IN THE SUPREME COURT OF MISSOURI

No. SC90323

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

Plaintiffs/Appellants

v.

STATE OF MISSOURI, *et al*.,

Defendants/Respondents,

and

MISSOURI CHARTER PUBLIC SCHOOL ASSOCIATION,

Intervenor/Respondent.

Appeal from Cole County Circuit Court
The Honorable Richard G. Callahan, Judge

BRIEF OF RESPONDENT MISSOURI CHARTER PUBLIC SCHOOL ASSOCIATION

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INTRODUCTION

This appeal touches on several complicated issues including school funding, federal desegregation remedies, the Hancock amendment and local taxing authority. But at the end of the analysis it presents a straightforward challenge to the constitutionality of a statute enacted by the General Assembly and signed by the Governor. Such a statute is entitled to the presumption of validity and this Court makes every effort to uphold the statute if possible. In this appeal, affirming the trial court and upholding the statute is indeed possible.

The Charter Schools Act presents a policy choice of the legislature to provide funding when communities make a voluntary decision to create charter schools. Such a decision is well within the province of the legislature. Charter schools were created as part of the legislation that led to the settlement of the Kansas City desegregation case and represent a compromise that balanced many political interests.

The Appellants challenge the funding mechanism for charter schools on grounds that the mechanism unconstitutionally impinges on local revenues and violates the state "Hancock Amendment." While Appellants try valiantly to come up with an interpretation of the statutes that would conflict with a constitutional provision, the plain language of the statutes and the Constitution does not present the kind of "plain and palpable affront to fundamental law" that would justify this court interfering with the legislature's enactments. Nor did the trial court err when if found that the Appellants did not present substantial and credible evidence below that would have required a ruling in their favor.

When this Court applies the correct standard of review and considers the evidence in a light favorable to the trial court's decision, the conclusion is clear. The trial court must be affirmed because no constitutional violation has occurred here.

STATEMENT OF FACTS

Pursuant to Rule 84.04(f), Respondent Missouri Charter Public School Association ("Charter Schools") provides the following additional facts to the Appellant Kansas City Missouri School District's ("KCMSD")[1] Statement of Facts, which are relevant to the questions presented for determination. Because these facts are favorable to the trial court's decree, they are assumed to be true for purposes of this appeal. *Watson v. Mense*, 298 S.W. 3d 521, 525 (Mo. banc 2009).

The Parties

In addition to the Parties noted by Appellants, the Missouri Charter Public School Association intervened in the case as a Defendant. L.F. 2-3.

Charter Schools are Public Schools

The Charter Schools law, §§160.400-.420, RSMo, has never mandated that charter schools exist. Like any public schools, charter schools "shall enroll" resident pupils of the school district. §160.410.1(1) and (2), RSMo Supp. 2008. Charter schools may neither charge tuition nor impose any fee that a school district may not impose. §160.415.10, RSMo Supp. 2008, and charter schools may not accept any grant, gift, or

[1] Charter Schools acknowledge that KCMSD is not nor is it claiming to be a proper plaintiff to bring the Hancock claims and three taxpayers are also plaintiffs in this case; however, for the purposes of ease of reference and continuity in this Brief, Appellants, the District and/or the taxpayers, will be referred to as "KCMSD".

donation if it is subject to a "condition contrary to law applicable to the charter school or other public schools[.]" §160.415.13, RSMo Supp. 2008.

Charter schools are required to participate in typical activities of a school district: to administer statewide student assessments and distribute an annual report card; to comply with laws and regulations of the state relating to health, safety, and minimum educational standards; to be non-sectarian in their programs, admission policies, employment practices, and all other operations; and to assure that needs of special education children are met. § 160.405, RSMo Supp. 2008.

Payments to Charter Schools

The state funding formula was updated in 2005 (effective July 1, 2006) via Senate Bill 287. The new version of the law changed the calculation for funding due to all schools under the "foundation formula." Tr. I, p. 155:4-10. In that legislation, charter schools were granted the option of becoming a Local Educational Agency ("LEA"). §160.415.2(1) and (2), and .4, RSMo Supp. 2008. It also made a change in the way charter schools that elected LEA status would receive their funding, Tr. I, p. 155:19-156:15; KCMSD no longer acts as the disbursal agent, Tr. I, p. 155:11-156:15.

The controlling statutory provision for funding of charter schools in KCMSD is Section 160.415.4, RSMo Supp. 2008:

> A charter school that has declared itself as a local educational agency shall receive from the department of elementary and secondary education an annual amount equal to the product of the charter school's weighted average daily attendance and the state adequacy target, multiplied by the

> dollar value modifier for the district, plus local tax revenues per weighted average daily attendance from the incidental and teachers funds in excess of the performance levy as defined in section 163.011, RSMo, plus all other state aid attributable to such pupils. If a charter school declares itself as a local education agency, the department of elementary and secondary education shall, upon notice of the declaration, reduce the payment made to the school district by the amount specified in this subsection and pay directly to the charter school the annual amount reduced from the school district's payment.

(emphasis added). Thus, the State pays the charter schools directly (the same amount per pupil that KCMSD would be entitled to per pupil) and reduces an equivalent amount from State payments to KCMSD. *Id.*; Tr. I, p. 155:2-156:15. This statutory mandate allowing charter schools to receive payment directly from the state is the statute challenged by KCMSD in this appeal.

Since FY2007, KCMSD has not transferred any local money out of any KCMSD accounts to the charter schools. Tr. I, p. 103:8-23. The State does not receive money from KCMSD's accounts; the State simply reduces the amount of State aid it sends to KCMSD. Tr. I, p. 103:24-105:16, 155:19-156:15; § 160.415.4.

The Local Levies

There are two constitutional provisions that are the authority for KCMSD to levy local taxes. As pointed out by KCMSD, Article X, Section 11(g) is one. But Article X, Section 11(b) is the other, authorizing KCMSD to levy an amount not to exceed $2.75

per $100 assessed valuation. Section 11(g) therefore authorizes the school board to add to that 11(b) amount and go as high as $4.95 per $100 assessed valuation. Tr. I, p. 8:12-22, 109:19-110:1. Since the 199-2000 school year, KCMSD has not relied on 11(g) alone to set the levy. Exhibit I-200; *see also* Exhibit P-44, p. 10. It divided the levy between an "operating levy" (which is the 11(b) authority) and what it variously referred to as a "desegregation levy" or an "operating levy increment (per Art. X, Sec. 11(g))". Exhibit I-200.

After 11(g) was adopted, the district's school board has always levied the full $4.95 per $100 assessed valuation. Exhibit I-200; Exhibit P-44, p. 10; Tr. I, p. 107:21-108:3, 110:6-8. Meanwhile, the property values in the District kept rising and rising over the same time period. Exhibit P-25, p. 100. The total assessed valuation grew from $2,515,693,295 on December 31, 199 (Exhibit P-14, p. 1) to $3,200,085,126 on December 31, 2007(Exhibit P-21, p.2), which is over half a billion dollar increase over that time period.

KCMSD's Enrollment and Spending Per Eligible Pupil

From Fiscal Year (School Year) 1998 through FY 2007, KCMSD has reported a drop in enrollment of nearly 9,000. Exhibit P-25, p. 101. For the same time period, with an increase in assessed valuation of over half a billion dollars and a steady levy of $4.95, KCMSD's expenditures per eligible pupil went from $8,783 to $13,275.

Facts Related to KCMSD's New Activity Claim

When charter schools are LEAs, the State pays the charter schools directly and reduces an equivalent amount from State payments to the Kansas City School District;

therefore, KCMSD no longer acts as the disbursal agent. Tr. I, p. 103:24-105:16, 155:19-156:15; § 160.415.4. KCMSD does not have to educate a student who goes to a charter school. Tr. I, p. 116:17-24. KCMSD does not have to add any administrative staff because children go to charter schools. Tr. I, p. 116:25-117:3. KCMSD has not had to add services because of charter schools or the option of charter schools to become LEAs. Tr. I, p. 117:6-10.

