IN THE SUPREME COURT OF THE STATE OF MISSOURI

THOMAS E. BAUER,
Relator-Respondent,

v.

TRANSITIONAL SCHOOL DISTRICT, et al.
Defendant

v.

BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, et al.
Defendant-Appellant

Case No. SC 84807

Appeal from the Circuit Court of the City of St. Louis, Missouri
The Honorable Robert H. Dierker

REPLY BRIEF OF APPELLANT BOARD OF EDUCATION OF THE CITY OF ST. LOUIS

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INTRODUCTION

The Board of Education's Appellant's Brief sets forth in detail the reasons why the Student Bill of Rights is unconstitutional and the other reasons why the circuit court erred in entering its July 31, 2002 order. Respondent's Brief does not substantially challenge the Board of Education's arguments. Instead, large portions of Respondent's Brief are devoted to a recitation of irrelevant facts or to presenting legal arguments relating to issues not on appeal.

The Board of Education respectfully requests that this Court find and declare Mo. Rev. Stat. § 162.666 unconstitutional, reverse the circuit court's order and direct the circuit court to enter judgment in favor of the Board of Education.

ARGUMENT

I. The Proper Standard Of Review For The Issues Raised By The Board of Education Is De Novo, Not Abuse Of Discretion.

The Board of Education's appeal raises seven Points Relied On for this Court's consideration. Each of these points concerns a question of law and, more specifically, whether the circuit court properly interpreted and applied the law.[1]

[1] See Appellant's Brief at 16-19.

Respondent does not dispute that all the issues on appeal are questions of law, but instead argues that this Court should review these questions under an abuse of discretion standard.[2] The flaw in Respondent's argument is inherent.

This Court has held unequivocally that questions of law are reviewed on appeal *de novo*. "Questions of law are matters reserved for the independent judgment of the reviewing court"[3] and "shall be reviewed *de novo*."[4] On appeal, no deference is given to the trial court's conclusions of law.[5]

The fact that this litigation is a mandamus action does not affect this rule. As noted by the western district court of appeals, Judge Stith, an appellate court's review of a circuit court's mandamus decision is not simply an "abuse of discretion" review of the entire proceeding as Respondent asserts:

> When reviewing a trial court's dismissal of a writ of mandamus, an appellate court's concern is whether the trial court reached the correct result. State ex rel. Patterson v. Tucker, 519 S.W.2d 22, 24 (Mo. App. 1975). The court's decision will not be reversed if the court exercised its discretion lawfully and no abuse is shown. Sampson Distrib. Co.

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2 Respondent's Brief at 18-20.

3 Dial v. Lathrop R-II Sch. Dist., 871 S.W.2d 444, 446 (Mo. 1994) (en banc).

4 Williams v. Kimes, 996 S.W.2d 43, 44-45 (Mo. 1999) (en banc).

5 Buttress v. Taylor, 62 S.W.3d 672, 679 (Mo. Ct. App. 2001).

v. Cherry, 346 Mo. 885, 143 S.W.2d 307, 309 (1940). "Therefore we sustain the judgment of the trial court in a mandamus action unless no substantial evidence exists to support it, it is against the weight of the evidence, *or it erroneously declares or applies the law*."[6]

The cases cited by Respondent do not contradict this principle and do not support his position. Nowhere do the cases Respondent cites declare that an appellate court reviews questions of law under an abuse of discretion standard. In fact, the primary case cited by Respondent, Sampson v. Cherry,[7] supports Appellant's position: "The discretion of the court below in granting or refusing the writ will not be reviewed where it appears to have been *lawfully exercised* and no abuse is shown."[8]

The very language of this Court's decision in Sampson demonstrates that this Court intends for appellate courts reviewing a mandamus action to apply a two-part test. First, the appellate court must determine whether the circuit court lawfully exercised its authority, and second, the appellate court must determine whether there was any abuse of discretion in deciding to issue the writ. It is

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[6] Wheat v. Bd. of Prob. & Parole, 932 S.W.2d 835, 838 (Mo. Ct. App. 1996) (emphasis added).

[7] 143 S.W.2d 307 (Mo. 1940).

[8] Sampson, 143 S.W.2d at 309 (emphasis added).

intrinsic that a circuit court cannot "lawfully exercise" its authority to issue a writ if it has misinterpreted and misapplied the law that underlies the court's decision, as is the case here.

