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. 06-AC-CC00639

THE APPELLANTS' REPLY BRIEF

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A. Appellants Do Not Challenge The State's Power To Form An Alternative System Of Education Through The Use Of Charter Schools; However, Funding This Alternative System By Diverting Local Tax Revenue Levied For School Purposes For The District Is Unconstitutional.

Respondents incorrectly characterize Appellants' claim and appeal as an attack on the State's power to form an alternative system of education through the authorization of charter schools and the State's ability to fund this alternative system of education with State aid. This is not the case, and Respondents' arguments in this regard obscure the real issue before the Court. Appellants are not challenging the States' authority to create an alternative charter school system.

Moreover, Appellants are not contesting the State's ability to fund charter schools with State resources. [1]

Rather, the State has violated the Constitution of Missouri, Article X, § 11(g), by attempting to fund the charter school alternative system of education by *diverting* local revenue from the School District to charter schools. Article X, § 11(g) authorizes the School District to levy a property tax for the specific purpose of providing funding for the "school purposes for the district." Accordingly, this appeal does not require an examination of the State's ability to distribute State aid to school districts and does not require a reexamination of the constitutionality of the foundation formula. Instead, the question raised by Appellants is whether the State can ignore the express language and intent of the Constitution of Missouri by diverting to charter schools local tax revenue authorized by Missouri voters to be collected and used for School District purposes only. The answer to this question is a resounding no.

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[1] The State Respondents argue that neither the School District nor the Taxpayers challenged the prior version of the Charter Schools Act, which provided for direct payments of local tax revenue to the charter schools. (State Respondents' Brief at p. 16). This is simply not true. As the State well knows, the State is a defendant in a currently pending case where this exact challenge was made. *See The School District of Kansas City, Missouri, et al. v. State of Missouri, et al.,* Case No. 06AC-CC00639 In the Circuit Court of Cole County, Missouri.

B. <u>The Express Language Of Article X, § 11(g) Requires That The Revenue Generated Pursuant Its Terms Be Used For School Purposes For The District, Meaning The Specific Entity Authorized To Impose The Levy.</u>

Where the language of a constitutional provision is plain and has one meaning, there is no room for the application of rules of construction. *Rathjen v. Reorganized Sch. Dist. of R-II of Shelby County*, 284 S.W.2d 516, 528 (Mo. 1955) (en banc). When constitutional construction is deemed necessary, the fundamental purpose of construction is to give effect to the intent of the voters who adopted the amendment. *Boone County Court v. State*, 631 S.W.2d 321, 324-325 (Mo. 1982) (en banc). In determining the meaning of the constitutional provision, the Court must first undertake to ascribe to the words the meaning that the people understood them to have when the provision was adopted. *Id.* The meaning conveyed to the voters is presumptively equated with the ordinary and usual meaning of the words contained in the provision. *Id.* Additionally, due regard is given to the primary objectives of the provision and the issue as viewed in harmony with all related provisions, considered as a whole. *Id.* Constitutional provisions should be construed to give effect to the intent or purpose manifested by the voters of the State in approving the amendment. *See Tichenor v. Mo. State Lottery Comm'n*, 742 S.W.2d 170, 173 (Mo. 1988) (en banc). The intent of the legislature is immaterial except to the extent that it may be found in the text of the proposal actually placed on the ballot. *Id.* It is the intent expressed in the

approval of the specific language of the amendment as adopted by Missouri voters that counts. *Id.* Moreover, the constitutional provision must be read and harmonized as a whole, and particular words and phrases must not be interpreted to have a meaning that does not fit within the context of the overall objective of the constitutional provision at issue. *Id.*

The language of Article X, § 11(g) specifically refers to and gives authority to 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. This language necessarily refers to specific school districts as entities, and not as an undefined collection of students in a geographic area, as argued by the Respondents. Otherwise the definitional language specifying which school districts have Section 11(g) taxing authority would be meaningless. The Section 11(g) language was specifically drafted to identify specific school district entities that were given additional taxing authority -- those schools districts whose operating levy was established by federal court order and any successor school district of such a school district. Only specific school district entities can fit within the § 11(g) definitional provisions. In fact, as Respondents recognize, the Kansas City, Missouri School District is the only district authorized to use Section 11(g) taxing authority. (*See* Intervenor's Brief at p. 15).

