IN THE MISSOURI SUPREME COURT
APPEAL NO. SC90323

THE SCHOOL DISTRICT OF KANSAS CITY, MISSOURI,
REV. CHARLES J. BRISCOE, RICHARD SEXTON and DR. JULIA HILL

Appellants,

v.

STATE OF MISSOURI, MISSOURI STATE BOARD OF EDUCATION,
MISSOURI DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION;
and CHRIS NICASTRO in her capacity as Commissioner of Education,

Respondents,

MISSOURI CHARTER PUBLIC SCHOOL ASSOCIATION,

Intervenor.

Appeal from the Honorable Richard G. Callahan, Division II – Circuit Court of Cole County, Missouri Case No. 05-AC-CC00389

THE APPELLANTS' OPENING BRIEF

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JURISDICTIONAL STATEMENT

This appeal involves the real and substantial questions of: (1) whether the funding mechanism of the Missouri Charter Schools Act, Mo. Rev. Stat. § 160.415, violates Article X, § 11(g) of the Missouri Constitution because the Act diverts a portion of local tax revenue to be used "for school purposes for the district" from the School District of Kansas City, Missouri (the "School District") to charter schools, and (2) whether the funding mechanism of the Missouri Charter Schools Act, Mo. Rev. Stat. § 160.415, violates the Hancock Amendment, Article X, §§ 16 & 21 of the Missouri Constitution because: (a) through the Act the State mandated a new activity and service of the School District but failed to provide full financing for the new mandated expenditures; and (b) through the Act the State reduced the State-financed proportion of existing funding for mandated expenditures of the School District. Therefore, the Missouri Supreme Court has original jurisdiction over this appeal pursuant to Article V, § 3 of the Constitution of Missouri. See State ex rel. Union Elec. Co. v. Pub Serv. Comm'n, 687 S.W.2d 162, 164-65 (Mo. 1985) (en banc).

STATEMENT OF FACTS

This case involves the State's funding of a charter school program as an alternative education system within the boundaries of the School District by diverting local tax revenue and state funding from the School District and transferring it to the independent charter schools. The following facts were established at trial:

I. THE PARTIES

Appellant, the School District, is a public governmental body established and organized under the Missouri Revised Statutes, located in Jackson County, Missouri.

Appellant, Rev. Charles J. Briscoe, is a taxpayer residing in Jackson County, Missouri, within the boundaries of the School District, at 1902 East 60th Street, Kansas City, Missouri, 64130. Joint Stipulation of the Parties entered November 3, 2008.

Appellant, Richard Sexton, is a taxpayer residing in Jackson County, Missouri, within the boundaries of the School District, at 4151 Warwick, Kansas City, Missouri, 64111. Joint Stipulation of the Parties entered November 3, 2008.

Appellant, Dr. Julia H. Hill, is a taxpayer residing in Jackson County, Missouri, within the boundaries of the School District, at 5100 Lawn, Kansas City, Missouri, 64130. Joint Stipulation of the Parties entered November 3, 2008.

The Respondents are the State of Missouri, Missouri State Board of Education, the Missouri Department of Elementary and Secondary Education; and Chris Nicastro in her capacity as Commissioner of Education,

II. CHARTER SCHOOLS

Legislation authorizing charter schools in St. Louis and Kansas City was enacted by the Missouri Legislature in 1998. Tr. 137:7-10; 144:20-23; Mo. Rev. Stat. §§ 160.400-.410. The first school year that charter schools operated in Kansas City was the 1999-2000 school year. Tr. 137:11-13.

Charter schools are not governed or controlled by the School District's Board of Directors. Tr. 137:15-25; Mo. Rev. Stat. § 160.405. Charter Schools are governed by their respective boards of directors. Tr. 138:1-2. There is no requirement that boards of directors of charter schools be elected; charter schools select their own boards of directors. Tr. 138:3-8.

Charter schools in Kansas City are not operated by the School District's superintendent or administration; charter schools have their own administrators who make their own decisions regarding the operations of the charter schools. Tr. 138:9-21; 143:24 to 144:2. The School District does not make decisions regarding charter schools' school hours, curricula, methods of instruction, or hiring of teachers and other employees. Tr. 138:18-25; 143:16-22. Charter schools hire their own teachers. Tr. 139:8-11. Charter schools are not required to have all of their teachers certified. Mo. Rev. Stat. § 160.420.2. The School District's teachers must be certificated to obtain state funding. Tr. 139:19-23.

The School District has no oversight over the finances of charter schools; charter schools make their own decisions regarding purchases and the management of their finances. Tr. 139:24 to 140:16; Mo. Rev. Stat. § 160.405.5(4). Charter schools have

separate audit reports and file a separate Annual Secretary of the Board Report ("ASBR") with the Missouri Department of Elementary and Secondary Education ("DESE"). Tr. 140:17 to 141:6. Each charter school operating within the boundaries of the School District is a separate non-profit corporation. Tr. 143:12-15.

Beginning in the 1999-2000 school year, the charter schools received federal, state, and local funding through the School District. Tr. 149:7 to 150:16. The School District was required to pass on to the charter schools the basic foundation formula per-pupil amount of state and local tax revenue. Tr. 151:5 to 152:11. The School District made payments of state and local funding to the charter schools beginning in the 1999-2000 school year through the 2005-2006 school year. Tr. 152:12-25.[1]

From the 1999-2000 school year through the 2005-2006 school year, the State required the School District to pay a portion of its local property tax proceeds to independent, not-for-profit, charter schools. Tr. 153:11 to 154:1. On July 1, 2006, each charter school operating within the boundaries of the School District declared itself a local educational agency ("LEA"). Tr. 154:2-21. In 2006, when the charter schools became LEAs, the formula for determining the amount of local money going to charter schools remained the same. Tr. 155:4-18. However, the method by which the charter schools received the money changed. Specifically, since July 1, 2006, the State has made

[1] Appellants also challenged this pre-2006 version of the Charter Schools Act, however, the Circuit Court ruled that this challenge was mooted by the 2006 amendments to the Charter Schools Act.

payments to the charter schools directly and withheld an equivalent amount of money from State funding that the School District would have otherwise received. The amount of State payments to the charter schools includes an amount equal to the per-pupil portion of local property tax proceeds that the State previously required the School District to pay to charter schools directly. Tr. 155:16 to 156:22. Neither the 2006-2007 nor 2007-2008 State appropriations bills includes a separate appropriation for funding charter schools. Tr. 148:1-4; 149:1-6; 160:4-17.

For the 2006-2007 school year, the amount equal to the per-pupil local property tax proceeds paid by the State to charter schools, and withheld from State funding that the School District would otherwise receive, was $22,414,264.00. Tr. 174:25 to 175:8; Exhibit P-3. For the 2007-2008 school year, the amount equal to the per-pupil local property tax proceeds paid by the State to charter schools, and withheld from State funding that the School District would otherwise receive, was $26,579,805.00. Tr. 175:17 to 176:11; Exhibit P-4. But for the State's funding of charter schools, the School District would not have had any deduction of its State aid in either 2006-2007 or 2007-2008. Tr. 175:9-16; 176:22 to 177:9.

