 9.4.3, the College Placement standard, DESE's March 5, 2007 APR for the District showed that the percent of students who attend postsecondary education within six months of graduation increased from 38.4% in 2004 to 39%

in 2005, the last year for which data was available for this standard for the 2006 APR. Ex. 87. See also Bourisaw Test. 153-54 (9/25/07) (testifying that percent of students attending postsecondary education within six months of graduating was "increasing" and that the percent of credits taken by juniors and seniors in department-designated vocational classes was "increasing"); Kemna Test. 163 (10/2/07) (testifying that, based on latest DESE APR on March 5, 2007, percentage of graduates entering college was "increasing" from 2001 to 2005).

Unaccreditation of the St. Louis Public School District by the State Board

The State Board met on March 22, 2007 and DESE representatives made a presentation to the State Board of Education. App. A12-A13. A DESE representative reviewed the academic history of the District and the District's performance as analyzed by DESE for its March 5, 2007 APR. In addition to reviewing which standards were "met" and "not met," as determined by DESE at that time pursuant to its calculations found in the UYAPR Manual, the DESE representative reviewed the controversy regarding whether Standard 9.4.2 and Standard 9.4.3 had been satisfied pursuant to the formulas contained in the UYAPR Manual. App. A16; Ex. 259; Kemna Test. 84-87 (10/2/07). Another DESE representative reviewed financial information regarding the District. Ex. 259; Kemna Test. 101-02 (10/2/07). DESE recommended, based on that review of the District's achievement as measured by DESE's UYAPR Manual calculations, that the District be found unaccredited. App. A27; Kemna Test. 167-68 (10/2/07). The State Board voted the same day to unaccredit the District with an effective

date of June 15, 2007. Ex. 271. That decision triggered the removal of authority of the Elected Board effective June 15, 2007, using the application of Section 162.1100.

Section 162.081 of the Missouri Statutes sets forth the procedure that must be followed when a school district becomes unaccredited. Mo. Rev. Stat. § 162.081 (2000). That provision applies to every district in the State. However, Section 162.1100, which applies only to the St. Louis Public School District, provides that in the event the District loses its accreditation, all of the powers granted to the Elected Board on or before August 28, 1998 "shall be vested with the special administrative board of the transitional school district containing such school district so long as the transitional school district exists." Mo. Rev. Stat. § 162.1100.3 (2000). Under the statute, the removal of authority of the Elected Board and its members is immediate.

The Current Elected Board of Education

Peter Downs and Donna Jones were first elected to the Board on April 4, 2006. Ex. 202; Downs Test. 52-53 (9/25/07). Both Downs and Jones are parents of students attending school in the District and ran for election to the Board out of concern over the way the District was being run and the choices being made by the previous Board. Downs Test. 52-53 (9/25/07). The performance data that was reviewed by DESE and presented to the State Board at its March 22, 2007 meeting was based on the DESE's final APR for the District dated March 5, 2007. See Ex. 259. That APR analyzed data regarding the District's performance from the 2001-

02 school year to the 2005-06 school year. See Ex. 87; Kemna Test. 157 (10/02/07). Peter Downs and Jones were not even in office during that period.

After the State Board made its accreditation determination, two new members were elected by the voters on April 3, 2007 to serve on the Board of Education of the City of St. Louis. Ex. 202; Wessling Test. 95-99 (9/25/07). The new board members, Katherine Wessling and David Jackson, are both residents and taxpayers of the City of St. Louis and parents of students attending the District. Wessling Test. 94-95, 99 (9/25/07). Ms. Wessling ran for a position on the Board of Education at the suggestion of other parents she met through her involvement with a local parents group. Wessling Test. 96-98 (9/25/07). Like Peter Downs and Donna Jones, Katherine Wessling and David Jackson were not members of the Elected Board during the 2005-06 school year, the last year analyzed by DESE in its presentation to the State Board. Wessling and Jackson were not even in office yet when the State Board decided to strip the District of its accreditation, triggering a transfer of the Elected Board's powers to the Special Administrative Board of the TSD.

No board member was given notice or afforded any opportunity to address the State Board of Education or to protest their removal from office. Downs Test. 63, 67-68 (9/25/07). The Board of Education and District superintendent filed an appeal of the State Board's accreditation decision to the Commissioner of Education, D. Kent King, pursuant to 5 CSR 50-345.100(9) on May 29, 2007. Ex. 24. The appeal was denied by the Commissioner on June 11, 2007. Ex. 51. On

June 7, 2007 the Petitioner-Appellants filed a request for a temporary restraining order in the Circuit Court of Cole County seeking to prevent the Special Administrative Board of the Transitional School District from taking control of the District on June 15, 2007. The circuit court denied the TRO on June 14, 2007. The Special Administrative Board took control of the District on June 15, 2007. Since June 15, 2007 the Elected Board and its members have had no role in the governance of the District. Downs Test. 72 (9/25/07). The Elected Board has existed as a powerless entity with no authority to make policy or act on behalf of the District. After a two-day hearing which occurred on September 25 and October 2, 2007 the Circuit Court of Cole County issued its final order and judgment on January 23, 2007 ruling in favor of the State Defendants and Special Administrative Board of the TSD. L.F. 837. The Elected Board and five of its members, along with some students attending school in the District, appealed that judgment to this Court on February 26, 2008.

POINTS RELIED ON

I. **The circuit court erred in ruling that the reestablishment of the Transitional School District and appointment of the Special Administrative Board did not impinge upon the rights of St. Louis voters because the transfer of powers necessary to run the SLPS District from elected officials to appointed officials effectively removes elected officials from office and amounts to a post-hoc nullification of votes cast by St. Louis voters, thereby violating the fundamental right to vote guaranteed by the Missouri and United States Constitutions and these constitutional rights of the voters supersede the legislative power of the General Assembly to remove the powers of elected officials in that the officials selected by the voters to govern the District, though still in office, have been stripped of the powers and resources necessary to fulfill the duties they were elected by the voters to perform.**

Armentrout v. Schooler, 409 S.W.2d 138 (Mo. 1966).

Preisler v. City of St. Louis, 322 S.W.2d 748 (Mo. 1959).

Tully v. Edgar, 664 N.E.2d 43 (Ill. 1996).

Weinschenk v. State, 203 S.W.3d 201 (Mo. 2006).

Mo. Const. art. I, § 1.

Mo. Const. art. I, § 3.

Mo. Const. art. I, § 25.

U.S. Const. amend. XV.

U.S. Const. amend. XIX.

U.S. Const. amend. XXVI.

Mo. Rev. Stat. § 162.571 (2000).

Mo. Rev. Stat. § 162.581 (2000).

Mo. Rev. Stat. § 162.621 (2000).

Mo. Rev. Stat. § 162.1100 (2000).

II. The circuit court erred in ruling that the Elected Board members have not been denied procedural due process because the board members have been effectively removed from their elected positions in which they have a property interest without being provided adequate notice or an opportunity to be heard in that Section 162.1100 strips the Elected Board members of substantially all of the powers associated with their elected position without providing procedural due process protections.

East St. Louis St. Louis Fedr'n of Teachers v. East St. Louis Sch. Dist., 687 N.E.2d 1050 (Ill. 1997).

Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979).

Jamison v. State Dept. of Social Services, Div. of Family Services, 218 S.W.3d 399 (Mo. 2007) (en banc).

Steig v. Pattonville-Bridgeton Terrace Fire Protection Dist., 374 F.Supp.2d 777 (E.D. Mo. 2005)

Mo. Const., art. I §10.

Mo. Const. art. VII, § 12.

U.S. Const. amend. XIV, § 1.

Mo. Rev. Stat. § 162.601 (Supp. 2006).

Mo. Rev. Stat. § 162.621 (2000).

Mo. Rev. Stat. § 162.631 (2000).

Mo. Rev. Stat. § 162.571 (2000).

Mo. Rev. Stat. § 162.1100 (2000).

III. The circuit court erred in ruling that Section 162.1100 of the Missouri Statutes does not constitute special legislation in violation of Article III, Section 40 of the Missouri Constitution because: (1) special status as a

constitutionally created entity is a basis for exempting a municipal corporation from the prohibition on special legislation; and (2) statutory classifications based on closed, immutable characteristics are prohibited by Article III, Section 40 in that the District and Board of Education of the City of St. Louis, unlike the City of St. Louis itself, is not a sui generis constitutionally created entity and the District's status as a school district in a city not within a county is a closed, immutable characteristic.

City of Springfield v. Sprint Spectrum, L.P., 203 S.W.3d 177 (Mo. 2006) (en banc).

Jefferson County Fire Protection Dist. Ass'n v. Blunt, 205 S.W.3d 866 (Mo. 2006) (en banc).

Tillis v. City of Branson, 945 S.W.2d 447 (Mo. 1997) (en banc).

Zimmerman v. State Tax Comm'n of Missouri, 916 S.W.2d 208 (Mo. 1996) (en banc).

Mo. Const. art III, § 40.

Mo. Rev. Stat. § 162.571 (2000).

Mo. Rev. Stat. § 162.1100 (2000).

IV. The circuit court erred in ruling that the State Board of Education's accreditation decision was not arbitrary and capricious despite the invalidity of DESE's unpublished rule because: (1) the State Board in its Rule at 5 CSR 50-345.100 identifies and limits the factors the State Board may rely on in making accreditation decisions to the MSIP standards; (2) decisions of an administrative agency such as the State Board which are based upon an unpublished rule as in this case are void and unenforceable; (3) the MSIP standards, standing alone, are too vague to adequately inform a district what is required for accreditation; and (4) financial performance and stability of leadership are improper considerations in the State Board's accreditation determination in that the State Board of Education relied upon DESE's analysis of the District's performance under an invalid rule, the Understanding Your Annual Performance Report Manual and other factors outside the State Board's MSIP Rule in unaccrediting the District.

Dept. of Soc. Services v. Little Hills Healthcare, 236 S.W.3d 637 (Mo. 2007) (en banc).

Ferguson Police Officers Association v. City of Ferguson, 670 S.W.2d 921 (Mo. Ct. App. 1984).

Martin-Erb v. Mo. Com'n on Human Rights, 77 S.W.3d 600, 608 n.6 (Mo. 2002) (en banc).

NME Hospitals, Inc. v. Dept. of Social Servs, 850 S.W.2d 71 (Mo. 1993) (en banc)

Mo. Rev. Stat. § 161.092 (2000).

Mo. Rev. Stat. § 165.011 (2000).

Mo. Rev. Stat. § 536.010 (2000).

Mo. Rev. Stat. § 536.021 (2000).

5 CSR 50-345.100.

V. The circuit court erred in ruling that Appellants' claims did not arise under Chapter 536 because: (1) neither Chapter 536 of the Missouri Statutes nor Missouri case law sets forth any pleading standard requiring that a Petition for Review of an administrative action expressly state that Review is brought pursuant to Chapter 536; and (2) a declaratory judgment action may properly be used to seek review pursuant to Chapter 536 in that in the First Amended Petition, denominated as a Petition for Review, Appellants sought circuit court

review of a decision of an administrative agency in a non-contested case.

Dept. of Soc. Services v. Little Hills Healthcare, 236 S.W.3d 637 (Mo. 2007) (en banc).

Mathews v. Pratt, 367 S.W.2d 632 (Mo. 1963).

NME Hospitals, Inc. v. Department of Social Servs, 850 S.W.2d 71 (Mo. 1993) (en banc).

Williamson's Estate v. Williamson, 380 S.W.2d 333 (Mo. 1964).

Mo. Rev. Stat. § 527.120 (2000).

Mo. Rev. Stat. § 536.010 (2000).

Mo. Rev. Stat. § 536.021 (2000).

Mo. Rev. Stat. § 536.050 (2000).

Mo. Rev. Stat. § 536.150 (2000).

VI. The circuit court erred in ruling that the only powers retained by the Elected Board after the transfer of powers to the Transitional School District pursuant to Section 162.1100.3 are the powers of auditing and public reporting because the legislature cannot be presumed to have enacted a meaningless provision in Section 162.1100.3, which expressly limits the powers which may vest in the Transitional School District to

those granted to the Board of Education on or before August 28, 1998 in that the voters of the City of St. Louis granted the Board of Education the authority to collect and expend the Desegregation Sales Tax and the existing debt service levy after August 28, 1998.

Abbott Ambulance v. St. Charles County Ambulance Dist., 193 S.W.3d 354 (Mo. Ct. App. 2006).

Brownstein v. Rhomberg-Haglin & Assoc., Inc., 824 S.W.2d 13 (Mo. 1992) (en banc).

Wadlow v. Consol. Sch. Dist. No. 3, 212 S.W. 904 (Mo. Ct. App. 1919).

Wollard v. City of Kansas City, 831 S.W.2d 200 (Mo. 1992).

Mo. Const. art. VI, § 26(f).

Mo. Rev. Stat. § 162.621 (2000).

Mo. Rev. Stat. § 162.1100 (2000).

ARGUMENT

I. The circuit court erred in ruling that the reestablishment of the Transitional School District and appointment of the Special Administrative Board did not impinge upon the rights of St. Louis voters because the transfer of powers necessary to run the SLPS District from elected officials to appointed officials effectively removes elected officials from office and amounts to a post-hoc nullification of votes cast by St. Louis voters, thereby violating the fundamental right to vote guaranteed by the Missouri and United States Constitutions and these constitutional rights of the voters supersede the legislative power of the General Assembly to remove the powers of elected officials in that the officials selected by the voters to govern the District, though still in office, have been stripped of the powers and resources necessary to fulfill the duties they were elected by the voters to perform.

The circuit court erred in holding that Section 162.1100 and the actions of the State Board do not interfere with the Appellants' constitutional rights under Article I, Section 1 (Source of Power), Article I, Section 3 (Power of the People), and Article I, Section 25 (Right of Suffrage) of the Missouri Constitution and the

right to vote under the Fifteenth, Nineteenth and Twenty-Sixth Amendments to the United States Constitution. The circuit court reasoned that the rights of the voters have not been encroached because the Elected Board continues to exist as an entity, albeit with little to no power. App. A50.

A. Standard of Review.

The decree or judgment of the trial court in a court-tried case should be sustained by the appellate court unless there is no substantial evidence to support it, it is against the weight of the evidence, it erroneously declares the law, or it erroneously applies the law. Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. 1976) (en banc). "Appellate courts should exercise the power to set aside a decree or judgment on the ground that it is 'against the weight of the evidence' with caution and with a firm belief that the decree or judgment is wrong." Id.