Moreover, as set forth fully in Appellants' opening brief, the historical setting in which Article X, Section 11(g) was adopted conclusively shows that the intent of this constitutional provision was to benefit the School District of Kansas

City, Missouri. It is the only school district the provision applies to. Clearly, the intent of the voters who approved this constitutional amendment was to allow additional levy authority to be used by, and for the purposes of, the School District of Kansas City, Missouri School District.

Ignoring this historical context and intent, Respondents focus on the words "for school purposes" and argue that that these words should be broadly interpreted to include the purposes of charter schools created within the School District's boundaries. In addition to ignoring the context and purpose of the amendment, this argument ignores the limiting language "for the district," which restricts the use of funds collected under Article X, § 11(g) to the particular school purposes for the specific school districts given the additional levy authority. Moreover, Mo. Rev. Stat. § 160.011(1) defines the terms "district" and "school district" as used in Chapter 160, which includes the charter school provisions, to mean "**seven-director, urban, and metropolitan school districts**" and does not include charter schools within the definition of a "district" or "school district." Accordingly, pursuant to the State's own definitional provisions adopted by the legislature, "school purposes for the district" cannot include charter schools or charter school purposes.

The term "school purposes" is also statutorily defined within the context of statutes setting forth "the methods of calculating state aid" for school districts as contained in Mo. Rev. Stat. Chapter 163. Within the provisions of the statutes governing State-aid for school districts, "school purposes" is defined as

"pertaining to teachers' or incidental funds." Mo. Rev. Stat. § 163.011(15). Teachers' and incidental funds in the context of state aid to school districts has no relation to charter schools. Teachers' and incidental funds are not used to fund teacher salaries or incidental expenses of charter schools, and charter schools are not required to account for their revenue and expenditures in the context of fund accounting like public school districts. Charter schools do not have the same fund accounting restrictions that public school districts have. *See* Mo. Rev. Stat. § 160 et. seq.

The charter school funding mechanism contained in Mo. Rev. Stat. § 160.415 attempts to take revenue collected pursuant to Article X, § 11(g) , which is only allowed be collected for the school purposes of the authorized district, and divert that revenue from the school purposes for the school district to the charter schools. This result violates the express language of Article X, § 11(g) , and is inconsistent with the entirety of the constitutional and statutory framework regarding State aid to school districts.

C. Missouri Constitution Article X, § 11(g) Places Constitutional Limits On The Use Of Revenue Collected Pursuant To Its Authority, Which Limit Is Applicable To The Legislature As Well As The School District.

Respondents argue that Article X, § 11(g) does not limit the General Assembly but only the School District. Thus, according to Respondents' argument, even if the charter school funding mechanism diverted local revenue to

an unauthorized purpose, because the State is diverting the revenue and not the School District, no constitutional violation occurs. This argument is contrary to reason and the law. The Missouri Constitution, as with most state constitutions, is a limiting document. In other words, rather than granting authority, it places limitations of power on the State and political subdivisions. *Franklin County v. Franklin County Comm'n*, 269 S.W.3d 26, 30 (Mo. 2008) (en banc). While the legislature has power within constitutional limits to govern with respect to taxation, the Missouri Constitution places outside limitations on that legislative power. *Id.* The constitutional restrictions on legislative power must be followed. *Id.* A statute that imposes obligations contrary to constitutional limitations is necessarily unconstitutional and cannot stand. While it is true that money acquired by the county from the taxation of its citizens is not the private property of the political subdivision colleting the revenue, the legislature only has the authority to direct the use of the revenue collected from constitutionally approved levies for the purposes stated within the constitutional authority. *State Ex Rel. Clark v. Gordon*, 170 S.W. 892, 895 (Mo. 1914).

In this case, the charter school funding mechanism contained in Mo. Rev. Stat. § 160.415 requires the transfer of money levied for school purposes for the district to other purposes that are contrary to constitutional authority granted by the Constitution. Accordingly, this statutory provision is unconstitutional.

D. The Purpose and Effect of the Charter School Funding Mechanism Is To Transfer Revenue Collected by the School District Pursuant to Article X, Section 11(g) to the Charter Schools.