The other two cases cited by Respondent are similarly unpersuasive.[9] A review of those decisions, and the cases cited by those decisions, demonstrates that ultimately each relied on this Court's ruling in Sampson. These cases do not hold that questions of law in a mandamus action are reviewed only for an abuse of discretion. Rather, in the Board of Education's view, the passages cited by Respondent are referring only to one aspect of the reviewing court's responsibilities. To the extent these cases are interpreted to hold that an entire mandamus action, including questions of law, are reviewed for an abuse of discretion, they are inconsistent with Sampson and are erroneous.

For the reasons set forth in Appellant's brief, the circuit court erroneously declared and applied the law. Its conclusions should be reversed.

[9] Casey's Gen. Stores v. City of West Plains, 9 S.W.3d 712 (Mo. Ct. App. 1999); Bergman v. Mills, 988 S.W.2d 84 (Mo. Ct. App. 1999).

II. This Court Has Jurisdiction To Review The Constitutionality Of The Student Bill Of Rights Prior To Placement On The Ballot.

In Respondent's Point Relied On II, Respondent contends that this Court lacks the authority to conduct a pre-election review of the Student Bill of Rights' legality.[10] Respondent's contention is erroneous.

As an initial matter, this Court lacks the authority to decide the point raised by Respondent. The circuit court correctly decided in January, 1999 (and a second time in the order on appeal) that determining the constitutionality of the Student Bill of Rights was a necessary precursor to ruling on whether mandamus would lie.[11] Respondent failed to appeal this issue, and it is therefore not before this Court.[12]

Even if this Court considers the merits of Respondent's argument, however, it must still consider the constitutionality of the Student Bill of Rights. While

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[10] Respondent's Brief at 20.

[11] See Board of Education's Appendix at A-36 to A-38; LF at 95.

[12] Bank of Kirksville v. First Bank Centre, 924 S.W.2d 884, 885 (Mo. Ct. App. 1996) (filing timely notice of appeal is jurisdictional); State ex rel. Ashcroft v. Marketing Unlimited, 613 S.W.2d 440, 447 (Mo. Ct. App. 1981) (Respondent's failure to file notice of appeal leaves court of appeals without jurisdiction to consider respondent's challenges to circuit court order).

generally the constitutionality of a ballot proposal is not ripe for adjudication prior to actual adoption by voters, here the statute specifically requires that a constitutional determination be made before the matter is placed on the ballot. The language of Section 162.666 unequivocally states that the Transitional District's obligation was to place the Student Bill of Rights on the ballot only "to the extent that the program is consistent with the Missouri and United States Constitutions."[13] Based upon the statute itself, any order requiring that the issue be placed on the ballot must be preceded by a determination of constitutionality. The circuit court agreed:

> In this case,…the General Assembly specifically conditioned the placement of the "student bill of rights" on the ballot on a determination, in advance, of its constitutionality. § 162.666.10. Consequently, the constitutionality of the "student bill of rights" is a ripe and justiciable question, whether constitutionality is facial or otherwise.[14]

If Respondent is correct that the courts lack the authority to conduct a pre-election review, however, then this Court has only one recourse. The Court must declare that the circuit court lacked the jurisdiction to enter its order, vacate the

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13 Mo. Rev. Stat. § 162.666.10 (2002).

14 LF at 95.

circuit court's order and direct the circuit court to dismiss the entire action. While the Board of Education does not believe this would be the proper decision, it is the only remedy available if Respondent is correct.[15]

The Legislature unambiguously required that a constitutional determination be conducted before the Student Bill of Rights is placed on the ballot. The determination of a statute's validity rests with this Court.[16] This Court must adhere to the intent of the Legislature and review the legality of the Student Bill of Rights' proposition.[17]

III. The March 15, 1999 Deadline For Placement Of The Student Bill Of Rights On The Ballot Was Intended As Absolute.

Respondent's brief does not dispute the positions of the Board of Education and the Attorney General, or the findings of the circuit court, that the March 15, 1999 deadline for placement of the Student Bill of Rights on the ballot was a day of significant importance to the Legislature. As set forth in the Board of Education's brief, that date coincided with another legislative deadline and was

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15 McDonald v. City of Brentwood, 66 S.W.3d 46, 49 (Mo. Ct. App. 2001).

16 Mo. Const. art. V, § 3.

17 See Wolff Shoe Co. v. Dir. of Rev., 762 S.W.2d 29, 31 (Mo. 1988) (en banc).

selected to ensure that the outcome of the matters addressed by Senate Bill 781 would be certain by that date.[18]

Nonetheless, Respondent contends that under the logic of Kersting v. Dir. of Rev.,[19] the term "shall" is directory rather than mandatory because the Legislature included no penalty for failure to place the issue on the ballot by March 15, 1999.[20] Respondent's reliance on Kersting is misplaced.