For the Hancock claims, KCMSD used an expert witness, Angela Morelock. For the unfunded mandate claim, Ms. Morelock did an analysis of what expenditures of KCMSD were fixed, semi-variable and variable, based upon her discussions with KCMSD and the number of children KCMSD, by its efforts, estimated had left KCMSD to go to charter schools. Exhibit P-44, pp. 6-8; Tr. I, p. 200:10-25, 202:7-13, 204:1-8.

Ms. Morelock opined that fixed costs (such as expenses for building maintenance) could not be reduced as children elected to leave KCMSD and attend charter schools (based on KCMSD's numbers). Tr. I, p. 205:8-21. But Ms. Morelock also testified that at some point a larger decline in enrollment changes a fixed cost to a semi-variable one. Tr. I, 208:13-17.

Ms. Morelock's classification as fixed, semi-variable and variable did not address the overall decrease in enrollment at KCMSD for the time period in question, which was nearly 9,000. Tr. I, 209:9-18; Exhibit P-25, p. 101. Ms. Morelock knew overall enrollment had declined more than KCMSD attributed to charter schools, but she testified there would be no reason to run an analysis based on overall enrollment decline. Tr. I, p. 271:16-19.

The charter schools also had an expert witness, Mr. Rick Westbrook. His opinion was that Ms. Morelock's determinations of fixed/semi-variable/variable were based on unreliable numbers and the results would be different using the overall enrollment decline. Tr. II, p. 160:12-18. Mr. Westbrook further testified that even using the lower student numbers she did, Ms. Morelock classified too many items as fixed expenditures and fixed should not be confused with permanent. Tr. II, 160:19-162:24. He also questioned whether the alleged duplicative costs were inevitable or were due to someone's choice not to eliminate costs and that Ms. Morelock had not addressed that. Tr. II, p. 161:25-162:7. The trial court found Mr. Westbrook's testimony to be highly credible. L.F. 55.

Facts Related to KCMSD's Proportional Funding Claim

KCMSD's expert witness put forth two different possibilities for the ratio to be used to analyze a decreased proportion of funding claim. Exhibit P-44, pp. 2-6. In her first opinion, she compared the ratio of state revenues for "state mandated programs"[2] to all local revenues. She assumed that all local revenues are available to be spent on state-mandated activities and therefore should be included in the denominator. Tr. I, p. 244:10-19. Her denominator had nothing to do with actual expenditures. *Id.* Additionally, she added in sources of local revenue (as they became available) that did

[2] As set forth in the Judgment, the experts agreed as to the numerator of the ratio formula. L.F. 82.

not exist until after 1980-1981, including earnings on state desegregation payments. Tr. I, p. 241:8-245:23.

Charter Schools' expert Westbrook testified that using this type of formula, any school district that increases its local levy by its own choices would be able to control the ratio and make it appear that the state was not keeping up. Tr. I, p. 248:1-24. Also, any school district that maintained a constant levy without rollbacks and had assessed valuations increasing over time would produce the same result. *Id.*; Tr. II, p. 128:8-129:1. And that therefore, irrespective of what the State did or did not do, the ratio would be different, based solely on local actions and this would artificially burden the state. Tr. II, p. 127:20-129:1.

KCMSD did not back out as discretionary spending any part of the teacher salaries expenditures that were in excess of the statutory minimum salary. Tr. I, p. 121:13-16. The KCMSD list of mandated expenditures included facilities and maintenance expenditures, except utilities, for all buildings in the district. Tr. I, p. 123:1-12, even though KCMSD's School Board paid for a facility utilization and planning study in 2006, which found that the District had excess building capacity and an average utilization rate for its buildings of around 70%. Tr. I, p. 123:13-124:20; Exhibit I-202, pp. KCMSD 24677 – KCMSD 246778. KCMSD's expert Ms. Morelock was aware of the building utilization study, but did not analyze the amount of expenditures that could be set aside if buildings were consolidated and the district's building costs reduced. Tr. I, p. 263:17-264:2. Ms. Morelock admitted that if the School District could actually close buildings, it could get rid of fixed costs. Tr. I, p. 261:17-262:24.

The charter schools' expert testified that KCMSD included millions of dollars of discretionary expenditures in its calculations in a few areas that he readily noticed: (1) discretionary teacher and administrators' salaries (Tr. II, p. 133:15-137:19; Exhibit I-203); (2) transportation expenditures that contain discretionary costs (Tr. II, p. 137:20-139:17); and (3) discretionary expenditures in the food service program (Tr. II, p. 140:4-142:12: Exhibit I-204).

STANDARD OF REVIEW

This case presents a constitutional challenge to a statute enacted by the Missouri General Assembly. As set forth by this Court in *City of Arnold v. Tourkakis*, 249 S.W.3d 202, 204 (Mo. banc 2008), review of such an issue is *de novo.*

During the *de novo* review this Court conducts, it must resolve all doubt in favor of the validity of the statute. *Westin Crown Plaza Hotel Co. v. King*, 664 S.W.2d 2, 5 (Mo. banc 1984). A court should not invalidate a statute "unless it clearly and undoubtedly contravenes the constitution and plainly and palpably affronts fundamental law embodied in the constitution." *State v. Kinder*, 89 S.W.3d 454, 459 (Mo. banc 2002)(quoting *Smith v. Coffey*, 37 S.W.3d 797, 800 (Mo. banc 2001)). The person challenging the validity of the statute has the burden of proving the act clearly and undoubtedly violates the constitutional limitations. *Franklin County ex rel. Parks v. Franklin County Comm'n*, 269 S.W.3d 26, 29 (Mo. banc 2008)(citing *Trout v. State*, 231 S.W.3d 140, 144 (Mo. banc 2007)).

The underpinning for this standard is the plenary power of the General Assembly. This Court has stated:

> Unlike the Congress of the United States, which has only that power delegated by the United States Constitution, the legislative power of Missouri's General Assembly, under Article III, Section 1 of the Missouri Constitution, is plenary, unless, of course, it is limited by some other provision of the constitution. *Liberty Oil Co. v. Director of Revenue*, 813

> S.W.2d 296, 297 (Mo. banc 1991); *Three Rivers Junior College v. Statler*, 421 S.W.2d 235, 238 (Mo. banc 1967). Any constitutional limitation, therefore, must be strictly construed in favor of the power of the General Assembly. *Brown v. Morris*, 365 Mo. 946, 290 S.W.2d 160, 166 (1956). As this Court summarized in *Liberty Oil Co.*: "[d]eference due the General Assembly requires that doubt be resolved against nullifying its action if it is possible to do so by any reasonable construction of that action or by any reasonable construction of the Constitution." *Liberty Oil Co.*, 813 S.W.2d at 297.

Board of Educ. of the City of St. Louis v. City of St. Louis, 879 S.W.2d 530, 532-33 (Mo. banc 1994).

This case also involves some evidentiary issues concerning the "Hancock Amendment" claims raised by Appellants. As recently set forth by this Court in *Watson*, 298 S.W.3d at 525-26:

> The appellate court will affirm the trial court's determination "unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law." *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo.1976). The trial court is free to believe or disbelieve all, part or none of the testimony of any witness. *T.B.G. v. C.A.G.*, 772 S.W.2d 653, 654 (Mo. banc 1989). When determining the sufficiency of the evidence, an appellate court will accept as true the evidence and inferences from the evidence that are

favorable to the trial court's decree and disregard all contrary evidence. *Morgan v. Morgan*, 701 S.W.2d 177, 179 (Mo.App.1985).

Therefore, the standard of review presents a very high hurdle for Appellants. Any doubts about either the law or the facts must be resolved in favor of affirming the trial court's judgment.