In cases involving questions of law, an appellate court reviews the trial court's determination independently, without deference to that court's conclusions. See Miller v. Kansas City Station Corp., 996 S.W.2d 120, 122 (Mo. Ct. App. 1999); ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. 1993) (en banc). The Supreme Court exercises its

independent judgment in correcting errors of law. All Star Amusement, Inc. v. Dir. of Revenue, 873 S.W.2d 843, 844 (Mo. 1994) (en banc).

B. The Transfer of Powers From an Elected Board to an Appointed Board Constitutes a Post-hoc Nullification of Votes Cast in the City of St. Louis and Violates the Constitutional Right to Vote.

Section 162.581 of the Missouri Revised Statutes provides for the election of the Board of Education by the voters of the City of St. Louis. Mo. Rev. Stat. § 162.581 (2000). Section 162.1100 provides that, upon the reestablishment of the TSD and the District losing its accreditation, any powers granted to the Elected Board on or before August 28, 1998 shall be vested with the Special Administrative Board, a governing body consisting of three appointed officials. Mo. Rev. Stat. § 162.1100.3 (2000).

The voters elected the members of the Board to run the District. Ex. 202 (2005-2007 election results for the City of St. Louis); Downs Test. 46, 51-54 (9/25/07). If Section 162.1100 as written and applied is allowed by this Court to strip the Elected Board of all of the powers necessary to fulfill the role for which the Board members were elected, then the will of the voters is denied.

"[T]he right to vote is fundamental to Missouri citizens." Weinschenk v. State, 203 S.W.3d 201, 211 (Mo. 2006) (en banc). Therefore, where the legislature places a heavy burden on the right to vote, the Missouri Constitution requires that the burden be justified by a compelling interest and that the statute be narrowly tailored or necessary to accomplish the statutory goals. Id. "Due to the more expansive and concrete protections of the right to vote under the Missouri Constitution, voting rights are an area where our state constitution provides greater protection than its federal counterpart." Id. at 212.

The question of whether the transfer of powers from an elected to an appointed board violates the constitutional rights of voters has not been considered by any Missouri Court. However, the Illinois Supreme Court has addressed this issue in a case challenging the constitutionality of a statute which curtailed the term of elected members of the Board of Trustees of the University of Illinois, effectively removing them from office, and replacing them with trustees appointed by the governor. Tully v. Edgar, 664 N.E.2d 43, 46 (Ill. 1996). A voter challenged the statute under various provisions of the Illinois Constitution which guarantee the right to vote and the right to free and equal elections, arguing that

the statute operated as a "post-hoc" negation of his right to vote. Id. The court reasoned that because the legislation implicated a fundamental constitutional right, the right to vote, the presumption of constitutionality most statutes enjoy was lessened and a more demanding scrutiny was required. Id. at 47-48. The court rejected the appellant's argument that the constitutional right to vote is only implicated by legislation that interferes with a citizen's right to vote or have that vote counted, stating: "It strains logic to suggest that the right to vote *is* implicated by legislation that prohibits a citizen from casting a vote or having that vote counted, but is not implicated by legislation that, in effect, deprives that same vote of its natural and intended effect." Id. at 48. The court held that legislation that replaced elected officials with appointed officials "eviscerates the election process" because it prevents the officials that received the majority of votes cast and counted on election day from holding office. Id.

The court found that the legislation in question was more egregious than legislation that would only implicate certain voters, stating:

> [I]t establishes a mechanism for *total* disregard of *all* votes cast by citizens in a particular election. The vote cast by a citizen is not

> simply diluted, but is totally nullified by the legislative scheme. The act does not simply "impair" the vote but, rather, obliterates its effect. The Act, in essence, voids the votes cast by citizens in a valid election and authorizes the Governor to select the candidates of his choice. The integrity of the vote is undermined and destroyed by the legislative scheme. . . . We must vigilantly ensure that our constitution protects not just the right to cast a vote, but the right to have a vote fully serve its purpose.

Id. at 49.

The voters of the City of St. Louis went to the polls and chose Peter Downs and Donna Jones in 2006 and Katherine Wessling and David Jackson in 2007 to govern their local school district and make decisions that would impact their children and their community. Ex. 202, Downs Test. 46, 51-54 (9/25/07). Peter Downs first decided to run for a position on the Board of Education in 2003. At that time, many parents in the District were concerned about the quality of education in the District and there was a general sense that the school board in place in 2003 was divorced from what was happening in the schools. Downs Test.

35-36 (9/25/07). During the 2003 school board election the slate of four candidates supported by the Mayor of the City of St. Louis was elected and became the new majority on the Board of Education. Id. Like other parents in the District, Mr. Downs became increasingly concerned with the way the then Board of Education ran the District, making sweeping changes with little public input. Id. at 38-39. Between the 2003 school board elections and the 2006 election the then acting Board continued to make decisions which concerned and alarmed parents in the District. Id. at 45-53. Thus, in 2006 these parents went to the polls to replace two mayoral supported candidates with Peter Downs and Donna Jones.

Two more parents and voters, Katherine Wessling and David Jackson, were elected in 2007. Katherine Wessling chose to run for a position on the Board of Education at the suggestion of other parents she met through her involvement with a local parents group. Wessling Test. 96-98 (9/25/07). These parent groups felt there was a need to ensure that more parents were represented and involved in the Board of Education. Id. These parents went to the polls in 2006 and 2007 in order to ensure that their voices would be heard and their interests represented on the Board of Education.

The circuit court erroneously held that the constitutional rights of the voters have not been denied because the Elected Board has not been eliminated by Section 162.1100. App. A58. The circuit court supports its argument by noting that the Elected Board continues to "have meetings, take votes, and make public statements." App. A59. Under Section 162.1100 the Elected Board retains the powers of "auditing and public reporting" in the event that the Elected Board's powers are transferred pursuant to Section 162.1100.3. Mo. Rev. Stat. § 162.621.2 (2000).

The voters of the City of St. Louis did not go to the polls so that their chosen representatives would exercise limited auditing and public reporting powers. They did not support Downs, Jones, Wessling and Jackson so that these individuals could take votes and issue public statements that can have no effect on the management and supervision of the St. Louis Public Schools. See Downs Test. 46-52 (9/25/07); Wessling Test. 96-100 (9/25/07). When the voters elected these individuals to office, the Elected Board of Education had broad power and authority to do all things necessary to govern the St. Louis Public Schools. Specifically, the Elected Board had the general authority to "do all things

necessary to accomplish the purpose for which the school district is organized." Mo. Rev. Stat. § 162.571 (2000). In addition, the Elected Board was given "general and supervising control, government and management of the public schools and public school property of the district in the city" and was directed by statute to "exercise generally all powers in the administration of the public school system therein." Mo. Rev. Stat. § 162.621 (2000). Missouri courts have recognized that school boards in this state are granted broad powers and discretion in management of school affairs. See, e.g., Bell v. Bd. of Educ. of City of St. Louis, 711 S.W.2d 950, 956 (Mo. Ct. App. 1986). The powers and duties of a public agency include those lying fairly within its scope, those essential to the accomplishment of the main purpose for which the office was created, and those which, although incidental and collateral, serve to promote the accomplishment of the principal purposes. Mo. Ethics Comm'n v. Wilson, 957 S.W.2d 794, 798 (Mo. Ct. App. 1997).

The Elected Board was rendered powerless with respect to performing the substantive and day-to-day functions required of a board of education. Due to the divestiture of the Elected Board's powers and transfer of powers to an appointed

board, the members of the Elected Board have been completely prevented from performing the functions they were elected to perform. The voters elected Downs, Jones, Wessling and Jackson because they wanted to replace a board with which they had become dissatisfied with individuals who were parents of students attending school in the District that were dedicated to improving the St. Louis Public Schools. They elected these board members with the understanding that they would exercise the broad and far-reaching powers granted to the Board of Education under Missouri law.

Through the operation of Section 162.1100, these elected officials were left only with the powers of auditing and public reporting with no budget and no authority. These activities are perfunctory only. Not only do these superficial powers leave the Elected Board with no actual input or authority with regard to the District, they are not even held exclusively by the Elected Board. The circuit court held that these powers "do not rest exclusively with [the Elected Board], and are to be employed by the City Board in conjunction with the TSD." App. A6. The legislature's decision to leave the Elected Board with superficial undefined authority and oversight monitoring does not detract from the intent and effect to

prevent the Elected Board members from having any role in the management and supervision of the District. The legislature recognized the unconstitutional nature of its action. The Elected Board has been divested of all governing and management powers and has been rendered effectively powerless. The legislature left the Elected Board with two meaningless powers to give the appearance of a purpose for the defunct Elected Board in an attempt to circumvent the constitutional rights of the voters. The Supreme Court cannot allow this.

By transferring the powers of these elected officials to individuals appointed by the Governor and other politicians, Section 162.1100 violates the right of St. Louis voters to be represented by their chosen elected officials. The statute "nullifies the people's choice by eliminating the right of the elected official to serve. . . ." Tully, 664 N.E.2d at 49. The result of the voters' choice of an elected official must be protected by the constitutional right to vote. Such right must encompass the right not only to cast a vote, but to have that vote fully serve its purpose. Id.

C. The Constitutional Right to Vote Supersedes Legislative Power of General Assembly to Limit Powers of Elected Officials.

The circuit court also supported its decision by claiming that because the Elected Board is a creature of statute, the Missouri General Assembly acted within its plenary powers when it stripped the Elected Board of its powers. App. A50. The Missouri Supreme Court has addressed the importance of voters' rights in the context of municipal corporations such as a city council or local school board, stating:

> The fact that [municipal corporations] are created by the legislature, do not derive their power from the people affected, and occupy a subordinate position in the hierarchy of government does not detract from the principal that in a representative government the people are entitled to equal representation. As a matter of logic voters selecting their representatives to sit on a municipal legislative body are entitled to the same equal protection in the exercise of their right of suffrage as that enjoyed by voters on the state level selecting their state senators and representatives in the state and national legislative

> bodies; are entitled to full and equal voice in the choice of their representatives . . . without dilution or diminution of the weight of their individual votes . . . .

Armentrout v. Schooler, 409 S.W.2d 138, 143 (Mo. 1966). If Section 162.1100 provides for the transfer of power from an elected board to an appointed board, the statute clearly negates the votes cast by the voters in the City of St. Louis. When faced with the same argument, the Illinois Supreme Court found in Tully v. Edgar that "the legislature's authority to enact *any* statute, including statutes governing legislatively created offices, is *subject to limitations imposed in the constitution*." 664 N.E.2d at 49 (emphasis in original). The fundamental right to vote is a limitation imposed in the constitution. Id. As in Illinois, the Missouri Constitution protects the fundamental right to vote. See Mo. Const. art. I §§ 1, 3, 25; Weinschenk v. State, 203 S.W.3d 201, 211 (Mo. 2006) (holding that right to vote is fundamental right). The Constitution supersedes the legislative power of the General Assembly. See Preisler v. City of St. Louis, 322 S.W.2d 748, 754 (Mo. 1959). Thus, when, as here, the General Assembly transfers the powers of

an elected body to an appointed body, the constitutional rights of the voters have been violated and the General Assembly has exceeded its legislative authority.

Regardless of the accreditation status of the District, the authority to oversee the District remains with the Elected Board. The constructive removal of the Elected Board from office and transfer of the Elected Board's powers to an appointed board pursuant to Section 162.1100 violates the constitutional rights of the voters of the City of St. Louis. The circuit court's decision should be reversed and the transfer of powers to the Special Administrative Board be held void with a declaration that the Elected Board has all powers necessary to govern and oversee the District pursuant to Chapter 162 of the Missouri Statutes.

II. The circuit court erred in ruling that the Elected Board members have not been denied procedural due process because the board members have been effectively removed from their elected positions in which they have a property interest without being provided adequate notice or an opportunity to be heard in that Section 162.1100 strips the Elected Board members of substantially all of the powers associated with their elected position without providing any procedural due process protections.

The standard of review for this claim of error is the same as for Point I, supra.

Under the Fourteenth Amendment to the U.S. Constitution and Article I, Section 10 of the Missouri Constitution, no state shall deprive any person of "life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1; Mo. Const., art. I §10. Both the Missouri and United States Constitutions prohibit states from depriving persons of property without due process. Conseco Finance Servicing Corp. v. Mo. Dept. of Rev., 195 S.W.3d 410, 415 (Mo. 2006) (en banc). The circuit court erroneously held that the members of the Elected Board have not been deprived of a liberty or property interest because the Elected Board has not been eliminated by Section 162.1100. App. A58. As written and as applied in this case, Section 162.1100 deprives the individual Elected Board members of their property interest in elected office in that they are effectively removed from their office to which they were elected by the voters and precluded from exercising powers granted to them by the voters for acts and conduct unrelated to their performance.

A. Section 162.1100 Effectively Removes the Individual Members of the Elected Board From Office.

The circuit court erroneously held that the members of the Elected Board have not been deprived of a liberty or property interest because the Elected Board has not been eliminated by Section 162.1100. App. A58. The circuit court supports its conclusion by noting that the Elected Board continues to "have meetings, take votes, and make public statements." App. A59. Further, under Section 162.1100 the Elected Board retains the powers of "auditing and public reporting" in the event that the Elected Board's powers are transferred pursuant to Section 162.1100.3. Mo. Rev. Stat. § 162.621.2 (2000).

As explained in Point I, supra, the members of the Elected Board did not run for office in order to meet, vote, and make public statements that can have no effect on the management and supervision of the St. Louis Public Schools. See Downs Test. 46-52 (9/25/07); Wessling Test. 96-100 (9/25/07). Prior to Respondents' actions and the application of Section 162.1100, the Elected Board had broad power and authority to do all things necessary to govern the St. Louis Public Schools.