The presence or absence of a penalty provision "is but one method" for determining whether a statute is directory or mandatory.[21] "The absence of a penalty provision does not automatically override other considerations."[22] The prevailing consideration is the context of the statutory provisions and legislative intent.[23] This is consistent with the "cardinal rule" of statutory construction which

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18 See Appellant's Brief at 30-32.

19 792 S.W.2d 651 (Mo. Ct. App. 1990).

20 Respondent's Brief at 21-22.

21 Southwestern Bell Tel. Co. v. Mahn, 766 S.W.2d 443, 446 (Mo. 1989) (en banc).

22 Id.

23 Farmers & Merch. Bank and Trust Co. v. Dir. of Rev., 896 S.W.2d 30, 32-33 (Mo. 1995) (en banc).

is to ascertain the intent of the Legislature and to give effect to that intent.[24] As set forth in the Board of Education's brief, the context of the statutory provisions demonstrates that the Legislature intended March 15, 1999 as an absolute deadline and its passage prohibits the Student Bill of Rights' placement on the ballot.[25]

Respondent's Brief attempts to distract from the merits of the issue by asserting that the Transitional District "used false statements and deception" to prevent the Student Bill of Rights from being placed on the ballot.[26] Respondent makes no effort to support his allegation by outlining what "false statements" were made or what "deception" was employed.

Equally as important, it is simply inaccurate to state that somehow the actions of the Transitional District prevented the Student Bill of Rights from being timely placed on the ballot. Respondent's own Statement of Facts demonstrates that the Transitional District made very clear, long before the election deadline, that it did not intend to place the Student Bill of Rights on the ballot:

> (a) In the Fall of 1998, the Transitional District requested a legal opinion on the constitutionality of the Student Bill of Rights;[27] (b) The

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24 Maudlin v. Lang, 867 S.W.2d 514, 516 (Mo. 1993).

25 See Appellant's Brief at 29-32.

26 Respondent's Brief at 21.

27 Id. at 12; Supplemental Legal File at 116 (hereinafter "SLF at __").

Transitional District's counsel advised the Transitional District that the Student Bill of Rights was unconstitutional in its entirety;[28] (c) the Transitional District advised Respondent in November 1998 that they did not intend to place the Student Bill of Rights on the ballot;[29] (d) Respondent then sued the Transitional District in November 1998, three and one-half months before the March 15 deadline, to force the issue's placement on the ballot;[30] and (e) after dismissal of his initial case, Respondent filed a First Amended Petition on January 29, 1999 but took no action to pursue the case until September, 1999, six months after the deadline.[31]

It is clear that the failure to meet the March 15, 1999 legislative deadline was not due to the "deceptive" actions of the Transitional District. It was due entirely to Respondent's failure to seek expedited relief from the circuit court.

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[28] Respondent's Brief at 12; SLF at 52, 53, 56-57, 58-59, 115, 116, 117, 118, 122, 123, 125.

[29] Respondent's Brief at 12-13, 22 (Respondent's Brief at 12-13 mistakenly states November 1999 rather than November 1998, See Tr. at 18).

[30] Id. at 13.

[31] Id.

The Legislature intended that the Student Bill of Rights be placed on the ballot before March 15, 1999 or not at all. This Court should uphold that legislative intent.

IV. The Student Bill Of Rights Is An Invalid Special Law.

Respondent does not dispute that the Student Bill of Rights is closed-ended and could never by its very terms apply to any other political subdivision other than the Board of Education. Respondent similarly does not dispute that the Legislature failed to follow the constitutional procedures for enacting a special law and that the Legislature's failure to follow these procedures is fatal.

Instead, Respondent seeks to defend the special law nature of the Student Bill of Rights by relying solely on this Court's decision in Zimmerman v. State Tax Comm'n.[32] Respondent's argument fails for several reasons. First, the circuit court held that the Student Bill of Rights is a special law, and Respondent failed to appeal this issue.[33] He is thus bound by the circuit court's conclusion, and may not now challenge that ruling.[34] The only special law issues properly before this Court

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[32] 916 S.W.2d 208, 209 (Mo. 1996) (en banc); Respondent's Brief at 23-24.

[33] LF at 105 (court cannot rule out that § 162.666 is a special law, but concluding it is not an "invalid special law").

