

**FILED**

APR 10 2012

JOAN M. GILMER  
CIRCUIT CLERK, ST. LOUIS COUNTYIN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS  
STATE OF MISSOURI

GINA BREITENFELD,

Plaintiff,

v.

SCHOOL DISTRICT OF CLAYTON,

et al.,

Defendants.


Case No. 12SL-CC00411

Division 9

FINAL SUBMISSION MEMORANDUM

All parties having filed their post-trial briefs and proposed findings of fact and conclusions of law, the matter is fully submitted for the Court's determination.

SO ORDERED:

  
JudgeDate: April 19, 2012.

**FILED**

MAY - 1 2012

JOAN M. GILMER  
CIRCUIT CLERK, ST. LOUIS COUNTY

GINA BREITENFELD, et al.,

Plaintiffs,

v.

SCHOOL DISTRICT OF CLAYTON, et. al.,

Defendants.

Cause Nos. 12SL-CC00411

07SL-CC00605

CONSOLIDATED

Division No. 9

Date: May 1, 2012

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

### ORDER AND JUDGMENT

This is the consolidated matter that is on remand from the Supreme Court of Missouri for further proceedings to be had therein, in conformity with the opinion in *Jane Turner, et al., v. School District of Clayton, et al.*, 318 S.W.3d 660 (Mo. banc 2010).

The parties and their respective attorneys appeared before this Court on March 5, 6, and 7, 2012 for trial on Plaintiff Gina Breitenfeld's (Breitenfeld) second amended petition and petition filed in both causes (hereinafter petition), Intervening School District of Clayton Taxpayers' (Clayton taxpayers) petition for declaratory judgment, Intervening St. Louis Public School District Taxpayer's (St. Louis taxpayer) petition for declaratory judgment, and School District of Clayton's (Clayton school district) counterclaim against Breitenfeld, along with all other pending pleadings and claims in these consolidated cases, including issues involving the Hancock Amendment and impossibility defense. After the evidence was submitted during the trial, the attorneys timely submitted additional evidence

and legal memoranda on April 10, 2012 to the Court. This matter is deemed submitted to the Court for its ruling.

After review of the pleadings, evidence, and legal memoranda submitted by the attorneys, the Court enters its findings of fact, conclusions of law, and order and judgment, as follows:

### FINDINGS OF FACT

#### The § 167.131 RSMo (2000) Mandate

§ 167.131 RSMo (2000) was enacted into law in 1993 as part of the Outstanding Schools Act. After the St. Louis public school district<sup>1</sup> lost its accreditation in 2007, § 167.131 RSMo (2000) mandated that Clayton school district shall admit City of St. Louis resident students and the transitional school district of the City of St. Louis (transitional school district)<sup>2</sup> shall pay for the students' tuition. *Turner, et al., v. School District of Clayton, et al.*, 318 S.W.3d 660 (Mo.banc 2010). This mandate, however, did not include State funding.

#### Plaintiff Gina Breitenfeld

Gina Breitenfeld, the plaintiff and appointed next friend in these matters, is a real estate agent living with her two school-aged children (Breitenfeld's children) in the

---

<sup>1</sup> For convenience, board of education of the City of St. Louis will be referred to as St. Louis public school district.

<sup>2</sup> For convenience, the special administrative board of the transitional school district will be referred to as the transitional school district.

City of St. Louis, Missouri. Breitenfeld's children are eligible to attend the St. Louis public schools but currently attend an elementary school and a middle school in the Clayton schools. They never attended the St. Louis public schools and the transitional school district receives no funding from the State for their education. Breitenfeld's children have attended Clayton schools for the 2009-2010, 2010-2011, and 2011-2012 school years.

Breitenfeld had entered into tuition agreements with Clayton school district for her children to attend Clayton schools for the two and one-third years they attended the schools. Breitenfeld submitted affidavits for the establishment of residence to Clayton school district, agreeing to pay her children's tuition if she did not reside in Clayton, Missouri. However, Breitenfeld, a St. Louis City resident, has not paid any tuition under these agreements, and the total tuition amount due to the Clayton school district is \$49,133.33.

After St. Louis public school district lost its accreditation in 2007, Breitenfeld sought to have the transitional school district pay for her children to attend the Clayton schools in St. Louis County, Missouri, which adjoins the City of St. Louis. When the transitional school district refused to pay, Breitenfeld filed suit against the school districts for a declaratory court order for Clayton school district to enroll her children and for the transitional school district to pay the tuition.