ARGUMENT

I. THE TRIAL COURT CORRECTLY DETERMINED THAT THE CHARTER SCHOOL FUNDING MECHANISM DOES NOT "PLAINLY AND PALPABLY AFFRONT FUNDAMENTAL LAW" EMBODIED IN ARTICLE X, SECTION 11(G) OF THE MISSOURI CONSTITUTION (RESPONDS TO APPELLANTS' POINT I).

In Point I of its appeal, KCMSD argues that the General Assembly's charter school funding statute violates Article X, Section 11(g) of the Missouri Constitution. KCMSD claims Section 11(g) prohibits the Missouri General Assembly from giving state money to charter schools and offsetting a like amount from state aid to KCMSD. They argue that the charter school funding law diverts, directly or indirectly, local tax revenue to charter schools, that charter schools are not "schools of the district" and that charter school expenditures are not expenditures "for school purposes for the district." This Court should reject the district's urging for multiple reasons. First, Section 11(g) only operates as a limitation on the school district; it does not purport to impose any limitation on the conduct of the General Assembly. This Court could comfortably conclude the analysis here. Second, this Court recently affirmed the constitutionality of consideration of local effort as part of the state's school funding formula in the face of an Article X constitutional challenge. There is no reason or need to reconsider those conclusions under the guise of Article X, Section 11(g). Third, even if this Court were to interpret Section 11(g) so that it applied to the state conduct at issue here, the trial court was

correct to interpret "for school purposes" broadly to include charter school LEAs within the district as well as those schools that are subject to the district's political control.

A. Article X, Section 11(g) only Operates as a Limitation on the School District.

Section 11(g) states, in pertinent part:

> The school board of any school district whose operating levy for school purposes for the 1995 tax year was established pursuant to a federal court order may establish the operating levy for school purposes for the district at a rate that is lower than the court-ordered rate for the 1995 tax year. The rate so established may be changed from year to year by the school board of the district. Approval by a majority of the voters of the district voting thereon shall be required for any operating levy for school purposes equal to or greater than the rate established by court order for the 1995 tax year.

Resolution of Appellant's challenge requires this Court to interpret the meaning of Article X, Section 11(g) for the first time. As Appellants correctly point out, KCMSD is the only school district "whose operating levy for school purposes for the 1995 tax year was established pursuant to a federal court order." Therefore, Section 11(g) only applies to KCMSD.

The plain text of Section 11(g) imposes two limits on KCMSD and only on KCMSD. The first limitation in Section 11(g) is on the amount of a levy that the school district may constitutionally impose. KCMSD may not impose a levy equal to or greater than the "rate established by court order for the 1995 tax year," which was $4.96 per

$100 assessed valuation (App Br. at 7), without a vote of the people. The undisputed evidence in this case is that KCMSD never exceeded that limitation, as they have levied one penny less that the 1995 court authorized rate for many years. Exhibit I-200; Exhibit P-44, p. 10; Tr. I, p. 107:21-108:3, 110:6-8 (showing that the levy rate has been $4.95 per $100 assessed valuation). Therefore, there can have been no violation of this constitutional restriction in this case.

The second limitation is on the purposes for which *the school district* can impose such a levy. KCMSD can only constitutionally impose a levy "for school purposes for the district" within the contemplation of Section 11(g). Nothing about the court's order or the evidentiary record suggests that KCMSD imposed *its* levy for any other purpose. KCMSD's citation to cases preventing the taxing authority from using funds for purposes not levied for those purposes are not relevant to the facts and allegations in this case. *See* App. Br. at 19. If KCMSD were using local money levied for school purposes to build a golf course, perhaps those cases would be relevant. Here, no one has challenged an action of KCMSD. The local revenues provided by the levy imposed pursuant to Section 11(g) are being used for the purpose other than what has been their use for decades – to provide revenue to KCMSD.

As the plain text of the constitutional provision reveals, it does not impose any limitation whatsoever on the authority of the General Assembly. It only limits KCMSD's authority to impose a levy and the purposes for which such a levy can be imposed. Indeed, the only entity who could possibly violate Section 11(g) is KCMSD itself. Since

the constitutional provision does not restrict the General Assembly, the trial court was correct to conclude that there could be no 11(g) violation here.

B. There is no transfer of local money from KCMSD to the charter schools under Section 160.415.4, given the plain language of the statute.

By its plain language, Section 160.415.4 is a transfer of state money to charter schools and has nothing to do with the local levy imposed by the school district under Section 11(g) or any other provision of the constitution. Nothing in the statutory provision requires KCMSD to impose a levy in a different amount or for different purposes. Nor does the statute require KCMSD to transfer any money to anyone at all. Section 160.415.4 requires the state department of elementary and education to pay state funds to charter schools. Reading the statute plainly reveals that the statute does not – and cannot – implicate Article X, Section 11(g) in any way because 11(g) deals entirely with local revenue.

Nor did any transfers of local revenue actually occur under authority of 160.415.4 as a matter of fact. KCMSD admits that since the change in the law for FY2007 and the election of all of the charter schools to be LEAs, it has not transferred any local money out of any KCMSD accounts to the charter schools. Tr. I, p. 103:8-23. The State does not receive money from KCMSD's accounts, the State simply reduces the amount of State aid it sends to KCMSD. Tr. I, p. 103:24-105:16, 155:19-156:15; § 160.415.4.

Because all of the charter schools in the District are LEAs, none of the charter schools can – as a matter of law -- or do – as a matter of fact -- receive their public

funding through KCMSD. The plain language of the statute has nothing to do with 11(g) money and the trial court was correct to find that no 11(g) money was transferred to charter schools. This court should affirm the trial court given the plain language of Section 160.415.4.

C. Section 160.415.4 does not "effectively transfer" 11(g) revenue.

KCMSD argues that case law prevents KCMSD from using 11(g) money for anything other than school purposes for schools of the district. App. Br. 19-21. Although there is no factual dispute that KCMSD retains every penny of the 11(g) revenues for the education of the students in the schools it administratively controls, KCMSD argues that Section 160.415.4 "effectively transfers" local tax revenue to the charter schools. App. Br. 22-23. KCMSD's argument is based in the fact that KCMSD's "local effort" is part of the formula used to calculate state aid for all public school students in the District. That amount of aid is then the amount used to determine payments of state money to charter schools.

KCMSD's citation to cases preventing the taxing authority from using funds for purposes not levied for those purposes simply has nothing to do with the matter at hand. *See* App. Br. at 19. If KCMSD were using local money levied for school purposes to build a golf course, perhaps those cases would be relevant. But here no one has challenged an action of KCMSD and local revenues are simply not being used for any purpose other than what has been their use for decades – to provide revenue to KCMSD.

KCMSD argues that 11(g) prohibits the use of lines identified as "local effort" and "local taxes" in the calculation of state money to be paid to charter schools, and a like

reduction in state aid being taken from KCMSD's state payment. The argument merits again noting this Court's upholding the overall funding formula enacted by SB 287.

In *Committee for Educ. Equality*, 294 S.W.3d at 483, this Court recognized that "[t]he revised formula . . . reflected a view that schools with greater "local effort" contributions require less state financial assistance" and upheld that as constitutional. So to the extent this Court were to entertain an "effective transfer" argument, the same argument could be applied to any school district who has its state aid reduced as a result of its local effort. The calculation made for charter schools is just another way of taking local effort into account when determining state aid. This Court has correctly upheld such a policy of the General Assembly.

D. Section 160.415.4 does not make KCMSD suffer a "forgone benefit" of the 11(g) revenue.

Undeterred by the plain language of the statute and the constitution, KCMSD puts forth a "forgone benefit" theory. App. Br. 25. Under this theory, KCMSD argues "money is fungible – it matters not whether the statute requires the School District to pay local tax funds to the charter schools directly or whether the State strips the School District of local tax levy funds by reducing State aid in a proportional amount. The effect on the School District is the same either way." *Id.* But it does indeed matter.