Under Section 162.1100 and 162.621.3, the Elected Board is only left with limited auditing and public reporting powers. Mo. Rev. Stat §§ 162.621.2 (2000); 162.1100 (2000). The legislature's decision to leave the Elected Board with superficial undefined authority and oversight monitoring does not detract from the clear intent and effect to prevent the Elected Board members from having any role in the management and supervision of the District. The Elected Board has been divested of all governing and management powers with regard to the District and has been rendered effectively powerless.[9]

[9] As discussed herein, infra, Section 162.631 provides a statutory procedure by which and reasons for which members of the Elected Board may be removed from office prior to the expiration of their terms. Mo. Rev. Stat. § 162.631.1 (2000). Under this statute, it is clear board members may be removed only for specific acts of misconduct involving abuse of trust, proof of gross misconduct in office or to prevent alienation of school property. Id. Such removal is only possible after a petition is filed in the Circuit Court as in other cases and a minimum of ten days notice is given in writing to the member complained of and a hearing conducted. Mo. Rev. Stat. § 162.631.2 (2000).

Despite allegations that the District's performance has been historically poor,[10] the State Board only decided to unaccredit the District in March of 2007 with the sole intention of transferring the powers of the Elected Board to the Special Administrative Board of the Transitional School District by operation of Section 162.1100. The Elected Board was rendered powerless with respect to performing the substantive and day-to-day functions required of a board of education and the remaining powers of auditing and public reporting are superficial and meaningless. They give the Elected Board no input or authority over the District. The legislature's decision to leave the Elected Board with these hollow powers was aimed at giving the appearance of a purpose for the defunct Elected Board. By doing so, the legislature tried to avoid claims that the Elected Board had actually been removed from office. The operation of Section 162.1100 effectuates the removal of the Elected Board from office without compliance with the statutory procedure for the removal of board members contained in Section 162.631 and without any procedural due process protections.

[10] See Herschend Test. 201-02 (10/2/07).

Due to the divestiture of the Elected Board's powers and transfer of powers to an appointed board, the members of the Elected Board have been completely prevented from performing the functions they were elected to perform. The Elected Board members were vested with broad powers to manage and run the District, a role the members of the Elected Board are now completely powerless to fulfill. Section 162.1100 removes the Elected Board members from office without providing them adequate notice or an opportunity to be heard. Such action abridges the board members' property interest in serving out the terms for which they were elected, and therefore violates the due process clauses of the Missouri and United States Constitutions.

B. The Effective Removal of the Board Members Violates Their Constitutional Right to Procedural Due Process.

The individual members of the Elected Board are entitled to constitutional protections. See generally Plyler v. Doe, 457 U.S. 202, 212 (1982) (all persons within the territorial jurisdiction of the United States may invoke the protections of the Constitution). Procedural due process claims concern the constitutionality of the specific procedures employed to deny a person's life, liberty, or property

interest. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985); Jamison v. State Dept. of Social Servs. Div. of Family Servs., 218 S.W.3d 399, 405 (Mo. 2007) (en banc). Procedural due process rules are meant to protect persons not just from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property. Fuentes v. Shevin, 407 U.S. 67, 81 (1972); Conseco Fin. Servicing Corp. v. Mo. Dept. of Revenue, 195 S.W.3d 410, 415 (Mo. 2006) (en banc). Courts considering procedural due process questions conduct a three-part analysis to determine if there is a due process violation: (1) whether there exists a liberty or property interest which has been interfered with by the State; (2) the risk of an erroneous deprivation of such an interest through the procedures already in place, while considering the value of additional safeguards; and (3) the effect the administrative and monetary burdens would have on the state's interest. Mathews v. Eldridge, 424 U.S. 319, 335 (1976); Jamison, 218 S.W.3d at 405.

i. Board Members Jones, Purdy, Wessling, Jackson and Downs Have a Property Right in Their Office.

The first step in the due process analysis is determining whether the individual Elected Board members have a property right in their office. Some early Missouri decisions held that an elected official has no property interest in elected office. See State ex rel. Conran v. Duncan, 63 S.W.2d 135, 143 (Mo. 1933) (en banc) (holding that elected prosecuting attorney does not have a right to due process because "a public office is not property"); State ex inf. McKittrick v. Kirby, 163 S.W.2d 990, 995 (Mo. 1942) (en banc) ("the right to be appointed to a public office is not a natural or property right within the protection of the due process clause"). No recent Missouri case has addressed whether an elected official has a liberty or property interest in elected office. Since those early Missouri cases, due process analysis has been substantially broadened in this country, and the definition of what constitutes "property" has evolved. See, infra, n.13, n.14. Thus, the question of whether an elected official has a property interest in his or her office should be reevaluated by this Court in light of developments in the area of due process analysis.

Where a state purports to confer a significant benefit on an individual and in so doing creates a reasonable expectation that the benefit will be of a continuing nature, any attempt to deprive the individual of the benefit must be accompanied by due process in order to prevent arbitrary administration of the laws. Neal v. Camper, 647 S.W.2d 923, 925 (Mo. Ct. App. 1983). The hallmark of "property" under the due process clause is "an individual entitlement grounded in state law, which cannot be removed except 'for cause.' Once that characteristic is found, the types of interest protected as 'property' are varied and, as often as not, intangible, relating 'to the whole domain of social and economic fact.'" Logan v. Zimmerman Brush Co., 455 U.S. 422, 430 (1982) (citations omitted). "Constitutional 'property interests' have been defined as 'more than an abstract need or desire [for the benefit]' and more than 'a unilateral expectation [of the benefit].'" Stieg v. Pattonville-Bridgeton Terrace Fire Protection Dist., 374 F.Supp.2d 777, 786 (E.D. Mo. 2005) (citing Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972)). In order for a benefit to be considered a constitutionally protected "property interest," the aggrieved employee must show a "legitimate claim of entitlement to it." Id. In Stieg, the Eastern District of

Missouri Court found that the plaintiff did not have any "property interest" in his public employment which would entitle him to procedural due process because no statute, ordinance or contractual provision entitled him to a hearing before his suspension from employment. Id.

Unlike the public employee in Stieg, the members of the Elected Board have a statutory entitlement to their office and are entitled to a hearing prior to their removal from office. Under the Missouri Constitution, public officers generally hold office for the term thereof and until their successors are duly elected or appointed and qualified. Mo. Const. art. VII, § 12. Section 162.601 of the Missouri Revised Statutes further provides that the individual members of the Elected Board "shall hold office for four years, and until their successors are elected and qualified." Mo. Rev. Stat. § 162.601.5 (2000). The plain language of both of these provisions clearly indicates that the term of the office to which the Elected Board members were elected is the minimum time they can expect and should remain in office.

Another statute provides the specific process by which and reasons for which members of the Elected Board may be removed from office prior to the

expiration of their terms. Mo. Rev. Stat. § 162.631.1 (2000). Under this section, it is clear that board members may be removed only for specific acts of misconduct involving abuse of trust, proof of gross misconduct in office or to prevent alienation of school property. Id. Such removal is only possible after a petition is filed in the circuit court as in other cases and a minimum of ten days notice in writing is given to the member complained of and a hearing conducted. Mo. Rev. Stat. § 162.631.2 (2000). In the absence of these acts of misconduct, the plain language of the Missouri Constitution and Section 162.601 of the Missouri statutes clearly indicates that the term of the office to which the Elected Board members were elected is the minimum time they should remain in office.

The Illinois Supreme Court recently analyzed whether elected officials have a property interest in their elected office in a 1997 case involving similar facts to the case at bar. East St. Louis Fed'n of Teachers v. East St. Louis Sch. Dist., 687 N.E.2d 1050, 1061 (Ill. 1997). In East St. Louis, when the local board of education (the "Local Board") was certified by the Illinois State Board of Education ("Illinois State Board") as a district in financial difficulty, the Illinois State Board created a "Financial Oversight Panel" (the "Panel") pursuant to an

Illinois statute. Id. at 1055. After the Local Board members refused to follow an order issued by the Panel, using the same statute, the Panel removed the members of the Local Board from office for failure to follow a valid order. Id. The Panel did not deliver any written charges to the individual board members or conduct a hearing before dismissing the school board members, actions that were not required by the statute. At the time of their purported removal, the terms of the seven school board members had not expired. The individual members of the Local Board claimed their procedural due process rights were violated. Id. at 1055-56.

Citing the U.S. Supreme Court decision in Snowden v. Hughes, the court acknowledged that although the individual board members had no property right to their offices secured by the federal due process clause, an elected official may have a property right in his office if such an interest is given to them under state law. Id. at 1060-61 (citing 321 U.S. 1, 7 (1944)).[11] The Court noted that an

[11] The Court also clarified that although individual board members may have a property right in their office, the board as an entity did not. East St. Louis, 687 N.E.2d at 1059. The same is true in Missouri. Only a "person" has a right to due process. Thus, a political entity, such as a school district, is not protected by the

interest is a property right subject to due process protections if that interest is secured by rules or mutually explicit understandings that support the claim of entitlement. East St. Louis, 687 N.E.2d at 1060; see also Perry v. Sindermann, 408 U.S. 593, 601 (1972) (citing Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972)). The Court ultimately found that under Illinois law, each member of the school board was entitled to serve a term of four years, that other jurisdictions have recognized that such a statute gives the elected official a property interest in the office for the given length of time, and that the official must receive due process before being removed from office. East St. Louis, 687 N.E.2d at 1060-61.[12]

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due process clause. See, e.g., State ex rel. Brentwood Sch. Dist. v. State Tax Comm'n, 589 S.W.2d 613, 615 (Mo. 1979) (en banc) ("[S]chool districts, as creatures of the state established to perform governmental functions, are not persons within the protections of the due process clause . . .").

[12] The Illinois Court referenced Crowe v. Lucas, 595 F.2d 985, 993 (5th Cir. 1979) (statute that provided that aldermen were to remain in office for four years and until such time that their successors were duly elected and qualified created a property right in that office); Collins v. Morris, 438 S.E.2d 896, 897 (Ga. 1994) (an elected official entitled to hold office under state law has a property right in

The Court recognized that the concept of what is considered "property" for due process purposes has evolved and expanded in recent years and early cases would have applied a narrower meaning of "property."[13] Id. at 1061. The Illinois Supreme Court found that statutes providing that an elected officer shall serve for a certain number of years and shall be removed only upon certain events gave rise to an expectation that that person will serve for the given length of time and will be removed for only the stated reasons. East St. Louis, 687 N.E.2d at 1061. The

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that office); Foley v. Kennedy, 885 P.2d 583, 589 (Nev. 1994) (recognizing the property right to office held by an elected official).

[13] The same is true with regard to due process cases considered by the U.S. Supreme Court. Recent Supreme Court decisions have held that procedural due process protection extends well beyond traditional concepts of ownership and title to encompass anything to which a person may assert a legitimate claim of entitlement. Bd. of Regents v. Roth, 408 U.S. 564, 572 (1972). Since Roth, courts have held that a variety of nontraditional property interests, including interests in public employment, constitute "entitlements" cognizable under the Due Process Clause. See, e.g., Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985) (recognizing a property interest in public employment); Perry v. Sindermann, 408 U.S. 593 (1972) (finding a property interest in employment); Bell v. Burson, 402 U.S. 535 (1971) (finding a property interest in a license to drive).

Court ultimately held that the school board members had a property right in their offices. East St. Louis, 687 N.E.2d at 1061.[14] The Court in East St. Louis felt so strongly that the concept of what is "property" for due process purposes had expanded over time, it overruled two of its earlier decisions that held office holders have no property rights in their office because the decisions are now

[14] Other cases have also held that elected officials have a property interest in their offices and serving out the full terms for which they were elected. See, e.g., Crowe, 595 F.2d at 993; Gordon v. Leatherman, 450 F.2d 562, 565 (5th Cir. 1971); Brown v. Perkins, 706 F.Supp. 633, 634 (N.D. Ill. 1989); Collins, 438 S.E.2d at 897-98; Foley, 885 P.2d at 589; Nelson v. Crystal Lake Park Dist., 796 N.E.2d 646, 651-52 (Ill. App. Ct. 2003); Gewertz v. Jackman, 467 F.Supp. 1047, 1061 (D.N.J. 1979); Kucinich v. Forbes, 432 F.Supp. 1101, 1115 n.21 (N.D. Ohio 1977); Ridgway v. City of Fort Worth, 243 S.W. 740, 749 (Tex. Civ. App. 1922); Guy v. Nelson, 44 S.E.2d 775, 777 (Ga. 1947); Richard v. Tomlinson, 49 So.2d 798, 799 (Fla. 1951); Fair v. Kirk, 317 F.Supp. 12, 14 (D.C. Fla. 1970); State ex rel. Landis v. Tedder, 143 So. 148, 150 (Fla. 1932); City of Ludowici v. Stapleton, 375 S.E.2d 855, 856 (Ga. 1989); Tarrant County v. Ashmore, 635 S.W.2d 417, 421-23 (Tex. 1982) (holding that an office holder's interest in his elected position, though not property in the conventional sense, is a recognizable interest for purposes of procedural due process analysis).

inconsistent with the modern understanding of the concept of a property right. See East St. Louis, 687 N.E.2d at 1061. As stated above, this question has not been addressed by any Missouri Court for over sixty-five years. See State ex rel. Conran v. Duncan, 63 S.W.2d 135, 143 (Mo. 1933) (en banc); State ex inf. McKittrick v. Kirby, 163 S.W.2d 990, 995 (Mo. 1942) (en banc). No more recent Missouri case has addressed this issue. This Court should adopt the reasoning of the Illinois Supreme Court and the many other jurisdictions and find a property interest.

As in Illinois, the Missouri Constitution and Missouri statutes afford the individual members of the Elected Board a property right and individual entitlement in their offices. Under the Missouri Constitution and Missouri statutes members of the Elected Board have an expectation and entitlement to their elected office. Under the Missouri Constitution, public officers generally hold office for the term thereof and until their successors are duly elected or appointed and qualified. Mo. Const. art. VII, § 12. By statute, members of the board are to "hold office for four years, and until their successors are elected and qualified." Mo. Rev. Stat. § 162.601.5 (2000). These provisions clearly indicate that the term of

the office to which the Elected Board members were elected is the minimum time they can expect and should remain in office. The members of the Elected Board also have an individual entitlement under state statutes in that Section 162.631.1 of the Missouri Statutes limits the procedure whereby and reasons for which board members may be removed from office. Mo. Rev. Stat. § 162.631 (2000).

ii. The Risk of an Erroneous Deprivation of a Property Interest Through the Procedures Already in Place is Significant.

