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IN THE CIRCUIT COURT OF ST. LOUIS COUNTY
STATE OF MISSOURI

JANINE MASSEY, Individually and as Next Friend to CHASE M.; KARL GRAY, JR., Individually and as Next Friend to KARL G.; SHARANDRA CARD, Individually and as Next Friend to DEVONTE B. and EARL B.; and NEDRA MARTIN, Individually and as Next Friend to MAHRIA P,	)	
Plaintiffs,	)	Case No.: 14SL-CC02359
v.	)	Division: 16
THE NORMANDY SCHOOLS COLLABORATIVE, THE STATE OF MISSOURI, THE MISSOURI STATE BOARD OF EDUCATION, THE MISSOURI DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION, THE PATTONVILLE SCHOOL DISTRICT, THE RITENOUR SCHOOL DISTRICT and THE FRANCIS HOWELL SCHOOL DISTRICT,	)	
Defendants.		

ORDER AND JUDGMENT

Cause called for a hearing on August 6, 2014, pursuant to Plaintiffs' Motion for a Preliminary Injunction. (Plaintiffs seek declaratory and injunctive relief against all defendants in their Second Amended Petition.) Plaintiffs appeared in person and through their attorneys, Joshua Schindler and Richard Gray. Solicitor General James Layton appeared on behalf of the State of Missouri, the State Board of Education and the Missouri Department of Elementary and Secondary Education. Attorneys Melanie Keeney and Celynda Brasher appeared on behalf of the Pattonville,

Ritenour and Francis Howell School Districts. Attorney Robert Useted also appeared on behalf of the Ritenour School District. Attorney Cindy Ormsby also appeared on behalf of the Francis Howell School District.[1] Attorney Dorothy White-Coleman entered on behalf of the Normandy Schools Collaborative after the date of the hearing.

Certain Defendants submitted a Motion for Judgment on the Pleadings ("Motion").[2] Because the issues before the Court on Plaintiffs' Second Amended Petition are the same issues that control in Defendants' Motion for Judgment on the Pleadings, this Court will rule on that motion as well.

Plaintiff parents – all residents within the boundaries of the former Normandy School District -- seek a preliminary injunction to require Defendants to adhere to the directives of Section 167.131 of the Missouri Revised Statutes ("the transfer statute") and allow their children to transfer for the 2014-15 school year to the schools that those children had previously attended in the 2013-14 school year.[3] In advance of this hearing, Plaintiffs submitted a memorandum of law that attached various exhibits, including affidavits from each Plaintiff detailing the basis for their individualized requests for relief.

This court makes the following Findings of Fact and Conclusions of Law:

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[1] This court notes that on August 8, 2014, Carrie Sims (filing individually and as next friend of Tate C.), Mark and Monica Lawless (filing individually and as next friends of Julian L.) and Elizabeth Lawrence (filing individually and as next friend of Robert L. and Ian L.) filed a Motion to Intervene in this lawsuit. Their motion is set for August 18, 2014. Because time is of the essence, this court will not wait until the hearing next week to rule. This court is unaware of how its ruling today would create any possible prejudice to any party or movant.

[2] The State of Missouri, the Missouri State Board of Education, and the Missouri Department of Elementary and Secondary Education filed their Motion for Judgment on the Pleadings. Francis Howell School District, Pattonville School District, and Ritenour School District later joined in the motion. Therefore, the only non-moving Defendant is the Normandy Schools Collaborative.

[3] For the 2013-14 school year, Plaintiff Massey's son, Chase, attended school in the Defendant Pattonville School District; Plaintiff Gray's son, Karl, attended school in the Defendant Pattonville School District; Plaintiff Card's sons, Devonte and Earl, attended schools in the Defendant Ritenour School District; and Plaintiff Martin's daughter, Mahria, attended school in the Defendant Francis Howell School District. *See* Plaintiffs' Exhibits B, C, D and E.

I. UNDISPUTED FACTS

On September 18, 2012, the Missouri State Board of Education ("the State Board") gave the Normandy School District the accreditation classification of "unaccredited," as of January 1, 2013. Section 167.131 of the Revised Statutes of Missouri ("RSMo.") provides that students who reside in a school district that is not deemed accredited may transfer to "an accredited school in another district of the same or an adjoining county." According to the statute, the transferring home school district is responsible for the cost of the child's education. [The Missouri Supreme Court upheld the statute in its *Turner v. School District of Clayton* decision, 318 S.W.3d 660 (Mo. banc 2010), reminding accredited school districts that, if chosen by a transferring student from an unaccredited district, they have no discretion to deny admission to him/her. *Id.* at 662-63.]