As discussed above, Section 11(g) does not place any limitation on the General Assembly at all. But even if KCMSD's tortured reading were accepted, no 11(g) revenue forgone by the KCMSD. Even if 11(g) may be read as a restriction on the General Assembly's control over state funds and even if a forgone benefit theory were adopted by

this Court, KCMSD failed to establish that any 11(g) money was actually forgone. As this Court said in *Committee for Educ. Equality*, 294 S.W.3d at 488 (citations omitted):

> Legislative acts are entitled to deference, and this Court must give these acts any reasonable construction to avoid nullifying them. In the absence of a constitutional prohibition, the legislature has the power to enact legislation on any subject. Constitutional provisions are read in harmony with all related provisions.

The District simply did not establish that it would have had additional local revenues from 11(g) available to it were it not for the State's payments to charter schools (and subsequent reduction in state aid to KCMD in an equal amount. For example, KCMSD's expert testified that in FY2007, the "forgone benefit" amount attributable to 11(g) was nearly $14.7 million. Exhibit P-44, p. 10. But not all of the KCMSD's non-state revenue comes from the 11(g) revenue. As discussed *infra*, KCMSD earned interest on a lump sum settlement amount paid to it by the state, KCMSD receives other revenue from levies issued under provisions other than 11(g), such as section 11(b). Even if its legal theory were adopted, KCMSD did not rule out other sources of revenue that could be used to supplant the money it claims to have foregone for the charter schools.

E. Article X, Section 11(g) allows local tax revenue to be used for public schools within the district — not just for those controlled by KCMSD.

In light of the foregoing barriers to KCMSD's claim, this Court needs not reach the KCSMD's claim that 11(g) is a limitation on the use of levy proceeds for charter schools. Nevertheless, KCMSD's argument is that 11(g) is a limit on the General

Assembly, prohibiting it from enacting a law that would allow revenues generated under 11(g) to be used for charter schools in the Kansas City, Missouri School District. KCMSD argues that the verbiage "for school purposes for the district" limits the use of the 11(g) tax levy revenues to schools that are under the control of the KCMSD School Board, in other words, schools under the administrative control of KCMSD, the entity.

But this language is capable of a different interpretation. Because 11(g) can be interpreted in a way that avoids making the charter school statute unconstitutional, that interpretation must be adopted. Even if KCMSD's theories were correct and the statute could be read as forcing KCMSD to transfer local revenues to charter schools, and even if KCMSD could not accomplish those transfers out of 11(b) money, such transfers would be proper so long as 11(g) revenues were being used to provide a free education to District residents at public schools. The requirement to construe constitutional provisions more broadly, with an eye towards their more permanent nature, supports a reading of the provision that allows the tax levy revenues to be spent on free public education of residents of the district and not to limit it to public schools under the administrative control of an entity that is subject to change by the legislature.

"The establishment and maintenance of a public school system is primarily a function of the state to be exercised by the legislature, whose powers are not to be fettered if exercised within the limits of the Constitution." *State ex inf. Eagleton ex rel. Reorganized School Dist. R-I of Miller County v. Van Landuyt*, 359 S.W.2d 773 (Mo. 1962)(en banc)(citing 78 C.J.S. Schools and School Districts Sec. 13, pp. 624 et seq.); MO. CONST. ART. IX, SEC. 1(a). School districts exist because the legislature created

them; they are instrumentalities created to facilitate the legislature's effectual discharge of its constitutional mandate under Article IX, Section 1(a). *School Dist. of Oakland v. School Dist. of Joplin*, 102 S.W.2d 909, 910 (Mo. 1937).

The legislature clearly has the authority to provide education to children in the Kansas City area. It has chosen to do so by permitting, but not requiring, the establishment of charter schools. Even if the General Assembly mandated that some local tax money generated by authority of Section 11(g) were to be used for the education of those students, the funds would be used for "school purposes" for "schools of the district." Charter schools, by statute, must provide a free education to residents of the district. §160.410.1(1) and (2), RSMo Supp. 2008; §160.415.10, RSMo Supp. 2008. Therefore, they are schools of the district and the funds would be used for school purposes. The legislature has the authority to define what schools constitute schools of the district and what are school purposes. The legislature has not abused that authority here. If the legislature required local funds to be used outside of the district or for future students not residing in the district, the issues might be different.

Additionally, this Court has recently noted that in the absence of a constitutional bar, it is clear that the legislature has plenary power to act in crafting the school funding formula. *Committee for Educ. Equality v. State of Missouri*, 294 S.W.3d 477, at 491 (Mo. banc 2009) (citing *Thompson v. Comm. on Legislative Research*, 932 S.W.2d 392, 394 (Mo. banc 1996)). Plaintiffs cannot show that Article X, Section 11(g) restricts the legislature's discretion in shaping the school funding formula, of which the charter school funding mechanism is an important part.

II. THE TRIAL COURT CORRECTLY DETERMINED THAT THE CHARTER SCHOOLS LAW DOES NOT PLAINLY AND PALPABLY AFFRONT THE CONSTITUTION AND CREATE AN UNFUNDED MANDATE IN VIOLATION OF THE HANCOCK AMENDMENT (RESPONDS TO APPELLANTS' POINT II).

KCMSD's second point relied on argues that "the charter school funding mechanism" creates an unfunded mandate in violation of the "Hancock Amendment."[3] Article X, Section 16 states in relevant part, "The state is prohibited from requiring any new or expanded activities by counties and other political subdivisions without full state financing, or from shifting the tax burden to counties and other political subdivisions." Article X, Section 21 states in pertinent part:

> A new activity or service or an increase in the level of any activity or service beyond that required by existing law shall not be required by the general assembly or any state agency of counties or other political subdivisions, unless a state appropriation is made and disbursed to pay the county or other political subdivision for any increased costs.

In order to prove a violation of the unfunded mandate provisions of the Hancock Amendment, KCMSD must prove that (a) Section 160.415.4 required "a new or

[3] KCMSD apparently does not challenge the statute allowing charter schools and did not below. Rather, Appellants challenge only the statutes relating to how the schools are funded.

increased activity" (b) KCMSD is required to perform that activity and (c) KCMSD had increased costs to perform that new activity or service without funding from the State. *Neske v. City of St. Louis*, 218 S.W.3d 417, 422 (Mo. banc 2007)(citing *Miller v. Dir. of Revenue*, 719 S.W.2d 787, 788-89 (Mo. banc 1986)). Although a failure to prove any of these elements would be fatal to an unfunded mandate claim, in this case, the trial court correctly concluded that KCMSD had failed to prove any of them.

A. The trial court correctly determined that no new or increased activity was required of KCMSD by the charter schools electing, under 160.415.4, to become LEAs and to receive their money directly from the State.

Rolla 31 Sch. Dist. v. State of Missouri, 837 S.W.2d 1 (Mo. banc 1992), is the seminal case on unfunded mandates and a good example of what the provision is intended to remedy. In that case, the department of elementary and secondary education sent a letter to all school districts telling them the school districts were obligated to begin providing special education services to district residents aged 3 and 4 years of age. This was clearly a new activity required of school districts — providing educational services to a new population of district residents — disabled preschoolers. *Id.* *Rolla 31* is an example of a new activity required of school districts.

KCMSD alleged that the General Assembly's authorization of optional charter schools as LEAs was a new program. L.F. 18, ¶ 45. But nothing in the statutes of which KCMSD complains expanded the service that must be provided. Before the enactment of charter school laws, local entities were required to provide a free public education to all

eligible pupils within the district. After the passage of charter school laws, the requirement was the same. KCMSD has not, and cannot, identify any expansion of service that is required.