The Respondents primary argument with respect to the Constitutional limitations of Article X, § 11(g) is that the actual local revenue collected by the School District pursuant to its levy authority is not physically transferred to the charter schools but instead is effectively transferred by reducing the School District's State aid in an amount equal to the local revenue collected by the School District. Intervenors again point to the Court's ruling upholding the foundation formula. This argument, however, ignores the evidence at trial, which established that the very purpose of the charter school funding statute was to transfer local revenue to charter schools, not State foundation formula aid.

As an initial matter, 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. (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). As shown above, this is a result that is expressly contrary to Article X,

§ 11(g) . The local revenue collected pursuant to Article X, § 11(g) is not being used for "school purposes for the district" but is admittedly being transferred to the independent not-for-profit charter schools.

Appellants' challenge to the charter school funding mechanism does not pose any challenge to the foundation formula itself. The purpose of the foundation formula is to equalize State aid to public school districts by taking local effort into account when formulating State aid payments. The foundation formula does not shift local revenue from one district to another but rather takes local revenue into account when determining State aid. *See Committee for Educ. Equality v. State*, 294 S.W.3d 477 (Mo. 2009) (en banc).

In contrast, the very purpose of the charter school funding mechanism is to divert local revenue from the School District to the charter schools. Accordingly, the charter school funding mechanism is not about distributing State aid but rather is designed to divert local tax revenue collected by the School District of Kansas City, Missouri to charter schools. The foundation formula is used to distribute revenue collected by the State under its general taxing authority, whereas, the charter school funding mechanism is being used to distribute to the charter schools local tax revenue generated pursuant to specific tax levy authority granted exclusively to the School District to generate revenue be used by the School District. These two actions are fundamentally different. The State cannot divert local tax revenue collected for a specific purpose to a different purpose not authorized by the electorate. *See State ex rel. Marlowe v. Himmelberger-Harrison*

Lumber Co., 58 S.W.2d 750, 754 (Mo. 1933) (improper to use revenue collected from a tax levy for "erecting public buildings" to make repairs or alterations of existing buildings); *Meyers v. Kansas City*, 18 S.W.2d 900, 901 (Mo. 1929) (en banc) (appropriation made for purpose of constructing, improving, and equipping municipal docks could not be used to purchase land on which to construct the docks); s*ee also Horsefall v. Sch. Dist., City of Salem*, 128 S.W. 33, 34 (Mo. Ct. App. 1910); *State ex rel. St. Louis-San Francisco Ry. Co. v. Darby*, 64 S.W. 2d 911, 915 (Mo. 1933);

E. <u>The Principle That "The Money Follows The Student" Does Not Apply To Local Tax Revenue Collected Pursuant To Article X, § 11(g) .</u>

With respect to the charter school funding mechanism, the State not only uses the local levy to determine the State aid given to a charter school, it converts the School District's local revenue to a per-pupil amount and effectively transfers this amount to charter schools for charter school purposes. Unlike the School District's State aid, local revenue collected pursuant to Article X, § 11(g) is not dependant on the number of students attending the School District. Rather, the local tax levy revenue is dependant on property value. (Tr. 37:9-18).

Accordingly, if a student leaves the School District to go to a private school or moves out of the School District, the State aid associated with that student is redistributed, and if the student goes to another public school, the State aid follows that student. This is not true with respect to the local tax levy revenue. When this

same student leaves to attend a private school or transfers to another public school district, the local tax revenue of the School District remains unchanged and no local money follows the student. (Tr. 46: 23 to 47:13). The charter school funding mechanism attempts to change this calculation. Under the unconstitutional charter school funding mechanism, for School District students that transfer to a charter school, the State transfers not only the foundation formula State aid, but also a portion of the School District's locally generated tax revenue. This is true even where the student has never attended the School District.

At trial, several witnesses addressed the situation of a fictional student who moves to Kansas City from Texas and immediately enrolls in a charter school. Naturally, any foundation formula State aid would go to the charter school, and the School District would have no claim to that money. This is because as foundation formula aid is based upon student attendance at a School District school. However, under the unconstitutional charter school funding mechanism, the School District would be required to transfer a portion of its locally generated levy revenue to the charter school. Even though the student never attended a School District school, and even though the School District did not receive any additional local revenue when the student moved into the School District boundaries, the School District would be required to pay the charter schools a portion of its local tax levy revenue through a further reduction of its State aid. (Tr. 158: 5 to 159: 22).