Accordingly, for the 2013-14 school year, Normandy students transferred to the schools of Defendants Pattonville School District ("Pattonville"), Ritenour School District ("Ritenour") and Francis Howell School District ("Francis Howell"), among others. These students included the five children of the four parent Plaintiffs in this action. All of the Plaintiff students successfully completed their 2013-14 school years. As stated in their affidavits, by early 2014, the Plaintiff parents completed the necessary paperwork for their children to return to Pattonville, Ritenour and/or Francis Howell, for the 2014-15 school year. *See* Plaintiffs' Exhibits B, C, D and E.

According to Rule 5 CSR 20-100.105 ("Missouri School Improvement Program"), a rule of the Department of Elementary and Secondary Education ("DESE"), DESE must annually review the performance of all school districts in this state. Such reviews will guide DESE in determining those districts in need of improvement and in determining the level of intervention, if necessary. The State Board of Education must assign each school district with one of four classification designations: "unaccredited, provisionally accredited, accredited and accredited with distinction."

5 CSR 20-100.105 (3). The rule also addresses the means by which the Board can change the designations. In particular, an unaccredited school district could become accredited if it "demonstrated significant change in student performance over multiple years." 5 CSR 20-100.05 (4) (B).[4]

On May 20, 2014, the State Board adopted a resolution that "lapsed" the Normandy School District as of June 30, 2014. See Plaintiff's Exhibit A. The May resolution established the Normandy Schools Collaborative ("NSC") as of July 1, 2014, retaining and exercising all authority previously granted to the Board of Education of the unaccredited Normandy School District. Further, the State Board gave the NSC the authority to take any actions necessary for its operation, subject to the advice and consent of the State Board. The State Board took this action pursuant to Section 162.081.3(2) (b), RSMo.[5] The minutes from the monthly May meeting made no mention of an effort to change the classification of the NSC at that time.

On June 16, 2014, the State Board addressed the accreditation status of the NSC. The meeting minutes indicate that the State Board voted unanimously to grant "a waiver under Mo. Rev. Stat. Section 161.210," giving the NSC a "new school status as a state oversight district" (as listed on the School Board's June meeting minutes under No. 12319, "Consideration of Classification Determination for the Normandy Schools Collaborative"). See Plaintiffs' Exhibit F.

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[4] Section 161.092(9), RSMo. provides the authority for the State Board to "classify the public schools of the state..., establish requirements for the schools of each class, and formulate rules governing the inspection and accreditation of schools." Section 161.092 (14), RSMo. gives the Board the authority to "promulgate rules under which the board shall classify the public schools of the state."

[5] The State Board had other available options, including attaching the territory of the NSC to another district or districts; or establishing one or more school districts within the territory of the NSC. *See* Section 162.081.3(2) (C) and (D), RSMo.

Several days later, the Missouri Department of Elementary and Secondary Education ("DESE") informed various school districts that they had the option to accept or deny the Normandy transfer students for the 2014-15 school year. Pattonville, Ritenour, and Francis Howell informed Plaintiffs that they would not accept transfers from the Normandy Schools Collaborative for the 2014-15 school year. (Other school districts willingly accepted the transfers.) Shortly thereafter, the NSC informed Plaintiffs that they (or their children) would not be allowed to transfer out of the NSC.

In July, 2014, DESE issued an "Accreditation Classification" Report. *See* Plaintiffs' Exhibit J. The report listed all 520 school districts in the state, breaking them down under four "classifications": 1. "Accredited" (with 506 school districts listed);

2. "Provisionally Accredited" (with 11 school districts listed);

3. "Unaccredited" (with 2 school districts listed); and

4. "State Oversight" (with 1 school district, the NSC, listed).

On July 14, 2014, Plaintiffs filed the underlying petition. (The petition was ultimately amended on July 22 and July 30, 2014.)

On August 1, 2014, the State Board amended its June meeting minutes in only one regard, as follows: "Correction of Item No. 12319 Consideration of Classification Determination for the Normandy Schools Collaborative in the minutes of the June 16-17, 2014 meeting of the State Board of Education." An attached page of the June minutes showed a sole revision from the June notation of "...new *school status* as a state oversight district..." to "...new *accreditation* as a state oversight district..." (Emphasis added.) *See* Plaintiffs' Exhibit F. (Counsel for the State Board explained that there had been two sets of minutes from the June meeting, and that the incorrect set was initially relied upon for voting by the Board.)

