

IN THE CIRCUIT COURT OF COLE COUNTY
19th JUDICIAL CIRCUIT
STATE OF MISSOURI

Board of Education of the City of St. Louis,)	
<i>et al.</i> ,)	
)	
Petitioners,)	
)	
v.)	Case No. 07AC-CC00488
)	
The Missouri State Board of Education, et al.,)	Division 2
)	
Defendants.)	

FINAL ORDER AND JUDGMENT

Now on this 23rd day of January, 2008, the Court again takes up this matter for the purpose of entering its final order and judgment.

Petitioners – the Board of Education of the City of St. Louis (“City Board”) and certain of its members and their children – filed this action seeking review of the March 22, 2007, decision by the Missouri State Board of Education (“SBOE”) declaring the St. Louis Public School District (“District”) unaccredited. Petitioners also raised multiple constitutional and other challenges to the validity and/or operation of Section 162.1100 (Cumm. Supp. 2006), which transferred control of the District to the Special Administrative Board (“SAB”) of Transitional School District (“TSD”) upon the District’s loss of accreditation. Petitioners also have named as Respondents the Commissioner of Education (“Commissioner”) and the Department of Elementary and Secondary Education (“DESE”) (collectively, with the SBOE, “State Defendants”).

Local 420 American Federation of Teachers and School Related Personnel, and

members of its Executive Board, (collectively the “Intervenor Union”) sought and were granted intervention as Petitioners pursuant to Rule 52.12(b). On June 15, 2007, following this Court’s denial of Petitioners’ application for a temporary restraining order, the SBOE’s decision became effective, the Governor appointed the Chief Executive Officer of the TSD and control over the District passed to the TSD pursuant to Section 162.1100. This Court subsequently granted the TSD’s motion to intervene so that it could seek a declaration that the TSD exercises plenary control over the District.

As set forth below, Court finds that DESE’s manual – “Understanding Your Annual Performance Report” (the “UYAPR Manual”) – is an agency statement of general application that implements, interprets or prescribes law or policy. It should, therefore, have been promulgated using the “notice and comment” procedures in Section 536.021. But, the Court further finds that DESE’s failure to do so is not a sufficient basis to void the SBOE’s accreditation decision. DESE’s Manual aside, the SBOE’s decision was based upon the wealth of competent and substantial evidence before it. Based upon the facts presented at trial, the credibility of the witnesses presented to the Court, and the totality of the circumstances facing the SBOE, this Court finds that the SBOE’s accreditation decision was reasonable, that it was amply supported by the facts, and that it was neither arbitrary nor capricious.

The Court further finds that the Petitioners’ constitutional and other challenges to Section 162.1100 are unpersuasive. Accordingly, with no basis upon which to void the SBOE’s decision, nor any basis upon which to prevent, or even limit, the change of control pursuant to Section 162.1100, this Court hereby finally orders and adjudges that

each of the claims in Petitioners' Amended Petition (and Intervenors' Petition) lacks merit, that each is denied, and that each should be – and is – dismissed with prejudice.

Petitioners' Claims

The Petitioners' Amended Petition raises 29 separate, but overlapping, claims seeking, ultimately, some combination of declaratory judgments and/or injunctions with the effect of having: (1) the SBOE's declaration that the District be unaccredited declared void *ab initio*; and/or (2) the transfer of control over the District from the City to the TSD pursuant to Section 162.1100 declared unconstitutional; and/or (3) the scope of the powers assumed by the TSD declared to be something less than the complete transfer of control suggested by Sections 162.1100 and 162.621 RSMo 2000.¹ The TSD seeks a

¹ The Intervenor Union filed a "Petition for Administrative Review, For Declaratory Judgment and for Permanent Injunction" but adduced no evidence in support of its claims, either at trial or otherwise, and submitted no post-trial brief arguing that its claims should be sustained. At oral argument, counsel for the Intervenor Union conceded that – once the TSD had evidenced an intent to be bound by the contracts entered into by the City Board – the Union's only remaining interest was in opposing the TSD's contention that the TSD only be bound by the requirements of a "7 director district" rather than those of a "metropolitan district." As this Court has held that this latter issue is not properly raised in this present case, the Intervenor Union's claims are deemed abandoned and are therefore dismissed on that ground as well as each of the grounds supporting the dismissal of the Petitioners' claims.