Beginning in 1999, and through June 30, 2007, the School District lost $142.3 million in local revenue that was directly or indirectly transferred to the charter schools pursuant to Mo. Rev. Stat. § 160.415. Tr. 41:13-22. Approximately 80% of School District and 90% of the charter school expenditures are fixed costs like buildings, teacher salaries, and equipment. Tr. 205:8 to 209:18; 210:6-23. The creation of charter schools created a duplication of costs for educating students within the boundaries of the

School District. Tr. 201:16 to 202:4. For each charter school operational within the boundaries of the School District, the duplication of services created an additional $3 million to $4 million in increased costs for educating students within the School District boundaries. Tr. 213:11 to 214:13.

III. STUDENTS OF THE CHARTER SCHOOLS

The School District has attempted to track the number of students leaving the School District for charter schools. Tr. 43:2-12. According to the School District's records, approximately 2,600 students left the School District from 2000 through 2008, reporting that they withdrew from the School District to attend charter schools. Exhibit P-5. The School District does not track students that move into the School District and attend charter schools or students who were never enrolled in the School District. Tr. 44:13 to 46:15.

Further, the School District tracks students who left to go to charter schools and then returned to the School District. Tr. 48:17 to 49:21; Plaintiffs' Exhibit 6. The School District also tracks the number of students who transfer back and forth between the School District and charter schools. Tr. 50:1-9. It is possible that the School District's records do not capture all of the students who left the School District to enroll in charter schools. Tr. 51:1-24. Even if all the students enrolled in charter schools came from the School District, there would still be a duplication in costs to provide education. Tr. 208:13 to 209:18. Prior to 1999, several charter schools were operating as private schools within the boundaries of the School District. These schools include: Acadamie Lafayette, Alta Vista, Brookside Day School, Genesis School, and Hogan Preparatory

Academy. Tr. 46:16-22. The students at these schools were not enrolled at the School District prior to these schools becoming charter schools, and so none of the School District's local revenue was spent on educating these students. Tr. 46:1 to 47:13.

IV. THE SCHOOL DISTRICT'S ACCOUNTING METHODS

The School District tracks all revenues and expenditures through its general ledger. Tr. 22:23 to 23:10. The form for the ASBR is a form that DESE created. Tr. 23:11-25. DESE created the account numbers and titles the School District uses on the ASBR form. Tr. 26:12-22. The ASBRs are a historical report of what the School District spent during a particular fiscal year. Tr. 28:7-21. All of the information in the ASBR comes from the School District's general ledger. Tr. 23:22-25. The School District's financial records are audited and reported in its Comprehensive Annual Financial Reports ("CAFR") each year. Tr. 29:3-16.

V. THE SCHOOL DISTRICT'S LOCAL PROPERTY TAX LEVY

The majority of the School District's local funding comes from local property tax. Tr. 32:5-12. During the desegregation litigation, the federal court raised the School District's local levy to $4.96 per $100 assessed valuation. Tr. 32:22 to 33:8. In order to ensure compliance with desegregation obligations, in 1998 Missouri voters approved language in Article X, § 11(g) to the Constitution of Missouri that specifically allows the School District to set its levy at $4.95 per $100 assessed valuation, one cent less than the rate set by the federal court in the desegregation litigation. Tr. 32:22 to 33:14. Through the Charter Schools Act funding mechanism, a portion of monies levied under Article X,

§ 11(g) intended to be used for the benefit of the School District is given to the charter schools. Tr. 194:16 to 195:1.

Prior to the enactment of the Charter Schools Act, the School District kept and used 100% of the monies levied under Article X, § 11(g). Tr. 96:8-15. In fiscal year 2007, the charter schools received $14.7 million local tax revenues generated pursuant to Article X, § 11(g). Tr. 199:17-23.

VI. THE SCHOOL DISTRICT'S LIST OF MANDATED PROGRAMS

The School District determined a list of mandated programs from its ASBRs and the analysis performed by Dr. Geraldine S. Ogle, Associate Commissioner of DESE; the sources used to identify mandated programs were State statutes and the Missouri School Improvement Program ("MSIP"), formerly known as AAA Standards. Tr. 57:10 to 58:12.

Pursuant to State law, the School District is required to follow the State standards for school districts. Failure to follow the State Standards would result in a State take-over of the School District. Tr. 59:9 to 61:1.

POINTS RELIED ON

POINT I : THE TRIAL COURT ERRED IN DETERMINING THAT THE CHARTER SCHOOLS FUNDING MECHANISM IN MO. REV. STAT. § 160.415 DOES NOT VIOLATE ARTICLE X, SECTION 11(G) OF THE CONSTITUTION OF MISSOURI BECAUSE THE CHARTER SCHOOLS FUNDING MECHANISM UNCONSTITUTIONALLY DIVERTS LOCAL TAX REVENUE FOR USES OTHER THAN FOR SCHOOL PURPOSES FOR THE DISTRICT BY DIRECTLY OR INDIRECTLY DIVERTING, LOCAL TAX REVENUE TO CHARTER SCHOOLS THAT ARE NOT SCHOOLS OF THE DISTRICT AND TO CHARTER SCHOOLS EXPENDITURES THAT ARE NOT SCHOOL PURPOSES FOR THE DISTRICT.

State ex rel. Marlowe v. Himmelberger-Harrison Lumber Co., 58 S.W.2d 750 (Mo. 1933)

State ex rel. St. Louis-San Francisco Ry. Co. v. Darby, 64 S.W. 2d 911 (Mo. 1933)

Meyers v. Kansas City, 18 S.W.2d 900 (Mo. 1929) (en banc)

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

Mo. Const. Article X, § 11(g)

Mo. Rev. Stat. § 160.405

Mo. Rev. Stat. § 160.415

POINT II: THE TRIAL COURT ERRED IN DETERMINING THAT THE CHARTER SCHOOLS FUNDING MECHANISM IN MO. REV. STAT. § 160.415 DOES NOT CREATE AN UNFUNDED MANDATE IN VIOLATION OF

ARTICLE X, §§ 16 & 21 OF THE CONSTITUTION OF MISSOURI BECAUSE THE CHARTER SCHOOLS FUNDING MECHANISM CREATES AN UNFUNDED MANDATE IN THAT IT REQUIRES THE SCHOOL DISTRICT TO TRANSFER A PORTION OF ITS LOCAL TAX REVENUE TO CHARTER SCHOOLS, WHICH CONSTITUTE A NEW STATE-MANDATED ACTIVITY OR SERVICE AND THE STATE HAS NOT PROVIDED FOR A SEPARATE APPROPRIATION TO FULLY FUND THE NEWLY CREATED CHARTER SCHOOL PROGRAM.

Rolla 31 Sch. Dist. v. State, 837 S.W.2d 1 (Mo. 1992) (en banc)

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

Boone County Court v. Missouri, 631 S.W.2d 321 (Mo. 1982) (en banc)

Mo. Const. Article X, §§ 16-24

Mo. Rev. Stat. § 160.415

POINT III: THE TRIAL COURT ERRED IN DETERMINING THAT THE CHARTER SCHOOLS FUNDING MECHANISM IN MO. REV. STAT. § 160.415 DOES NOT REDUCE THE RATIO OF STATE FUNDING FOR THE SCHOOL DISTRICT'S EXISTING MANDATED PROGRAMS IN VIOLATION IN VIOLATION OF ARTICLE X, §§ 16 & 21 OF THE CONSTITUTION OF MISSOURI BECAUSE THE CHARTER SCHOOLS FUNDING MECHANISM REDUCES THE RATIO OF STATE FUNDING FOR THE SCHOOL DISTRICT'S EXISTING MANDATED PROGRAMS IN THAT THE EVIDENCE AT TRIAL PROVED THAT THE PERCENTAGE OF STATE FUNDING FOR THE

SCHOOL DISTRICT'S EXISTING MANDATED PROGRAMS HAS SUBSTANTIALLY DECREASED AS A RESULT OF THE CHARTER SCHOOL FUNDING MECHANISM AND THE SCHOOL DISTRICT WAS NOT REQUIRED TO SHOW THAT ITS EXPENDITURES FOR MANDATED PROGRAMS CONTAINED NO INEFFICIENCIES.