The absence of a new or expanded required activity distinguishes this case from other cases where this Court has concluded that an unfunded mandate existed. *Brooks v. State of Missouri*, 128 S.W.3d 844 (Mo. banc 2004)(new activity imposed on county sheriffs of processing concealed weapons permits); *City of Jefferson v. Missouri Dep't. of Natural Resources*, 863 S.W.2d 844 (Mo. banc 1993)(mandating cities to file a new solid waste management plan with various additional components that did not exist in the law prior to the Hancock Amendment being adopted); *Rolla 31 Sch. Dist.*, 837 S.W.2d 1(pre-school special education). In those cases, the new or expanded activity required of local subdivisions was clear. Here, there is none at all. The activities are exactly the same, they are just voluntarily performed in different ways and by different entities. Indeed, the charter school law relieves certain burdens from local schools rather than imposing them.

B. KCMSD has not been burdened with any added or expanded service under Section 160.415.4.

Even if Section 160.415.4 could be read as being a new activity, KCMSD has no added burden under the statute. The charter school law mandates nothing from the KCMSD (particularly when all of their charter schools have elected LEA status and receive their funds directly from the state). Nor does it mandate the existence of charter schools, rather it gives an option to establish charter schools which must then educate children that KCMSD would otherwise be required to educate. In this way, the charter

school act actually relieves the burden on KCMSD because the KCMSD does not have to educate a student who goes to a charter school. Tr. I, p. 116:17-24. KCMSD does not have to add any administrative staff because children go to charter schools. Tr. I, p. 116:25-117:3. KCMSD has not had to add services because of charter schools or the option of charter schools to become LEAs. Tr. I, p. 117:6-10. But even as KCMSD's enrollment declines (Tr. I, p. 19-25; Exhibit P-25, p. 101), it has always levied $4.95 (Tr. I, p. 110:6-8; Exhibit I-200), and under Section 160.415.4, is allowed to keep all of its local tax revenue.

C. KCMSD receiving less state aid is not a "new or increased activity or service."

When charter schools are LEAs, the State pays the charter schools directly and reduces an equivalent amount from State payments to the Kansas City School District. Tr. I, p. 103:24-105:16, 155:19-156:15; § 160.415.4. To the extent KCMSD might be claiming that getting less state money through the application of Section 160.415.4 is equivalent to the imposition of a "new or increased activity or service" such a claim also fails. *St. Charles County v. Director of Revenue*, 961 S.W.2d 44, 48 (Mo. banc 1998). Similar to the *St. Charles County* case, any activities imposed by Section 160.415.4 are imposed on the department of elementary and secondary education, not KCMSD. The plain language of Section 160.415.4 does not require KCMSD to take any action nor does it require them to undertake any new or increased activity or service. Again, KCMSD fails to prove a new or increased activity or service. In fact, since the charter schools became LEAs, KCMSD is no longer the disbursal agent. *Cf.* § 160.415.2, RSMo 2000,

and § 160.415.4, RSMo Supp. 2008. Its activities have actually been reduced. Since the statute can be interpreted in ways that require no new activity and since no new activity has in fact occurred, KCMSD's claims were properly denied.

D. KCMSD failed to prove increased costs due to Section 160.415.4.

KCMSD skips by the first parts of an unfunded mandate inquiry and moves straight to increased costs arguing that although students left KCMSD to go to charter schools, KCMSD's costs could not be reduced and the per pupil cost has therefore gone up. Tr. I, p. 117:6-12. KCMSD's claim still fails because KCMSD did not establish, as a factual matter, that the increased costs they complain of are caused by the charter schools.

If KCMSD were able to prove a new activity imposed upon KCMSD, it must also provide "specific proof of the increased expenses due to the new or increased duties." *Brooks*, 128 S.W.3d at 849(emphasis added). "[T]hese elements cannot be established by mere 'common sense,' or 'speculation and conjecture'." *Id.* (citing *Miller v. Director of Revenue*, 719 S.W.2d 787, 789 (Mo. banc 1986)). A court cannot "presume increased costs resulting from increased mandated activity." *Id.* (citing *City of Jefferson I*, 863 S.W.2d at 848).

Rather than providing the specific proof required by the law, KCMSD presented expert testimony by Angela Morelock. Ms. Morelock did an analysis of what, in her discussions with KCMSD, were fixed versus variable expenditures. KCMSD had a method. Ms. Morelock opined that fixed costs (such as expenses for building maintenance) could not be reduced as children elected to leave KCMSD and attend charter schools. Therefore, she said, there were duplications of costs when charter

schools voluntarily formed and undertook their own fixed costs obligations. Duplication of costs are not increased costs.

E. The trial court correctly discounted KCMSD's expert testimony.

The trial court correctly discounted Ms. Morelock's expert testimony because it failed to show that charter schools caused increased expenses for KCMSD. Even if charter schools duplicated efforts of KCMSD, they did so, as a matter of law, voluntarily, and Ms. Morelock's causation argument was far too speculative to establish proof that charter schools caused any *increased* expense by KCMSD. Among the fatal flaws in this analysis is that KCMSD does not know how many students left its schools to attend charter schools in the district. As a result, KCMSD can never establish that any student attending a charter school had any impact on the district's costs or expenses.

The trial court's credibility conclusion dooms KCMSD here. "The taxpayers failed to provide credible evidence that tied the increased cost per pupil to the charter schools . . ." L.F. 55. All the evidence KCMSD recites regarding increased spending on a per pupil basis was properly disregarded under the trial court's credibility determination. This Court will not look behind the credibility determinations of the trial court in a court-tried case. *In re Adoption of W.B.L.*, 681 S.W.2d 452, 455 (Mo. banc 1984).

1. KCMSD's flawed evidence – Angela Morelock

Nevertheless, because KCMSD claims, without any proof in the Legal File, that the trial judge adopted verbatim the proposed findings of fact and conclusions of law of the Charter Schools and suggests that this raises an appearance issue, the Charter Schools will set forth the substantial evidence that can be readily gleaned from the written record

to support the trial court's credibility determination and finding that the new mandate claim failed.

The extent of experience with school districts by KCMSD's expert, Angela Morelock, was internal control reviews and fraud investigations. Tr. I, p. 193:10-13. Ms. Morelock did an analysis of what, based upon her discussions with KCMSD, were fixed versus semi-variable versus variable expenditures. Exhibit P-44, pp. 6-8; Tr. I, p. 200:10-25. The classification was dependent upon numbers that KCMSD had as to how many children left KCMSD to go to charter schools. Exhibit P-44, pp. 6-8; Tr. I, p. 202:7-13, 204:1-8. According to KCMSD, based on its "W19 forms", only 2,500 students left KCMSD to attend charter schools from 2000 through 2008. Exhibit P-5; Tr. I, p. 42:20-44:12. But KCMSD admitted that the W19 form numbers are not completely reliable because KCMSD has to depend on the students or parents sharing with KCMSD where the student is going. Tr. I, p. 99:20-100:2. KCMSD admitted it did not match up with the charter schools enrollment, either. Tr. I, p. 99:6-100:9; Exhibit P-1. Ms. Morelock admitted there was disagreement over the correct number of students that left KCMSD to attend charter schools. Tr. I, p. 209:4-7.

Ms. Morelock opined that fixed costs (such as expenses for building maintenance) could not be reduced as children elected to leave KCMSD and attend charter schools (based on KCMSD's numbers). Tr. I, p. 205:8-21. Therefore, she said, there were duplications of costs when charter schools voluntarily formed and undertook their own fixed costs obligations. Exhibit P-44, p. 8; Tr. I, p. 200:10-15. But Ms. Morelock also testified that at some point a larger decline in enrollment changes a fixed cost to a semi-

variable one. Tr. I, 208:13-17. Morelock did not testify to an overall increased cost, only to ratios. She did so by taking KCMSD's costs and dividing them by its declining student enrollment. She did not look at total costs.