counter-declaration that the transfer of control to the TSD pursuant to Sections 162.1100 and 162.621 was an absolute and complete transfer of all powers and authorities exercised by the City Board prior to June 15, 2007, less the powers of auditing and public reporting expressly to be shared by the City Board pursuant to Section 162.621.2.

At oral argument, the City Board claimed that it is seeking a review of the SBOE's accreditation decision under Section 536.150, *i.e.*, an "uncontested case" review under the Missouri Administrative Procedures Act. But neither the Petition nor the Amended Petition invokes this statute anywhere in its dozens of counts; Chapter 536 is conspicuous in its absence among Petitioners' 66-page Amended Petition – the Amended Petition which repeatedly invokes Section 537.020, the general declaratory judgment statute, as the basis for the review Petitioners seek.

Accordingly, this Court has reviewed the evidence to determine whether the SBOE's accreditation determination was reasonable, whether it was supported by competent and substantial evidence, and to ensure that the SBOE's decision was neither arbitrary nor capricious. Such review is relevant not only to Petitioners' pleaded claims under Section 527.020, but also to the extent that Petitioners' due process or other constitutional claims incorporate claims that the SBOE acted arbitrarily or capriciously, or that the City Board was unfairly surprised or prejudiced by DESE use of the formulae and procedures set forth in the UYAPR Manual.

This Court already has disposed of three of Petitioners claims, *i.e.*, Counts XXIII, XXIV and XXV, that related to and were based upon the 1999 Desegregation Settlement Agreement. On September 14, 2007, this Court granted the State Defendants' Motion for

Judgment on the Pleadings with respect to these counts on the grounds that the plain language of the 1999 Agreement – of which the District was a principal drafter and beneficiary, and to which it is a signatory – expressly acknowledges that the “Transitional School District may be re-established as permitted by state statute [Section 162.1100].” *See* Desegregation Agreement (Exh. 14 (Pet. Vol. I)) at § 18(b). Moreover, as discussed in greater detail below, the Settlement Agreement recognized that Section 162.1100 required an immediate and complete shift of control over the operation of the District from the City Board to a re-established TSD if the District ever lost its accreditation. *Id.*, at § 16.² The plain language of these provisions, and others, in the Settlement Agreement preclude the Petitioners’ claims that the Settlement somehow limited the application of Section 162.1100 and 162.621.2. Accordingly, this Court entered judgment on Counts XXIII, XXIV and XXV in favor of the State Defendants. That judgment is incorporated herein as if fully set forth, and is made a part of this Order and Final Judgment.

For the reasons set forth below, this Court finds for the State Defendants on each and every remaining Count, and orders them dismissed with prejudice. In addition, the TSD’s counterclaim is granted and, with the exception of its powers of auditing and public reporting, this Court declares that the transfer of control over the District (and its

² To alleviate any claims of unfairness or hardship from this “change of control” procedure, the Agreement prohibited the SBOE from declaring the District unaccredited before June 30, 2002. This protection – for which the City Board and the State bargained – came into play and prevented the City Board from losing control in 2000.

programs, assets, liabilities, management and operation) from the City Board to the TSD upon the District's loss of accreditation, is plenary and complete. Moreover, the powers of auditing and public reporting retained by the City Board do not rest exclusively with it, and are to be employed by the City Board in conjunction with the TSD.

I. Findings of Facts

The facts leading up to the SBOE's decision in March of 2007 to declare the District unaccredited are not disputed in any material way. Nearly all of Petitioners' 26 counts are legal challenges to the effect of that decision, the constitutionality or legality of the statutes and rules involved, or the proper interpretation to be given to certain statutory language. But, because Petitioners allege that SBOE's decision was "arbitrary and capricious" (and to the extent such an examination is relevant to the substantive and constitutional claims raised by the Petitioners), a review of the evidence at trial is necessary. Contrary to Petitioners' assertions, however, as set forth below, this evidence overwhelmingly established that the SBOE's actions were well-grounded in law, the MSIP Rule and the facts relating to the District's performance.