After determining the existence of a property right and the applicability of the Due Process Clause, the question remains as to what process is due. Loudermill, 470 U.S. at 541; Jamison, 218 S.W.3d at 405. The first step in determining what process is due is to consider the risk of erroneous deprivation of one's property interest in an elected office through the procedures already existing in the statutes. Mathews, 424 U.S. at 334. Here, the analysis is straightforward.

Section 162.1100 contains no procedures that had to be followed before the individual Elected Board members were effectively removed from office. Indeed the past performance of the District has no bearing on a majority of the ousted board members. Two board members, Wessling and Jackson, had just been

elected in April 2007. Ex. 202; Wessling Test. 96-98 (9/25/07). Two others, Downs and Jones, were elected in April 2006. Ex. 202; Downs Test. 52 (9/25/07). The State Board's decision was purportedly based on performance and conduct that occurred before these individual board members were even in office.[15] Similar to the statute in the East St. Louis case, Section 162.1100 provides for the effective removal of the Elected Board members without apprising the members that such decisions are being made. East St. Louis, 687 N.E.2d at 1062 (finding that "without warning, an entire elected board could be removed at the whim of the Panel"). With no procedural requirements, the risk of erroneous deprivation of the Elected Board members' property right is great. In fact, the lack of an opportunity to be heard did result in the State Board being deprived of important information. For example, the State Board was not aware that two of the Elected Board members that are Appellants (Katherine Wessling and David Jackson) had

[15] Dr. Williams resigned in July 2006, after Peter Downs and Donna Jones were sworn in as board members. However, all performance data analyzed by the State Board was for fiscal year 2006 and before, and the financial condition of the district was created in 2003-2004 by borrowing that the State Board contractually authorized. See Ex. 24, Tab 13, Tab 14.

just been elected in April, 2007 and had nothing to do with the District's current status. See Ex. 202.

With no procedure in place, this Court must consider what procedure would be constitutionally adequate. While due process is flexible and calls for such procedural protections as the particular situation demands, its fundamental requirement is the opportunity to be heard at a meaningful time and in a meaningful manner. Cafeteria & Rest. Workers Union, Local 473 v. McElroy, 367 U.S. 886, 895 (1961); Mathews, 424 U.S. at 333. See also Grannis v. Ordean, 234 U.S. 385, 394 (1914) (the fundamental requisite of due process of law is the opportunity to be heard). Before the individual may contest the state action he must be made aware of it. Notice is a fundamental requirement of due process. Greenholtz v. Inmates of Neb. Penal and Correctional Complex, 442 U.S. 1, 38 (1979); Conseco, 195 S.W.3d at 415. The notice must be reasonably calculated to apprise interested parties of the contemplated action and to afford the interested parties an opportunity to present their objections. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 315 (1950). The individual Elected Board

members were clearly entitled to some form of notice prior to the decision to constructively remove them from office. Here, they received none.

Aside from notice, they were also entitled to a hearing prior to the pending decision. It is a well settled principle that if the state feasibly can provide a hearing before deprivation of a protected interest, it generally must do so in order to minimize "substantively unfair or mistaken deprivations." Jamison, 218 S.W.3d at 408 (citing Zinermon v. Burch, 494 U.S. 113, 132 (1990)). The "root requirement" of due process is that an individual be given the opportunity to respond before he is deprived of a protected right. Id. (citing Loudermill, 470 U.S. at 542; Fuentes, 407 U.S. at 80).

Here, the Elected Board members were granted no hearing and therefore the risk of a mistaken deprivation was high. As board member Peter Downs testified, no member of the Elected Board was given any opportunity to present before the State Board before being deprived of their elected positions. Downs Test. 68-69 (9/25/07); see also, Herschend Test. 225-26 (10/2/07). Even the District superintendent, Diana Bourisaw, was denied the opportunity to be heard by the State Board in the months leading up to the accreditation decision, despite

monthly requests from November 2006 through March 2007. Bourisaw Test. 129-30 (9/25/07). Here the State Board could have easily given a pre-deprivation hearing. The State Board expressed its intention to consider the District's accreditation status many months before its March 2007 decision, but never asked for input from the Elected Board members. Herschend Test. 225-26 (10/2/07); Downs Test. 68-69 (9/25/07). Instead of a hearing for the Elected Board members, the State Board was content to receive its information unilaterally from DESE and the Special Advisory Committee. App. A28. It is clear that having outside entities conduct a factual investigation into the District's performance cannot serve as a substitute for due process. "No matter how elaborate, an investigation does not replace a hearing." Jamison, 218 S.W.3d at 409 (quoting Winegar v. Des Moines Indep. Cmty. Sch. Dist., 20 F.3d 895, 901 (8th Cir. 1994)).

iii. The Effect of the Administrative and Monetary Burdens on the State's Interest is Minimal.

The final step in the due process analysis is balancing the state's interest in intervening in the operation of a school district against the members' rights to

procedural due process. Purportedly, the purpose of Section 162.1100 is to provide a "take over" scheme for the St. Louis Public School District if and when it becomes unaccredited. However, notice and an opportunity for a hearing are neither oppressive nor extraordinary remedies for the statute's constitutional flaw, and are not so burdensome as to overly hamper the state's efforts.

"Failure to provide a pre-deprivation hearing is acceptable only if: (1) a pre-deprivation hearing would be 'unduly burdensome in proportion to the interest at stake,' (2) the state is unable to anticipate the deprivation, or (3) an emergency requires immediate action." Jamison, 218 S.W.3d at 409-10 (citing Zinermon, 494 U.S. at 132; Bell v. Burson, 402 U.S. 535, 542 (1971)). When, such as here, an erroneous deprivation of a protectable interest "will occur, if at all, at a specific, predictable point," it can be sufficiently anticipated so as to require a pre-deprivation hearing. Jamison, 218 S.W.3d at 410 (citing Zinermon, 494 U.S. at 136).

There is nothing in the record to suggest any of these three factors were satisfied here. The State Board had adequate time to conduct a hearing and provide the individual Elected Board members with an opportunity to present their

thoughts on the status of the school district. Providing a hearing is more compelling in cases such as here, where the individuals comprising the current Elected Board have not been accused of any wrongdoing while in office and in fact, most of the Appellant board members were not in office at the time of the decisions which may have contributed to the District's most recent academic and financial performance. See Ex. 202; Wessling Test. 100-02 (9/25/07); Downs Test. 46-54 (9/25/07). The basis of DESE's recommendation of unaccreditation in this case is clearly not attributable to the current members. See Herschend Test. 200-01 (10/2/07) (stating accreditation determination was a "function of history").

Fundamental fairness is both the foundation and the touchstone of due process. Mullane, 339 U.S. at 314; see also State ex rel. Boyle v. Sutherland, 77 S.W.3d 736, 738 (Mo. Ct. App. 2002). It is contrary to the very notion of fairness and due process to effectively remove the individual members of the Elected Board from office with no allegation of misconduct and then fail to provide any notice or opportunity to be heard.

Section 162.1100 did not preclude the State Board from giving the Elected Board members notice and a hearing before removing them from office. The

statute does not require that the Elected Board be removed without notice and a hearing. Given that the State Board was free to give notice and a hearing if it so chose, the statute is not on this issue facially unconstitutional. However, the manner in which it was applied in this case violated the Elected Board members' procedural due process rights by not affording them notice and an opportunity to be heard. The fact is, the decision to implement Section 162.1100 was made by the State Board well in advance of its March 22, 2007 meeting. Therefore, Section 162.1100 is clearly unconstitutional as applied in this case.

Respondents' actions and the application of Section 162.1100 have deprived the individual Elected Board members of their property interests in their offices. Although the statute does not expressly remove the Elected Board members from office, it creates the Transitional School District and purportedly transfers virtually all of the powers given to the Elected Board members at the time they attained office. Thus, the statute effectively deprives the Elected Board members of their powers. Such action abridges the Elected Board members' property interests in serving out the terms for which they were elected, and

therefore violates the due process clauses of the Missouri and United States Constitutions.

Regardless of the accreditation status of the District, the authority to oversee the District remains with the Elected Board. The constructive removal of the Elected Board from office without notice or an opportunity for a hearing violates the individual board members' constitutional right to procedural due process. The circuit court's decision should be reversed and the transfer of powers to the Special Administrative Board be held void with a declaration that the Elected Board retains all powers necessary to govern and oversee the District pursuant to Chapter 162 of the Missouri Statutes.

III. The circuit court erred in ruling that Section 162.1100 of the Missouri Statutes does not constitute special legislation in violation of Article III, Section 40 of the Missouri Constitution because: (1) special status as a constitutionally created entity is a basis for exempting a municipal corporation from the prohibition on special legislation; and (2) statutory classifications based on closed, immutable characteristics are prohibited by Article III, Section 40 in that the District and Board of Education of the

City of St. Louis, unlike the City of St. Louis itself, is not a sui generis constitutionally created entity and the District's status as a school district in a city not within a county is a closed, immutable characteristic.

The standard of review for this claim of error is the same as for Point I, supra.

The circuit court erroneously held that Section 162.1100, which only applies to the Board of Education of the City of St. Louis, is not a "special law" in violation of Article III, Section 40 of the Missouri Constitution. App. A54. The Court relied on precedent holding that Missouri statutes applicable only to "a city not within a county," a class of which St. Louis is the only member, do not violate Article III, Section 40 because St. Louis is a unique entity under the Missouri Constitution. Id. The circuit court erroneously declared the law in holding that this rationale applies to the Board of Education of the City of St. Louis. The Board, though defined by the same boundaries as the City of St. Louis, is not a "unique" entity created by the Missouri Constitution. Section 162.1100 contains an impermissible classification based on a closed characteristic and therefore constitutes special legislation in violation of the Missouri Constitution.

A. **The Missouri Constitution Prohibits the Legislature From Enacting Local and Special Legislation Regarding School Districts.**

Article III, Section 40 of the Missouri Constitution prohibits the General Assembly from passing any local or special law regarding school districts. That provision states, in part:

> The general assembly shall not pass any local or special law:
>
> . . . .
>
> (20) creating new townships or changing the boundaries of townships or school districts;
>
> (21) creating offices, prescribing the powers and duties of officers in, or regulating the affairs of counties, cities, townships, election or school districts;
>
> . . .
>
> (24) regulating the management of public schools, the building or repairing of schoolhouses, and the raising of money for such purposes;

(25) legalizing the unauthorized or invalid acts of any officer or agent of the state or of any county or municipality[.]

Mo. Const. art III, § 40 (emphasis added). Section 162.1100 of the Missouri Revised Statutes establishes a Transitional School District to replace the duly elected Board of Education for the District, creates offices for the Transitional School District, regulates the management and affairs of public schools in the District, and prescribes the powers and duties of school district officials. The statute only applies to the Board of Education of the City of St. Louis and therefore expressly violates the Missouri Constitution's prohibition on local and special legislation.

B. The Board of Education Is a Separate Municipal Corporation From the City of St. Louis and Is Not Afforded the Same Special Recognition Under the Missouri Constitution as the City of St. Louis.

Section 162.1100 provides that, upon the District being declared unaccredited, "any powers granted to any existing school board in a city not within a county on or before August 28, 1998, shall be vested with the special

administrative board of the transitional school district . . . ." Mo. Rev. Stat. § 162.1100.3 (2000).

As noted by the Missouri Supreme Court in Jefferson County Fire Protection District Association v. Blunt, "legislation enacted to address the class of which St. Louis City is the only member is not special legislation within the meaning of article III, section 40." 205 S.W.3d 866, 872 n.6 (Mo. 2006) (en banc). Several courts have considered whether legislation which limited its applicability to the classification of "any city not within a county," a description which only applies to the City of St. Louis, was a special law in violation of Article III, Section 40. Courts have held that this classification does not violate the prohibition on special laws, reasoning that:

> St. Louis City is given specific recognition in Art. IV, § 31, of the Constitution of Missouri as being sui generis, a unique entity in a unique class. Legislation enacted to address the class of which St. Louis City is the only member is therefore not special legislation within the meaning of Art. III, § 40.

Zimmerman v. State Tax Comm'n of Mo., 916 S.W.2d 208, 209 (Mo. 1996) (en banc) (quoting Boyd-Richardson Co. v. Leachman, 615 S.W.2d 46, 52-53 (Mo. 1981) (en banc)). Thus, the City of St. Louis is afforded special treatment in the area of local and special legislation because of the City's special status under the Missouri Constitution.

The Board of Education of the City of St. Louis and the St. Louis Public School District are not the City of St. Louis and do not have the same constitutional status. Though they are defined by the same boundaries, they are separate entities. The District and the Board of Education of the City of St. Louis are statutorily created and do not enjoy the unique constitutional attributes of the City of St. Louis. See Mo. Rev. Stat. § 162.571 (2000). Thus, the reasoning Missouri courts have used to exempt the City of St. Louis from the Constitution's prohibition on local and special laws is completely inapplicable to statutes addressing the District and Board of Education of the City of St. Louis.

C. Section 162.1100 is a Local or Special Law in Violation of the Missouri Constitution.

"Special legislation refers to statutes that apply to localities rather than to the state as a whole . . . ." Jefferson County Fire Prot. Dist. Ass'n v. Blunt, 205 S.W.3d 866, 868 (Mo. 2006) (en banc). A law is facially special if it is based on close-ended characteristics. Id. at 870. Classifications based upon historical facts, geography, or constitutional status focus on immutable characteristics and are therefore facially special laws." Tillis v. City of Branson, 945 S.W.2d 447, 449 (Mo. 1997) (en banc) (quoting Harris v. Mo. Gaming Comm'n, 869 S.W.2d 58,65 (Mo. 1999) (en banc)). Facially special laws are presumed to be unconstitutional. O'Reilly v. City of Hazelwood, 850 S.W.2d 96, 99 (Mo. 1993) (en banc). Where it is impossible or highly unlikely that the status of a political subdivision under the classification could change, the classification is based on an immutable characteristic and is invalid. See City of Springfield v. Sprint Spectrum, L.P., 203 S.W.3d 177, 185 (Mo. 2006) (en banc) (citing Tillis, 945 S.W.2d at 449, Reals v. Courson, 164 S.W.2d 306, 309 (Mo. 1942)).