According to Ronald Lankford, Deputy Commissioner of Education for the Office of Financial and Administrative Services for DESE, "if students transfer from the Normandy School Collaborative in numbers equal to or exceeding the 2013-14 school year and at the tuition and transportation costs paid during the 2013-2014 school year, that the Normandy School Collaborative will exceed its operational cash balances effective October 31, 2014, and will not have sufficient funding to sustain school operation for the remainder of the 2014-15 school year." *See* Defendants' Affidavit.

The School Board and the other state defendants maintain that because the School Board had the statutory authority to waive the accreditation rules and give the NSC "accreditation as a state oversight district," the NSC should now be deemed "accredited" -- and thus, the transfer statute (Section 167.131, RSMo.) does not apply to those pupils who reside within its boundaries. The Defendant school districts agree with this interpretation, justifying their decisions to deny admission to the NSC students. Plaintiffs argue, *inter alia*, that the Board had no authority to accredit the Normandy School Collaborative -- and therefore, they still have the right to transfer, as Section 167.131, RSMo. prescribes.

II. CONCLUSIONS OF LAW

A preliminary injunction is appropriate when it appears "by the petition" that the plaintiff is entitled to the relief requested. Section 526.050, RSMo; Rule 92.02 of the Mo. Sup. Ct. Rules of Civil Procedure; *State ex rel. Eagleton v. Cameron*, 384 S.W.2d 627, 629-30 (Mo. 1964). In deciding whether to issue a preliminary injunction, a court must consider (1) the plaintiff's probability of success on the merits, (2) the threat of irreparable harm to the plaintiff absent relief, (3) the balance between the harm and any injury the injunction may inflict on other parties, and (4) the public interest in relation to the requested relief.[6] *State ex rel. Dir. of Revenue v. Gabbert*, 925

[6] Plaintiff must also establish that there is no adequate remedy at law. Section 526.030, RSMo. An action for damages is not being sought here. It obviously would not be an adequate remedy.

S.W.2d 838, 839 (Mo. banc 1996). In determining whether to issue a preliminary injunction, this court will address all four considerations.

A. LIKELIHOOD OF SUCCESS ON THE MERITS

This court must first consider the likelihood of Plaintiff's success on the merits. The issue before this court relates to whether or not the State Board properly deemed the NSC an accredited "state oversight district," thereby eliminating the right of its students to transfer to accredited school districts, as Section 167.131, RSMo. provides. This court has two concerns. The first question relates to whether or not the State Board has the statutory authority to deem the formerly unaccredited Normandy School District "accredited," regardless of the "state oversight district" qualifier. The second issue relates to whether or not the NSC engaged in impermissible rule making.

1. The State Board Did Not Have the Authority to Deem the Normandy Schools Collaborative "Accredited" as the State Board Did Not Comply with the Requirements of Section 162.081, RSMo.

All parties are in agreement that the Normandy School District was unaccredited from January 1, 2013 until it lapsed on June 30, 2014. On May 20, 2014, the State Board resolution lapsed the corporate organization of the organized district [pursuant to Section 162.081.3(2), RSMo.] and determined an "alternative governing structure" for the district [pursuant to Section 162.081.3(2) (b), RSMo.]. Plaintiffs do not challenge those actions in this litigation.

By August 1, 2014 (and arguably on June 16, 2014), the State Board purported to give the Normandy Schools Collaborative "new accreditation as a state oversight district." *See* Plaintiffs' Exhibit F at 3. The State Board relied upon Section 161.210, RSMo. in doing so. *Id.* Further, counsel for Defendants stated in written argument, immediately after quoting Section 161.210, that "the State Board waived its rules regarding accreditation by giving Normandy a new, temporary classification . . . ." *See* Defendants' Motion at 5.

Section 161.210.1, RSMo. grants the State Board broad power "to waive or modify any administrative rule adopted by the state board or policy implemented by the department of elementary and secondary education." This power is bestowed upon the State Board "notwithstanding any provision of law to the contrary." *Id.* The State Board, therefore, would seem to have the authority to waive or modify any requirements imposed by Rule 5 CSR 20-100.105 (the aforementioned rule that requires the State Board to designate one of the four classifications to each school district and that addresses how the State Board can change a classification based on significant changes in student performance), as it is an administrative rule. Consequently, the State Board could create a new classification designation -- "new *accreditation* as a state oversight district"[7] -- if there were no provisions of law "to the contrary." This court finds that Section 162.081.3, RSMo. is "to the contrary," posing a significant problem for the State Board.

Section 162.081, RSMo. provides the procedures that DESE and the State Board must follow to change the status of a school district after it has been classified as "unaccredited." There was no evidence provided to demonstrate any compliance whatsoever. Neither DESE nor the State Board has met its Section 162.081 obligations.