[34] Bank of Kirksville, 924 S.W.2d at 885 (filing timely notice of appeal is jurisdictional); State ex rel. Ashcroft, 613 S.W.2d at 447 (Respondent's failure to

are whether the Legislature followed the constitutional procedures for enacting a special law, which it did not, and the consequences of that failure.

Second, the Zimmerman decision by its express terms is inapplicable to this case and Respondent has overstated its holding. The court in Zimmerman simply held that the Legislature did not violate the special laws prohibition by creating a class which included only those cities that are "a city not within a county."[35] The court's decision did not authorize the Legislature to identify political subdivisions by name, as the Student Bill of Rights does.

Third, the logic underlying Zimmerman has no applicability to the Board of Education. The court found the Legislature's action at issue in Zimmerman permissible because of the unique constitutional status of the City of St. Louis. The City is expressly established, by name, by the Missouri Constitution:

> **Section 31. Recognition of the City of St. Louis as now existing.** The City of St. Louis, as now existing, is recognized both as a city and as a county unless otherwise changed in accordance with the provisions of this constitution. As a city it shall continue for city purposes with its present charter, subject to

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file notice of appeal leaves court of appeals without jurisdiction to consider Respondent's challenges to circuit court's order).

[35] Zimmerman, 916 S.W.2d at 209.

> changes or amendments provided by the constitution or by law, and with the powers, organization, rights and privileges permitted by this constitution or by law.[36]

Because of this special status, this Court found that the Legislature could pass laws that as a practical matter affected only the City of St. Louis as a political subdivision: "St. Louis City is given specific recognition in art. VI, § 31 of the Constitution of Missouri as being *sui generis*, a unique entity in a unique class. Legislation enacted to address the class of which St. Louis City is the only member is therefore not special legislation within the meaning of art. III, § 40."[37]

The Student Bill of Rights does not, however, apply to the City of St. Louis as a political subdivision. Its implementation would not require the City to undertake, or refrain from undertaking any action, a fact which Respondent has admitted.[38] The Student Bill of Rights applies only to the Board of Education,

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[36] Mo. Const. art. VI, § 31 (emphasis in original).

[37] Zimmerman, 916 S.W.2d at 209.

[38] See Plaintiff's Response to the Board of Education's Motion for Judgment on the Pleadings at 7-8 (Student Bill of Rights regulates practices of school board by taking away the power of student assignments and regulating expenditures of funds on a per-pupil basis).

which is an entirely separate and independent political subdivision.[39] Thus, the Zimmerman decision has no applicability.

Equally as important, there is no basis to expand the logic underlying Zimmerman to include the Board of Education. Zimmerman was based solely on the unusual status of the City being established by name by the Constitution. The Board of Education is established by State statute.[40] It has no special constitutional status of the type conferred on the City and discussed by the court in Zimmerman.[41] Zimmerman has no applicability to the Board of Education, or to the Student Bill of Rights.

The fact that the Board of Education is currently the only "metropolitan" school district does not change this conclusion. The Board of Education is established by the State statute that defines "metropolitan districts."[42] The same chapter of the statutes also establishes urban districts and seven director districts, the other two primary classifications for Missouri school districts.[43] Nothing in the statute precludes there from being other metropolitan districts in the future if they

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39 Compare Mo. Const. art. VI, § 31 with Mo. Rev. Stat. § 162.571 (2002).

40 Mo. Rev. Stat. § 162.571 (2002).

41 See Zimmerman, 916 S.W.2d at 209.

42 Mo. Rev. Stat. § 162.571 (2002).

43 Mo. Rev. Stat. §§ 162.211 & 162.461 (2002).

meet the statutory definition. Respondent's logic is similar to that of the circuit court, which as explained in the Board of Education's Appellant's Brief, would eviscerate the prohibition against special laws.[44]

Finally, Respondent argues that because the Student Bill of Rights was a part of Senate Bill 781, the Student Bill of Rights "stands in the same shoes" as Senate Bill 781. Respondent appears to then argue that since the Board did not consider the remainder of Senate Bill 781 to be "special legislation," the Student Bill of Rights cannot be considered special legislation.[45]

Respondent's argument has no merit. First, the remainder of Senate Bill 781 is not an issue in this case, and the Board of Education's views, or the lack thereof, on the remainder of Senate Bill 781, are irrelevant. Second, the fatal flaw for the Student Bill of Rights is that it specifically references the St. Louis City School District so that the Student Bill of Rights could never apply to any other school district – even another metropolitan district. The remainder of Senate Bill 781 is not so narrowly worded. Not all of Senate Bill 781's provisions contain the inherent flaws found in the Student Bill of Rights.