Section 162.1100 applies to "the school district of a city not within a county." Unlike population or other open ended characteristics, the fact that the District is located in a city not within a county is a closed, immutable characteristic. It is a matter of both geographical and historical fact that is highly unlikely to change. No other school district is located in a city not within a county, as every other city in the State of Missouri is located within a county. No other school district could fall into this classification. Therefore, Section 162.1100 violates the constitutional prohibition on local and special laws and is void.

Regardless of the accreditation status of the District, the authority to oversee the District remains with the Elected Board. The statute providing for the creation of the Transitional School District and transfer of power from the Elected Board to the appointed Special Administrative Board is special legislation in violation of Article III, Section 40 of the Missouri Constitution. The circuit court's decision should be reversed and the establishment of the Transitional School District and transfer of powers to the Special Administrative Board be held void with a declaration that the Elected Board has all powers necessary to govern and oversee the District pursuant to Chapter 162 of the Missouri Statutes.

IV. The circuit court erred in ruling that the State Board of Education's accreditation decision was not arbitrary and capricious despite the invalidity of DESE's unpublished rule because: (1) the State Board in its Rule at 5 CSR 50-345.100 identifies and limits the factors the State Board may rely on in making accreditation decisions to the MSIP standards; (2) decisions of an administrative agency such as the State Board which are based upon an unpublished rule as in this case are void and unenforceable; (3) the MSIP standards, standing alone, are too vague to adequately inform a district what is required for accreditation; and (4) financial performance and stability of leadership are improper considerations in the State Board's accreditation determination in that the State Board of Education relied upon DESE's analysis of the District's performance under an invalid rule, the Understanding Your Annual Performance Report Manual and other factors outside the State Board's MSIP Rule in unaccrediting the District.

Section 162.1100 is unconstitutional on its face and as applied as explained in Points I – III above. As explained in Point I of this brief, Section 162.1100 is unconstitutional on its face and as applied here because the statute operates to

transfer authority from the Elected Board to an appointed board, violating the constitutional right to vote of voters in the City of St. Louis. Further, as demonstrated in Point II of this Brief, the Elected Board members lost authority to supervise and manage the District without being provided due process protections prior to their effective removal from office. Section 162.1100 also violates the constitutional prohibition on local and special laws because, as written and as applied, it can only be applicable to the Board of Education of the City of St. Louis. Therefore, the State Board's use and reliance on that provision to affect a transfer of authority from the Elected Board and its members is null and void.

Even if this Court holds that the statute is constitutional in each of the above respects, the State Board's action in unaccrediting the District is null and void as well as arbitrary and capricious. Thus, the transfer of power from the Elected Board to the appointed SAB by operation of Section 162.1100 is a nullity and this Court should declare that the authority remains vested in the Elected Board.

A. Standard of Review of Non-contested Case Administrative Decision.

The circuit court does not merely review evidence on review of a non-contested administrative case, nor refer to administrative information, but rather determines evidence in a hearing de novo and determines the validity of an administrative decision on the facts as found by the circuit court and, thus, the circuit court owes no deference of credibility to the administrative decision. State ex rel. Rice v. Bishop, 858 S.W.2d 732, 736 (Mo. Ct. App. 1993). On appeal from the circuit court of a non-contested administrative decision, the appellate court reviews the judgment of the circuit court, rather than the decision of the administrative agency, and as such, appellate review is essentially the same as for other judgments in a judge-tried case. State ex rel. Christian Health Care of Springfield, Inc. v. Mo. Dept. of Health and Senior Services, 229 S.W.3d 270, 275 (Mo. Ct. App. 2007). Thus, the appellate court reviews the circuit court's judgment to determine whether it's finding that an administrative agency's decision was unconstitutional, unlawful, unreasonable, arbitrary, capricious, or the product of an abuse of discretion rests on substantial evidence and correctly

declares and applies the law. Cade v. State, 990 S.W.2d 32, 37 (Mo. Ct. App. 1997). The appellate court is to sustain the decree or judgment of the trial court unless there is no substantial evidence to support it, unless it is against weight of evidence, unless it erroneously declares law, or unless it erroneously applies law. Citizens for Safe Waste Management v. St. Louis County, 810 S.W.2d 635 (Mo. Ct. App. 1991).

In cases involving questions of law, an appellate court reviews the trial court's determination independently, without deference to that court's conclusions. See Farm Properties Holdings, L.L.C. v. Lower Grassy Creek Cemetery, Inc., 208 S.W.3d 922, 924 (Mo. Ct. App. 2006), ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. 1993) (en banc). The Supreme Court exercises its independent judgment in correcting errors of law. All Star Amusement, Inc. v. Director of Revenue, 873 S.W.2d 843, 844 (Mo. 1994) (en banc).

B. The Circuit Court Erred in Upholding the State Board's Accreditation Determination Because it Was Not Based on the MSIP Standards as Required by the State Board's own Rule.

The State Board proffered three reasons for its decision to unaccredit the District: 1) the District's achievement with regard to the MSIP Performance Standards; 2) the District's financial condition, and 3) "disarray" of District leadership. Herschend Test. 191-93, 213, 221 (10/2/07). The circuit court found that the State Board's decision was based on the information provided by the Advisory Committee and the information provided by DESE at the March 22, 2007 meeting. App. A28. Both the State Board's proffered reasons and the circuit court's findings fail to account for the State Board's MSIP Rule and instead rely either on DESE's void rule or other factors not contained in the State Board's MSIP Rule.

i. The State Board is Required by Law to Follow its own Administrative Rules.

Duly promulgated agency regulations have the force and effect of laws. Dilts v. Dir. of Rev., 208 S.W.3d 299, 302 (Mo. Ct. App. 2006). Administrative

agencies, like the general public, are bound by the terms of rules promulgated by them. State ex rel. Stewart v. Civil Service Com'n of City of St. Louis, 120 S.W.3d 279, 287 (Mo. Ct. App. 2003). "Once an agency exercises its discretion and creates the procedural rules under which it desires to have its actions judged, the agency denies itself the right to violate those rules." Martin-Erb v. Mo. Com'n on Human Rights, 77 S.W.3d 600, 608 n.6 (Mo. 2002) (en banc). Generally, when an administrative agency usurps its authority, its unlawful act is void. Cantrell v. State Bd. of Registration for Healing Arts, 26 S.W.3d 824, 828 (Mo. Ct. App. 2000). So it is here.

The State Board's MSIP Rule states that "The State Board of Education (board) will assign classification designations of unaccredited, provisionally accredited, and accredited based on the standards of the MSIP." Ex. 1. The only other criteria published by the State Board of any kind is found in the Missouri School Improvement Program (MSIP) Standards and Indicators Manual, which is incorporated by reference into the State Board's MSIP Rule and is comprised of qualitative and quantitative standards for school districts. Ex. 1, 2.

Those standards contained in the MSIP Standards and Indicators Manual are organized into three sections — Resource Standards, Process Standards and Performance Standards. Id. The Resource Standards consist of requirements regarding programs of study which must be offered, class size and assigned enrollment, support and administrative staff, professional certification, and planning time. Ex. 1, 2. The Process Standards consist of a wide variety of standards, including standards regarding instructional design and practices, testing, professional development, use of library media sources, student guidance programs, differentiated instruction and supplemental programs, school services, adoption of a district-wide Comprehensive School Improvement Plan (CSIP), and school safety, to name just a few. Ex. 1, 2. The Performance Standards include standards addressing MAP testing, college preparation and placement, placement in advanced or vocational classes, and general academic achievement. Ex. 1, 2.

The State Board's MSIP Rule requires the State Board to base its accreditation decisions on the Resource, Process, and Performance Standards as they are defined by its Standards and Indicators Manual, which is incorporated by reference into the State Board's MSIP Rule. Ex 1, 2. However, neither Resource

nor Process Standards were reviewed by the State Board in 2006 or 2007. By failing to review the three types of MSIP Standards, the State Board usurped its authority, making its accreditation decision void. The State Board's MSIP Rule cites Section 161.092 of the Missouri Revised Statutes as the State Board's authority to promulgate the rule, and the Foreword to the Standards and Indicators Manual portion of the State Board's MSIP Rule states that it is the official policy of the State Board. Ex. 1, 2. If the State Board in fact utilized its MSIP Rule in making its decision to declare the District unaccredited as required by its MSIP Rule, it would have evaluated all three categories of standards. The State Board clearly did not do so. The State Board considered Performance Standards only, and only as evaluated by DESE under DESE's unpublished and therefore invalid UYAPR Manual, in making its determination with regard to the District. Indeed, Performance Standards are the only standards addressed in DESE's unpromulgated UYAPR rule. Ex. 2. Process Standards and Resource Standards are not measured at all under DESE's unpublished rule.

ii. The Circuit Court Erroneously Applied the Law in Upholding the State Board's Decision, which Was Based on Factors Outside the State Board's MSIP Rule.

Apparently recognizing the problem above and based on testimony by Mr. Herschend as to what the State Board relied upon, the circuit court found that the State Board based its decision on the Advisory Committee Report and DESE's analysis under DESE's UYAPR Manual. App. A28. The State Board's MSIP Rule requires the State Board to base its accreditation decisions on the MSIP Standards, and the State Board is required by law to follow its own administrative rules. Because the Advisory Committee Report and DESE's analysis pursuant to DESE's UYAPR Manual are factors outside of the State Board's MSIP Rule, the circuit court erroneously applied the law when it held that the State Board's decision was valid and this Court should therefore overturn the circuit court's decision.

DESE annually reviews data submitted by school districts and generates an Annual Performance Report ("APR") for each district. Bourisaw Test. 202 (9/25/07). DESE evaluates districts based on the formulae contained in its

unpublished UYAPR Manual and determines how many Performance Standards a school district has "met" or "not met" out of fourteen possible standards selected and analyzed by DESE. App. A15. DESE does not address or measure districts' performance with regard to Process or Resource Standards through DESE's UYAPR Manual. The calculations utilized by DESE to determine whether Performance Standards are "met" are contained in DESE's UYAPR Manual but not in any rule noticed and published by the State Board or DESE. See Ex. 2, 3. Unlike the State Board's MSIP Rule, which incorporates the Standards and Indicators Manual, the UYAPR Manual has never been noticed and published pursuant to Section 536.021 of the Missouri statutes by either DESE or the State Board. App. A31-A32. When the State Board is considering a district's accreditation status, DESE makes a recommendation to the State Board based on its analysis of a district's performance pursuant to DESE's UYAPR Manual, as opposed to the State Board's MSIP Rule.

At its July 27, 2006 meeting, the State Board established the "Special Advisory Committee to evaluate the St. Louis Public School District and prepare a report to the Commissioner of Education and the State Board of Education

advising them of the challenges facing the District and providing recommendations for improvement. Ex. 58; Herschend Test. 189-90 (10/2/07). The Special Advisory Committee's Report was issued on December 17, 2006 and was formally considered by the State Board at its January 11, 2007 meeting. Ex. 269; Ex. 72; Herschend Test. 192 (10/2/07).

The Special Advisory Committee Report observed that in the event the State Board decided the District should be unaccredited, the State Board could first vote to reestablish the Transitional School District pursuant to its authority to do so under Section 162.1100, which was enacted as a part of Senate Bill 781. Ex. 72. On February 15, 2007 the State Board did just that and voted 5-2 to reestablish the Transitional School District. App. A12; Herschend Test. 196 (10/2/07).

The State Board next met on March 22, 2007, at which time DESE representatives made a presentation to the State Board of Education. App. A12-A13. A DESE representative reviewed the academic history of the District and the District's performance as analyzed by DESE for its March 5, 2007 APR. In addition to reviewing which standards were "met" and "not met," as determined by

DESE at that time pursuant to DESE's calculations found in the UYAPR Manual, the DESE representative reviewed the controversy between DESE and the St. Louis Public School administration regarding whether Standard 9.4.2 and Standard 9.4.3 had been satisfied pursuant to the formulae contained in the UYAPR Manual. App. A16; Ex. 259; Kemna Test. 84-87 (10/2/07). DESE recommended unaccreditation based on that review of the District's achievement as measured by DESE's UYAPR Manual calculations. App. A27; Kemna Test. 167-68 (10/2/07). The State Board voted that same day to unaccredit the District with an effective date of June 15, 2007. Ex. 271.

As explained above, the State Board is required by law to follow its own administrative rules. See State ex rel. Stewart v. Civil Service Com'n of City of St. Louis, 120 S.W.3d 279, 287 (Mo. Ct. App. 2003). The State Board's administrative rule requires the State Board to base its decisions on a review of the three kinds of Standards found in the MSIP: Resource, Process and Performance Standards. The circuit court erroneously applied the law when it found that the State Board's decision to unaccredit the District was valid, despite being based on

the information provided by the Advisory Committee and the information presented by DESE at the State Board's March 22, 2007 meeting. App. A28.

The Advisory Committee Report did not review the District's performance pursuant to the State Board's published MSIP standards, and DESE's recommendation was based on its analysis of only one set of those standards, the Performance Standards, as measured by DESE pursuant to its invalid rule. See Ex. 259; Ex. 72. Therefore, the State Board was never presented with any evidence of the District's performance as measured by its own MSIP Standards. Because the circuit court found that the State Board's decision was based on these factors, as opposed to an analysis of the District's performance under the State Board's MSIP Standards, the circuit court erroneously applied the law in upholding the State Board's decision.

iii. The Circuit Court's Decision Should Be Overturned because it Was Not Based on Substantial or Competent Evidence.

The circuit court's determination that the State Board's decision was valid should also be overturned because it was not based on substantial evidence. "Substantial" evidence is "competent" evidence from which the trier of fact could

reasonably decide the case. M.R. v. S.R., 238 S.W.3d 205, 209 (Mo. Ct. App. 2007). "Substantial evidence" means "evidence which, if true, would have a probative force upon the issues [and] implies and comprehends competent, not incompetent evidence." State ex rel. Rice v. Public Serv. Comm'n, 220 S.W.2d 61, 64 (Mo. 1949) (en banc) (citations omitted) (emphasis added).

Here, the circuit court found that the State Board's decision was based on the information provided by the Advisory Committee and the information provided by DESE at the March 22, 2007 State Board meeting. App. A28. Neither of these two sources of information are "competent evidence" upon which the State Board could base its decision or the circuit court could uphold such a decision because they are not a part of the MSIP Standards on which the State Board is required by Rule to base its decisions. 5 CSR 50-345.100(3).