A. The SBOE's Accreditation Process and DESE's UYAPR Manual.

One of the SBOE's chief legal duties is to "[c]lassify the public schools of the state . . . and formulate rules governing the inspection and accreditation of schools preparatory to classification." Section 161.092(9) RSMo (Cumm. Supp. 2006). SBOE has promulgated the Missouri School Improvement Program Rule ("MSIP Rule") to govern the accreditation process. 5 CSR 50-345.100. The MSIP Rule incorporates the

MSIP Standards and Indicators Manual, which set forth “qualitative and quantitative standards for school districts.” 5 CSR 50-345.100(1).

The power to determine accreditation status rests solely with the SBOE. 5 CSR 50-345.100(3) (the SBOE “will assign classification designations of unaccredited, provisionally accredited and accredited based on the standards of the MSIP”). But, because there are 524 school districts in the state, the SBOE cannot classify every school district every year. Accordingly, the MSIP Rule provides:

During each year, DESE will select school districts which will be reviewed and classified in accordance with this rule, including the standards, with the appropriate scoring guide and forms and procedures outlined in the annual MSIP.

5 CSR 50-345.100(2) (emphasis added). The reference to “standards” is to the Standards and Indicators Manual which, as noted above, is formally made part of the MSIP Rule. The reference to “annual MSIP” and its “scoring guide and forms and procedures,” on the other hand, is a reference to the UYAPR Manual which is not formally made part of the MSIP Rule.

Rebecca Kemna, Coordinator of School Improvement and Accountability for DESE, who is chiefly responsible for administering the MSIP Rule within DESE and performing the annual district evaluations required by the SBOE, testified that the UYAPR Manual is prepared annually by DESE and distributed to each of the 524 school districts in the state. It outlines how DESE will be evaluating the districts’ actual performance in light of the Performance Standards set forth in the MSIP Rule.

Ms. Kemna testified that the UYAPR Manual identifies the data that must be reported by each district for each of the Standards, as well as the mathematical formulae DESE will use to compare each district's data to the results of districts statewide. In general, DESE assigns each district a score for "status" and "progress" for each of the Performance Standards set forth in the MSIP Rule. Each score is arrived at by comparing the district's performance with the statewide average, with a cutoff for unacceptable performance usually one standard deviation below the statewide mean. DESE then establishes minimally acceptable scores for each Performance Standard in the MSIP Rule, and states the numbers of standards that must be "met" before DESE will recommend full accreditation, provisional accreditation or loss of accreditation to the SBOE, which makes the ultimate decision. Because these scoring guides change annually to incorporate changes in statewide performance data, the UYAPR Manual is frequently updated by DESE and distributed to the districts mainly through DESE's website.

Example: The roles of the MSIP Rule, the Standards and Indicator Manual, and DESE's UYAPR Manual are best understood by example. For instance, as noted above, the MSIP Rule formally incorporates the MSIP Standards and Indicators Manual into the Rule. The Standards and Indicators Manual includes Performance Standard 9.4(3) which provides: "The percent of students who attend postsecondary education within six months of graduating is high or increasing." The MSIP Rule, subparagraph (2), states that DESE will evaluate districts' performance under this Standard using the "appropriate scoring guide and forms and procedures outlined in the

annual MSIP,” *i.e.*, the UYAPR Manual. The UYAPR Manual for FY07 is divided into two parts, Scoring Guide Measures, and Scoring Guides. For Standard 9.4(3), the UYAPR Manual’s Scoring Guide Measure explains how the relevant data (*i.e.*, total number of graduates, number of graduates entering a 2-year or 4-year college or technical school) are to be reported to the DESE “core data system.” The Scoring Guide Measure goes on to explain how the percentage is calculated for a given year (*i.e.*, by dividing the second number by the first number), and how a district’s five-year average is calculating (adding each year’s percentage together and dividing by 5).