In the most extreme example of the impact of this unconstitutional transfer of local revenue, the School District was required to transfer local revenue collected pursuant to Article X, § 11(g) to several charter schools that had previously been private schools. Accordingly, before the charter school funding mechanism was adopted, the School District had no funding obligation to these private school students. After the adoption of the Charter Schools Act, these private schools became charter schools and the School District was required to transfer a portion of the local tax revenue to the newly created charter schools for students that had never been students of the School District. (Tr. 46: 16 to 47:13).

F. Appellants Established That, But For The Charter School Funding Mechanism, The School District Would Have Had The Benefit Of Millions Of Dollars Of Additional Local Revenue.

Respondent's final argument with respect to Article X, § 11(g) is that the Appellants did not adequately prove "that [the School District] would have had additional local revenues from 11(g) available to it were it not for the State's payments to charter schools." (Intervenors' Brief at p. 20). This argument ignores the undisputed evidence presented at trial, including the evidence presented by the State's primary witness who was responsible for overseeing the charter school calculations. Dr. Ogle acknowledged that if the charter schools did not exist in the 2006-2007 school year, the School District would have retained an 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).[2] While it is true that the School District receives revenue from other sources, Dr. Ogle specifically testified that she was referring only to the money that was associated with the local revenue generated pursuant to Article X, § 11(g) . (*Id.)* Respondents presented no evidence disputing Dr. Ogle's testimony or establishing that this forgone revenue included any revenue other than that collected pursuant to Section 11(g) .

[2] Without citation or authority, the State Respondents argue that the School District collected some amount of local revenue pursuant to Article X, Section 11(b), rather than Section 11(g). (State's Brief at p. 22). The State fails to cite the record for this point because it is not in the record. In fact, the School District witnesses testified that the School District collected its entire $4.95 levy pursuant to Section 11(g) , as opposed to other school districts that collect local revenue pursuant to Section 11(b). (Tr. 32: 9-21). The State also points to discovery responses by the School District arguing that somehow the School District's admissions suggest that the School District's levy consisted of money generated pursuant to Article X, Section 11(b). However, the State ignores the School District's direct response to this very question. The School District confirmed "the entire School District levy is authorized pursuant to the School District specific levy under Article X, § 11(g) ." *See* Defs' Exhibit MM, P. 12, No. 31.

II. THE CHARTER SCHOOLS FUNDING MECHANISM IN MO. REV. STAT. § 160.415 CREATES AN UNFUNDED MANDATE IN VIOLATION OF ARTICLE X, §§ 16 & 21 OF THE CONSTITUTION OF MISSOURI 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 A SEPARATE APPROPRIATION TO FULLY FUND THE NEWLY CREATED CHARTER SCHOOL PROGRAM.

As the Respondents acknowledge, the unfunded mandate prong of 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 1980-81 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). Respondents do not dispute that the State did not make any specific appropriation to fund the entire cost of the charter schools program. Similarly, there is no dispute that no charter school program existed prior to 1980-81. Despite the fact that the Charter Schools Act creates a, new alternative system of education requiring a separate infrastructure and bureaucracy, and despite the fact that this new infrastructure and bureaucracy is to be paid for in part by transferring a portion of the School District's local levy revenue to the newly created charter schools, Respondents argue that no new

activity was created and no additional expense occurred through the creation of charter schools. This argument defies the evidence at trial and the law regarding the scope of the Hancock Amendment. The newly created alternative system of education created through the Charter Schools Act creates an unconstitutional, unfunded mandate on the School District.

A. The Alternative System Of Education Created Through The Charter Schools Act Is A New Activity And Service Mandated Upon The School District For Which No Specific Appropriation Was Made.

Respondents argue that the alternative charter school education system is not a new service or activity mandated on the School District. The primary basis for this argument is Respondents' contention that the School District has always been responsible for the education of school children and that charter schools merely fit within this existing obligation. This argument not only is contrary to the law but strains the bounds of reason.