As stated, the information presented by the Advisory Committee is not based on an evaluation of the District's performance under the State Board's MSIP Standards. Further, the State Board has no authority to assemble a Special Advisory Committee to inform its accreditation decisions or to delegate its responsibility to a Special Advisory Committee. An administrative agency may

not delegate its authority absent express statutory authority to do so. State ex rel. Rogers v. Bd. of Police Comm'r, 995 S.W.2d. 1, 6 (Mo. Ct. App. 1999). Thus, the Special Advisory Committee report is not "competent" evidence in this context because it is not evidence on which the State Board is authorized to base its decisions under the State Board's MSIP Rule. The circuit court also held that the information presented by DESE on March 22, 2007 was a valid basis for the State Board's decision. App. A28. However, the Court also inconsistently found that "DESE's UYAPR Manual is a rule and should have been promulgated." App. A31. DESE's presentation to the State Board was based on its own analysis of the District's performance under the UYAPR Manual, which the circuit court held to be an invalid rule. App. A31. Because DESE's presentation and recommendation were based on its analysis under an invalid rule they are not "competent" evidence and therefore not substantial evidence.

C. The Circuit Court's Determination That the State Board Did Not Utilize DESE's UYAPR Manual is Against the Weight of the Evidence and Without the UYAPR Manual, the MSIP Standards are Vague.

The circuit court correctly found that DESE's UYAPR Manual is a "rule" within the meaning of Section 536.010(6) that should have been noticed and published pursuant to Section 536.021 of the Missouri Administrative Procedures Act. App. A31-32. The circuit court correctly noted: "a failure to promulgate a rule as required voids the decision that should have been promulgated as a rule." Dept. of. Soc. Services v. Little Hills Healthcare, 236 S.W.3d 637, 643 (Mo. 20007)(en banc); see also, NME Hospitals, Inc. v. Dept. of Social Servs, 850 S.W.2d 71, 74-75 (Mo. 1993) (en banc). However, the Court incorrectly held that the State Board's accreditation decision was valid despite the invalidity of DESE's invalid UYAPR Manual. App. A34.

The State Board rule identifies many of its Performance Standards as "high or increasing" performance with regard to a particular Standard. If the State Board did not utilize DESE's UYAPR Manual in finding the District unaccredited, then

the State Board somehow utilized the data presented by DESE and independently determined that the District's performance was not "high or increasing" with regard to the various performance standards. The data presented to the State Board by DESE, based on DESE's final APR for the District, clearly indicated that the percentages measured by Standard 9.4.2 and 9.4.3 were "increasing". If the State Board, utilizing only the MSIP Rule Standards, found that these measures were not achieved, the State Board's MSIP Rule must be unconstitutionally vague.

Either the State Board utilized DESE's UYAPR Manual and the Board's decision is void for being based on an invalid rule, or it utilized only the MSIP Standards incorporated into the State Board's MSIP Rule, which are void for vagueness. The State Board's decision is invalid under either outcome.

i. <u>The State Board Improperly Based Its Review of the District's Academic Performance on DESE's Invalid Rule.</u>

Much of the circuit court's findings of fact in its Final Order and Judgment address whether two of the Performance Standards at issue were "met" pursuant to the calculations and analysis established by DESE's unpublished rule. App. A16-

A27. The circuit court goes into great detail regarding the calculation of Standard 9.4.2, the Career Education Standard, and Standard 9.4.3, the College Placement Standard. Those Standards originate in the State Board's MSIP Rule, which describes the Standards as:

> 9.4.2. The percent of credits taken by juniors and seniors in Department-designated vocational classes is high or increasing.
>
> 9.4.3. The percent of students who attend postsecondary education within six months of graduation is high or increasing.

The circuit court's analysis focuses on whether these standards were "met" or "not met" as determined under DESE's unpublished and invalid UYAPR Manual. App. A16-A27. Much of Becky Kemna's March 22, 2007 presentation to the State Board focused on why, under DESE's unpublished rule, these two standards were "not met." Ex. 259; Kemna Test. 85-87, 103 (10/2/07).

a. <u>The Performance Standards Reviewed by the State Board and Circuit Court Were Measured Pursuant to DESE's UYAPR Manual.</u>

The circuit court and DESE focused on these two standards because the District would be provisionally accredited if it met six performance standards and would be unaccredited if it met less than six. However, the requirement that the District meet six standards is found only in DESE's UYAPR Manual. There is nothing in the State Board's MSIP Rule which delineates how many standards are needed for a district to be accredited. See Ex. 1, 2, 3.

Furthermore, in all of the circuit court's and DESE's discussion and analysis of Standards 9.4.2 and 9.4.3, the focus was not on whether the District's performance with regard to these standards was "high or increasing" as those terms are commonly understood, but whether it was "high or increasing" as that language is defined by the calculations found in DESE's unpublished rule, the UYAPR Manual. In fact, the data presented to the State Board on March 22, 2007 regarding all of the other performance standards simply stated whether those standards were "met" or "not met" pursuant to DESE's calculations found in the UYAPR Manual. Ex. 259. The State Board was not given information that would allow it to independently analyze the District's performance with regard to these performance standards. Thus, it is difficult to comprehend how the State Board

could have evaluated these factors independently of DESE's invalid rule based on the information presented to the State Board.

The DESE requirement that a District must meet six of fourteen performance standards to be provisionally accredited is not contained in the State Board's MSIP Rule. See Kemna Test. 154 (10/2/07). The formulas and calculations that DESE analyzed to determine whether certain standards are "met" or "not met" are not found in the State Board's MSIP Rule. See Bourisaw Test. 60-61 (10/2/07). The requirement that a district must achieve a certain number of "progress" and "status" points is not found in the State Board's MSIP Rule. See Bourisaw Test. 219-21 (9/25/07). The requirement that a district must fall within a certain number of standard deviations of the statewide mean is not contained in the State Board's MSIP Rule. See Kemna Test. 150-51 (10/2/07). The requirement that five years of data must be evaluated is not included in the State Board's MSIP Rule. The limitation to consideration of Performance Standards, and disregard for Resource and Process Standards is also not consistent with the State Board's MSIP Rule. See Bourisaw Test. 123-24 (9/25/07). All of these

elements by which the District was evaluated are found in the invalid unpublished rule utilized by DESE. See Ex. 1, 2, 3.[16]

[16] DESE's unpublished UYAPR Manual has long been the basis for determining whether or not districts are accredited, unaccredited, or provisionally accredited. DESE's influence with regard to the accreditation process is so pervasive that it was able to shift the focus of accreditation review from all three types of standards identified in the State Board's MSIP Rule to just one type of standard, the Performance Standards. Prior to July 2006 DESE's UYAPR Manual analyzed school districts on a 100-point scale that included Resource and Process Standards, as well as Performance Standards. App. A13. Kemna Test. 82 (10/2/07); Bourisaw Test. 116-17 (9/25/07). Then, prior to the 2006 school year, DESE drastically altered its accreditation review by amending its UYAPR Manual so that districts were only reviewed based on their achievement under the MSIP Performance Standards, and not reviewed at all with regard to Process Standards and Resource Standards. Thus, DESE completely altered the focus of accreditation review from the three kinds of Standards addressed in the State Board's MSIP Rule to only one, Performance Standards, simply by revising its UYAPR Manual. Id. DESE did so without ever publishing a rule and without any changes being made to the State Board's MSIP Rule.

b. The State Board's Consideration of the District's History of Performance Was also Based on DESE's Analysis under the DESE UYAPR Manual.

At trial, State Board President Peter Herschend also testified that the State Board's accreditation determination was based in part on the District's history of academic performance. Herschend Test. 201 (10/2/07). That "history" was reviewed for the State Board by Becky Kemna of DESE at the State Board's March 22, 2007 meeting. Ms. Kemna reviewed for the State Board the District's performance for each of the school years 1998-99 through 2005-06. Ex. 259. Every year the District was officially classified as provisionally accredited. Ex. 259. During those years, the State Board only made a determination regarding the District's accreditation for the 2003-04 school year. Ex. 259. Ms. Kemna's presentation of how many "points" the District received in those years and whether or not the District was "unaccredited" or "provisionally accredited" during that period was based solely on DESE's evaluation of the District under DESE's invalid unpublished rule. Thus, even the data presented to the State Board regarding the "history" of the District's performance is only a measure of

the history of the District's performance under DESE's unpublished rule. The State Board did not independently analyze the District's actual history of performance, but was instead presented with a review of DESE's conclusions as to how the District was performing, as measured pursuant to DESE's invalid rule.

c. The Circuit Court's Determination that the State Board Independently Determined the District's Accreditation Status is Against the Weight of the Evidence and Should be Overturned.

The circuit court found that the State Board makes accreditation determinations independently of DESE's analysis and recommendations and that the State Board's decision was therefore valid and based on competent and substantial evidence. App. A27. The circuit court's finding on this matter is against the weight of the evidence and should be overturned. "'Weight of the evidence' means its weight in probative value, not the quantity or amount of evidence. The weight of the evidence is not determined by mathematics, but on its effect in inducing belief." Bauer v. Bauer, 38 S.W.3d 449, 455 (Mo. Ct. App. 2001). The weight of the evidence presented to the circuit court demonstrated that

the State Board's decision was based on an analysis of the District's performance under an invalid rule and that, absent the formulas and calculations contained in DESE's invalid rule, the District met MSIP Performance Standards that DESE claimed were not met. See infra pp. (112-15).

Regardless of the State Board's authority to accept or reject DESE's recommendation regarding the District's accreditation, the reality is that the question of the District's accreditation status was based upon its performance as measured by DESE's unpublished and therefore invalid rule. DESE presented a recommendation to the State Board based entirely on its evaluation of the District pursuant to DESE's invalid rule. The State Board never considered whether the District had satisfied the State Board's MSIP Rule standards independently of DESE's analysis and recommendation. An administrative agency decision based on an invalid unpublished rule is void. Dept. of Soc. Services v. Little Hills Healthcare, 236 S.W.3d 637, 643 (Mo. 2007) (en banc). Therefore, the State Board's determination that the District is unaccredited is void and the purported operation of Section 162.1100 to transfer authority to the Special Administrative Board of the TSD is a nullity.

ii. If the State Board Had Used its Published MSIP Rule and Not Relied on DESE's Analysis Under the UYAPR Manual, the District Could Not Have Been Found Unaccredited.

The bulk of the Performance Standards for K-12 Districts contained in the State Board's MSIP Rule only require that achievement of a district with regard to a particular standard be "high or increasing." Ex. 2. Absent the various formulas, time periods, and arbitrary standards established and utilized by DESE, this standard of "high or increasing" is very basic. In fact, the two standards that Becky Kemna highlighted in her presentation to the State Board on March 22, 2007, the same standards that were discussed at length in the circuit court's Final Order and Judgment, were both satisfied in 2006. App. A16-A27. Kemna Test. 85-87, 103 (10/2/07).

With respect to Standard 9.4.2, the Career Education Course Standard, according to DESE's March 5, 2007 APR for the District, the APR which was presented to the State Board, the percent of credits earned in career education courses went from 10.4% in 2005 to 11.4% in 2006. Ex. 87. Thus, under the plain language of the State Board's MSIP Rule, the standard was met. The percent

of credits taken by juniors and seniors in Department-designated vocational classes had increased from the previous year.

The same is true with respect to Standard 9.4.3, the College Placement standard. According to DESE's March 5, 2007 APR for the District, the percentage of students who attend postsecondary education within six months of graduation went from 38.4% in 2004 to 39% in 2005, the last year for which data was available for this standard for the 2006 APR. Ex. 87. Thus, under the plain language of the State Board's MSIP Rule, this standard was also met. The percentage of students attending postsecondary education within six months of graduation had increased from the previous year. See also Bourisaw Test. 153-54 (9/25/07) (testifying that percentage of students attending postsecondary education within six months of graduating was "increasing" and that the percentage of credits taken by juniors and seniors in department-designated vocational classes was "increasing"); Kemna Test. 163 (10/2/07) (testifying that, based on latest DESE APR on March 5, 2007, percentage of graduates entering college was "increasing" from 2001 to 2005).

The purpose of statutory construction is to ascertain the intent of the legislature. Dir., Mo. Dep't of Pub. Safety v. Murr, 11 S.W.3d 91, 96 (Mo. Ct. App. 2000) (citations omitted). When interpreting statutes, courts are to give the language used its plain and ordinary meaning. Rupert v. State, 250 S.W.3d 442, 448 (Mo. Ct. App. 2008). In the absence of a statutory definition, a word's plain and ordinary meaning is derived from the dictionary. State v. Bush, 250 S.W.3d 776, 780 (Mo. Ct. App. 2008). Regulations of administrative agencies are subject to the same principles of statutory construction as statutes. Teague v. Mo. Gaming Comm'n, 127 S.W.3d 679, 685 (Mo. Ct. App. 2003). The term "increase" is defined by the dictionary as "to become greater or larger." American Heritage Dictionary 653 (2d. ed. 1982).

The evidence presented to the State Board and the circuit court with regard to Standards 9.4.2 and 9.4.3 clearly established that performance in these areas had increased. The District satisfied the standards as they are described in the State Board's MSIP Rule. The State Board must have utilized DESE's UYAPR Manual to find the District unaccredited. Thus, the circuit court's determination that the

State Board's decision was valid despite the invalidity of DESE's unpublished UYAPR Manual is against the weight of the evidence.

iii. If the State Board Did Not Utilize DESE's UYAPR Manual Then the Published MSIP Standards Were Met or Are Unconstitutionally Vague.

If the State Board did not utilize DESE's UYAPR Manual in finding the District Unaccredited, then the State Board somehow utilized the data presented to it and independently determined that the District's performance was not "high or increasing" with regard to the various Performance Standards. As explained above, the data presented to the State Board by DESE, based on DESE's final APR for the District, clearly provided that the percent of credits earned in career education courses went from 10.4% in 2005 to 11.4% in 2006 and that the percent of students who attend postsecondary education within six months of graduation went from 38.4% in 2004 to 39% in 2005, the last year for which data was available for this standard for the 2006 APR. Ex. 87. The data clearly indicated that the percentages measured by Standard 9.4.2 and 9.4.3 were "increasing." If

the State Board, utilizing only the MSIP Rule standards, found that these measures were not achieved, the State Board's MSIP Rule must be unconstitutionally vague.