Ms. Morelock's classification as fixed, semi-variable and variable were done in a vacuum because they completely ignored the enrollment declines at KCMSD generally, which were in greater amounts than what KCMSD estimated to be the number of students going to charter schools. Again, from 2000 through 2008, her designation of costs was based on 2,500 to 5,000 students (the latter being a "sensitivity analysis"). Tr. I, 209:9-18. But from KCMSD's own records, the drop in enrollment from FY1998 through FY 2007 was nearly 9,000. Exhibit P-25, p. 101. Ms. Morelock knew overall enrollment had declined more than KCMSD attributed to charter schools, but she testified there would be no reason to run an analysis based on overall enrollment decline. Tr. I, p. 271:16-19.

2. KCMSD's Evidence supporting the Trial Court – Rick Westbrook

This Court must accept as true the evidence and inferences from the evidence that are favorable to the trial court's judgment. *Morgan*, 701 S.W.2d at 179. The Charter Schools also had an expert witness, Mr. Westbrook. Mr. Westbrook testified that about 20% of his accounting firm's work relates to school finance auditing and consulting. Tr. II, p. 123:15-20. He and his firm have audited school districts regarding attendance-related issues and performed consulting work on attendance issues as well. Tr. II, p. 123:21-124:19. Mr. Westbrook testified that his opinion was that W-19 coding as used

by KCMSD to estimate the number of children leaving for charter schools is not reliable. Tr. II, p. 153:9-154:15.

Mr. Westbrook reviewed school district records and created a demonstrative chart showing KCMSD eligible pupil counts, charter school total eligible pupil counts and the two added together. Exhibit I-205; Tr. II, p. 154:16-158:6. He further testified that overall eligible pupils remained fairly stable but that the decline in KCMSD's eligible pupils clearly corresponded to the increasing number of charter schools' eligible pupils. Tr. II, p. 159:7-160:11.

Thus his opinion was that Ms. Morelock's determinations of fixed/semi-variable/variable were based on unreliable numbers and the results would be different using the more likely numbers. Tr. II, p. 160:12-18. Mr. Westbrook further testified that even if the numbers were as low as the 2,500 Ms. Morelock relied on, she classified too many items as fixed expenditures and fixed should not be confused with permanent. Tr. II, 160:19-162:24. He also questioned whether the alleged duplicative costs were inevitable or were due to someone's choice not to eliminate costs and that Ms. Morelock had not addressed that. Tr. II, p. 161:25-162:7. The trial court found Mr. Westbrook's testimony to be highly credible. L.F. 55.

F. The trial court correctly rejected the theory that an increased cost of a previously-existing activity is a new or increased activity.

Appellants argued below that it costs KCMSD more to educate residents of the district (on a per pupil basis) than it used to because fixed costs remained the same even as pupil count dropped. What did remain constant despite the decrease in enrollment was

the total levy of $4.95. Exhibit I-200; Exhibit P-44, p. 10; Tr. I, p. 107:21-108:3, 110:6-8. And the property values in the District kept rising and rising. Exhibit P-25, p. 100. More KCMSD local money but fewer KCMSD students equals more KCMSD local money spent on each KCMSD student. *See* Exhibit P-25, p. 101. This is not a Hancock violation. This is the *Neske* case.

In *Neske*, this Court held there was no violation of the Hancock Amendment's prohibition on an unfunded mandate where the activity required of the City was unchanged and the only thing that happened was it was more expensive for the City to carry out the same activity. *Id.* at 422. The *Neske* court stated:

> There is no new or increased activity. The Hancock Amendment is aimed at limiting taxes by controlling and limiting governmental revenue and expenditure increases. See *Boone County Court v. State of Mo.*, 631 S.W.2d 321, 325 (Mo. banc 1982). The amendment's official ballot title stated that it prohibited "state expansion of local responsibility without state funding." *Id.* . . . . The change in the [cost] is not the measure of whether Hancock is violated. The question is whether the City has been mandated to bear new responsibilities in relation to this activity. It has not.

Id. KCMSD spending more per pupil to educate the children in its schools than it used to spend per pupil is not a Hancock violation. Nor is a "per pupil" analysis even the correct analysis to use. The trial court was correct to deny KCMSD's claims.

III. THE TRIAL COURT CORRECTLY DETERMINED THAT THE CHARTER SCHOOLS LAW DOES NOT PLAINLY AND PALPABLY AFFRONT THE CONSTITUTION AND REDUCE THE RATIO OF STATE FUNDING FOR THE SCHOOL DISTRICT (RESPONDS TO APPELLANTS' POINT III).

In its third point relied on, KCMSD argues that the charter school laws reduce the ratio of state funding for the school district's mandated programs. KCMSD's brief argues that the trial court erred by not accepting the testimony offered by KCMSDs' expert who purported to calculate the ratio of state funding to local funding. Appellants' claim that their expert's testimony can be the basis to overturn the trial court's judgment has been squarely rejected by the Courts, particularly when the expert testimony is "less than clear" as it was here. *Snyder v. Hendrix,* 648 S.W.2d. 894, 895 (Mo.App. W.D. 1983). Of course, the trial court is always free to make a determination of the credibility of the expert and to outright disbelieve the expert's testimony. *Id.*; *State v. Kreyling,* 890 S.W.2d 414, 417 (Mo.App. E.D. 1995). In this case, the trial court was correct to discount KCMSD's expert testimony because they failed to conduct the detailed analysis that would be required to present a funding ratio claim. This fact, combined with counter testimony from a state expert and an expert for the charter schools, led the Court to conclude that KCMSD did not prove its ratio claim. Without a factual basis to rule in their favor and the trial court must be affirmed.

Article X, Section 21 states in pertinent part, "The state is hereby prohibited from reducing the state financed proportion of the costs of any existing activity or service

required of counties and other political subdivisions." This portion of the Hancock Amendment prohibits a reduction in the state financed proportion of the costs of an activity mandated by the state at the time the Hancock amendment was adopted.

On this type of claim, *Fort Zumwalt Sch. Dist. v. State of Missouri*, 896 S.W.2d 918, 922-23 (Mo. banc 1995) sets forth the requirements for such a claim in language that is difficult to paraphrase:

> To support their factual averment that the state has violated Section 21, the taxpayers must present evidence to establish the program mandated by the state in 1980-81 and the ratio of state to local spending for the mandated program in that year. The taxpayers must then establish the costs of the mandated program in each subsequent year and the ratio of state to local spending for the mandated program in each subsequent year. Unless the school district's budgets allocated personnel costs and operating expenditures in a highly segmented manner, clearly distinguishing resources directly committed to the state mandates for special education from those not so dedicated, it may be impossible to prove the correct proportions.
>
> [One would be mistaken to believe] that establishment of the Section 21 proportions requires no more than comparing 1980-81 and subsequent year costs with the state's contribution to special education in those years. In establishing the state's required contribution, the taxpayers may not include any discretionary expenditure a district undertook that went beyond

> the state mandate. For example, to the extent that district finances permitted greater-than-required salary increases for . . . instructors, aides, and other personnel, the taxpayers may not include these in the school district portion of the ratio. The taxpayers also must exclude any new or expanded activity required of the local district after 1980-81 for which the state bears full responsibility.

(citing *Rolla 31*, 837 S.W.2d at 5-7).

KCMSD attempted to make its ratio claim with the testimony of its expert Ms. Morelock. Ms. Morelock made every single mistake this court warned of in *Fort Zumwalt.* The trial court was correct to find that Plaintiffs had not presented sufficient credible evidence to support their claim. As the trial court correctly concluded, "The taxpayer's effort to tie the alleged change in proportion of funding to the charter school program was based on faulty evidence and was not credible." L.F. 59. The trial court was well within its rights in making this determination and its decision should not be disturbed. *Snyder*, 848 S.W.2d at 895.