### **The Jones Report**

In 2011, E. Terrance Jones, Ph.D. conducted a statistical study and prepared a report on the likelihood of student residents transferring from the City of St. Louis to St. Louis County school districts, assuming that § 167.131 RSMo (2000) is enforceable. Dr. Jones is a professor of political science and public administration at the University of Missouri – St. Louis, specializing in public policy, metropolitan governance, public opinion, strategic planning, and survey research. Jones' testimony and opinions were based on a random survey of 601 city residents with school aged children, historical data regarding actual Voluntary Interdistrict Choice Corporation (VICC) transfers and applications; data regarding respondents' preferences for schools they regard as academically superior; data regarding transportation between St. Louis City residential locations and County school districts; and historical evidence showing the willingness to accept extended commuter ride times for City-to-County transfers.

During the trial, Dr. Jones testified that approximately 15,740 St. Louis City-resident students would transfer this coming fall from their current school to a school in St. Louis County if given the opportunity under § 167.131 RSMo (2000), with 8,318 students coming from the St. Louis public schools, 1,746 from Charter schools, 2,757 from private/parochial schools, and 2,248 from the VICC program. Also, out of these 15,740 St. Louis City students, Jones estimated that 3,567 would transfer to the Clayton school district, with 1,904 transferring to the Kirkwood school district, 1,857 transferring to the Lindbergh school district, 1,763 transferring to the Rockwood school district, 1,731 transferring to the Ladue school district, and 1,149 transferring to the Brentwood school

district, with unknown County school preferences for another 3,769 transferring students.

David Glaser, Chief Executive Officer of VICC, testified that Dr. Jones' Report is the only available information resource for County school districts to use in their planning for § 167.131 RSMo (2000) transfers. Glaser talked about the importance of school district planning for growth in student enrollment, the various factors considered in strategic planning, and how transitional planning for the student transfers under § 167.131 RSMo (2000) may be virtually impossible. He added that school districts experiencing rapid growth in student enrollment generally have years of advanced planning to adequately accommodate increased enrollment. Glaser has extensive experience in strategic planning and budgeting for a school district.

#### **St. Louis Public School District**

St. Louis public school district is a political subdivision that currently educates over 23,000 students from kindergarten to 12<sup>th</sup> grade in its 76 schools within the boundaries of the City of St. Louis. In June 2007, the St. Louis public school district lost its accreditation with the State board of education and is not expected to be considered for re-accreditation until 2014.

In 2007, the district was considered financially stressed, but is currently considered to be financially stable. In recent years, the St. Louis public school district has closed schools, reduced staffing, and reduced teachers to eliminate its operating budget deficit and obtain a balanced budget. The district does not have an operating surplus of funds. Between 2007-2011, the attendance rate for the St. Louis public school district

increased by 3.8% to 92.9%. The district also improved its eligibility for accreditation by increasing the number of Annual Performance Report (APR) indicators it met from three out of fourteen in 2008-09 to six out of fourteen in 2010-11. APR indicators are used by the State board of education in assessing student performances as a partial measure of a district's eligibility for accreditation.

In 2011, the St. Louis public school district's operating budget expenditures were \$288 million. The district received revenue from local sales and property taxes, with additional funding from state and federal governments.

As support for the Jones Report's projection of student transfers, St. Louis public school district superintendent Dr. Kelvin Adams testified as to the possibility of transfers by noting the well-established "historical culture" of St. Louis City parents applying for transfer to other schools. He testified that, even within the city, there are some 6,000 to 7,000 transfer applications each year for magnet schools, and that the culture of applying to County schools for transfer is also well established as a result of the VICC transfer program.

Dr. Adams testified that, if § 167.131 RSMo (2000) is enforceable, 15,740 St. Louis City-resident students would transfer to County schools, and the expense of paying for the transferring students would be \$223,790,964.16 per year. Out of this total amount, the St. Louis public school district would have to pay \$40,057.38 per year for Breitenfeld's children's enrollment in the Clayton schools. Along with un-reimbursable costs of bus transportation estimated between \$25.6 million to \$38.4 million, the total cost of § 167.131 transfers can go as high as \$262 million. This would leave a budget of approximately \$26

million for the district to educate the remaining 15,182 students in K-12 grades. The St. Louis public school district would also lose restricted federal funds, including funds for free and reduced lunch, as students transfer out of the district.

Dr. Adams also stated that it would be impossible for the district to maintain or improve its current attendance and academic achievements and to adequately educate the remaining students enrolled in the district if the transfers estimated by Dr. Jones occurred and the resulting tuition and transportation costs were imposed on the district. Dr. Adams stated that regaining accreditation would be impossible.