The UYAPR Manual Scoring Guide for Standard 9.4(3) then shows how points are awarded based on “status” or “progress” to correspond to the language of the Standard which is phrased in terms of whether the district’s college placement rate is “high or increasing.” For “status,” a district is given points based upon how its 5-year average compares to the results statewide. No points are awarded to districts whose averages are more than one standard deviation below the statewide mean. Points are also awarded for “progress” using several different measures of progress (*e.g.*, year-over-year, rolling averages). The UYAPR Manual Scoring Guide then explains that a district must earn at least four “status” points or four “combined status and progress” points for DESE to consider the district to have “met” Standard 9.4(3). Finally, at the end of the UYAPR Manual, DESE identifies that, of the fourteen Performance Standard measurements assessed in 2006-07, a district must meet at least nine standards for DESE to recommend to the SBOE full accreditation, six-to-eight standards for DESE to recommend provisional accreditation to the SBOE, and a district’s failure to meet at

least six standards will result in DESE's recommendation to the SBOE that the district lose its accreditation.

B. The SBOE's Concern Over the District

The performance of the District was not a new concern for the SBOE in 2006-07. Mr. Herschend, President of the SBOE in March 2007 and a member of the SBOE for sixteen years (Tr. II at 184), stated that District's performance had been at or below minimally acceptable levels since 1994. (Tr. II at 191). In addition, the District had been experiencing severe financial difficulties, falling from a positive fund balance of \$63 million at the end of June 2001, to a balance of negative \$30 million on June 30, 2006; in essence spending in excess of \$90 million more than it took in during that five-year period. Exh. 72 (Pet. Vol. V) at p. AGO4863 (the "Advisory Committee Report"). Exhibit 268 (Def. Vol. II) collects a series of correspondence between Commissioner King and the SBOE detailing growing concern about the performance and financial viability of the District since 2004.

C. The Advisory Committee Process

In July of 2006, following the "abrupt resignation" of then-Superintendent Creg Williams, the Commission of Education ("Commissioner King") appointed an advisory committee to advise him, the SBOE, and the community regarding the issues confronting the District and possible responses under applicable statutes. Exh. 58 (Def. Vol. I) at p. 9. The Final Report of this Advisory Committee, chaired by Frankie Freeman and William Danforth, states that the Advisory Committee was charged with responsibility to (1) "analyze SLPS academic performance," (2) "review the 1999 Desegregation

Settlement Agreement, governance of the SLPS, and accreditation status,” (3) “clarify the financial condition of the SLPS,” (4) “clarify the primary concern of parents, community residents, and teachers concerning the governance and operations of SLPS,” and (5) “consider possible state law concerning the State’s involvement with SLPS.” Exh. 72 (Pet. Vol. V) at p. AGO4855. The Advisory Committee issued its Final Report (*see* Exh. 72 (Pet. Vol. V)) on December 17, 2006.

D. The SBOE Receives the Advisory Committee Report and Re-establishes the TSD

The SBOE received the Final Report from the Advisory Committee, and considered it at length, at its meeting on January 11, 2007. Exh. 269 (Def. Vol. III) at p. 4 (SBOE January Meeting Minutes). The Advisory Committee’s Report stated in no uncertain terms: “Our committee believes that the schools exist to educate children; that the SLPS are not doing an adequate job; that the current crisis demands attention and that the majority of the St. Louis region would like a change.” Exh. 72 (Pet. Vol. V) at p. AGO4870. The Advisory Committee recommended, first and foremost, that “[t]he State Board of Education decide on accreditation status of the SLPS. Subsequent actions depend on that decision.” *Id.* The Advisory Committee also recommended that the SBOE, acting pursuant to Section 162.1100, re-establish an overlay district, or “transitional school district” (“TSD”), so that a TSD would be in position to assume responsibility for the operation and control of the District pursuant to Section 162.1100 should the SBOE declare the District “Unaccredited.” *Id.* The SBOE took no immediate action on these recommendations. Tr. II at 193.