Rolla 31 Sch. Dist. v. State, 837 S.W.2d 1 (Mo. 1992) (en banc)

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

Mo. Const. Article X, §§ 16-24

Mo. Rev. Stat. § 160.415

ARGUMENT

I. INTRODUCTION

Article X of the Constitution of Missouri is the source of taxing authority for school districts, providing constitutional authority for the School District to levy property taxes within the School District for School District purposes. The Missouri Constitution also contains comprehensive restrictions protecting local taxpayers from State-created increases to local taxation and from State actions that shift local tax revenue from local programs to State use. Article X, §§ 16-24 (the Hancock Amendment), forbids the State from forcing unfunded mandates on local taxpayers, and prevents the State from reducing the State-financed proportion of State-mandated programs or shifting the costs of those programs to local taxpayers.

In violation of these constitutional limitations, the State created a funding mechanism for the charter schools that diverts local tax revenue from the School District to the charter schools to be used for charter school purposes rather than for "school purposes for the school district" as required by Article X, § 11(g) of the Constitution of Missouri. This diversion of local tax revenue is accomplished by reducing the School District's State funding in an amount equal to its per-pupil amount of local tax revenue for every student attending a charter school, whether the student previously attended a School District school or not.

Charter schools are not schools of the School District. They are separate corporations, with separate boards, separate governing statutes, separate authority,

separate finances, and separate functions. Using the revenue from the School District's tax levy is contrary to uses local taxpayers directed when approving the constitutional amendment to allow the School District's local levy. This is true even though charter school funding is accomplished not as a direct payment of local money to the charter schools, but through a reduction in State aid in an amount equal to the per-pupil amount of local tax levy revenue.

Even if the State could circumvent the approval of the voters by creating an indirect transfer of local tax revenue without running afoul of § 11(g), the charter schools funding mechanism violates the unfunded mandate restrictions of the Hancock Amendment. The Hancock Amendment forbids the creation of State-mandated programs or services without a specific appropriation to fund the costs of that new service. Moreover, the Hancock Amendment restricts the State from increasing the tax burden of local taxpayers by shifting State funding available for existing programs and services to new services, or by changing the proportion of State-to-local funding for State-mandated programs.

The record below establishes that the State has never made any specific appropriation for charter schools funding. Rather the funding mechanism uses diverted local tax revenue to fund the new charter schools program, or, at the very least, shifts State funding from existing programs, which funding must be replaced by local revenue. Whether by diverting local revenue from its constitutional purpose, or by creating a new State program without the required State funding, the Charter Schools Act violates the

local taxpayer protections set forth in the Constitution of Missouri. Accordingly, the Charter Schools Act is unconstitutional.

II. POINT I : THE TRIAL COURT ERRED IN DETERMINING THAT THE CHARTER SCHOOLS FUNDING MECHANISM IN MO. REV. STAT. § 160.415 DOES NOT VIOLATE ARTICLE X, SECTION 11(G) OF THE CONSTITUTION OF MISSOURI BECAUSE THE CHARTER SCHOOLS FUNDING MECHANISM UNCONSTITUTIONALLY DIVERTS LOCAL TAX REVENUE FOR USES OTHER THAN FOR SCHOOL PURPOSES FOR THE DISTRICT BY DIRECTLY OR INDIRECTLY DIVERTING, LOCAL TAX REVENUE TO CHARTER SCHOOLS THAT ARE NOT SCHOOLS OF THE DISTRICT AND TO CHARTER SCHOOLS EXPENDITURES THAT ARE NOT SCHOOL PURPOSES FOR THE DISTRICT.

A. Standard Of Review

The claims below were resolved in Findings of Fact and Conclusions of Law issued by the circuit court after a non-jury trial. The circuit court's judgment will be sustained "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) (en banc); see also Citibank (South Dakota), N.A. v. Mincks, 135 S.W.3d 545, 548 (Mo. Ct. App. 2004). "The trial court is free to believe or disbelieve all, part or none of the testimony of any

witness." Watson v. Mense, __S.W.3d__, 2009 WL 3833453, at *2 (Mo. 2009) (en banc). If a point on appeal raises the sufficiency of the evidence, this 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." Id.

The constitutional validity of school funding laws and the circuit court's interpretation of the Missouri Constitution are questions of law given *de novo* review. Committee for Educational Equality v. State, 294 S.W.3d 477, 488 (Mo. 2009) (en banc). Constitutional provisions are read in harmony with all related provisions. Id.

B. The Historical Context Of Article X, § 11(g) Shows That The Intent Of Article X, § 11(g) Is To Provide Local Tax Revenue To Benefit The School District Of Kansas City, Missouri

Article X, § 11(g) of the Constitution of Missouri was adopted by the voters in 1998 and provides:

> 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. The authority granted in this section shall apply to any successor school district or successor school districts of such school district.

Mo. Const. Art. X, § 11(g). The Kansas City, Missouri, School District is the only school district "whose operating levy for school purposes for the 1995 tax year was established pursuant to a federal court order."

According to its express language, Article X, § 11(g) permits the School District to levy taxes only for "school purposes for the district." To understand this constitutional limitation, the language of Article X, § 11(g) must be considered in its historical context.

Article X, § 11(g) was specifically enacted as a remedial and protective measure to ensure that the School District could meet its obligations arising out of the desegregation litigation. For many years, the State and the School District were involved in protracted litigation in which the School District and the State were found jointly and severally liable for intentionally creating a system of racially segregated public schools and then failing to eliminate its discriminatory vestiges. See Jenkins v. Missouri, 593 F. Supp. 1485, 1488, 1504-06 (W.D. Mo. 1984); see also Jenkins v. Missouri, 931 F.2d 470, 477 (8th Cir. 1991) (rejecting State's attempt to relitigate "joint and several liability" finding). To undue this unconstitutional discrimination, the Federal Court approved one of the nation's most comprehensive desegregation remedies. Jenkins v. Missouri, 639 F. Supp. 19 (W.D. Mo. 1985), aff'd as modified, 807 F.2d 657 (8th Cir. 1986) (en banc), cert. denied, 484 U.S. 816 (1987).

Substantial capital improvements to school buildings were a key remedial component because the Federal Court found that, as a result of the unconstitutional action of the State and the School District, many of the School District's facilities were so deteriorated that they presented health and safety hazards, undermined educational improvement efforts, discouraged non-minority enrollment, and left intact an inferior education for minority students. Jenkins, 639 F. Supp. at 39-41; see also Jenkins v.

Missouri, 672 F. Supp. 400, 411 (W.D. Mo. 1987), aff'd in relevant part, 855 F.2d 1295 (8th Cir. 1988) ("[the School District's] physical facilities have literally rotted").