The standard for determining whether a law is void for vagueness is whether the terms or words used are of "of common usage and are understandable by persons of ordinary intelligence . . . ." State v. Beine, 162 S.W.3d 483, 491 (Mo. 2005) (en banc). Where, however, the language is of such uncertain meaning, or so confused that the courts cannot discern with reasonable certainty what is intended, the law is void. Lincoln Credit Co. v. Peach, 636 S.W.2d 31, 36 (Mo. 1982) (en banc). "[T]he vagueness doctrine assures that guidance, through explicit standards, will be afforded to those who must apply the statute, avoiding possible arbitrary and discriminatory application." Conseco Finance Servicing Corp. v. Mo. Dept. of Revenue, 195 S.W.3d 410, 415 (Mo. 2006) (en banc); Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972) (emphasis added).

In Ferguson Police Officers Association v. City of Ferguson, employees of the Ferguson Police Department challenged a provision of the city charter which provided that certain city employees could not "engage, directly or indirectly, in sponsoring any person as a candidate for Councilman or in any way electioneer for

or against a candidate for Councilman . . . ." 670 S.W.2d 921, 923 (Mo. Ct. App. 1984). The court held that the provision was not sufficiently explicit and therefore void for vagueness, reasoning that it left open the possibility of arbitrary and discriminatory enforcement because the language was unclear enough that the city manager could "interpret § 29 as he or she sees fit when a particular situation arises, without the guidance of written regulations." Id. at 927. Courts from other jurisdictions have recognized in various contexts that interpretations of comparative adjectives such as "high" or "low" may vary substantially. See, e.g., Hastings Mfg. Co. v. Automotive Parts Corp., 39 F.Supp. 319, 326 (D.C. Mich. 1941) (stating that patent claim should not make use of indeterminate adjectives such as "high" or "low" in describing functions, as such terms are open to varying interpretations); In re Nakoski, 742 A.2d 260, 264 (Pa. Ct. Jud. Disc. 1999) (stating in dicta that judicial canon which refers to "high standards of conduct" is "a standard which we believe would be considered unconstitutionally vague . . . .").

The MSIP Standards are unconstitutionally vague because, in the absence of further details or clarification, they are so vague and incomplete that a person of

ordinary intelligence would not know what is required. Many of the Performance Standards require percentages that are "high or increasing." This standard provides no meaningful guidance, but rather leaves superintendents, teachers, pupils, school districts, school boards, and the public to speculate as to its meaning. The only way these standards are not vague is by applying the unpublished and therefore invalid rule.

Whether or not a percentage is "high" could vary greatly depending upon the region and socioeconomic factors of a particular district. Even if the term is not considered with regard to the context in which a particular district operates, there is no clear indication from the rule what percentage may qualify as "high." Furthermore, the term "increasing" is an equally vague and amorphous term. Such a standard could require a percentage increase from a previous semester, a previous school year, or an average increase over a period of years. The term "high or increasing" does not provide any useful guidance and could not, standing alone, be understood and interpreted by a person of ordinary intelligence. This is especially clear in light of the fact that the State Board was able to find that

Standards 9.4.2 and 9.4.3 were not met, despite the fact that the percentages in those areas had plainly increased from the previous year.

The State Board claims it did not utilize DESE's unpublished UYAPR Manual in reaching its decision. The requirement that a District must meet six of fourteen performance standards to be provisionally accredited is only found in the UYAPR Manual. See Kemna Text. 154 (10/2/07). The formulas and calculations used to determine whether certain standards are "met" or "not met" are only found in the UYAPR Manual. See Bourisaw Test. 60-61 (10/2/07). The requirement that a district must achieve a certain number of "progress" and "status" points is only found in the UYAPR Manual. See Bourisaw Test. 219-21 (9/25/07). The additional details and formulae attempted to be provided in the UYAPR Manual are invalid for the reasons set forth above. Therefore, the State Board MSIP Rule opens the door to arbitrary and discriminatory interpretation and enforcement and is therefore void for vagueness.

The State Board's decision is invalid under either outcome. Either the State Board utilized DESE's UYAPR Manual and the Board's decision is void for being

based on an invalid rule, or it utilized only the MSIP Standards incorporated into the State Board's MSIP Rule, which are void for vagueness.

D. The State Board Acted Arbitrarily and Capriciously to the Extent It Based Its Accreditation Decision on Stability of District Leadership and District Finances.

State Board of Education President Peter Herschend testified that, in addition to DESE's analysis regarding the District's academic performance, the State Board considered the turnover in the superintendent position, media coverage of turmoil amongst board members and the District's financial performance in unaccrediting the District. Herschend Test. at 191-93, 213, 221 (10/2/07). To the extent that these factors are not a part of the MSIP standards or any State Board Rule, they cannot and do not constitute a basis for the State Board's accreditation decision. The circuit court misapplied the law in upholding a decision based on such factors, as the State Board's MSIP rule requires accreditation decision to be based on the standards of the State Board's MSIP Rule. 5 CSR 50-345.100.

The State Board's reliance on the District's financial performance is further arbitrary and capricious because the District's negative fund balances were caused by borrowing that the State Board expressly agreed to. See Ex. 24, Tabs 13 & 14; Downs Test. 41-42 (9/25/07); Bourisaw Test. 144-46 (9/25/07). In June 2003, the District was experiencing financial difficulties caused by a substantial and precipitous reduction in state funds. Herschend Test. 224 (10/2/07). A private management team was hired by the Elected Board to reduce costs and to ensure efficiency of operation. Downs Test. 38-39 (9/25/07). Upon examining the District's financial condition in early June 2003, the management team concluded there was an immediate and significant short-term cash flow problem. Downs Test. 39-41 (9/25/07). Thus, the management team, in order to keep the schools from closing, requested and obtained permission from the State to borrow funds from the Desegregation Capital Account (the "Account"), established pursuant to the 1999 Desegregation Settlement Agreement, to use for operating purposes.[17]

[17] This agreement was presented to the federal district court for approval because it authorized the District to borrow money from a fund without repaying it, contrary to the limitation contained in Section 165.011.2, which requires borrowing from a designated fund to be repaid within the same fiscal year.

Bourisaw Test. 144-46 (9/25/07). Thus, in 2003 the State, the Elected Board and the Desegregation Case Plaintiffs reached an agreement. See Ex. 24, Tab 13, pp. 2-3; Bourisaw Test. 145-46 (9/25/07). This agreement permitted the Elected Board to: 1) borrow up to $49 million from the Account during fiscal year 2004; and 2) repay the amount borrowed in six annual installments each roughly equal in size. Id. The first scheduled payment was due June 30, 2005. Ex. 24, Tab 13. The loan agreement the parties to the desegregation litigation entered into was approved by a federal district court consent decree. Ex. 24, Tab 13.

During fiscal year 2004, the Elected Board borrowed $47.1 million from the Account. Ex. 24, Tab 14, p. 2. At trial, both State Board President Peter Herschend and District Superintendent Diana Bourisaw testified that it was this borrowing (and the agreement that the funds could be repaid over six years) that has resulted in the District's negative fund balance that the State Board asserted as a basis for unaccrediting the District. Herschend Test. at 222-23 (10/2/07); Bourisaw Test. 144-46 (9/25/07). Moreover, in January 2005, instead of finding the District unaccredited for financial reasons, the State Board agreed to modify the Loan Agreement and extended the due date for the first repayment to June

2007. Ex. 24, Tab 14; Herschend Test. 223 (10/2/07). All this time the District remained provisionally accredited.

It is unreasonable, arbitrary and capricious for the State Board to now find the District's negative fund balances to be a basis for unaccrediting the District since the State Board agreed to such spending. The State Board, as a party to the Loan Modification Agreements, consented to money being borrowed and knew that during the repayment term, the Elected Board would maintain a negative fund balance. Having agreed to such a condition, the State Board acted arbitrarily and capriciously in relying on this condition as a basis for unaccrediting the District. The negative fund balances the District has experienced for the past few years are a natural and logical consequence of the District borrowing $47.1 million from the Account in 2004. The State Board contractually agreed that the District should be authorized to borrow such a large amount in order to address financial shortfalls the District was experiencing at that time, mostly due to reductions in State education funding. Bourisaw Test. 139 (9/25/07); Herschend Test. 223-24 (10/2/07). The 2003 and 2005 Agreements entered into by the Board and the State expressly authorize such borrowing. Ex. 24, Tabs 13 & 14. An implied covenant

of good faith and fair dealing exists in every contract. Penalizing the District for the consequences of borrowing that the State Board contractually authorized does not comport with standards of good faith and fair dealing to which parties to a contract should adhere. Beavers v. Recreation Ass'n of Lake Shore Estates, Inc., 130 S.W.3d 702, 717 (Mo. Ct. App. 2004).

The circuit court's decision upholding the validity of the unaccreditation of the District by the State Board of Education should be reversed. The State Board violated its own rule by considering factors outside the State Board's MSIP Rule in making its accreditation decision. The State Board improperly relied on DESE's analysis of the District pursuant to DESE's unpublished and invalid rule, without which the standards of the State Board's MSIP Rule are unconstitutionally vague. The State Board also relied on stability of District Leadership and other information presented in the Special Advisory Committee report. These factors, and the use of a Special Advisory Committee, are not provided for by the State Board's MSIP Rule and therefore do not constitute a valid basis for the State Board's decision. Finally, the State Board's reliance on the District's financial condition cannot be upheld because the District's financial condition was caused

by borrowing that was expressly ratified by the State Board of Education through the 2003 and 2005 Loan Agreements. The circuit court's decision upholding the validity of the State Board's accreditation decision with regard to the District should be reversed. The transfer of powers to the Special Administrative Board should be held void with a declaration that the District should be returned to its prior accreditation status and that the Elected Board has all powers necessary to govern and oversee the District pursuant to Chapter 162 of the Missouri Statutes.

V. The circuit court erred in ruling that Appellants' claims did not arise under Chapter 536 because: (1) neither Chapter 536 of the Missouri Statutes nor Missouri case law sets forth any pleading standard requiring that a Petition for Review of an administrative action expressly state that Review is brought pursuant to Chapter 536; and (2) a declaratory judgment action may properly be used to seek review pursuant to Chapter 536 in that in the First Amended Petition, denominated as a Petition for Review, Appellants sought circuit court review of a decision of an administrative agency in a non-contested case.

The standard of review for this claim of error is the same as for Point I, supra.

A. Petitioner is Not Required to Plead that Review is Sought Under a Provision of Chapter 536 in Seeking Judicial Review of Administrative Agency Decision or Rulemaking.

Even if this Court finds no constitutional violation, the determination of unaccredited status of the District is invalid and void. As a consequence the divestiture of power set forth in Section 162.1100.3 is of no effect, and this Court should find that the Elected Board members should be reempowered and the SAB relegated to an advisory position.

The circuit court held in its Final Order and Judgment that DESE's UYAPR Manual is a "rule" within the meaning of Section 536.010(6) that should have been noticed and published pursuant to Section 536.021. App. A31-A32. As the circuit court noted, "a failure to promulgate a rule as required voids the decision that should have been promulgated as a rule." Dept. of Soc. Services v. Little Hills Healthcare, 236 S.W.3d 637, 643 (Mo. 2007) (en banc). The court below erred however, when it held that cases such as Little Hills Healthcare do not apply

here because the Appellants' claims did not arise under Chapter 536.[18] App. A4, A33. The Court reasoned that "Petitioners merely seek a declaratory judgment as to whether the SBOE's actions . . . were arbitrary or capricious, or so lacking in basis or reason to be void. Accordingly, the Little Hills Healthcare line of cases does not apply." App. A33. The circuit court's holding on this point erroneously declares the law and should be reversed.

i. Missouri Law Does Not Require a Petition For Review of an Administrative Agency Decision to Designate Under What Provision of Chapter 536 Review is Sought.

Nowhere in the Little Hills Healthcare case does the court state that its application is dependent upon a petition being designated as a petition for review under a specific provision of Chapter 536. Little Hills Healthcare, 236 S.W.3d 637. See also, NME Hospitals, Inc. v. Department of Social Servs, 850 S.W.2d

[18] The Circuit Court notes: "The City Board claimed that it is seeking review of the SBOE's accreditation decision under Section 536.150, i.e., an 'uncontested case' review under the Missouri Administrative Procedures Act. But neither the Petition nor the Amended Petition invokes this statute anywhere in its dozens of counts . . ."

71, 74-75 (Mo. 1993) (en banc) (an agency decision that should have been promulgated as a rule, but was not promulgated according to the rulemaking procedures set out in the Missouri Administrative Procedures Act ("MAPA"), will be invalidated). These cases set forth a basic principal of law regarding the effect of the failure to follow rulemaking procedures under MAPA. Such principles apply regardless of whether the petition expressly identifies under what provision of MAPA review is sought. The circuit court offers no legal support for the conclusion that the First Amended Petition must be designated as a petition for review under Section 536.150 for this line of cases to be applicable, and no such requirement exists.[19] MAPA does not set forth any pleading requirements that

[19] In fact, both Section 536.150, providing for judicial review in an uncontested case and Section 536.050, providing for judicial review of an administrative agency's rulemaking procedures, authorize a wide variety of causes of action which may be employed in seeking judicial review pursuant to those provisions. Section 536.150 provides that judicial review of an administrative agency's decision in a non-contested case may be had by a "suit for injunction, certiorari, mandamus, prohibition or other appropriate action . . . ." Mo. Rev. Stat. § 536.150 (2000) (emphasis added). That section further provides that "[n]othing in this section shall be construed . . . to limit the jurisdiction of any court or the scope of

must be met when seeking judicial review of an administrative agency decision of a non-contested case.