As to DESE, Section 162.081 demands that the agency "conduct at least two public hearings at a location in the unaccredited school district regarding the accreditation status of the school district." Section 162.081.2, RSMo. This court has heard no evidence to establish that DESE has conducted any public hearings within the Normandy School District (or now Normandy School Collaborative) on the issue at hand.

[7] Unlike the Plaintiffs, this court attaches no legal significance to the August 1, 2014 minutes modification. Whether or not the State Board deemed the NSC accredited in June or August makes no difference in a legal sense. This court only mentions the two sets of minutes to demonstrate the quandary that the State Board knew it had...

Section 162.081.3 also imposes numerous obligations on the State Board when it lapses the governing structure for the school district. The State Board must:

1. Provide a rationale for the decision to use an "alternative form of governance": and "in the absence of the district's achievement of full accreditation, the state board of education shall review and recertify the alternative form of governance every three years"; and
2. Establish a method for the residents of the district "to provide public comment after a stated period of time or upon achievement of specified academic objectives"; and
3. Provide "expectations for progress and academic achievement, which shall include an anticipated time line for the district to reach full accreditation"; and
4. Submit "annual reports to the general assembly and the governor on the progress towards accreditation..., including a review of the effectiveness of the alternative governance."

This court is unaware of the State Board's compliance with any of the four directives. Certainly, the residents of the NSC have not been provided with any opportunity to comment after a "stated period of time" (as hardly any time has passed since the lapse) or "upon achievement of specified academic objectives" (as no such achievement has been brought to this court's attention). Furthermore, the State Board has not presented any evidence to this court of its submission of annual reports to the legislature and the Governor "on the progress toward accreditation." (The State Board has not provided this court with any indication of such progress.).

Simply put, Section 162.081, RSMo. understandably demands that once a school district is deemed unaccredited and its corporate organization is lapsed, the State Board must meet many expectations to change that district's classification.[8] The School board has only just begun. It clearly cannot simply deem the NSC "accredited" to bypass the transfer statute.

2. The State Board Did Not Follow Rulemaking Procedures in Waiving the Accreditation Regulations as to the Normandy Schools Collaborative.

Under Missouri law, a rule is "each agency statement of general applicability that implements, interprets, or prescribes law or policy . . . ." Section 536.010(6), RSMo. Changes in statewide policy are rules within the meaning of Chapter 536. *NME Hospitals, Inc. v. Dept. of Social Svcs.*, 850 S.W.2d 71, 74 (Mo. banc 1993).

Promulgation of a rule requires compliance with the rulemaking procedures specified in Section 536.021, RSMo. *NME* at 74. Section 536.021, RSMo provides that "(n)o rule shall hereafter be made, amended or rescinded unless such agency shall first file with the secretary of state a notice of proposed rulemaking and subsequent order of rulemaking." The purpose of the notice procedure is to "allow opportunity for comment by supporters or opponents of the measure, and so to induce a modification. To neglect the notice....or to give effect to a proposed rule before the time for comment has run...undermines the integrity of the procedure." *NME* at 74. Failure to comply with rulemaking procedures renders the purported rule void. *Id.*

[8] This case is drastically different than the case cited by Defendants, *Board of Education of the City of St. Louis, et al. v. the Missouri State Board of Education, et al.*, 271 S.W.3d 1 Mo. 2008), in which the Missouri Supreme Court upheld the State Board's decision to "unaccredit" the St. Louis Public School District. The Court deferred to the State Board's decision, noting the plaintiffs' "very high burden" to successfully invalidate an agency decision. *Id.* at 18. Unlike the situation with the *City of St. Louis* case, there are significantly different hurdles for the State Board when it changes a classification from "unaccredited" to "accredited" (as opposed to *vice versa*). Section 162.081, RSMo. is one of them.

In taking its actions regarding the Normandy Schools Collaborative, the State Board cited its broad authority to waive or modify its own rules as well as DESE's policies. The Court recognizes that authority. Section 161.210, RSMo. This court also recognizes, however, that Section 161.210 must be read alongside Section 536.010(6), which specifically states that a rule includes "the amendment or repeal of an existing rule." Section 536.010(6), RSMo. *See Greenbriar Hills Country Club v. Director of Revenue*, 47 S.W.3d 346, 356 (Mo. banc 2001).

This court must determine whether or not the State Board engaged in rule making when it reclassified the NSC (thereby waiving the necessary accreditation regulations). If so, its waiver of the accreditation regulations should be void (because the State Board did not follow the necessary rule making procedures). The Missouri courts have provided much guidance in determining whether or not an agency has engaged in rule making. Some considerations include:

1. Was the statement (i.e., the "June/August Resolution") "generally applicable" (and therefore a rule) or intended to apply only to a "specific set of facts"?
2. Does the statement have a "future effect" (and is therefore a rule)?
3. Does the statement affect a party's legal rights (and is therefore a rule)?
4. Did the agency promulgate the statement as a rule?

a. The "June/August Resolution" was "generally applicable," according to the Missouri Supreme Court's interpretation.