A. KCMSD's expert's testimony and opinions were simply not credible.

KCMSD supported its ratio claims with the testimony of expert Ms. Morelock. Morelock's Hancock analysis was so riddled with flaws that the trial court did not find it to be credible. The Hancock ratio analysis compares what the state pays for State-Mandated activities to what the local cost is for State-mandated activities. The analysis required testimony about the state contribution in 1980-81 compared to the local cost in that same year. This ratio must then be compared to intervening years and the current

year. *Fort Zumwalt*, 896 S.W.2d at 922-23 ("each subsequent year"). But Plaintiffs did not provide the trial court with evidence sufficient to reach conclusions about the correct ratios in 1980-81 or in the current year.

1. KCMSD's expert offered the wrong formulas for calculating the ratio.

KCMSD's expert witness, Angela Morelock, actually put forth two different possibilities for the ratio to be used to analyze a decreased proportion of funding claim. Exhibit P-44, pp. 2-6. In her first opinion, she compared the ratio of state revenues for "state mandated programs"[4] to all local revenues. She assumed that all local revenues are available to be spent on state-mandated activities and therefore should be included in the denominator. Tr. I, p. 244:10-19. Her denominator had nothing to do with actual expenditures. *Id.* But if local revenue increases, the ratio of state funding to local funding necessarily gets smaller. Tr. I, p. 240:22-24. This would allow for increases in local revenues having nothing to do with state mandated expenditures to make the ration of state: local get smaller and smaller. Using this type of formula, any school district that increases its local levy by its own choices would be able to control the ratio and make it appear that the state was not keeping up. Tr. I, p. 248:1-24. Also, any school district that maintained a constant levy without rollbacks and had assessed valuations increasing over time would produce the same result. *Id.*; Tr. II, p. 128:8-129:1.

[4] As set forth in the Judgment, the experts agreed as to the numerator of the ratio formula. L.F. 82.

Therefore, irrespective of what the State did or did not do, the ratio would be different, based solely on local actions and this would artificially burden the state. Tr. II, p. 127:20-129:1.

As already indicated, KCMSD's constant $4.95 levy plus increased assessed valuation necessarily caused local revenues to increase. This would cause the ratio to be smaller over time regardless of actual costs of state-mandated programs. Additionally, Ms. Morelock did not hold local revenues constant when comparing the 1980-81 ratio to later years. For years after 1981, she admitted that she added local revenue from sources that did not even exist in 1981, including Proposition C State Sales Tax, M&M surtax, in lieu of tax, food service program, food service non-program, and county stock insurance fund. All of those items are new local revenue items that were not available in 1981. Tr. I, p. 27, and pp. 241-244. To not include them in the 1980-1981 ratio but to add them in later would necessarily decrease the state: local ratio, artificially burdening the state.

In addition to the local revenues identified in the previous paragraph, Ms. Morelock added even more "new" local revenues into the denominator. She included earnings on investments in local revenues in the denominator. She included $12.9 million in 2000; $28.2 million in 2001; $8 million in 2006; and $11 million in 2007. Tr. I, p. 245:3-16. By way of comparison, the School District had $1.3 million in earnings and investments in 1981. *Id.* Ms. Morelock admitted that a significant portion of the earnings and investments from 2000 to the present were created by funds paid as part of the desegregation settlement, well after 1981. Tr. I, p. 245:17-23. Those payments were made by the State. *Id.* Of course, the earnings on investment were not local revenues

available in 1981 as the settlement had not yet been paid. *Id.* Therefore KCMSD's expert improperly placed numerous sources of local revenues into the denominator, which artificially lowered the ratio in later years.

But revenues have nothing to do with expenditures on state-mandated programs, much less mandated levels of expenditures. *See Fort Zumwalt.* The trial court correctly discounted Ms. Morelock's Opinion 1 and related testimony and concluded this was simply the wrong formula.

In her second shot at the ratio to be used in a proportionate funding analysis, Ms. Morelock used a different denominator than in her first opinion. Exhibit P-44, pp. 2-6. Her denominator was closer to the correct one, but still wrong. Tr. II, 131:7-132:5. The denominator in this opinion was state plus local mandated expenditures — she included both sources of revenue for costs in the denominator. Exhibit P-44, pp. 4-6. This is simply contrary to the language of the constitution and *Fort Zumwalt.* Additionally, as set forth below, there was a failure to prove that local expenditures were limited to mandated expenditures as required in *Fort Zumwalt.*

2. KCMSD's expert used state revenue amounts that were improperly calculated .

In addition to not offering ratios that followed the plain language of the Constitutional provisions and *Fort Zumwalt*, Taxpayers' expert improperly calculated the revenues, whether state or local, due to the way KCMSD "backed out" charter school payments on its books. By understating the amount of state money received by KCMSD in years after 1980-81, Ms. Morelock's testimony improperly deflated the ratio of state

funds. In the years when KCMSD acted as a disbursal agent to the charter schools, and itself sent money to the charter schools, KCMSD treated the payments to the charter schools — representing both state and local monies — as negative revenue on its own books (Annual Secretary of the Board Reports, or "ASBRs"). In other words, they appeared nowhere; they were not listed as revenues at all. So revenue existed (both state and local) that was not reflected in the documents Ms. Morelock used, the ASBRs. Tr. I, p. 83:1-24; Tr. II, p. 29:15-36:10; Defs' Exhibits Y through FF.

What is more telling is the way that KCMSD backed out the amount, as it affects the ratio that Morelock computed for the Hancock opinions. KCMSD backed ALL amounts paid – amounts representing both state and local monies – out of the State revenue figure on the ASBRs, instead of backing out the state portion from the state revenue figure, and the local portion from the various local revenue components. *Id.* For ordinary ASBR and DESE purposes, that treatment does not matter, but for purposes of Morelock's attempt to compute a Hancock ratio, it does. *Id.* Since the state revenue figure was decreased by an amount equal to both state and local revenue, then the numerator that Ms. Morelock used for the Hancock ratio is too low, and the ratio Morelock calculated for the Hancock analysis was artificially deflated. *Id.*

KCMD's expert thus miscalculated both local effort and state mandated expenditures when opining on the ratios. The trial court saw the demeanor of the witness and heard the testimony before determining that the evidence was not credible. The trial court was fully justified in doing so.

B. KCMSD's own evidence was fatally flawed because it did not exclude discretionary spending.

But perhaps the biggest flaw was Ms. Morelock's failure to remove discretionary spending by KCMSD. As if there were no transcript of the proceedings below, KCMSD brazenly says that "there is no evidence in the record to support the Circuit Court's implied conclusion that the School District provided the mandated services inefficiently as compared with comparable school districts." App. Br. 42. Of course the issue is whether the KCMSD voluntarily exceeded state mandates and the evidence was clear that they did. KCMSD's eligible pupil numbers have gone down since 1999, the assessed valuation has gone up, and the School District's per-pupil expenditures have increased since 1999. Tr. I, p. 114:16-116:16; Exhibit P-25, pp. 100-101; Exhibit P-14, p.1; Exhibit P-21, p.2. In 1989, the District spent approximately $8,000 per pupil and in 2007, it spent approximately $13,000 per pupil. Tr. I, p. 116:11-16; Exhibit P-25, p. 101. Clearly the district is spending a great deal of money on a per pupil basis.

In its Brief (p. 41-43) KCMSD argues that the trial court confused the issues of discretionary spending with "inefficient" spending. The evidence was not about mere efficiencies or lack thereof. Efficiencies bring to mind minor effects upon the amount of money spent. The evidence the trial court had before it that ruined KCMSD's expert testimony credibility were large money items, and truly amounted to discretionary spending, not merely inefficiencies.