In the context of its desegregation remedies, the Federal Court also determined that the School District was unable to raise sufficient revenue to fund its share of the desegregation remedy without a "diminution in the quality of its regular academic program." Jenkins, 672 F. Supp. at 410-11, aff'd in relevant part, 855 F.2d at 1309. This was because state law "so narrowly circumscribe[d] [the School District's] ability to raise money that, if forced to operate within these limits, the district court would lack power to implement a remedy." Jenkins v. Missouri, 855 F.2d 1295 (8th Cir. 1988). Thus, the Federal Court determined that the only appropriate way to fund the desegregation remedy was to enjoin the operation of State laws that prevented the School District from increasing its property tax levy to finance the School District's share of the remedy. See id. at 1309-15; Jenkins, 672 F. Supp. at 410-13. Pursuant to these court orders, the School District increased its levy to $4.96 per $100 of assessed valuation. See Jenkins v. Missouri, 943 F.2d 840, 841-42 (8th Cir. 1991).

In 1996, the School District and the State reached a settlement in the desegregation litigation. As part of this agreement, the State agreed to pay the School District approximately $320 million and to support existing court-ordered financing including the increased tax levy rate then in existence. See Jenkins v. Missouri, 959 F. Supp. 1151-52, 1169 (W.D. Mo. 1997). The Federal Court carefully scrutinized the terms of the agreement between the School District and the State and approved the agreement with the

understanding that "it releases the State from further financial obligation but leaves in place the $4.96 court-ordered levy." Id. at 1154.

On appeal, the United States Court of Appeals for the Eighth Circuit affirmed the approval of the settlement agreement. In doing so, the court indicated that its decision was predicated upon its understanding that the court-authorized levy would remain in place, not only until the School District became unitary but also as "a means for continued financial support of the [School District] after the [School District] is no longer under court supervision." Jenkins v. Missouri, 122 F.3d 588, 601 (8th Cir. 1997). In the context of a later appeal, the Eighth Circuit noted the constitutional amendment adopted by Missouri voters – Article X, § 11(g) – that permitted the School District to set a levy of "up to $4.95 for $100 assessed valuation," one cent below the court-authorized rate. Id. at 986. The Eighth Circuit noted that, in its view, Article X, § 11(g) provided assurance that, even after the State's dismissal, the tax levy increase would remain in place. See Jenkins v. Missouri, 158 F.3d at 986 (8th Cir. 1998) (recognizing that the amendment provided the School District with the "authority to maintain that part of the levy which has heretofore been devoted to retire its indebtedness"). Accordingly, Article X, § 11(g) was specifically adopted to benefit the School District and only applies to the School District, with other school districts being granted taxation authority by Article X, § 11(b). (Tr. 32:9 to 33:14).

C. The Grant of Taxing Authority Must Be Strictly Construed In Favor of the Public and In Limiting The Expenditure of Tax Levy Appropriations to the Express Terms for Which the Appropriation Was Made.

As the Circuit Court recognized, courts must "give due regard to the primary objectives of the constitutional provision under scrutiny, as viewed in harmony with all related provisions." Neske v. City of St. Louis, 218 S.W.3d 417 (Mo. 2007) (en banc). Once taxes have been levied for a particular purpose, those funds may not be redirected to some other, different purpose. See State ex rel. Marlowe v. Himmelberger-Harrison Lumber Co., 58 S.W.2d 750, 754 (Mo. 1933); Horsefall v. Sch. Dist., City of Salem, 128 S.W. 33, 34 (Mo. Ct. App. 1910). If any doubt arises out of the use of the words employed to grant appropriation authority, "it is to be resolved in favor of the public and in limiting the expenditures of the appropriation to the express terms for which it was made." State ex rel. St. Louis-San Francisco Ry. Co. v. Darby, 64 S.W. 2d 911, 915 (Mo. 1933). The express purpose of the School District in levying taxes under Article X, § 11(g) is "for school purposes for the district."

Under these principles, this Court has held that it was improper to use revenue collected from a tax levy for "erecting public buildings" to make repairs or alterations of existing buildings. State ex rel. Marlowe, 58 S.W.2d at 753-54. Similarly, an appropriation made for purpose of constructing, improving, and equipping municipal

docks could not be used to purchase land on which to construct the docks. Meyers v. Kansas City, 18 S.W.2d 900, 901 (Mo. 1929) (en banc).

The Circuit Court's conclusion[2] that Article X, § 11(g) should be broadly interpreted to authorize local tax revenue collected pursuant to § 11(g) to be used for any public education purpose within the geographic boundaries of the School District is contrary to the intent of this provision and erroneously declares and applies the law. This holding ignores the history of Article X, § 11(g) and the express purpose for which it was adopted. The law requires that tax levy revenue only be used for the purposes contained in the express language granting the appropriation power. The Circuit Court's decision is not supported by the law.

[2] Throughout this brief Respondents refer to the Court's Judgment and Order, however, it should be noted that the Circuit Court Judge adopted the proposed findings of fact and conclusions of law of the Intervenors verbatim, several months after the trial. "For obvious reasons, when a court adopts in its entirety the proposed findings of fact and conclusions of law of one of the parties, there may be a problem with the appearance. The judiciary is not and should not be a rubber-stamp for anyone." State v. Griffin, 848 S.W.2d 464, 471 (Mo.,1993).

D. Charter Schools Expenditures Are Not Used For School Purposes Of The School District, And Charter Schools Are Not Schools Of The District

As shown above, Article X, § 11(g) only permits the expenditure of revenue collected under its provisions to be used for "school purposes for district." Charter schools expenditures are not made for school purposes for the School District. Accordingly, the use of revenue collected under the authority of Article X, § 11(g) for charter schools expenditures is unconstitutional.

By definition, "[a] charter school is an **independent** public school." Mo. Rev. Stat. § 160.400.1 (emphasis supplied). This "independence" is clear from the manner in which these schools are governed and operated:

- Charter schools are not governed by the School District's board of directors (Mo. Rev. Stat. § 160.405; Tr. 137:15-25);
- Charter schools are governed by boards that are not publicly elected (Mo. Rev. Stat. § 160.405; Tr. 138:1-8);
- Test scores of students enrolled in charter schools are not included in any measure of School District performance (Mo. Rev. Stat. § 160.405.5(6));
- Charter schools are not operated by the School District's superintendent or administration; charter schools have their own administrators who make decisions regarding the operations of the charter schools (Tr. 138:9-21; 143:24 to 144:2);

- The School District does not make decisions regarding charter schools' school hours, curriculum, method of instruction, or hiring of teachers and other employees (Tr. 138:18-25; 143:16-22);
- Charter schools hire their own teachers (Tr. 139:8-11);
- Charter schools are not required to have certified teachers (Mo. Rev. Stat. § 160.420.2);
- The School District has no oversight over the finances of charter schools (Mo. Rev. Stat. § 160.405.5(4); Tr. 139:24 to 140:16); and
- Charter schools are not required to engage in the same competitive bid procedures as is the School District (Mo. Rev. Stat. § 160.405.5(3)).

In addition, each charter school is a separate non-profit corporation; schools of the School District are not organized as separate non-profit corporations. Because charter schools are wholly independent from the School District, payments made to them out of local tax revenues are not "for school purposes for the district," the purpose for which the funds were collected under Article X, § 11(g).