Section 536.010.6, RSMo. requires that a statement be of "general applicability" to be a rule. Similarly, Section 536.010.6(b), RSMo. states that an agency statement is not a rule if it is an interpretation "with respect to a specific set of facts and intended to apply only to that specific set of facts." Several Missouri cases analyze the "general applicability" issues, focusing on how general the applicability must be. At first glance, the facts in the cases would not seem to support findings

of "general applicability." The Missouri Supreme Court, however, has repeatedly addressed this issue, giving a clear understanding of what the term means.

In *NME*, the plaintiffs claimed that the Department of Social Services, Division of Medical Services ("DMS") engaged in illegal rulemaking when it simply announced that most psychiatric services were not Medicaid reimbursable. *Id.* at 72-74. The Court held (despite DMS' argument that the policy change had only affected Medicaid payments and was therefore not one of "general applicability") that "[t]he reimbursement policy applies generally to all participants in the Medicaid program" and thus changes to the policy needed to be "made by rule and regulation" which required promulgation of a rule. *Id.* at 74. Similarly, in *Department of Social Services, Division of Medical Services v. Little Hills Healthcare, L.L.C.*, the plaintiffs claimed DMS violated rulemaking procedures by failing to regulate the method for calculating the estimated Medicaid days. *Dep't of Soc. Servs., Div. of Med. Servs. v. Little Hills Healthcare, L.L.C.*, 236 S.W.3d 637, 640 (Mo. 2007). The Court found that because DMS applied the same calculation method to all Medicaid-participating providers, the protocol was generally applicable, even if it did not apply to all Missouri hospitals. *Id.* at 642. *See also Young v. Children's Div., State Dep't of Soc. Servs.*, 284 S.W.3d 553, 558 (Mo. 2009).

Like the above-described cases, the "June/August Resolution" is "generally applicable" to a target population – here, all school children in the Normandy School Collaborative. To be generally applicable, the resolution need not apply to all Missouri schoolchildren. Indeed, the disputed protocols in *NME* and *Little Hills* only applied to hospitals/providers that were Medicaid providers, rather than to all hospitals/providers. The Court found that these protocols were rules, as they were "generally applicable" within the subset of Medicaid providers. Similarly, the State Board's

resolution is "generally applicable" to the subset of Missouri students who live within the borders of the Normandy Schools Collaborative.

b. The "June/August Resolution" had a "future effect"

The Missouri Supreme Court has indicated that for an agency statement to be a rule, it must have a "future effect" on as yet unspecified facts. *See, e.g. NME at* 74. In *Little Hills*, DMS argued that its determination of the estimated Medicaid day payments did not amount to a rule because DMS annually changed its calculation formula; consequently, DMS argued, and so there was no future effect. The Court rejected this argument, stating "DMS's choice to annually update or change its calculation methods does not change the fact that its methods could apply indefinitely in the future." *Little Hills*, 236 S.W.3d at 643.

The Resolution does not designate a time frame. Regardless, the Court's rationale in *Little Hills* suggests that even if the Normandy Schools Collaborative plans to change this resolution annually, the current policy can still be considered to have a "future effect" on as yet unknown facts.

c. The "June/August Resolution" affected the plaintiffs' legal rights.

To be considered a "rule," an agency statement must have some significant impact, or direct potential for impact, on a party's legal rights. In *Baugus v. Director of Revenue*, used car dealers ("Baugus") alleged that the State Department of Revenue ("Department") created an invalid rule. *Baugus v. Dir. of Revenue*, 878 S.W.2d 39, 40 (Mo. 1994). The statute in question authorized the Department to include the label *salvage* on a car title. *Id.* The Department announced its plan to place something more on the label – the term *prior salvage* -- on certain car titles, but did not undergo any of the rulemaking processes described in Section 536.021, RSMo. *Id.*

The Court found that the Department's announcement was not a rule:

> "Not every generally applicable statement or "announcement" of intent by a state agency is a rule. Implicit in the concept of the word "rule" is that the agency declaration has a *potential, however slight, of impacting the substantive or procedural rights* of some member of the public. Rulemaking, by its nature, involves an agency statement that affects the rights of individuals in the abstract." *Id.* at 42. [Emphasis added.]