Charter schools are an independent and separate system of providing education to Missouri school children. 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). 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). Accordingly, charter schools created pursuant to Mo. Rev. Stat. § 160.415 *et seq.* are a completely separate structure and bureaucracy for providing educational services to students. Merely because those services overlap in some respects with the services that the School District provides does not mean that the Charter Schools Act does not mandate an increased level of operations and services to be paid for by the School District.

In *Boone County Court v. Missouri,* 631 S.W.2d 321 (Mo. 1982) (en banc), the Court evaluated what constituted a new service or activity for purposes of the Hancock Amendment. In *Boone County*, the state mandated that the Boone County collector receive a pay raise of $100. *Id.* at 323. The Boone County Court filed suit asserting that the State must cover the cost associated with the mandated raise in salary. Similar to Respondents in this case, the State argued that a salary raise alone did not constitute an increased activity because the statute imposed no additional duties on the Boone County collector and, therefore, did not increase any activities of the collector or the county. *Id.* at 324. The Court rejected the

State's argument holding that the terms "any," "service," and "activity" are to read alternatively and broadly include any increase in the level of governmental operation. *Id.* Accordingly, the requirement to pay the collector more was an increase in the level of governmental operation and was an increase in the level of "any activity" for purpose of the Hancock Amendment restrictions. *Id.*

In this case, while the School District is not required to directly provide educational services to charter schools, the School District is mandated to pay the charter schools a portion of its local levy revenue that would have gone to its own educational services but for the charter schools. Because the School District is required to pay for the costs of the newly created charter school education system, this is an increase in the level of its governmental operation and is an increase in the level of "any activity" for purposes of the Hancock Amendment. *See id.*

Respondents also suggest that the formation of charter schools is not mandatory but is voluntary. This may be true in the sense that a charter school authorized under the law can choose to provide services or not, but this has no relevance to the question at hand. The School District does not have the authority to prevent the operation of any charter school within its boundaries. Moreover, once a charter school is operational, the School District cannot refuse to provide it the funding mandated by Mo. Rev. Stat. § 160.415. The funding requirements imposed on the School District are not voluntary in any respect.

B. The Increased Activity and Service Of Funding An Alternative Charter School Education System Created Additional Costs To the School District.

As argued fully in Appellants' Opening Brief, the increased costs of providing the mandated alternative charter school education system are shown both in the actual local revenue transferred to the charter schools and in the increased costs of providing two competing systems of education requiring separate infrastructure and bureaucracies.

The School District presented evidence that the creation of charter schools created $3 to $4 million dollars of additional costs per charter school operating within the School District's boundaries. This increased cost is created by the duplicative infrastructure and bureaucracy needed to support the alternative system of charter school education. (Tr. 213:11 to 214:13). To support this conclusion, Appellants presented evidence of the fixed costs of the School District and the fixed costs of a sample of charter schools. Fixed costs are those costs that are generally not affected by volume or, in this case, the number of students being educated. (Tr. 202: 14-25). Accordingly, when a student leaves to go to a charter school, under the unconstitutional charter school funding mechanism, the School District's local revenue is transferred to the charter school; however, the fixed costs associated with educating that student remain at the School District and are duplicated at the charter school. (Tr. 211: 16 to 212: 11). When a student

transfers to a charter school, the charter school has duplicative fixed costs associated with educating the transferring student. (Tr. 210:10 - 23).

Respondents' primary dispute with this evidence is that the exact number of students who left the School District to attend charter schools is unknown. The School District's records show that 2,600 students reported that they were leaving the School District to attend a charter school. (Tr. 43:2-12, Exhibit P-5). Total charter school enrollment was approximately 5,000 students, which Respondents claim more accurately depicts the true number of students leaving the School District for charter schools. However, in order to account for this unknown and to test the conclusions drawn from this data, Appellants presented evidence that, even if all of the students who attended charter schools came from the School District, it would not significantly impact the fixed costs of the School District and the duplication would be approximately the same. (Tr. 213:15 to 216:23). Moreover, even if the fixed costs were reduced to 25% of total costs rather than the 80% shown by the actual data, there would still be significant duplication of costs. (*Id.)* This duplication is the measure of the unfunded costs of the newly created charter school alternative education system.