The Student Bill of Rights is a special law and should be declared unconstitutional and invalid.

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44 See Appellant's Brief at 42-44.

45 Respondent's Brief at 24.

V. **The Student Bill Of Rights Ballot Language Is Misleading And Deceptive.**

A. The Board of Education Properly Pled the Unconstitutionality of the Student Bill of Rights.

Respondent contends that the Board of Education did not properly raise the unconstitutionality of the Student Bill of Rights in its Answer, and therefore it has waived these challenges.[46] Although not specifically stated, Respondent appears to argue that the Board of Education's Answer did not identify "facts" demonstrating the unconstitutionality of the Student Bill of Rights or cite the sections of the Missouri or United States Constitutions that the Student Bill of Rights violates. Respondent's argument fails for a multitude of reasons.

First, even if Respondent were correct, he has waived this argument. Respondent never raised this argument before the trial court, and "[a]n issue that was never presented to or decided by the trial court is not preserved for appellate review."[47]

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[46] See Respondent's Brief at 25, 28, 45.

[47] State ex rel. Nixon v. American Tobacco Co., 34 S.W.3d 122, 129 (Mo. 2000) (en banc).

Second, the case cited by Respondent, Ford Motor Credit Co. v. Hous. Auth.,[48] does not stand for the proposition Respondent claims. Respondent's brief states that "To properly raise a constitutional issue a *party* must [plead in a certain manner]…."[49] The Ford Motor case, however, actually states that "[t]o properly raise a constitutional question, *plaintiffs* are required to [plead in a certain manner]…."[50] The difference is significant.

The Board of Education is a defendant in the present case. It is the Respondent who raised the constitutional question in his Petition, praying that the circuit court "issue a Declaratory Judgment that §162.666 RSMo. is consistent with the Missouri and United States Constitutions…."[51] The Board of Education was under no obligation to answer Respondent's Petition that the Student Bill of Rights was constitutional with anything more than a general denial or admission of his allegations or, no response at all to Respondent's allegations of law.[52] If Respondent's present position is adopted as law, it would essentially require that

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48 Ford Motor Credit Co. v. Hous. Auth., 849 S.W.2d 588 (Mo. Ct. App. 1993).

49 Respondent's Brief at 25 (emphasis added).

50 Ford Motor, 849 S.W.2d at 592 (emphasis added).

51 Respondent's Second Amended Petition at 6.

52 See Mo. R. Civ. P. Rule 55.07.

parties file answers that include "fact allegations" showing that the plaintiff is not entitled to relief. Such a proposition has no foundation in Missouri law.

Third, the Missouri rules of pleading did not apply to the Board of Education's Answer when filed. The Board of Education's Answer was filed in federal court in compliance with federal rules, while the federal court had jurisdiction, which answer was also effective in state court.[53]

Finally, even if the rule cited by Respondent is potentially applicable, there are at least two reasons it does not apply here. "When the public interest is involved," the rules governing the pleading of constitutional issues "do not prevent this Court from deciding constitutional questions."[54] There is no disagreement that this case involves the public interest. The statute at issue has a direct bearing on the education of tens of thousands of City children, may affect them for decades, and prevents local education officials from responding to changing student needs in the future. Thus, this Court may, and should, consider the constitutional challenges.

In addition, the statute itself requires that it be placed on the ballot only to the extent constitutional. It is apparent that the Legislature intends for the

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53 See Williams v. St. Joe Minerals Corp., 639 S.W.2d 192, 194-95 (Mo. Ct. App. 1982).

54 Callier v. Dir. of Rev., 780 S.W.2d 639, 641 (Mo. 1989) (en banc).

constitutionality to be broadly evaluated. It does not intend for the review of the statute to be limited to those raised by the parties to the case.

B. The Ballot Language is Misleading and Deceptive.

Respondent does not dispute that the five concepts incorporated into the Student Bill of Rights are distinct concepts. Rather, Respondent contends that since they are part of a single "plan," and are "dependent on each other," the ballot language affords the voters due process even though only two of the five components of the plan are identified by the ballot language.[55] Respondent's position does not withstand scrutiny.