Dr. Roger Dorson, currently with the Missouri department of elementary and secondary education and a former school superintendent in Missouri, testified that in his experience a district would be unable to provide an adequate education to two-thirds of its existing student body after losing 80% of its operating budget.

#### **School District of Clayton**

The Clayton school district is a political subdivision located in St. Louis County, Missouri and currently educates approximately 2,500 students from kindergarten to 12<sup>th</sup> grade in its five schools. The district has an operating budget of approximately \$50 million. The Clayton school district receives about 75 percent of its operating revenues from local real estate and personal property taxes. The district's costs for textbooks and supplies for each student range from \$285 and \$650. The average annual cost of hiring an additional teacher is \$88,000 and a teaching intern is \$35,000.

If § 167.131 RSMo (2000) is enforceable, Clayton school officials anticipate



3,567 St. Louis City resident students would transfer to Clayton, based on Dr. Jones' report. This would more than double Clayton's current enrollment of about 2,500 students. To accommodate these transfer students, Clayton school district would have to build multiple new school buildings, develop a mechanism for financing construction, and acquire 50 acres of land, which may not be available. Also, planning and construction would require four years. This planning period does not include the time that would be required to arrange financing for such projects.

The cost for building construction and land acquisition for the Clayton school district to accommodate the transfer students would be approximately \$135 million, with an additional \$42,200,000 in annual operating costs. Clayton's bonding capacity is only \$56 million and requires voter approval.

Dr. Sharmon Wilkinson, acting superintendent of the Clayton school district, testified that it would be impossible for the district to adequately educate two-thirds of its existing student body after losing 90% of its operating budget, and further, that it would be impossible for the district to accommodate 3,567 transfer students without years of advance planning and construction work.

### CONCLUSIONS OF LAW

These consolidated cases involve the issue of the enforceability of § 167.131 RSMo (2000), which in its present form was enacted into law in 1993 as part of the Outstanding Schools Act.

After the St. Louis public school district lost its accreditation in 2007, § 167.131

RSMo (2000) required the transitional school district to pay tuition for transferring resident students attending accredited St. Louis County school districts. *Turner, et al., v. School District of Clayton, et al., supra.* Carrie Hegdahl, as a St. Louis taxpayer for St. Louis public school district, and Janis Abrams, Judith L. Glik and Elizabeth L. Wack as Clayton taxpayers for the Clayton school district are challenging the enforceability of § 167.131 RSMo (2000) as being in violation of the Hancock Amendment. The school districts are challenging this law based on the impossibility of compliance defense. Additionally, the Clayton school district has a counterclaim against Breitenfeld for payment of tuition for Breitenfeld's children.

§ 167.131 RSMo (2000) provides, in relevant part, the following:

1. The board of education of each district in this state that does not maintain an accredited school pursuant to the authority of the state board of education . . . shall pay the tuition of and provide transportation . . . for each pupil resident therein who attends an accredited school in another district of the same or an adjoining county.
2. The rate of tuition to be charged by the district attended and paid by the sending district is the per pupil cost of maintaining the district's grade level grouping which includes the school attended. The cost of maintaining a grade level grouping shall be determined by the board of education of the district but in no case shall it exceed all amounts spent for teachers' wages, incidental purposes, debt service, maintenance and replacements. . . . Subject to the limitations of this section, each pupil shall be free to attend the public school of his or her choice.

#### **The Hancock Amendment**

The Hancock Amendment, Missouri Constitution Art. X, §§ 16 – 24, was adopted to "rein in increases in governmental revenues and expenditures" and to "erect a

comprehensive, constitutionally-rooted shield . . . to protect taxpayers from the government's ability to increase the tax burden . . ." *Roberts v. McNary*, 636 S.W.2d 332, 336 (Mo. banc 1982); *Fort Zumwalt Sch. Dist. v. State*, 896 S.W.2d 918, 921 (Mo. banc 1995).

Art. X, § 16 states in relevant part:

The state is prohibited from requiring any new or expanded activities by counties and other political subdivisions without full state financing, or from shifting the tax burden to counties and other political subdivisions.

Art. X, § 21 explains the policy set forth in § 16, stating in relevant part:

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

Section 21 of the Hancock Amendment is violated if both (1) the State requires a new or increased activity or service of a political subdivision; and (2) the political subdivision experiences increased costs in performing that activity or service without funding from the State. *Miller v. Dir. of Revenue*, 719 S.W.2d 787, 788-789 (Mo. banc 1986). The first prong is met when the State requires a local entity to begin a new mandated activity or to increase the level of the activity beyond the level that existed on November 4, 1980. *Neske v. City of St. Louis*, 218 S.W.3d 417, 422 (Mo. banc 2007); *Fort Zumwalt Sch. Dist.*, 896 S.W.2d at 921. The funding required by the second prong has to fully offset the cost of compliance. *City of Jefferson v. Missouri Department of Natural Resources*, 863 S.W.2d 844, 849 (Mo. banc 1993).