At the February 15, 2007, SBOE meeting, as a result of the Advisory Committee's Report and acting on the recommendation of Commissioner King, the SBOE voted to re-establish the TSD pursuant to Section 162.1100. By law, the TSD did not come into existence for 30 days following the SBOE's action. § 162.1100.12 RSMo (Cumm. Supp. 2003). Petitioners do not challenge the SBOE's decision to re-establish the TSD.

E. The SBOE's March 22, 2007, Meeting

At its March 22, 2007, meeting, the SBOE took up the issue of the District's accreditation status. In addition to the extensive financial analysis the Board already had considered as part of the Advisory Committee's Report, *see* Exh. 72 (Pet. Vol. V) at pp. AGO4884-4919 (35-page financial analysis performed by Messrs. Biggs and Virgil, including analysis performed by Mr. Westbrook), the SBOE was briefed on the District's financial status by Ms. Geri Ogle, Deputy Commissioner. Ms. Ogle informed the SBOE that the District had met the statutory criteria as a "financially stressed" district for four consecutive years beginning with the 2002-03 school year. Exh. 259 (Def. Vol. II) at p. AGO2046 (Presentation to SBOE, March 22, 2007). By law, any district that does not carry a positive fund balance at the end of the year equal to at least 3% of the previous year's expenditures is "financially stressed." §§ 161.520-161.525 RSMo 2000. The Virgil/Biggs financial analysis in the Advisory Committee Report, after noting that only six districts of the 524 school districts throughout Missouri were "financially stressed" and that the 5 districts other than SLPS had a combined enrollment of 440 students, stated starkly: "In short, the SLPS's financial condition today is dire." Exh. 72 (Pet. Vol. V) at p. AGO4884. The Westbrook analysis, on which Vigil/Biggs relies, opined that the

district should be operating with fund balances of 15% rather than the mere 3% required by state law. *Id.* at AGO4897. In any event, the District's fund balances of negative 5%, or more, were clear cause for alarm. Exh. 259 (Def. Vol. II) at p. AGO2046.

In addition to the report from Ms. Ogle on the District's finances, the SBOE received a report from Ms. Kemna regarding the District's accreditation history. Ms. Kemna began by stating that the District was classified "accredited" with respect to the 1993-94 school year, though the DESE recommendations at that time were not based on academic performance.

Ms. Kemna further advised the SBOE that, in October of 1999, when objective measures of performance had begun to play a meaningful role in DESE's accreditation evaluations, DESE recommended that the District be classified as "unaccredited" with respect to the 1998-99 school year. But, pursuant to Section 16 of the 1999 Desegregation Settlement Agreement, *see* Exh. 14 (Pet. Vol. I) at pp. 21-22, the SBOE was prohibited from acting on such a recommendation prior to June 30, 2002, thereby giving the District more than a 2-year "grace period" to try to achieve acceptable performance levels. Exh. 259 (Def. Vol. II) at p. AGO2038. Following this 2-year grace period, DESE re-evaluated the District and recommended that the District be classified as "Provisionally Accredited." This recommendation, however, was based not on any improvement in the District's academic performance but rather on the basis of "resource and process" scores which, under the matrix DESE used at that time to assess districts, could qualify a district for a DESE recommendation of Provisional Accreditation even if academic performance scores were unacceptably low. *Id.* The SBOE followed that

recommendation and the District was declared “Provisionally Accredited” in October of 2000. Finally, with respect to the 2003-04 school year, DESE also recommended that the District be given “Provisional Accreditation,” and the SBOE again followed that recommendation. *Id.*

After reviewing the District’s accreditation history, Ms. Kemna reviewed for the SBOE the District’s actual performance for each of the school years 1998-99 through 2005-06. Her review highlighted that, in the 2003-04 school year when the SBOE last addressed the District’s accreditation, the District had already begun its retreat from its high-water mark achieved in 2002-03 when the District had scored a total of 64 out of 100 possible points on the scale DESE used to evaluate districts at that time. The 2002-03 school year was the beginning of a decline that continued through 2006-07 when the District presented performance data so poor that DESE could no longer recommend provisional accreditation, and the SBOE declared the District “Unaccredited.”