The Court found that inserting the word *prior* before *salvage* on certain car titles "merely communicates the difference between the two types of titles" and "does not substantially affect the legal rights of any party." *Id.*

The Supreme Court further addressed the *Baugus* "potential impact" requirement in *Missouri Soybean Assn. v. Missouri Clean Water Comm'n*, 102 S.W.3d 10, 14, 21 (Mo. 2003). The "potential impact" on the rights of some members of the public must flow directly from the supposed "rule" (and not from possible future contingencies). *Id.* at 24.

The "non-rules" in both *Baugus* and *Missouri Soybean Association* are clearly distinguishable from the "June/August Resolution." While the policy in *Baugus* was simply a change in wording on a legal document that had no effect on the legal rights of the plaintiffs, the new resolution from the State Board directly affects the legal rights of students in the NSC area and the rights and obligations of receiving school districts. As *Baugus* indicates, all that the Plaintiffs need to establish is that the resolution has a potential – however slight – of impacting the rights of a student in the NSC. Certainly, Plaintiffs have met that burden.

d. The State Board attempted to promulgate the "June/August Resolution" as a rule.

Even a statement that seems to fit the definition of a rule under Section 536.010.6 RSMo is not a rule if the agency making the statement has not attempted to promulgate the statement as a rule. *United Pharmacal Co. of Missouri Inc. v. Missouri Bd. of Pharmacy*, 159 S.W.3d 361, 365 (Mo. 2005). If a statement is not a rule, then it is "merely an expression of the [state agency's] interpretation of law without any force or legal effect." *Id.*

In *United*, the Missouri Board of Pharmacy ("Pharmacy") posted on its FAQ section on its website that any entity that sells veterinary legend drugs must be licensed as a pharmacy or a drug distributor. *Id.* at 364. Pharmacal later sent United Pharmacy ("United") a cease-and-desist letter, stating that United must stop selling veterinary drugs without a pharmaceutical license. *Id.* at 363. United filed suit, claiming that the rule on the website was illegally created, as Pharmacy had not followed any of the Section 536.021 procedures for rulemaking and thus, the rule was void. *Id.* at 363-64. Pharmacy responded that the FAQ posting was not a rule. *Id.* The Court agreed with Pharmacy: "Not everything that is written or published by an agency constitutes an administrative rule. In this case, the board made no attempt to comply with the protective procedures required for the promulgation of a rule. In fact, the agency did not even try to promulgate the FAQ as a rule." *Id.* at 365.

The Missouri Supreme Court arrived at a similar conclusion in the case of *Missouri Association of Nurse Anesthetists, Inc. v. State Board of Registration for Healing Arts*, 343 S.W.3d 348, 352 (Mo. 2011). The Missouri Association of Nurse Anesthetists ("MANA") brought suit against the State Board of Registration for Healing Arts ("Board") arguing that an alleged rule was void as the Board did not follow rulemaking requirements. *Id.* The Board sent a letter to MANA and to Missouri physicians stating that, while Missouri statutes allowed a physician to delegate

some responsibilities, the Board believed that certain nurses were not appropriately trained to complete specific procedures. *Id.* MANA filed suit, claiming that the Board's letter was essentially a rule, and was therefore invalid as the Board had not complied with rulemaking notice requirements. *Id.* The Board maintained that the letter was not a rule, stating that "[t]he letter at question in this case is merely an expression of the Board's position and is without force and effect. It is a non-binding statement issued by the Board and does not have the force or effect of law." *Id.* at 352-53. The Court agreed, finding that the letter was not a "rule." *Id.* at 357.

In the situation at hand, the State Board did not merely mention its reclassification on its website. It did not merely send a letter to the NSC providing an advisory opinion. The State Board's resolution was promulgated as a rule, immediately affecting the rights of many NSC students.

e. All four factors demonstrate that the "June/August Resolution" is a rule. The State Board, then, must have taken the necessary steps to propose the rule.

In summary, the "June/August Resolution" was clearly a rule. First, it was a statement of "general applicability," as interpreted by the Missouri Supreme Court. Second, the Resolution had a "future effect." Third, the Resolution affected the plaintiffs' legal rights. And last, the Resolution was promulgated as a rule. Accordingly, the State Board could only promulgate such a rule through appropriate measures – which it failed to do.