Respondents did not present any evidence to rebut the School District's evidence regarding fixed costs. Nor did Respondents identify any costs that were identified as fixed costs that they believed were improperly categorized. The only critique argued in Respondents' briefing is that the School District's expert did not calculate the fixed costs using the School District's entire decline in enrollment,

even though it is clear that none of that decline was attributable to charter schools. (Interveners' Brief p. 30). However, Interveners misrepresent the evidence presented at trial. Interveners accuse Appellants' expert of not testing the effect of including the total decline in enrolment to determine what, if any, affect that would have on the conclusion drawn. At trial, however, Appellants' expert specifically testified that her analysis of recategorizing all fixed costs as semi-fixed costs was conservative enough to account for the entire decline in enrollment and that this analysis did not change her conclusions. (Tr. 271:16 - 25, 213:15 to 216:23).

Intervenoors' expert did not provide any alternative numbers or provide any opinion regarding how he would categorize the costs of the school district or the charter schools. Even more importantly, Mr. Westbrook did not offer any opinion to suggest that there was no duplication of costs associated with the creation of the new, alternative charter school education system. (*See generally* Tr. II 160-162).

The cost of the new, alternative charter school system of education is also shown in the amount of local revenue the School District transferred to the charter schools. For the 2006-2007 school year, the first year charter schools 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 schools 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.

C. Respondents Concede That No Specific Appropriation Was Made to Fund The New, Alternative Charter School Education System.

Respondents make no argument and present to evidence to suggest that the State made any specific appropriation to fund the entire cost of the new charter school education system. This is consistent with Dr. Ogle's testimony wherein she 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).

III. THE CHARTER SCHOOL FUNDING MECHANISM CONTAINED IN MO. REV. STAT. § 160.415 REDUCES THE RATIO OF STATE FUNDING FOR THE SCHOOL DISTRICT'S EXISTING MANDATED PROGRAMS IN VIOLATION OF ARTICLE X, §§ 16 & 21 OF THE CONSTITUTION OF MISSOURI.

Article X, §§ 16 & 21 of the Constitution of Missouri bars the State from shifting the tax burden for new State-mandated programs onto political subdivisions by reducing the ratio of the State-financed portion of a political subdivision's existing mandated programs. *Fort Zumwalt Sch. Dist. v. State,* 896

S.W.2d 918, 921 (Mo. 1995) (en banc). The State must maintain the same proportion of the cost of financing the School District's State-mandated programs as existed in fiscal year 1980-1981. *Id.* In *Fort Zumwalt*, the Court set forth the precise method to be used to make this showing. First, "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.** *Id.* at 922. Then they must present evidence to establish the ratio of "**state to local spending"** for State-mandated programs in subsequent years to show a decrease in the ratio of state to local spending on state-mandated programs. *Id.* In presenting this evidence, the taxpayers must exclude discretionary expenditures beyond the State mandate, and must exclude any new or expanded activity required of the local district after 1980-81 "for which the State bears full responsibility." *Id.* at 923. This is the precise methodology used by the Appellants to establish their claim at trial. (Tr. 217-240) (Exhibit P44). Using this methodology, Appellants established that, by diverting local funding from the School District to the charter schools, the State reduced the ratio of state to local spending on existing mandated programs of the School District. (*Id.; see also* Appellants Opening Brief pp. 38-40.

Respondents make two primary challenges to the substantial evidence presented to the Court regarding this analysis. First, the State Respondents challenge the School Districts evidence regarding what School District programs are mandated by the State. Second, Respondents cherry-pick a few mandated

programs and contend that the School District did not exclude non-mandated expenditures, arguing that that the above ratio analysis should be expanded to look at whether the expenditures on mandatory programs were efficient. Both of these challenges fail. The mandated programs the School District used to establish the relevant ratios were based on the State's own testimony regarding what is mandatory. Moreover, the standard established by the Court for the ratio analysis speaks of the ratio of state to local **spending** on mandated programs and does not require an efficiency analysis. Moreover, Respondents fail to cite to any evidence sufficient to establish that the School District's spending on State-mandated programs was inefficient.

A. Appellants Presented Substantial Evidence Establishing the Cost to the School District of the State-Mandated Programs.