Exhibit 259 (Def. Vol. II) which is Ms. Kemna’s presentation to the SBOE on March 22, 2007, shows the District’s Annual Performance Report (“APR”) scores for the last nine years ending with the 2006-07 school year. Of the District’s last nine APRs that Ms. Kemna reviewed for the SBOE, six APRs resulted in scores so low that DESE would have recommended “Unaccredited” had the SBOE taken up the District’s accreditation at that time. In only three of the last nine years would the District’s APRs have justified a DESE recommendation of “Provisionally Accredited” and, presumably by happenstance, two of those years (1999-2000 and 2002-03) coincided with actual SBOE accreditation determinations. At trial, Mr. Herschend likened Ms. Kemna’s report of the District’s

APR results since 1994 to being shown a grade card with three “D’s” and six “F’s”. Tr. II at 191.

After reviewing the District’s historical academic performance record, Ms. Kemna then took the SBOE through the District’s 2006-07 APR in detail. Unlike prior year’s scoring schemes in which DESE assigned each district a certain number of points for each of DESE’s various performance assessments, which points were aggregated to give the district a total score out of 100 possible points, DESE devised a system for the 2006-07 APR in which DESE would give each district a a Pass/Fail grade, or Met/Not Met, for each of the 14 areas that DESE evaluated in 2006-07. Thus, in the District’s 2006-07 APR that was presented to the SBOE in March of 2007, the District “Met” only 4 of the 14 areas analyzed by DESE. Conversely, the District was graded “Not Met” in the remaining ten areas assessed by DESE. Exh . 259 (Def. Vol. II) at p.8.

Specifically, the District “Met” the minimum standard for only 2 of the 6 categories for MAP Test results,³ which are the statewide assessment tests in mathematics and communication arts given periodically throughout elementary and secondary school. The only other categories in which the District “Met” DESE’s minimal standard were in (a) the percentage of juniors and seniors taking advanced

³ Though not part of the 2006-07 APR presented to the SBOE prior to its decision in March of 2007, the District’s MAP test scores on the tests given in the spring of 2007 earned a “Not Met” designation for **all six** of the MAP Test categories, demonstrating further deterioration in performance. Tr. II, at 158-59; Exh. 266 (Def. Vol. III) pp.1-3.

classes offered by the district, and (b) the percentage of students who completed vocational education courses and then were employed in fields related to the voc-ed training they received. Notably, in addition to failing, or receiving an assessment of “Not Met,” in four of the six MAP Test categories, the District also received “Not Met” assessments in the key categories of attendance, graduation rates and performance on the ACT. Exh . 259 (Def. Vol. II) at p.8.

Because Ms. Kemna was aware that the District already was disputing DESE’s evaluations in the District’s 2006-07 APR, and in the interest of ensuring that she presented the SBOE with the complete facts, Ms. Kemna went into great detail with respect to two of the categories evaluated by DESE. These were Performance Standard 9.4(2) dealing with the percentage of District juniors and seniors taking DESE-approved career education courses, and Performance Standard 9.4(3) dealing with the percentage of graduates entering a 2-year or 4-year college or technical school within six months of graduation.

Career Education: In early October 2006, Ms. Kemna sent career education course listings to District employees with the suggestion that they check their records to ensure that they were properly reporting all of their courses and thus getting all the credit to which the District was entitled. Tr. II, at 104. Later in October of 2006, Ms. Kemna met with Superintendent Bourisaw and others at the District to discuss the District’s performance data that was being reported for DESE’s use in preparing the District’s APR and preparing an accreditation recommendation should the SBOE request one. During that meeting, the District questioned whether it was getting credit under Standard 9.4(2)

for all of the career education courses taught at the Clyde C. Miller Career Academy. Tr. II, at 104-06.