Further, general pleading standards in Missouri dictate that a petition's allegations will be given liberal construction according to their reasonable and fair intendments and, when so considered, a petition is sufficient if its averments invoke substantial principles of law which entitle the petitioner to relief. See Williamson's Estate v. Williamson, 380 S.W.2d 333, 337-38 (Mo. 1964). A petition will not be held insufficient because of a lack of definiteness or certainty in allegation. Mathews v. Pratt, 367 S.W.2d 632, 634 (Mo. 1963). Here, the Petitioner-Appellants clearly pled that their petition was a request for judicial review of an administrative decision in a non-contested case. The First Amended Petition was designated as a "Petition for Review and for Declaratory Judgment" and raised various challenges to the State Board's accreditation determination. In fact, during the trial of this case before the circuit court, the court asked counsel for the Elected Board Plaintiffs whether review was sought under Chapter 536 and

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any remedy available in the absence of this section." Id. Section 536.050 expressly authorizes a declaratory judgment with regard to a declaration regarding the validity of administrative agency rules. Mo. Rev. Stat. § 536.050 (2000).

he responded that it was. Tr. 23 (9/25/07). Thus, to the extent there was any confusion as to this issue, it was addressed and resolved before the circuit court. The court did not find any jurisdictional or other procedural deficiency with regard to the First Amended Petition. Rather, the court's argument that the Petition does not seek review under Chapter 536 is merely an attempt to avoid the application of cases such as Little Hills Healthcare and NME Hospitals, Inc., cases which are clearly applicable in this case.

ii. Declaratory Judgment Cause of Action is Appropriate Vehicle for Review of Non-Contested Case and Challenge to Invalid Rule.

As noted by the circuit court, the First Amended Petition sought a declaratory judgment under § 527.010, et seq. of the Missouri Statutes.[20] Section 527.010 gives circuit courts the "power to declare rights, status, and other legal

[20] In its Final Judgment and Order the Circuit Court erroneously states that the First Amended Petition "repeatedly invokes Section 537.020, the general declaratory judgment statute . . . ." App. 4. The First Amended Petition actually invokes the Court's authority to issue a declaratory judgment under §§ 527.010 et seq., the declaratory judgment statutes. L.F. at 53.

relations whether or not further relief is or could be claimed." Mo. Rev. Stat. § 527.010 (2000). The purpose of the declaratory judgment law is to "settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and it is to be liberally construed and administered." Mo. Rev. Stat. § 527.120 (2000). Section 536.150, which provides for judicial review of non-contested cases, authorizes judicial review by a broad and open-ended variety of actions. That section provides that the decision of an administrative agency in a non-contested case "may be reviewed by suit for injunction, certiorari, mandamus, prohibition or other appropriate action, . . . and the court may determine whether such decision, in view of the facts as they appear to the court, is unconstitutional, unlawful, unreasonable, arbitrary, or capricious or involves an abuse of discretion." Mo. Rev. Stat. § 536.150.1 (2000). Thus, the statute provides that the forms of judicial relief which may be sought to review a non-contested case are broad and open-ended. Further, Section 536.150 expressly states that: "Nothing in this section shall be construed . . . to limit the jurisdiction of any court or the scope of any remedy available in the absence of this section." Mo. Rev. Stat. § 536.150.3 (2000).

Furthermore, in support of its argument that the State Board's accreditation determination was arbitrary, capricious and void, Appellants in the First Amended Petition sought a declaration that DESE's UYAPR Manual was an unpublished and therefore invalid rule. Section 536.050 provides for judicial review regarding the validity of rules. That section provides: "The power of the courts of this state to render declaratory judgments shall extend to declaratory judgments respecting the validity of rules, or of threatened applications thereof, and such suits may be maintained against agencies whether or not the plaintiff has first requested the agency to pass upon the question presented." Mo. Rev. Stat. § 536.050 (2000).

The First Amended Petition sought a declaration that DESE's UYAPR Manual is invalid as an unpublished rule, a cause of action expressly authorized by Section 536.050. The Little Hills Healthcare line of cases addresses the effect of failure to follow proper rulemaking procedures under MAPA. The circuit court erred in stating that such a line of cases does not apply in the context of this case, as such cases are directly on point in the context of a declaration regarding the validity of a rule. See, Little Hills Healthcare, 236 S.W.3d at 637; NME Hospitals, Inc., 850 S.W.2d at 74-75.

The circuit court's determination that cases such as Little Hills Healthcare and NME Hospitals, Inc. do not apply in the instant case to void the decision of the State Board should be reversed. The First Amended Petition was a petition for review under Chapter 536 of the Missouri Statutes and properly utilized the declaratory judgment cause of action to seek review under Chapter 536. Further, nothing in those cases suggests that they are only applicable where a petition expressly states that it is brought pursuant to Chapter 536. The First Amended Petition seeks review of a non-contested case administrative agency decision and challenges a rule of an administrative agency. This Court should apply its recent decision in Little Hills Healthcare and hold that the State Board's accreditation decision is based on an invalid unpublished rule and therefore void. The circuit court's decision upholding the validity of the State Board's accreditation decision with regard to the District should be reversed and the transfer of powers to the Special Administrative Board be held void with a declaration that the Elected Board has all powers necessary to govern and oversee the District pursuant to Chapter 162 of the Missouri Statutes.

VI. The circuit court erred in ruling that the only powers retained by the Elected Board after the transfer of powers to the Transitional School District pursuant to Section 162.1100.3 are the powers of auditing and public reporting because the legislature cannot be presumed to have enacted a meaningless provision in Section 162.1100.3, which expressly limits the powers which may vest in the Transitional School District to those granted to the Board of Education on or before August 28, 1998 in that the voters of the City of St. Louis granted the Board of Education the authority to collect and expend the Desegregation Sales Tax and the existing debt service levy after August 28, 1998.

The standard of review for this claim of error is the same as for Point I, supra.

Section 162.1100.3 provides that in the event the District loses its accreditation, "any powers granted to any existing school board in a city not within a county on or before August 28, 1998, shall be vested with the special administrative board of the transitional school district . . . ." Mo. Rev. Stat. § 162.1100.3 (2000). This statutory provision explicitly limits the transfer of powers to the appointed board to those powers granted to the Elected Board "on or before August 28, 1998." Id. The circuit court disregarded the plain meaning of the law and ignored basic principals of statutory construction by holding that the

date limitation contained in this statute, "August 28, 1998," is a meaningless provision of the statute. App. A58.

A. Canons of Statutory Interpretation Require That the Statute Be Given Its Plain and Ordinary Meaning and That All Statutory Language Be Given Meaning.

Pursuant to Section 162.1100, the Elected Board retains certain powers even when the Transitional School District is in place. These powers fall into two broad categories as set forth by the General Assembly. First, the Board retains all powers granted to it after August 28, 1998. Mo. Rev. Stat. § 162.1100(3) (2000). Second, the Elected Board retains "auditing and public reporting powers." Mo. Rev. Stat. § 162.621.2 (2000).

Statutory construction is a matter of law. City of St. Joseph v. Village of Country Club, 163 S.W.3d 905, 907 (Mo. 2005) (en banc). The primary rule of statutory construction is to determine the intent of the legislature from the language used by considering the plain and ordinary meaning of the words used in the statute. Maxwell v. Daviess County, 190 S.W.3d 606, 610 (Mo. Ct. App. 2006); Delta Air Lines, Inc. v. Dir. of Revenue, 908 S.W.2d 353, 355 (Mo. 1995)

(en banc). The starting point in statutory interpretation is always the plain language of the statute. Jones v. Dir. of Revenue, 981 S.W.2d 571, 574 (Mo. 1998) (en banc). Words in a statute should be given their plain and ordinary meaning whenever possible, and courts will look elsewhere for interpretation only when the meaning is ambiguous. Spradlin v. City of Fulton, 982 S.W.2d 255, 258 (Mo. 1998) (en banc). Where the language of a statute is clear, the court should regard the laws as meaning what they say; the legislature is presumed to have intended exactly what it states directly and unambiguously. State ex rel. Bunker Res., Recycling & Reclamation, Inc. v. Dierker, 955 S.W.2d 931, 933 (Mo. 1997) (en banc). Where the statutory language is unambiguous no room is afforded for construction. Brownstein v. Rhomberg-Haglin & Assoc., Inc., 824 S.W.2d 13, 15 (Mo. 1992) (en banc).

Here, the General Assembly has expressed its intent precisely. First, Section 162.1100 states specifically that in the event that the District loses its accreditation, upon the appointment of a chief executive officer, any powers granted to any existing school board in a city not within a county "on or before August 28, 1998", shall be vested with the special administrative board of the

transitional school district containing such school district so long as the transitional school district exists, except as otherwise provided in Section 162.621**."** Mo. Rev. Stat. §162.1100.3 (Supp. 2006) (emphasis added). By the express terms of Section 162.1100, only those powers granted to the Elected Board on or before August 28, 1998 become vested in the TSD upon the appointment and confirmation of the TSD CEO. By law all other powers are not transferred and remain with the Elected Board.

In interpreting statutes, courts presume that the legislature intended that each word, clause, sentence, and provision of a statute have effect and should be given meaning. Abbott Ambulance v. St. Charles County Ambulance Dist., 193 S.W.3d 354, 358 (Mo. Ct. App. 2006); State ex rel. Womack v. Rolf, 173 S.W.3d 634, 638 (Mo. 2005) (en banc). Conversely, courts presume that the legislature did not insert superfluous language or idle verbiage in a statute. Abbott Ambulance, 193 S.W.3d at 358. "It is the responsibility of the Court to ascertain and effectuate the intent of the General Assembly and in so doing the Court should look first to the language of the statute and the plain and ordinary meaning of the words employed. . . . *The legislature is presumed not to enact meaningless*

provisions." Wollard v. City of Kansas City, 831 S.W.2d 200, 203 (Mo. 1992) (internal quotations omitted) (emphasis added). See also J.S. DeWeese Co. v. Hughes-Treitler Mfg. Corp., 881 S.W.2d 638, 643 (Mo. Ct. App. 1994) (legislature is presumed not to enact meaningless provisions). Nonetheless, this is exactly what the circuit court held, that the "on or before August 28, 1998" language purposefully inserted by the General Assembly be disregarded as if it does not exist. This is not permitted as it essentially rewrites the statute.

B. The Elected Board Was Granted the Authority to Collect the Desegregation Sales Tax and Collect and Expend the Debt Service Levy After August 28, 1998 and Therefore Retains Such Powers.

The voters of the City of St. Louis authorized the Elected Board to collect and expend the Desegregation Sales Tax on February 2, 1999. See Ex. 200. Section 162.621 provides that the Board had the power to "levy taxes authorized by law for school purposes." Mo. Rev. Stat. § 162.621.1(4) (2000). However, the sales tax was not authorized by law for the City or anywhere else in this state on or before August 28, 1998. That power only became effective when the voters

approved the ballot measure authorizing the Elected Board to collect the Desegregation Sales Tax. The voters also authorized the Elected Board to issue bonds for the purpose of air conditioning school buildings on November 7, 2000. See Ex. 201. The Missouri Constitution provides:

> Before incurring any indebtedness every county, city, incorporated town or village, school district, or other political corporation or subdivision of the state shall provide for the collection of an annual tax on all taxable tangible property therein sufficient to pay the interest and principal of the indebtedness as they fall due . . . .

Mo. Const. art. VI, § 26(f). The requirement that taxes be levied to pay indebtedness is mandatory and self-enforcing. Once voters approve general obligation bonds, it is not necessary that they separately vote on and approve the tax necessary to pay the indebtedness. See, e.g., State ex rel. Consol. Sch. Dist. No. 8 of Pemiscot County v. Smith, 121 S.W.2d 160, 165 (Mo. 1938); State ex rel. Gilpin v. Smith, 96 S.W.2d 40, 41 (Mo. 1936); State ex rel. Emerson v. Allison, 66 S.W.2d 547, 548 (Mo. 1933).

When a municipal corporation has the authority to incur indebtedness, that authority "carries with it the mandatory duty to collect a tax sufficient to pay the principal and interest of the indebtedness as they become due." City of Raytown v. Kemp, 349 S.W.2d 363, 367 (Mo. 1961) (en banc) (emphasis added). Thus, when issuing general obligation bonds, "the school board must, either at the time of incurring the indebtedness or before that time, provide for the collection of an annual tax as a sinking fund and to pay interest." Wadlow v. Consol. Sch. Dist. No. 3, 212 S.W. 904, 905 (Mo. Ct. App. 1919) (emphasis added).

The voters of the City of St. Louis approved the issuance of the bonds on November 7, 2000. Since the Board's power to issue the bonds was granted by the voters after August 28, 1998, the Board's authority to collect a tax sufficient to pay the principal and interest on the bonds was also imposed after August 28, 1998.

Thus, the Elected Board's power to collect the Desegregation Sales Tax and to collect and expend the debt service levy was granted by the voters after August 28, 1998. Because that was not a power held by the Board "on or before August

28, 1998," it did not vest in the Special Administrative Board of the Transitional School District upon the District being declared unaccredited.

Regardless of the accreditation status of the District, the circuit court erred in holding that limitation in Section 162.1100.3 which vests in the Transitional School District only those powers granted to the Elected Board "on or before August 28, 1998" is meaningless. The voters of the City of St. Louis granted the Elected Board the authority to collect and expend the Desegregation Sales Tax and the existing debt service levy after August 28, 1998. The circuit court's determination that the Elected Board has lost these powers should be reversed.

CONCLUSION

For the reasons discussed herein, the Final Judgment of the circuit court in favor of the State Respondents and against the Board of Education Appellants should be reversed and the transfer of powers to the Special Administrative Board be held void with a declaration that the Elected Board retains all powers necessary to govern and oversee the District pursuant to Chapter 162 of the Missouri Statutes.

Respectfully submitted this 21st day of July, 2008.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the foregoing Brief and a disk in compliance with Rule 84.06(g) were mailed on this 21st day of July, 2008 by first-class mail, postage pre-paid, to:

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06

The undersigned hereby certifies that the foregoing Brief complies with the limitations set forth in Rule 84.06(b) and that the number of words in the Brief is 26,088. The undersigned relied on the word count feature of the firm's word processing system to arrive at that number.

The undersigned further certifies that the labeled disk, filed concurrently herewith, has been scanned for viruses and is virus-free pursuant to Rule 84.06(g).

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APPEAL NO. SC 89139

IN THE SUPREME COURT
OF THE STATE OF MISSOURI

BOARD OF EDUCATION OF
THE CITY OF ST. LOUIS, et al.

Appellants

v.

MISSOURI STATE BOARD OF EDUCATION, et al.

Respondents

APPEAL FROM THE COLE COUNTY CIRCUIT COURT
STATE OF MISSOURI
Honorable Richard G. Callahan
Circuit Court Cause No.: 07AC-CC00488

APPENDIX TO APPELLANTS' BRIEF

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