The State Respondents argue, without citation to the record, that the Appellants failed to establish mandated programs and the costs associated with those programs. (State Respondents' Brief pp. 37-38). This argument ignores the evidence presented at trial and the testimony of the State's own witnesses. Appellants admitted into evidence a detailed list of mandated programs along with the costs associated with those mandates. (Tr. 60-71) (Exhibits p-26, 27, 28, 30, 32, and 34). The State did not present any evidence to suggest that the identified programs were not mandated by the State. None of the State's witnesses identified any mandated category of expenses that the State believed should not be included as a mandated expense. Additionally, in their brief, the State Respondents do not

identify a single category of expense that they believe was wrongly included as a mandatory expenditure as defined by Appellants at trial.

Moreover, both the experts presented by Respondents indicated that they had no disagreement with the mandated programs identified by the School District. Mr. Westbrook, the expert presented by the Intervenors, specifically testified that he did not disagree with what the School District characterized as mandated programs and activities. (Tr. Vol. II, 168:10-13). Similarly, the State's expert, Mr. Pevnick, also testified that he had no disagreement with the School District's definition of mandated programs. (Tr. Vol. II, 71:19-24).

At most, the State Respondents make a half-hearted argument that accreditation standards are some how not mandatory even though the result of losing accreditation is that the School District would be dissolved, and despite the fact that the accreditation standards specifically identify themselves as being mandatory . (*See* Tr. 58:4 to 60:5) (Exhibit P12, p. 4).

Respondents' repeated statements that the Appellants "put on no evidence" of the costs associated with the mandated accreditation standards is simply untrue and defies the record in this case. Even their own experts do not support the arguments made in their briefing to the Court.

B. In Calculating The School District's Spending On State-Mandated Programs, Appellants Excluded All Discretionary Spending From Their Analysis.

Contrary to Respondents' argument, in presenting the ratio of state to local spending on State-mandated programs, Appellants removed all discretionary spending from their analysis. At trial, Appellants presented substantial evidence of their efforts to establish the mandatory expenses associated with the State-mandated programs at issue. In their analysis, Appellants reduced all expenditures to the mandated level of spending. (Tr. 64:4 to 70:19). While the Respondents' experts identified spending that they believed was inefficient, neither of the experts offered any analysis to identify any specific level of discretionary spending that should have been eliminated from the ratio analysis and neither offered any conclusion regarding how the elimination of any alleged discretionary spending would impact the overall analysis of the ratio of state to local spending on mandated programs.

For example, the State's Expert, Mr. Pevnick, testified that he did not question the School District's calculation of spending on mandatory programs, but rather he believed that the analysis should have included determining what steps the School District could have taken to "reduce the required expenditure." (Tr. Vol. II, 102:16 to 103:15). Despite this conclusion, Mr. Pevnick offered no opinion regarding what the School District could have done to reduce the mandated expenditures and specifically testified that he had no idea whether any

such reduction would change the overall conclusion offered by the School District's expert witness. (Tr. Vol. II, 103 16 to 104: 14).

Similarly, Mr. Westbrook's analysis centered on his untested belief that, in calculating the School District's expenditures on State-mandated programs, the School District should have attempted to eliminate inefficiencies in the expenditures on mandated programs. However, Mr. Westbrook offered no opinion on the level of inefficiencies within the School District expenditures on mandatory programs and offered no opinion as to how the elimination of these alleged inefficiencies would impact the ratio of state to local spending on State-mandated programs, if at all. (Tr. Vol. II, 169:8 to 170:9). Because they did not analyze any of the data regarding mandated expenses or identify any specific spending that should not have been included in the ratio analysis, the Respondents' expert testimony is nothing more than speculation and is not adequate to support the Circuit Court's decision. "An expert's opinion must be founded on substantial information and not mere conjecture or speculation, and there must be a rational basis for the opinion." *Mo. Hwy. & Trans. Comm'n. v. Kansas City Cold Storage, Inc.*, 948 S.W.2d 679, 685 (Mo. Ct. App. 1997). Because the experts offered by Respondents performed no analysis of the underlying data, and based their opinions on speculation and conjecture, the Court should give their opinions no weight.