There can be no legitimate question that the ballot language is misleading. Based upon the ballot language, when voters vote to approve or disapprove the Student Bill of Rights, they will have no idea that by voting for or against the two concepts identified in the ballot that they are actually approving or disapproving three additional concepts that are *not* identified in the ballot language. These three concepts are not simply "implementation" details related to the two identified concepts. They are wholly separate and distinct, and will have a significant impact on the District and its students. To omit these issues from the ballot language is misleading and deceptive.

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[55] Respondent's Brief at 26.

VI. The Student Bill Of Rights Violates The Prohibition Against Doubleness.

Respondent asserts that the Board of Education correctly cites the rule against doubleness but "misapplies" the rule in this instance. Respondent never explains how the rule has been misapplied and does not dispute that a K-8 system and neighborhood schools are in fact distinct concepts, wholly unrelated to one another. Instead, Respondent summarily recites four cases where courts ruled the prohibition against doubleness had not been violated. Each of these cases is distinguishable from the present case.

In State v. Holman,[56] the court approved submission of a single bond issue to pay for a hospital expansion and new nursing home which were to be constructed on a single property. The court found no violation because by their very nature, the two facilities were related. Nursing home patients often need hospital care, and absent a convenient nursing home, they might unnecessarily continue to occupy a hospital bed.[57] There is no similar relationship between K-8 and neighborhood schools. Both can operate entirely independently, and having one without the other has no inherent adverse impact.

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[56] 461 S.W.2d 689 (Mo. 1971) (en banc).

[57] Holman, 461 S.W.2d at 691.

In City of Raytown v. Kemp,[58] the court approved ballot language requesting voter approval of a bond issue that also specified the method that would be used to pay down the bond obligation. The court found combining these issues was not a doubleness violation. Although the court did not offer a detailed explanation, it appears the court concluded the two issues were necessarily related.[59] One aspect of the ballot was essential to implementing the other. This bears no similarity to the Student Bill of Rights, where each concept may stand alone and they are unrelated.

In City of Chillicothe v. Wilder,[60] the court approved ballot language requesting voter approval of a single bond issue to fund "a waterworks and electric light plant."[61] The court approved the language because "the clearly expressed purpose in this case is to erect one plant, on one site, to be conducted by one management, and, in this manner, save the expense of another plant."[62] Thus, there was no doubleness because only one plant was being approved. Again, in this instance, the two propositions in the ballot language are two distinct concepts.

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58 349 S.W.2d 363 (Mo. 1961) (en banc).

59 Kemp, 349 S.W.2d at 367-69.

60 98 S.W. 465 (Mo. 1906).

61 Wilder, 98 S.W. at 466.

62 Id.

Finally, in City of Maryville v. Cushman, the issue of doubleness in ballot propositions was not raised, and thus this case is not persuasive.[63] The court did emphasize, however, that the two projects to be funded with the bond proceeds were necessarily intertwined:

> The purpose of a city sewer system is to collect such water after it has become contaminated and injurious to health and (with other unhealthful substances) remove them all from the various premises and dispose of it all in sanitary manner…. A sewer system is complementary to a water system. *A sewer system would be of no value without a water system and a water system would be entirely incomplete without a sewer system.*
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> * * *
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> *We think the two services are so closely interlocked that neither can be effective without the other*.[64]

There is no such relationship between a K-8 system and neighborhood schools – one without the other does not render the other inherently "incomplete."

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63 249 S.W.2d 347 (Mo. 1952) (en banc).

64 Cushman, 249 S.W.2d at 352, 355 (emphasis added) (internal quotations and citations omitted).

VII. The Student Bill Of Rights Conflicts With Court Orders In Effect In 1998 And Is Therefore A Violation Of The United States Constitution's Supremacy Clause.

Respondent does not apparently contest the Board of Education's argument that the intent of the Legislature is for the Student Bill of Rights' constitutionality to be evaluated as of the law and facts that existed in 1998. In fact, Respondent asserts that "[t]he validity of the Student Bill of Rights should be tested against the actual realities that existed at the time [the Student Bill of Rights was passed by the Legislature in 1998]."[65]

Nor does Respondent contest that in 1998 every term of the Student Bill of Rights was contrary to various federal court orders in effect at the time.[66] Similarly, Respondent does not contest that this conflict between the Student Bill of Rights and the court's orders is a violation of the Supremacy Clause. "[R]espondent must respond to the points preserved and argued by the appellant."[67] Because he has failed to do so, judgment should be entered in the Board of Education's favor on this Point.

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65 Respondent's Brief at 27-28.