The best example of KCMSD's discretionary spending that was <u>not</u> backed out of the mandated costs is found in footnote 5 of Appellant's brief. App. Br. 43. *Fort*

Zumwalt clearly states, as an example of items to count as discretionary spending, greater than required salaries. In footnote 5, Appellants admit that their expert considered expenses for teacher salaries in excess of the statutory minimum salary for teachers when calculating her ratios for the Hancock Amendment. The only level of spending that is specifically statutorily mandated of public school districts is minimum teacher salaries. For new teachers, from FY1995 through FY2007, the minimum teacher salary was $18,000; in FY2008, it is $22,000 and rises $1,000 every year thereafter until the minimum reaches $25,000 for FY2010 and each subsequent year. § 163.172, RSMo Supp. 2008. For teachers with 10 years of experience and a masters degree, from FY1995 through FY2007, the minimum was $24,000; in FY2008, it is $30,000 and rises $1,000 every year thereafter until the minimum reaches $33,000 for FY2010 and each subsequent year. *Id.* But in her testimony about state mandated expenditures for teachers, Ms. McKelvy did not back out any part of the $ 131 million in salaries in excess of the statutory minimum salary. Tr. I, p. 121:13-16. This Court need look no further to affirm the trial court.

The same problem was evident in KCMSD's testimony concerning building expenses. The KCMSD list of mandated expenditures included facilities and maintenance expenditures, except utilities, for all buildings in the district. Tr. I, p. 123:1-12. KCMSD's School Board paid for a facility utilization and planning study in 2006, which found that the District had excess building capacity and an average utilization rate for its buildings of around 70%. Tr. I, p. 123:13-124:20; Exhibit I-202, pp. KCMSD 24677 – KCMSD 246778. Data from the department of elementary and secondary

education reflects that enrollment decreased in the Kansas City School District in the 1980-81 school year from 38,000 pupils to 25,000 pupils in the 2007-2008 school year. Tr. II, p. 17:11-17. Data from the department of elementary and secondary education reflects that in the 1980-81 school year, the Kansas City School District reported 74 buildings open and serving children; 69 buildings open in the 2007-2008 school year; and 65 buildings open in the 2008-2009 school year, the same year in which the School District lost approximately 7 buildings to the independent school district because of annexation. Tr. II, p. 18:11-19:21; Defs' Exhibit C.

KCMSD's expert Ms. Morelock was aware of the building utilization study, but did not analyze the amount of expenditures that could be set aside if buildings were consolidated and the district's building costs reduced. Tr. I, p. 263:17-264:2. Ms. Morelock admitted that if the School District could actually close buildings, it could get rid of fixed costs. Tr. I, p. 261:17-262:24. There was substantial evidence for the trial court to conclude that expenditures for buildings were in excess of state mandated levels as the evidence was clear that KCMSD had gross excess in building capacity and needed to close schools.

C. The trial court had competent evidence from the Charter Schools' expert that supported a finding that discretionary spending was improperly included in KCMSD's ratio calculations.

The trial court had substantial evidence to support a finding that discretionary spending was improperly included in the Hancock calculations by KCMSD. In addition

to the evidence from KCMSD's own witness and expert, the trial court heard from the charter schools' expert, Rick Westbrook.

Mr. Westbrook testified that Ms. Morelock did not properly apply the formula set out in *Fort Zumwalt,* which looks at mandated activities. Mr. Westbrook testified that the denominator would need to be the local cost of mandated programs or activities, which Ms. Morelock miscalculated in more than one way. Tr. II, p. 127:1-132:18. Not all expenditures in a mandated program are mandated expenditures, and Mr. Westbrook concluded that Ms. Morelock erroneously counted discretionary expenditures in the mandated costs. *Id.*; Tr. II, p. 132:20-133:14.

One item of discretionary expenditures that Morelock erroneously included was discretionary teacher and administrators' salaries. Tr. II, p. 133:15-137:19. For 2007, Westbrook identified $25 million more in spending for certified teachers salaries and $4 million more for administrators than comparable school districts such as Springfield or districts contiguous to Kansas City. Tr. II, p. 133:24-136:13; Exhibit I-203. Mr. Westbrook also pointed to transportation expenditures. The KCMSD's transportation efficiency factor is about 200%, and in his 25 years of experience auditing schools, he has never seen such a high factor on a consistent or even isolated basis. That expenditure contains discretionary costs. Tr. II, p. 137:20-139:17. Mr. Westbrook also pointed to the costs of the food service program. He testified that compared to other districts, the Kansas City School District's recent costs appear to include $3.6 million in discretionary spending. Tr. II, p. 140:4-142:12: Exhibit I-204. Morelock did not remove discretionary

spending. She included all expenditures related to what she considered mandated areas. Tr. I, p. 250:18-251:8; Tr. II, p. 142:14-21.

The trial court had sufficient evidence to conclude that KCMSD's ratio calculations did not meet the mandates of *Fort Zumwalt*. Those calculations included the wrong baseline numbers, included expenses for non-mandated activity and failed to back out discretionary expenditures. The findings of the trial court cannot be disturbed in light of the evidence that was before it.

D. The remedy sought by KCMSD is inappropriate for a proportional funding claim.

The proportional funding requirement in Hancock is about programs that were mandated by the State in 1980-1981. Charter Schools were not authorized to exist until 1998 and did not exist until 1999. Yet somehow, the relief KCMSD sought at the trial court was to "declare" Section 160.415.4 to be in violation of the Hancock Amendment's prohibition on decreased proportion of funding of 1980-1981 program and to "declare" that the State could not reduce state aid by factoring in local tax revenues as set forth in Section 160.415.4. L.F. 19. KCMSD's theory, as best the charter schools can understand it as testified to by Ms. Morelock, is that if the State stopped reducing the State aid to KCMSD under Section 160.415.4, the dollar amount resulting from that would bring the State "more in line" with the 1980-1981 base year ratio. Tr. I, p. 231:3-8. It is nonsensical that a court would do this — declare as unconstitutional something that was not even in existence until almost 20 years after Hancock was adopted. The relief sought

is also the equivalent of ordering the State to pay KCMSD money or issuing an injunction, no matter that KCMSD used the word "declare."

Article X, Section 23 provides the authority for lawsuits to enforce the Hancock Amendment. Aside from the specific costs and attorneys' fees language, this Court has found that the only relief authorized under Section 23 is declaratory relief. Neither injunctive relief nor money judgments are permitted. *Committee for Educ. Equality*, 294 S.W.3d at 491; *Fort Zumwalt*, 896 S.W.2d at 923. What is proper is for a Court (where a violation is found) is "a declaratory judgment relieving a local government of the duty to perform an inadequately funded required service or activity." *Id.*

In the case of a disproportionate funding claim, the inadequately funded service or activity can only be one that existed in 1980-1981. Charter schools were not in existence until almost two decades later. The relief sought by KCMSD as to this claim cannot be awarded. This claim has nothing to do with charter school funding and the remedy should not either.

CONCLUSION

KCMSD and the taxpayers have failed to meet their heavy burden of showing that the trial court erred in finding that Section 160.415.4 did not violate the Constitution. This Court should affirm the trial Court's Judgment as being a correct application of the law and supported by substantial evidence.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that pursuant to Rule 84.06(c), this brief: (1) contains the information required by Rule 55.03; (2) complies with the limitations in Rule 84.06(b); and (3) contains 12,074 words, exclusive of the sections exempted by Rule 84.06(b), determined using the word count program in Microsoft Office Word 2007. The undersigned counsel further certifies that the accompanying floppy disk has been scanned and was found to be free of viruses.

_____

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CERTIFICATE OF SERVICE

I certify that one hard copy of this brief and one copy on floppy disk, as required by Rule 84.06(g), were served by placing same in the U.S. Mail, first class postage prepaid, on this 18th day of March 2010, to:

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