E. <u>The Evidence At Trial Conclusively Established That The Charter Schools Funding Mechanism Of Mo. Rev. Stat. § 160.415 Violates Article X, § 11(g) Of The Constitution Of Missouri</u>

In its decision, the Circuit Court determined that the charter schools funding mechanism of Mo. Rev. Stat. § 160.415 does not violate Article X, § 11(g) because, even though a portion of the School District's local tax levy revenue is effectively transferred

to the charter schools, the School District did not show that any actual dollar of local tax revenue was physically transferred to the charter schools. (Judgment at 7, Appendix at A7). This conclusion defies the undisputed testimony of the State's own witnesses and the legal reality of the charter schools funding mechanism.

Section 160.415 requires the School District to use its local tax revenue that it collected pursuant to its tax levy to make up for the shortfall in state funding for charter schools. Section 160.415 specifically provides that a charter school shall be paid "local tax revenues per weighted average daily attendance."

Moreover, Dr. Geraldine Ogle, Associate Commissioner of DESE, specifically testified that the intent of the charter schools funding formula contained in § 160.415 is to share the tax revenue collected by the School District from the local taxpayers with the independent not-for-profit charter schools and the students that attend them. (Tr. 153:16 to 154:1). Dr. Ogle further admitted that the charter schools funding calculation includes local money collected by the School District, and that § 160.415 is set up so that it necessarily includes a portion in the funding of charter schools from the local tax revenues of the School District. (Tr. 155:16-18, 177:5-9).

In testifying about the charter schools payment calculation for the 2006-2007 school year, Dr. Ogle confirmed that for that year, the charter schools payment calculation based upon the $4.95 levy authorized by Article X, § 11(g), multiplied by the weighted average daily attendance of the charter schools, resulted in $22 million of local tax money transferred to the charter schools from the School District. (Tr. 174:19-24). Further, Dr. Ogle acknowledged that if the charter school LEAs did not exist in the 2006-

2007 school year, the School District would have retained that additional $22 million of its local revenue. (Tr. 175: 2-16). Similarly, for the 2007-2008 school year an additional $26.5 million of local tax money collected pursuant to Article X, § 11(g) was transferred from the School District to the charter schools pursuant to Mo. Rev. Stat. § 160.415. (Tr. 175:17 to 176:6).

The statutory language of § 160.415, as well as the admissions of the State's own witness, confirm that the charter schools funding statute is designed to, and does, transfer a substantial portion of the School District's local tax revenue collected pursuant to Article X, § 11(g) to the independent charter schools. Ignoring this evidence, however, the Circuit Court erroneously held that because the actual tangible dollars collected by the School District in local tax revenue were not transferred to the charter schools, § 160.415 does not violate Article X, § 11(g). This hypothetical analysis elects form over substance and, if taken to its logical conclusion, would allow the State to entirely reduce State aid for the full amount of the School District's local tax levy. This cannot be the law and would make Article X, § 11(g) meaningless. Further, such a reading of Article X, § 11(g) would clearly violate the State obligations under the desegregation settlement.

As the statutory language provides, and as Dr. Ogle acknowledged, the charter schools funding statute is designed to transfer the local revenue of the School District to the charter schools. That the statute accomplishes this design by taking the School District's local revenue by transferring the dollars from the School District's State aid does not change the statute's unconstitutional purpose or effect. Expert testimony

presented by the School District showed the effect on the School District is the same, regardless of whether it actually paid local tax revenue to the charter schools or had an equal amount reduced from its State aid. Tr. 198:15 to 199:3. 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.

To illustrate this point even further, the charter schools funding mechanism for charter schools that have not declared themselves as LEAs requires the School District to make the charter schools payments directly to charter schools, including the local revenue portion set forth in the charter schools funding formula. Mo. Rev. Stat. § 160.415. Accordingly, had the charter schools at issue not declared themselves LEAs, the School District would have been required to pay its local tax revenue, as determined by the funding formula, directly to the charter schools. The fact that all of the charter schools within the boundaries of the School District have declared themselves LEAs does not magically alter the fact that the purpose and effect of the charter schools funding statute is to transfer the Article X, § 11(g) levy revenue from the School District to the charter schools.

Even if this Court were to accept the Circuit Court's conclusion that § 160.415 does not violate Article X, § 11(g) because the State transferred local revenue by reducing the School District's State aid, this conclusion runs headlong into the Hancock Amendment of the Constitution of Missouri. One of the bedrock principles of the

Hancock Amendment is that the State ma not shift costs to local taxpayers by requiring a political subdivision to use its local sources of revenue for expenditures that were previously covered by State appropriations. Rolla 31 Sch. Dist. v. State, 837 S.W.2d 1, 7 (Mo. 1992) (en banc). Accordingly, as to the constitutionality of § 160.415, the charter school funding mechanism either improperly transfers local Article X, § 11(g) revenue to the charter schools for other than School District purposes, or requires the School District to shift its local tax revenue to cover costs previously covered by the unreduced State aid in violation of the Hancock Amendment.

III. POINT II: THE TRIAL COURT ERRED IN DETERMINING THAT THE CHARTER SCHOOLS FUNDING MECHANISM IN MO. REV. STAT. § 160.415 DOES NOT CREATE AN UNFUNDED MANDATE IN VIOLATION OF ARTICLE X, §§ 16 & 21 OF THE CONSTITUTION OF MISSOURI BECAUSE THE CHARTER SCHOOLS FUNDING MECHANISM CREATES AN UNFUNDED MANDATE IN THAT IT REQUIRES THE SCHOOL DISTRICT TO TRANSFER A PORTION OF ITS LOCAL TAX REVENUE TO CHARTER SCHOOLS, WHICH CONSTITUTE A NEW STATE-MANDATED ACTIVITY OR SERVICE AND THE STATE HAS NOT PROVIDED FOR A SEPARATE APPROPRIATION TO FULLY FUND THE NEWLY CREATED CHARTER SCHOOL PROGRAM.

A. Standard Of Review

The claims below were resolved in Findings of Fact and Conclusions of Law

issued by the circuit court after a bench trial. The circuit court's judgment will be sustained "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, 536 S.W.2d at 32; see also Citibank, 135 S.W.3d at 548. "The trial court is free to believe or disbelieve all, part or none of the testimony of any witness." Watson, 2009 WL 3833453, at *2. If a point on appeal raises the sufficiency of the evidence, this 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." Id.

The constitutional validity of school funding laws and the circuit court's interpretation of the Missouri Constitution are questions of law given *de novo* review. Committee for Educational Equality, 294 S.W.3d at 488. Constitutional provisions are read in harmony with all related provisions. Id.

B. The Hancock Amendment To The Missouri Constitution Creates A Comprehensive Shield To Protect Taxpayers From Government Increases To The Tax Burden Borne By Taxpayers As Of November 4, 1980

On November 4, 1980, Missouri voters adopted an amendment to the Missouri Constitution – Article X, Sections 16-24 – called the "Hancock Amendment." Roberts v. McNary, 636 S.W.2d 332, 334 (Mo. 1982) (en banc). The objective of the Hancock Amendment was to "rein in increases in governmental revenue and expenditures." Id. at

336. Put differently, the Hancock Amendment "aspires to erect a comprehensive, constitutionally-rooted shield erected to protect taxpayers from government's ability to increase the tax burden above that borne by the taxpayers on November 4, 1980." Fort Zumwalt Sch. Dist. v. State, 896 S.W.2d 918, 921 (Mo. 1995) (en banc); see also Beatty v. Metropolitan St. Louis Sewer Dist., 867 S.W.2d 217, 221 (Mo. 1993) (en banc).