66 See Appellant's Brief at 55-62.

67 Boyer v. Grandview Manor Care Ctr., 793 S.W.2d 346, 347 (Mo. 1990) (en banc).

While Respondent does not rebut the Board of Education's Point Relied On which alleges the Student Bill of Rights violated court orders, Respondent does brief an issue raised by the Board of Education in the trial court, but not appealed – specifically whether the Student Bill of Rights conflicts with the 1999 Desegregation Settlement Agreement in Liddell.[68] Because the Board of Education did not appeal this issue (the circuit court found that the Board of Education does not have to adhere to the Student Bill of Rights to the extent inconsistent with the Settlement Agreement),[69] the Board of Education does not intend to reply to Respondent's arguments.[70]

VIII. The Circuit Court Lacked The Authority To Order The Transitional District, The Board Of Education And The Board Of Election Commissioners To Place The Student Bill Of Rights On The Ballot.

A. The Transitional District

Respondent argues that even though the Transitional District had been dissolved, and its individual board members dismissed from the case, that the

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[68] See Respondent's Brief at 28-39.

[69] LF at 98-99.

[70] The circuit court correctly concluded that the Settlement Agreement has the force of a court order because the district court incorporated the Agreement into its order. See Kokkonen v. Guardian Life Ins., 511 U.S. 375, 381 (1994).

circuit court could still order the Transitional District to place the Student Bill of Rights on the ballot. Although not entirely clear, Respondent appears to argue this is so because the Transitional District allegedly made misrepresentations about the existence of a "legal opinion" on the Student Bill of Rights' constitutionality in the early stages of the litigation.[71] Respondent cites no cases to support his proposition and his argument must be unsuccessful.

Respondent's argument fails initially because he failed to appeal the circuit court's ruling "that the [c]ourt cannot enter a judgment against a dissolved entity [the Transitional District]…."[72] The failure to appeal this decision prevents Respondent from now raising this issue and Respondent is bound by the circuit court's conclusion.[73]

Even if the court did somehow retain jurisdiction over a non-existent defendant, Respondent does not rebut Appellant's point that the Legislature, through the State Board of Education, revoked the Transitional District's authority

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71 Respondent's Brief at 40.

72 LF at 18.

73 Bank of Kirksville, 924 S.W.2d at 885 (filing timely notice of appeal is jurisdictional); Ashcroft, 613 S.W.2d at 447 (Respondent's failure to file notice of appeal leaves court of appeals without jurisdiction to consider Respondent's challenges to circuit court order).

to place the Student Bill of Rights on the ballot.[74] Thus, even if the court did have jurisdiction over the Transitional District, it is undisputed that the Transitional District lacked the statutory authority to place the matter on the ballot. And as set forth in Appellant's Brief, the court cannot order a political subdivision to take actions beyond the scope of its legislative authority.[75]

Finally, Respondent's repeated allegations that the Transitional District used "false and deceptive actions" to avoid placing the Student Bill of Rights on the ballot are inflammatory and not well founded. The Transitional District and its members have been unable to defend themselves for more than the last two years following dismissal of the Transitional District board members from the case.

The Board of Education is aware of the circuit court's conclusion that counsel for the Transitional District (not counsel for the Board of Education) made false representations to the court as to the existence of a legal opinion about the Student Bill of Rights' constitutionality. The circuit court did not explain its finding. The circuit court simply cited to a January 1999 Transitional District pleading where the Transitional District stated: "Although Respondents, after

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[74] Appellant's Brief at 22-23.

[75] United Air Lines, Inc. v. State Tax Comm'n, 377 S.W.2d 444, 452 (Mo. 1964) (en banc) (courts cannot supply political subdivisions with powers not provided by the Legislature).

preliminary analysis, have reason to believe that the Students' Bill of Rights is unconstitutional, based upon North Carolina State Board of Education v. Swann, 402 U.S. 43, 91 S.Ct. 1284 (1971), the Respondents have no way to complete the legal analysis without a copy of the settlement agreement in Liddell, which has yet to be finalized."[76] The circuit court's order cited to no evidence that led the court to believe this statement was false.

Regardless of the correctness of the circuit court's conclusion, the disclosure or non-disclosure of the legal opinion did not have any impact on whether the Student Bill of Rights could appear on the ballot by March 15, 1999. As set forth in Section III of this Brief,[77] the Transitional District advised Respondent in November, 1998 that it had no intention to place the Student Bill of Rights on the ballot, three and one-half months before the legislative deadline. Respondent filed his Petition only days later, bringing the entire issue before the court months before the deadline.