Because there was no evidence submitted during the trial that the § 167.131 RSMo (2000) mandate included funding for student transfers, the Court finds that this mandate did not include any State funding. Therefore, the only issue regarding the enforceability of the § 167.131 RSMo (2000) mandate is whether or not it requires a new or increased activity or service after November 4, 1980.

In evaluating whether the State mandated a new activity after November 4, 1980, it is important to review the law at the time of the enactment of the Hancock Amendment. In 1980, when the Hancock Amendment was adopted, § 167.131 RSMo (1978) (hereinafter "old transfer law") read as follows in relevant part:

1. The board of education of each district in this state that does not maintain an approved high school offering work through the twelfth grade shall pay the tuition of each pupil resident therein who has completed the work of the highest grade offered in the schools of the district and who attends an approved high school in another district of the same or an adjoining county . . . where work of one or more higher grades is offered . . .

2. . . . Subject to the limitations of this section, each pupil shall be free to attend the school of his or her choice; but no school shall be required to admit any pupil.

This statute is unambiguous and therefore there is no need for this Court to resort to statutory interpretation or construction. *Turner, et al., v. School District of Clayton, et al.*, 318 S.W.3d at 669, citing *Abrams v. Ohio Pac. Exp.*, 819 S.W.2d 338, 340 (Mo. banc 1991).

Under the clear and unambiguous language in the old transfer law in 1980, this statute applied to school districts that did not have approved high schools that offered work through the twelfth grade. These particular school districts were required to pay the tuition

for their students attending other school districts with approved high schools. Transferring students, however, were not eligible to attend other school districts until after they completed the work of the highest grade in their school districts. Students not completing the highest grade in their districts were ineligible to transfer to other districts. Also, the old transfer law allowed other districts the discretion to accept or reject students transferring from districts without approved high schools.

In applying the old transfer law to the facts in this matter, in 1980 the Breitenfeld children would not be eligible to transfer to the Clayton schools because they are currently attending elementary and middle schools and have not completed the highest pre-high school grade available in the St. Louis public schools. Also, the Clayton school district would have the discretion to not accept student transfers from St. Louis.

In comparing the old transfer law with § 167.131 RSMo (2000), the passage of § 167.131 RSMo (2000) created new and increased activity or service for school districts over and above what was required in 1980 under the old transfer law. § 167.131 RSMo (2000) created the requirement for unaccredited school districts to pay tuition and transportation regardless of any work completed by the transferring students. It also expanded an unaccredited district's activity by requiring payment for a new population of students, from kindergarten to 8<sup>th</sup> grade. It also appears that this law created a state-administered, district-wide scheme of accreditation that did not exist in 1980.

Furthermore, § 167.131 RSMo (2000), without any state funding, would: (1) place an expanded burden on St. Louis taxpayers to pay tuition and transportation for resident students attending County schools; (2) require the transitional school district to

pay \$40,057.38 for Breitenfeld's children's tuition; (3) place a burden on Clayton taxpayers by requiring the Clayton school district to construct new buildings for a student body that would double in size; and (4) eliminate the Clayton school district's discretion to accept or reject students from unaccredited school districts.

Therefore, because the unfunded mandate created new or increased activity or service, § 167.131 RSMo (2000) violates the Hancock Amendment and is not enforceable. Clayton taxpayers and St. Louis taxpayer are entitled to receive from the State of Missouri their costs including reasonable attorneys' fees incurred in maintaining this suit. Mo. Con. Art. X § 23.

### The Impossibility Defense

The districts challenge the enforceability of § 167.131 with the impossibility of compliance defense. Under Missouri law, "if a statute is such that it is 'impossible to comply with its provisions, it will be held to be of no force and effect.'" *George v. Quincy, Omaha & K.C. R.R. Co.*, 167 S.W. 153, 156 (Mo. Ct. App. 1914). Also, "impossibility of compliance may constitute [a] valid excuse[] for non-compliance with a statute." *Egenreither ex rel. Egenreither v. Carter*, 23 S.W.3d 641, 646 (Mo. Ct. App. 2000).