When the State Board created the new classification (even if temporary) of "state oversight district" in the "June/August Resolution," it should have followed the rulemaking procedure required by Section 536.021, RSMo. *See NME,* 850 S.W.2d 70 at 74. Section 536.021 requires that the State Board, at least in part, file notice of its proposed rulemaking and subsequent final order of rulemaking. Section 536.021.1, RSMo. The proposed rulemaking and final order of

rulemaking would then be "published in the Missouri Register by the secretary of state as soon as practicable." *Id.* Further, Section 536.021 provides that "after the final order of rulemaking has been published in the Missouri Register, the text of the entire rule shall be published in full in the Missouri code of state regulations. No rule, except an emergency rule, shall become effective prior to the thirteenth day after the date of publication of the revision to the Missouri code of state regulations." Section 536.021.8, RSMo.

The State Board simply did not follow the rule making requirements of Section 536.021. Similar to the Division of Medical Services in the *NME* case, the State Board undermined the integrity of the rulemaking procedure. As *NME* indicates, the failure to comply with rulemaking procedures renders the purported rule void. *Id.* at 74.

B. IRREPARABLE HARM TO PLAINTIFFS

In determining whether or not this court should issue a preliminary injunction, this court must next consider whether or not the plaintiffs will suffer irreparable harm. Sadly, the evidence is crystal clear that the students will suffer if their request is not granted. Every day a student attends an unaccredited school (instead of an accredited one) he/she could suffer harm that cannot be repaired after the fact. A school accreditation structure obviously recognizes that accredited schools are better for students than non-accredited schools. By enacting the transfer statute, the people of Missouri, through their legislature and the Governor, recognized that leaving children in unaccredited school districts with no option to transfer from those districts, is harmful to those children.

The parents submitted affidavits objecting to their children attending any NSC schools, that they want their children to return to their 2013-14 schools, and that their children would be irreparably harmed by returning to Normandy. One child expressed her plans to continue in

activities that she was engaged in during the past school year. This court is concerned about the upheaval that would occur if the plaintiff children had to go from one school in the Normandy School District (for 2012-13) to a different school in another school district (for 2013-14) and then back to a school in the NSC (for 2014-15) if they do not prevail on their motion.

None of the parties question the State Board's decision to give the Normandy School District an "unaccredited" classification. The Normandy School District's last performance rating, under the Missouri accreditation standards, was an abysmal eleven percent.[9] There was no evidence presented to suggest that this rating has significantly improved since September 18, 2012, the date when the State Board classified the Normandy School District as "unaccredited." Certainly, the ratings of the accredited Pattonville, Ritenour and Francis Howell School Districts surpass those in the NSC – and significantly so.[10]

Plaintiffs have undoubtedly established that they will suffer irreparable harm if they are not allowed to transfer back to their schools in Pattonville, Ritenour and Francis Howell.

C. BALANCE OF HARM TO PLAINTIFFS WITH HARM TO OTHER PARTIES

The third consideration for this court relates to balancing the aforementioned harm to the plaintiffs (if the relief that they seek is not granted) with the harm to the other parties (if the relief that the plaintiffs seek is granted). This court will consider the harm to two groups: first, to the non-NSC defendants; and second, to the NSC and its students.

[9] This figure was presented at the hearing without objection.

[10] Missouri accreditation standards are governed by DESE and its implementation of the Missouri School Improvement Program-5 ("MSIP"). Under the MSIP, there are certain academic and other criteria that the State Board uses in assigning classification designations to schools. *See* Plaintiffs' Exhibit K, "The Comprehensive Guide to the Missouri School Improvement Program." After assessing a school and giving it an Annual Performance Report ("APR") score, the State Board hears recommendations and makes a determination as to the accreditation designation of the school. Id. at 9, 56. Schools that earn less than 50% of the APR points possible, fall under the guideline to be unaccredited. Id. at 56.

Defendants certainly articulated no harm to the State of Missouri, the State Board or DESE if the plaintiffs prevailed on their motion. Defendants also did not articulate any harm to the receiving school districts of Pattonville, Ritenour or Francis Howell. Because these districts ably accepted transfer students in the 2013-14 school year, this court can safely assume that they would be able to accept transfer students in the 2014-15 school year.

This court recognizes that allowing the plaintiff students to transfer will have an impact on the students remaining in the Normandy Schools Collaborative. Some of the resources that would ordinarily be used for students remaining in the district will instead be used for the cost of educating the transferring NSC students elsewhere. This court is very mindful of the fact that, under such current dire circumstances, the Normandy Schools Collaborative needs significant funding to return to a legitimately "accredited" status. The NSC, however, has not presented credible evidence of how much money it will lose (nor how many children would actually transfer) if injunctive relief is granted. Deputy Commissioner Lankford's conclusions in his affidavit are too speculative to control the outcome of this ruling. Nonetheless, this court is aware of the potential significant effect on the NSC's budget.

This court, however, finds that the direct and immediate harm in preventing the student plaintiffs from transferring to accredited schools outweighs any speculative financial harm to the Normandy Schools Collaborative.