Article X, § 16 of the Missouri Constitution states, in 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.

Additionally, Article X, § 21 places the following restrictions on State-mandated programs:

> 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. 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.

Mo. Const. Art. X, § 21.

These provisions of the Hancock Amendment create two distinct rules. First, the Legislature must provide complete funding in the form of an express appropriation for any newly mandated program. Rolla 31, 837 S.W.2d at 7 (Mo. 1992) (en banc) ("unfunded mandate violation"). The costs of a newly created program cannot be covered by requiring the political subdivision to use its local sources of revenue for expenditures that were previously covered by State appropriations. Id. Second, the State cannot shift the tax burden for new programs onto political subdivisions by reducing the

ratio of the State-financed portion of a political subdivision's existing mandated programs. Fort Zumwalt, 896 S.W.2d at 923 ("reduced ratio violation"). The charter school funding mechanism of § 160.415 violates both of these Hancock Amendment provisions.

C. The Charter Schools Act Mandates New Activities And Services Without State Financing

Under the unfunded mandate prong, the Hancock Amendment prevents the State from requiring the School District to begin a new mandated activity or service, or to increase the level of service beyond its 1980-1981 level, without a specific appropriation of State monies to completely finance the costs of the new or increased service. Neske v. City of St. Louis, 218 S.W.3d 417, 422 (Mo. 2007) (en banc). Under this prong of the Hancock Amendment there is a violation where: (1) there is a new mandated service or program created by the State that was not mandated in 1980-81; (2) there is an increase in costs to the local political subdivision challenging the new program; and (3) the State fails to make a specific appropriation to fund the entire cost of the new service or program. Id.

Charter schools and charter school LEAs are a new State-mandated activity and service created by the State specifically within the boundaries of the School District. The Charter Schools Act creates a new system and structure for providing public education to students living within the boundaries of the School District that did not exist in 1980-1981. Mo. Rev. Stat. § 160.415 et seq. Under the new program, students living within

the boundaries of the School District can choose to attend a school operated and administered by the School District, or they can choose to attend the State-created yet independently and privately run charter schools operating within the School District's boundaries. *Id.* The cost for providing this alternative form of education is required to be paid, in part, by the School District. Under the Charter Schools Act, the School District has no option to prevent its students from attending charter schools and has no ability to refuse paying for this State-mandated alternative system of education. Id. While the School District does not physically provide the services to the charter schools students, the new charter school activity is a new activity required of the School District because the School District is required to fund the charter schools' operations.

The Circuit Court determined that the Charter Schools Act does not create a new activity or program, apparently concluding that the activity of educating children within the School District boundaries has always existed and further concluding that the School District is actually relieved from providing services because some of its students will be educated by the charter schools. (Judgment at 12, Appendix at A12). This conclusion is not valid. While the School District does not directly provide services to the charter schools students, it does pay for those services to be provided. The Hancock Amendment's official ballot title stated that its purpose was to prohibit "state expansion of local responsibility without state funding." Neske, 218 S.W.3d at 422. Requiring the School District to fund an alternative system of education through charter schools with its local tax revenue creates a new responsibility that is not funded by the State.

The Circuit Court's application of Neske and Rolla is flawed. In Neske the Hancock Amendment challenge by the City of St. Louis dealt with increases in City contributions to employee retirement systems. Neske, 218 S.W.3d at 421. The court held that there was no Hancock Amendment violation because the City had always been required to contribute the full amount determined by an actuarial formula that was in place prior to the Hancock Amendment's passage. Id. at 422. The City argued that, because the formula resulted in an increase in the funding level for years after 1981, there was a violation of the Hancock Amendment. Id. at 421. In rejecting that argument, the Court reasoned that, because the funding formula did not change, the City had no increased responsibility and, therefore, no Hancock Amendment violation occurred. Id. Both prior to and after the Hancock Amendment's passage, the City had to contribute the full amount determined by the actuarial formula. Id.

Neske is inapposite to the case before this Court. In this case, the imposition of an alternative system of public education through charter schools and LEAs is new and did not exist prior to 2006. Through the Charter Schools Act, the State created a duel system of free public education – one through the public school system created pursuant to Mo. Rev. Stat. § 162.011 et seq. and another through charter schools and LEAs as newly created by Mo. Rev. Stat § 160.415 et seq. Offering and funding a charter school program of education was not within the School District's statutory obligation prior to 1981 when the Hancock Amendment was passed and, therefore, requiring the School District to pay for this statutory obligation is a violation of Article X, § 16 of the Constitution of Missouri.

As the Court held in Boone County Court v. Missouri, 631 S.W.2d 321 (Mo. 1982) (en banc), the terms "any," "service," and "activity" are to be read alternatively and broadly as any School District action performed for the benefit of its constituents, and any general functioning and operation of the School District in performing services. See id. at 325 (holding that a Hancock Amendment violation occurred where the State-mandated increased salaries for county collectors).

The protections of the Hancock Amendment would be eviscerated if the State could skirt around its provisions by requiring a local governmental subdivision to pay for new services required by the State under the guise that the local government does not actually provide the service because the State has created an alternative delivery system. Under this reasoning, for example, the State could have prevailed in the Rolla case if it set up a private entity to provide special education services to pre-school age children, but had the cost of the program paid for by the school district. Such a result would thwart the very purposes of the Hancock Amendment and is clearly unconstitutional.

By requiring the School District to pay for a new system of providing educational services to students within the School District's boundaries and requiring the School District to pay its local tax revenue for the education of students that had not previously been educated by the School District, the Charter Schools Act creates a new activity and service provided by the School District, in violation of Article X, § 16 of the Constitution of Missouri

D. The Charter Schools Act Results In Increased Costs to The School District

It is undisputed that the cost of public education for the School District and school children within the School District's geographic boundaries increased with the implementation of the Charter Schools Act. This reality is first evidenced by the amount of local tax revenue paid by the School District to charter schools. Between the 1999-2000 school year and the 2006-2007 school year, the School District was required to transfer $277,336,993.00 to fund the charter schools. (Tr. 38:5 to 39:20; Ex. P-1). Of that amount, $142.3 million came from local tax revenue generated through the School District's local tax levy authority, shifting that revenue away from the School District's own programs to cover the newly created State charter schools program. (Tr. 40:15 to 41:22; Ex. P-2). For the 2006-2007 school year, the first year charter school LEAs were allowed by law, the School District paid $22 million of local tax revenue to the charter schools. (Tr. 174:19-24). Further, Dr. Ogle acknowledged that if the charter school LEAs did not exist in the 2006-2007 school year, the School District would have retained that $22 million of its local tax revenue to spend on its own expenses and programs. (Tr. 175: 2-16). Similarly, for the 2007-2008 school year, an additional $26.5 million of local tax revenue was transferred from the School District to the charter schools pursuant to Mo. Rev. Stat. § 160.415. (Tr. 175:17 to 176:6). The loss of this local tax revenue

represents the cost to the School District of funding the State-mandated alternative system of providing educational services through charter schools.[3]

Moreover, the School District is actually required to expend its local tax revenue on students to whom it did not previously provide educational services. Under normal circumstances, the School District receives its State aid generally according to how many students it is educating. (Tr. 36:24 to 37:18). Accordingly, if a student leaves the School District, the State funding for that student also leaves the School District. Local tax revenue, however, is not determined by the number of students being educated by the School District. Rather, it is based upon the assessed value of property located within the School District's geographic boundaries. (Tr. 36:24 to 37:18). Accordingly, when a student leaves the School District, the School District's local tax revenue is not impacted.