Despite not providing any evidence or analysis evaluating the School District's spending on State-mandated programs, Respondents attempt to question

the School District's expenditures on teacher salaries, buildings, and transportation. Again, Respondents' criticisms are directed to what they allege are inefficiencies in spending and not to the level of mandated programs. However, in each of these areas, Respondents' own experts offered no evidence or opinion regarding what inefficiencies existed or how removing the alleged inefficiencies would impact the ratio of state to local spending on the School District's State-mandated programs.

1. Teachers.

With respect to teachers, Respondents argue that the teacher expense for the ratio analysis should be reduced to the statutory minimum salary for teachers. This argument ignores the State-mandated requirement that the School District's maintain a State-imposed student/teacher ratio. The School District spending included in the ratio analysis was the mandatory costs associated with maintaining the mandated student/teacher ratio. (Tr. 64:22 to 65:14). Respondents offered no evidence to suggest that the School District could have met this mandated student/teacher ratio by only paying the statutory minimum salary. In fact, the School District presented evidence that its average starting teacher salaries were near the lowest average teacher salaries in the State. (Tr. 72:2-21)

Moreover, Mr. Westbrook acknowledged that School District backed out all teachers and administrators to drill down to only those required by State mandates. (Tr. Vol. II, 175:21 to 176: 8). Mr. Westbrook also acknowledged that

he did not even examine how many teachers were used in the School District's analysis of mandated expenditures for teachers. (Tr. Vol. II, 176: 5-8)

Similarly, Mr. Pevnick did not perform any analysis to determine if there could have been a reduction of teachers at any school and could offer no opinion regarding whether any teachers could be reduced, or the dollar impact of any such reduction. (Tr. Vol. II, 114:7 to 115:4).

2. Buildings.

Respondents also argue that Appellants include inefficiencies in their State-mandated expenditures relating to the School District's buildings. Again, Respondents do not contend that building expenses are not State-mandated. Instead, they challenge the efficiency of the School District's building resources. However, again Respondents offered no evidence or expert opinion regarding what level of alleged inefficiencies existed or which, if any, school building costs could be eliminated. Respondents offer no evidence that the School District could have successfully taken any steps to reduce building costs and presented no evidence regarding what other expenditure costs may have resulted from eliminating school building. For example, fewer buildings may very well have resulted in increase transportation costs, food service costs and other operational expenditures that could overwhelm any costs savings gained through the reduction of buildings. Respondents offered no competent evidence to support their argument that the School District's expenditures on mandated buildings were inefficient.

3. Transportation.

Finally, with respect to transportation, Respondents suggest, without proof, that the School District's transportation costs are inefficient and that some undefined level of these costs should be excluded from the ratio calculation. As an initial matter, as the State concedes, the School District's transportation costs were accepted and reimbursed by the State. (*See* State Respondents' Brief p. 44). Moreover, as Respondents also acknowledge, the Appellants backed out all discretionary transportation expenses for busing students who live within 3.5 miles from school. Neither the State's nor the Intervenor's experts could point to any specific level of inefficiency that existed in the School District's transportation costs or offered any opinion as to any specific expenditure to be excluded, any methodology to use to determine inefficiencies, or what impact the elimination of the alleged inefficiencies would have on the ratio of state to local expenditures on State-mandated programs. (Tr. Vol. II 167:7 to 168:13, Vol. II 101 to 116). Without this type of evidence, the Respondents' criticisms are nothing more than unsupported speculation.

C. Appellants Are Seeking The Appropriate Relief Available Under Article X, § 21

Respondents recognize that the appropriate relief for a violation of Article X, § 21, is to relieve the local government of the duty to perform an inadequately funded required service or activity. *Fort Zumwalt,* 896 S.W.2d at 923. This is what the Appellants are seeking. As argued fully above, the

unfunded service is requiring the School District to pay for the alternative charter school system of education by diverting a portion of the School District's local revenue to the charter schools. Appellants seek a declaratory judgment relieving the School District of the duty to pay for the expanded operational services created by the alternative charter school system of education. This is precisely the remedy authorized by the Court. *See id.*

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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 7,722 words 726 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 April 2, 2010, 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 Reply Brief were mailed this 2nd day of April, 2010, to:

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