D. PUBLIC INTEREST

The last consideration that this court must make pertains to the "public interest." The public interest is served by providing students with the opportunity to transfer from districts that do not maintain an accredited school. Section 167.131, RSMo. The right to a decent education has long been recognized by the people of Missouri, through laws duly enacted by the legislature and approved

by the Governor. The public interest is also served by requiring all Missouri agencies, including the Missouri State Board of Education to consistently follow the accreditation rules it has promulgated, and to follow the rulemaking process when enacting new rules. This ensures that the public knows about such rules in advance, and has an opportunity to comment. *See Degraffenreid v. State Board of Mediation*, 379 S.W.3d 171, 184 (Mo. App. W.D. 2012).[11]

E. BALANCING ALL CONSIDERATIONS – THE BOTTOM LINE

As has been indicated, this court has addressed all of the required considerations in determining whether to grant injunctive relief. First, the plaintiffs have a strong likelihood of prevailing on the merits of their lawsuit – on several grounds. Most significantly, the State Board did not have the authority to give the NSC accreditation as a "State Oversight District." Further, the State Board did not follow the necessary rulemaking procedures in waiving the accreditation regulations as to the NSC. Second, the plaintiffs would suffer from significant irreparable harm absent such relief: they cannot make up for missed educational opportunities. Third, the harm to the plaintiffs (which would be significant) greatly outweighs the credible harm (all mostly speculative) to the children of the NSC; there was no harm ever mentioned against the other defendants should this injunction be granted. And last, it is in the public interest for the plaintiffs to prevail: every child in this community has a right to a decent education. The scale overwhelmingly tips in the favor of this court's granting Plaintiffs the relief they seek. Plaintiffs have clearly proven that a preliminary injunction is warranted.[12]

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[11] This court sympathizes with the State Board and the NSC. The State Board was merely trying to fix a problem now when it was not provided by law with the tools to do so. At its meeting in August, the State Board tried to have it both ways – call the NSC something different than "accredited" (which would necessarily require, among other things, a demonstration of years of significant test score improvements) but not call the NSC "unaccredited" to keep all desperately needed funding with the NSC, which as a poorly performing school district cannot afford to lose one dollar. The NSC is simply trying to do whatever it can to keep such funds in its district to care for all of its children. Regardless, the State Board had no authority to create the classification that it did.

[12] Plaintiffs' burden of proof is "clear proof," although some courts apply other standards. *Community Title Co. v. Roosevelt Federal Savings and Loan Ass'n*, 670 S.W. 2d 895 (Mo. App. E.D. 1984).

WHEREFORE,

IT IS HEREBY ORDERED that Plaintiffs' request for a preliminary injunction is **GRANTED**.

IT IS FURTHER ORDERED that Defendants' Motion for Judgment on the Pleadings is **DENIED**.

IT IS FURTHER ORDERED that Defendant Pattonville School District is immediately enjoined from denying enrollment to Plaintiff Chase M., the child of Plaintiff Janine Massey, and to Plaintiff Karl G., the child of Plaintiff Karl Gray, Jr., as transfer students from the Normandy Schools Collaborative, pursuant to the requirements of Section 167.131, RSMo.

IT IS FURTHER ORDERED THAT Defendant Ritenour School District is immediately enjoined from denying enrollment to Plaintiff Devonte B. and Plaintiff Earl B., the children of Plaintiff Sharandra Card, as transfer students from the Normandy Schools Collaborative, pursuant to the requirements of Section 167.131, RSMo.

IT IS FURTHER ORDERED THAT Defendant Francis Howell School District is immediately enjoined from denying enrollment to Plaintiff Mahria P., the child of Plaintiff Nedra Martin, as a transfer student from the Normandy Schools Collaborative, pursuant to the requirements of Section 167.131, RSMo.

The Court finds that with no monetary relief being requested, a nominal injunction bond is sufficient to secure the matter to be enjoined. Section 526.070, RSMo. Therefore, this order shall take effect upon the posting by Plaintiffs of an injunction bond in the amount of $100.00.

SO ORDERED:

The Honorable Michael D. Burton

Dated: August 15, 2014

8/15/14

CC: Attorneys of Record:

Joshua Schindler and Richard Gray, Attorneys for Plaintiffs;

James Layton, Attorney for the State of Missouri, the State Board of Education and the Missouri Department of Elementary and Secondary Education;

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Cindy Ormsby, Attorney for the Francis Howell School District;

Dorothy White-Coleman, Attorney for the Normandy Schools Collaborative; and

Elkin Kistner, Attorney for the Intervention Movants.