The Charter Schools Act changes this equation. Pursuant to the Charter Schools Act, the School District is required to calculate its local revenue on a per-pupil basis and transfer that amount to the charter schools for each student that attends the charter schools, whether or not that student was previously a student of the School District. Under this system, the School District is required to provide services through the State-mandated charter schools financing to students that were never students of the School

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[3] Of course the School District also lost its State aid portion of its funding for the charter school students also; however, because the State aid portion is provided to the School District based upon is student population, this reduction does not trigger a Hancock Amendment violation.

District because attended non-publically supported entities such as private and parochial entities. In this way, the School District is required by the Charter Schools Act to provide new educational services.

In fact, the undisputed evidence at trial showed that several charter schools were operating as private schools prior to the enactment of the Charter Schools Act. (Tr. 46:16-22). Because these schools were private schools, the School District had no obligation to fund the education for any student attending one of these private schools. Once the Charter Schools Act was passed, however, these private schools became charter schools, and the School District was required to pay to these schools a portion of its local tax revenue based on a per-pupil amount for each student attending these charter schools. (Id.)

The increased cost to the School District for the State-mandated alternative charter schools system of education is also shown in the duplication and increase of fixed costs between the School District and the charter schools. The undisputed evidence at trial established that, with respect to each charter school that operates within the School District's boundaries, an additional $3 million to $4 million of expense is created. (Tr. 213:11 to 214:13). This expense is created by duplication of fixed costs between the School District and individual charter schools. Because many of the educational expenses of both the School District and the charter schools are fixed expenses, meaning that they do not reduce significantly in relation to the number of students that are being educated, the creation of charter schools caused the overall expense of educating the same number of students to increase. (Tr. 214:14 to 215:5).

E. The State Has Not Made A Specific Appropriation Fully Funding The Cost Of The Newly Created Charter Schools

It is undisputed that there was no specific appropriation for the funding of charter schools. (Tr. 148:1-4; 149:1-6; 159:11 to 160:17; 162:9-13, 20-22). Rather, funding for the charter schools program comes from diverting both State funding and local tax revenue from the School District to the charter schools. (Tr. 149:23 to 154:1; 155:2 to 159:10). Dr. Ogle, Associate Commissioner at DESE, testified that the Charter Schools Act requires the local tax revenue collected from the local taxpayers residing within the School District boundaries to be shared with the independent, non-profit charter schools to cover the additional costs created by the Charter Schools Act. (Id.) She also acknowledged that there was no specific appropriation for the operation of charter schools. (Tr. 148:1-4; 149:1-6; 159:11 to 160:17; 162:9-13, 20-22).

The Charter Schools Act creates an unfunded mandate on the School District. It gives the School District the increased responsibility of funding an alternative system of education for students within the School District's boundaries. The State does not fully fund this newly mandated responsibility with a specific appropriation but instead requires the School District to expend its local revenue to fund a portion of the newly mandated responsibility. Accordingly, the charter schools funding mechanism violates the unfunded mandate prong of the Hancock Amendment.

IV. POINT III: THE TRIAL COURT ERRED IN DETERMINING THAT THE CHARTER SCHOOLS FUNDING MECHANISM IN MO. REV. STAT. § 160.415 DOES NOT REDUCE THE RATIO OF STATE FUNDING FOR THE SCHOOL DISTRICT'S EXISTING MANDATED PROGRAMS IN VIOLATION IN VIOLATION OF ARTICLE X, §§ 16 & 21 OF THE CONSTITUTION OF MISSOURI BECAUSE THE CHARTER SCHOOLS FUNDING MECHANISM REDUCES THE RATIO OF STATE FUNDING FOR THE SCHOOL DISTRICT'S EXISTING MANDATED PROGRAMS IN THAT THE EVIDENCE AT TRIAL PROVED THAT THE PERCENTAGE OF STATE FUNDING FOR THE SCHOOL DISTRICT'S EXISTING MANDATED PROGRAMS HAS SUBSTANTIALLY DECREASED AS A RESULT OF THE CHARTER SCHOOL FUNDING MECHANISM AND THE SCHOOL DISTRICT WAS NOT REQUIRED TO SHOW THAT ITS EXPENDITURES FOR MANDATED PROGRAMS CONTAINED NO INEFFICIENCIES.

A. The Charter Schools Act's Funding Formula Reduced The Ratio Of State Funding For The School District's Existing State-Mandated Programs

To establish a reduced-ratio violation of the Hancock Amendment, plaintiffs must establish as a baseline the mandatory programs required by the State in the 1980-81 school year and the ratio of State-to-local spending for the mandatory programs for that

year. Rolla 31, 837 S.W.2d at 7. Plaintiffs must then establish the costs of mandated programs for subsequent years and demonstrate that the ratio of State-to-local spending for the mandated programs in the subsequent years has decreased. Id. In so doing, plaintiffs must exclude from their calculus any discretionary expenditures that the School District undertook since the 1980-81 school year that are not related to the mandatory programs. Id. Despite the fact that Appellants followed this precise method of proof, the Circuit Court applied an additional evidentiary burden, which was inappropriate as a matter of law.

At trial, undisputed evidence established the School District's State-mandated programs. In fact, the School District formulated its calculation based upon the programs that the State's own witnesses concluded were mandatory. These mandated expenditures include expenditures in the areas of student instruction, special education, board of education services, professional development, student transportation, certificated teacher compensation, teacher and non-teacher retirement, teacher support projects, textbooks, audit services, telephone services, employee benefits, records retention, student assessment, food service, facilities and maintenance, and building administrators, as well as others. See Exhibit P26.

The School District established that, in 1981, 32.1% of the School District's mandated program expenditures were covered by State revenue to the School District. (Tr. 229:22 to 230:13). This percentage was determined by using as the numerator the State revenue available to the School District for its mandated programs and as the denominator the actual cost to the School District for the programs that the parties agreed

were mandated by the State. (Tr. 234:22 to 235:8). Using this same ratio, for the same State-mandated programs, for the years after the implementation of the Charter Schools Act, the ratio of State revenue to mandated expenditures declined. (Tr. 229:22 to 230:13). In 2001, when the School District first felt the full impact of charter schools operations, State funding to the School District covered only 26.74% of State-mandated expenditures. (Tr. 224:10 to 224:14; Ex. P-44 p. 5). In 2006, when the Charter Schools Act was amended to allow charter schools to act as local educational agencies, State revenue to the School District covered only 23.16% of State-mandated expenditures. (Tr. 224:14 to 224:18). Finally, in 2007, State revenue to the School District covered only 25.43% of State-mandated expenditures. (Tr. 230:12 to 230:13). Had the ratio of State revenue for State-mandated programs remained at the 1981 level, the School District would have received approximately $13 million in additional State revenue in 2001, approximately $23 million in 2006, and approximately $18 million in 2007. (Tr. 230:14-22). But for the funding lost to the charter schools, State funding for the School District's mandated programs would have remained close to the 1981 level. (Tr. 231:3-10).