From the evidence adduced during the trial, it appears that it would be impossible for the transitional school district, the St. Louis public school district, and the Clayton school district to comply with § 167.131 RSMo (2000). The annual tuition cost of \$223,790,964.16, along with transportation costs, would likely consume over 77% of St.

Louis public school district's operating budget, leaving the district without a sufficient budget to properly educate the remaining students. As indicated by Dr. Adam's testimony, the St. Louis public schools would cease to exist in any meaningful sense.

Also, without state funding or additional support, the Clayton school district could not finance the \$135 million capital expenditures required by § 167.131 RSMo (2000) because its remaining bonding capacity is only \$56 million and requires voter approval. The Clayton school district lacks the ability to plan in advance to accommodate these transfers, lacks the financial mechanisms needed to fund construction that would be required, and does not have land available that it could use to build the required buildings. The tuition payments chargeable under § 167.131 RSMo (2000) would not be enough to finance such a project.

The above substantial evidence indicates that compliance with § 167.131 RSMo (2000) would be impossible. At trial, three witnesses with school superintendent experience testified, with two predicting dire consequences in attempting to implement § 167.131 RSMo (2000), and the third, a state employee, had no recommendation for any solution under these unusual circumstances. It is apparent that, from this evidence, the enforcement of § 167.131 RSMo (2000) would overwhelm area school resources to the extent of adversely impacting local districts.

Therefore, compliance with § 167.131 RSMo (2000) is impossible and held to be of no force and effect. Transitional school district, St. Louis public school district, and Clayton school district are excused from complying with its mandate.

### Clayton School District's Counterclaim

Clayton school district is seeking in its counterclaim against Breitenfeld \$49,133.33 in tuition for the Breitenfeld children for the two and one-third years they attended Clayton schools, pursuant to agreements in Breitenfeld's affidavits submitted to the Clayton school district, implied by the conduct of the parties, or in quantum meruit. No sufficient evidence was submitted at trial to relieve Breitenfeld of her obligation to pay the tuition, and these agreements and facts are supported with sufficient consideration and are enforceable. Therefore, Clayton school district is entitled to recover tuition in the amount of \$49,133.33 from Breitenfeld.

### ORDER AND JUDGMENT

ACCORDINGLY, IT IS ORDERED, ADJUDGED, DECLARED, AND DECREED THAT, based upon the foregoing Findings of Fact and Conclusions of Law, as well as the entire record in this case:

1. Judgment is entered in favor of St. Louis public school district, St. Louis taxpayer, Clayton school district and Clayton taxpayers and against plaintiff Breitenfeld on her petition.
2. Judgment is entered in favor of St. Louis public school district and St. Louis taxpayer and against the State of Missouri and plaintiff Breitenfeld on St. Louis Intervenor's Petition.
3. Judgment is entered in favor of Clayton school district and Clayton taxpayers and against the State of Missouri and plaintiff Breitenfeld on Clayton Intervenor's Petition.



4. § 167.131 RSMo (2000) is unconstitutional and unenforceable as to transitional school district, St. Louis public school district and Clayton school district because it violates the unfunded mandate prohibition contained in the Hancock Amendment, Mo. Con. Art. X, §§ 16, 21 and, alternatively to this constitutional violation, because compliance is impossible, and said statute shall not be enforced against transitional school district, St. Louis public school district or Clayton school district.

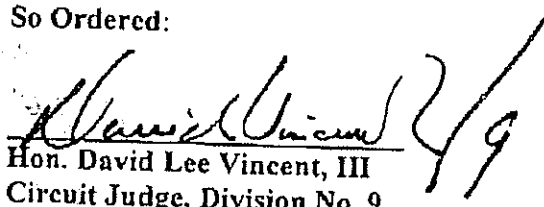
5. Judgment is entered in favor of Clayton school district and against plaintiff Breitenfeld on the district's Counterclaim in the amount of \$49,133.33.

6. All other claims not otherwise addressed above are dismissed as moot.

7. Costs shall be taxed in favor of transitional school district, St. Louis public school district, St. Louis taxpayer, Clayton school district and Clayton taxpayers, and against the State of Missouri and plaintiff Breitenfeld. Pursuant to the Hancock Amendment, and as prevailing parties, St. Louis taxpayer and Clayton taxpayers shall submit appropriately supported applications for awards of attorneys' fees and costs against the State of Missouri no later than 21 days after the date of this judgment.

So Ordered:

Dated: May 1, 2012

  
Hon. David Lee Vincent, III  
Circuit Judge, Division No. 9

cc: Attorneys of record

*Breitenfeld v. School District of Clayton, et al.*  
Cause Nos. 12SL-CC00411 and 07SL-CC00605