B. The Board of Education

Respondent asserts that because the Board of Education is the "successor" to the Transitional District, it has authority to place the Student Bill of Rights on the ballot. In support of his position, Respondent cites case law generally holding that

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[76] LF at 90; SLF at 134.

[77] Supra at 13-14.

when two districts are merged, the successor district inherits the liabilities of the dissolved district.[78] Respondent's argument misses the point.

The flaw in Respondent's reasoning is twofold. First, in this case, there was no "merger." The Legislature simply directed that the Transitional District be dissolved, and made no provision for the Board of Education to be the general successor, as even the trial court noted in December, 2000: "In this case, the matter of substitution is obfuscated by the absence of any provision in law identifying the successor. Indeed, § 162.1100 does not seem to contemplate a successor."[79]

Even if the Board of Education is considered the successor to the Transitional District, however, the extent to which the Board of Education assumed the Transitional District's roles and responsibilities is controlled by legislative intent. As discussed in the Appellant's Brief, the Legislature has limited the extent to which the Board of Education has assumed the Transitional District's powers and obligations.[80] The authority to place the Student Bill of Rights on the ballot was omitted from the powers transferred to the Board of Education, demonstrating conclusively the Legislature does not intend the Board of Education to have this power.

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78 Respondent's Brief at 41-42.

79 LF at 18.

80 Appellant's Brief at 26-28.

C. The Board of Election Commissioners

The Board of Education does not contend that the Board of Election Commissioners lacked "the authority to obey the orders of the Court" as Respondent asserts.[81] As set forth in Appellant's Brief, the Board of Education contends that the court lacks the authority to order the Board of Election Commissioners to take an act that is beyond the authority granted to them by the Legislature.

IX. Other Comments By Respondent.

Respondent has in his Brief, or other filings with the Court, made various statements or representations that the Board of Education believes require correction, clarification, or otherwise merit some brief response:

(a) Respondent states that white County students have a better chance of enrolling in magnets than white City students.[82] While Respondent's questioning and the answers given by the witness in the portion of the Transcript cited were somewhat confusing, the fact is that City and County white students have an equal chance to attend magnet schools. No priority is given to County white children.

(b) Respondent has submitted to the Court various transportation maps introduced at trial as exhibits. Respondent has used these in the past to allegedly

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81 Respondent's Brief at 44.

82 Id. at 14.

show the "inefficiencies" of the Board of Education's student assignments and that students are not assigned to neighborhood schools. These maps, however, show selected transportation routes for transporting low-incident special education students and English as a Second Language students who all require highly specialized services.[83] These routes save the Board of Education funds by allowing similarly situated students to be taught by a single qualified teacher at one location.

(c) Respondent places great emphasis on the benefits of a K-8 system, relying on the testimony of Kay Mayer, a retired school teacher.[84] While this issue is in the Board of Education's view irrelevant to the present appeal, the Court should be aware that the Board of Education presented evidence that, in today's public schools, the presence of middle school students in schools with elementary students has a negative effect on the younger students.[85]

CONCLUSION

The circuit court erred in finding the Student Bill of Rights constitutional and ordering it placed on the ballot for the reasons set forth in Appellant's Brief and this Reply. Appellant Board of Education respectfully requests that this Court

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83 See Tr. at 119-120, 123.

84 Respondent's Brief at 15-16.

85 Tr. at 105-106.

declare Mo. Rev. Stat. § 162.666 unconstitutional, reverse the circuit court's July 31, 2002 order, and direct the circuit court to enter judgment in favor of the Board of Education of the City of St. Louis.

Respectfully submitted,

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RULE 84.06(c) CERTIFICATION

I hereby certify in accordance with Rule 84.06(c) that this reply brief includes the information required by Rule 55.03, complies with the limitations contained in Rule 84.06(b) and includes 7,036 words in its entirety.

_____

CERTIFICATE OF VIRUS FREE DISK

I hereby certify that the disk filed with this Reply Brief required by Rule 84.06(g) has been scanned for viruses and that it is virus free.

_____

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed on the _____ day of _____, 2003, by prepaid United States mail to: Charles R. Oldham, Attorney for Relator-Respondent, facsimile 314-367-0926, 5227 Westminster Place, St. Louis, MO 63108; Rufus J. Tate, Jr., facsimile 314-726-0424, 7751 Carondelet Avenue, Suite 803, St. Louis, MO 63105, Attorney for Board of Election Commissioners.

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