The School District also established that the ratio of State revenue available for State-mandated programs as compared to local revenue available for those mandated programs also declined. For this analysis, the School District established the 1981 baseline by using as the numerator the State revenue available to the School District for mandated programs, and used as the denominator the total local revenue available to the School District for State-mandated programs. (Tr. 236:14 to 237:4). In 1981, 38.69% of

the revenue available to the School District for use on its State-mandated programs came from the State. (Tr. 238:2-11). In 2001, however, the State provided only 34.20% of the revenue needed for the School District's State-mandated programs. (Ex. P-44, p. 3). In 2006, the State provided only 29.09% of the revenue needed for State-mandated programs. (Ex. P-44, p. 3). In 2007, the State provided only 33.73% of the revenue needed for the School District's State-mandated programs. (Tr. 238:12-15).

The Charter Schools Act significantly reduces the amount of State aid to the School District by diverting to charter schools an amount of State aid in proportion to the number of students enrolled at the charter schools. See Mo. Rev. Stat. § 160.415.4. This diversion of State funds to the charter schools necessarily reduces the State-financed proportion of funding for mandatory programs at the School District. Further, because many of the School District's mandated programs are akin to "fixed costs," the School District has no ability to reduce its costs to account for the reduction in State aid and must instead divert discretionary monies to cover the shortfall.

Angela Morelock, the expert witness for the School District, testified that many of these mandated expenditures are fixed or semi-variable costs that the School District cannot reduce in proportion to the number of students who leave the School District to attend charter schools.[4] Ms. Morelock's testimony substantiated the loss of local funds

[4] In other words, for these mandatory programs with "fixed" or "semi-variable" cost thresholds—none or only a small portion of these programs can be reduced as School District enrollment declines. Thus, if a number of the School District's students

that the School District must divert to pay for these mandatory fixed and semi-variable costs.

B. The Circuit Court's Determination That The School District's Ratio Analysis Must Also Consider Inefficiencies In Spending For Mandated Programs Is Not Supported By The Law

The expert testimony provided by the Intervenor did not dispute the School District's calculations or the conclusions of its expert witness. Rather, the Intervenor's expert suggested, and the Circuit Court concluded, that a further evidentiary step should have been taken, essentially requiring the School District to prove that all of its expenditures on its mandated programs were efficient. The Hancock Amendment and the cases interpreting those constitutional provisions do not support that heightened evidentiary burden. This Court's decision in Fort Zumwalt speaks of the ratio of "state to local spending for the mandated programs" to establish the baseline, and then requires that the ratio of state-to-local spending remain constant for the future costs of the program. No Hancock Amendment cases have focused on the issue of the efficiencies or inefficiencies in the cost of the mandated programs. The Circuit Court wrongfully

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transfer to charter school LEAs, the School District cannot simply cut portions of these programs in an amount equal to the reduction in State aid caused by the Charter Schools Act. Rather, the School District must continue to expend the same amount of money on these programs or, at the very least, it cannot reduce the mandated programs beyond their small "variable" component.

equated the term "discretionary expenditures" with efficient expenditures. At trial, the School District's witnesses specifically and undisputedly testified that all discretionary spending was backed out of the mandatory expenditure calculation at issue. For example, the State mandates that the School District provide transportation to students who live more than three and one-half miles from school. (Tr. 67:8 to 68:8). At its discretion, however, the School District provides transportation to students who live closer than three and one-half miles from their school. For purpose of the mandatory cost calculation, the School District only included those costs associated with the mandated portion of the overall transportation costs. Accordingly, for transportation, the School District only included the $2 million connected to the mandatory level of transportation, and did not include $20 million in non-mandatory or discretionary costs. (Id.)

Similarly, with respect to teacher salaries, the State requires that the School District maintain a certain student/teacher ratio. Where the School District exceeded the mandated number of teachers, for purpose of the Hancock Amendment calculation, the cost attributed to teacher salaries was reduced to the mandated level. (Tr. 64:20 to 65:14). This same analysis was completed on all of the services and programs mandated by the State for each of the years at issue. (Tr. 64:4 to 70:19).

The Circuit Court's conclusion that the School District failed to account for discretionary levels of expenditures is not supported by the evidence. Rather, the Circuit Court points to Intervenors' expert testimony speculating on whether these mandated programs were administered efficiently. However, neither Fort Zumwalt nor any other Hancock Amendment case makes comparative efficiency an element of a Hancock

Amendment claim. Moreover, 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 other comparable public school districts.[5] Neither the State nor the Intervenors presented any competent evidence of any inefficiencies in the School District's cost to provide the State-mandated programs.

The decline in the proportion of State funding for the cost of mandated programs in this case is even worse than that identified in Fort Zumwalt. In that case, the plaintiff school district alleged that the State had failed to *increase* State aid at a rate sufficient to maintain the State-financed proportion of special education funding as it existed in 1981 at the time the Hancock Amendment was ratified. Fort Zumwalt, 896 S.W.2d at 920. The trial court found that the State had indeed failed to increase funding sufficiently to maintain the 1981 ratio. Id. However, it found that the State did not violate the Hancock Amendment because it took no action to affirmatively reduce the ratio. Id. at 921. This

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[5] Intervenors' expert suggested that the proper measurement for mandated teacher costs should be the statutory minimum salary for teachers. However, the State MSIP requirements mandate that the School District maintain a certain student-teacher ratio. The School District witnesses testified that the teacher salaries were reduced to the level mandated to maintain that level. There was no evidence to suggest that any school district could maintain the mandatory student-teacher ratio by paying the statutory minimum salary for teachers, which was only $22,000.00 in 2006. Mo. Rev. Stat. 163.172.

Court held, however, that the State's failure to adequately increase the amount of State funding to maintain the same State-financed proportion as existed in 1981 was "an affirmative act by the state to reduce the state financed proportion of the cost of special education." Id. at 922.

While the violation identified in Fort Zumwalt consisted merely of a failure to *increase* State funding for mandated programs, the Charter Schools Act affirmatively *reduces* the level and proportion of State funding for mandated programs by diverting a *proportional* amount of per-pupil funding to charter school LEAs, without accounting for the fixed nature of many of the School District's mandated expenditures. Thus, the Charter Schools Act results in a reduced-ratio violation of the Hancock Amendment.

CONCLUSION

For the foregoing reasons, the Circuit Court's decision should be reversed and remanded with directions to the Circuit Court to enter judgment in favor of Appellants on the basis that the charter schools funding formula in Mo. Rev. Stat. § 160.415 is unconstitutional pursuant to Article X § 11(g) and/or Article X, §§ 16 and 21 of the Constitution of Missouri.

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that the foregoing brief fully complies with the provisions of Rule 55.03; that it contains 12,251 words 1,283 lines and complies with the word/line limitations contained in Rule 84.06(b); that a CD-ROM of this brief is included herewith in Microsoft Word format; that the CD-ROM was scanned for viruses using McAfee VirusScan Enterprise 8.0.0, updated December 18, 2009, and found to be free of viruses; and that one copy of the CD-ROM and two copies of Appellant The School District Of Kansas City, Missouri's Opening Brief were mailed this 15th day of January, 2010, to:

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