On November 2, 2006, Superintendent Bourisaw returned the documents Ms. Kemna had sent in early October, and asked that DESE enter corrections for courses the District had omitted. Tr. II, at 111-13. Ms. Bourisaw's cover letter states: "The district has undergone dramatic changes over the past few years and, sadly, student data has been caught in the crossfire." Exh. 24 (Pet. Vol. III) at Tab 8. Also in this letter, Superintendent Bourisaw requests that DESE add six pages of career education course listings at Clyde C. Miller Academy for the years 2001-02, 2002-03 and 2003-04 to "Screen 22" of the DESE data-input system, and informed DESE that the District had already added all of the Clyde C. Miller courses to "Screen 22" for the years 2004-05 and 2005-06. Tr. II, at 113-14. Prior to these corrections, the District had been reporting all of the Clyde C. Miller Academy courses for all years on "Screen 20." Tr. II, at 115. The difference between "Screen 22" and "Screen 20" in this context is critical, and was explained at length by Ms. Kemna at trial. Tr. II, at 114-16.

Ms. Kemna explained that the Clyde C. Miller Academy has a "building code" that identifies it as an "area career center." Tr. II, at 115. Ordinarily, "area career centers" around the state are not comprehensive high schools, *i.e.*, schools that students attend all day, presenting the full range of courses, and from which students graduate. Instead, ordinarily, "area career centers" receive students from surrounding comprehensive high schools. These students go to their "area career center" solely to take career education courses and they then return to their comprehensive high school for

all their other courses. Tr. II, at 116-17. The students' comprehensive high school reports these students' enrollment in these courses to DESE on "Screen 22," and thus "Screen 22" is known as the "Sending School" screen. Tr. II, at 114. Because the students who are attending an "area career center" actually "belong" to their high school, DESE's computer system counts the enrollments in Screen 22 when doing the career education calculations under Standard 9.4(2). Tr. II, at 115. And, because the "area career centers" will also be reporting these classes and enrollments on their Screen 20, *i.e.*, the normal "course listing" screen, DESE's software ignored any "Screen 20" career education courses reported from "area career centers" in order to avoid double counting those students. Tr. II, at 115. And such logic works for all of the "area career centers" around the state . . . except for the Clyde C. Miller Academy in St. Louis.

The Clyde C. Miller Academy is not an ordinary "area career center." It has a large number of students for whom the Academy is their day-long, comprehensive high school. The Academy had always reported its courses and enrollments like a comprehensive high school, and reported them on "Screen 20." It had not seemed necessary to report them using "Screen 22" because the students were not being "sent" anywhere . . . they never left the Clyde C. Miller Academy. But, DESE did not know that the District was reporting the students only on "Screen 20," and the District did not know that DESE's software was not counting career education courses from the Clyde C. Miller Academy because its building code identified it to the DESE software as an "area career center" whose students presumably were being reported on their "sending school's" Screen 22.

All would have been well if either (a) DESE had changed its program to count “Screen 20” enrollments from Clyde C. Miller Academy, or (b) the District had begun reporting the Clyde C. Miller Academy career education enrollments on its “Screen 22” (which was being counted) in addition to its “Screen 20” (which was not). Unfortunately, both (a) and (b) occurred, resulting in a temporary overstatement of the District’s performance.

In November of 2006, the District began to report the Clyde C. Miller students on “Screen 22,” as well as on “Screen 20,” in order to accommodate what they understood to be DESE’s computer program. Exh. 24 (Pet. Vol. III.) at Tab. 8). At the same time, just prior to the printing out the December preliminary APRs, DESE changed its computer program to begin counting any Clyde C. Miller Academy students reported on “Screen 20” for Clyde C. Miller students. Tr. II, at 117-18; Exh. 262 (Def. Vol. I) at p.2-3. The result of both of these mutually exclusive “fixes” being employed simultaneously, of course, was that the District’s December APR was prepared giving the District credit for Clyde C. Miller students reported on “Screen 20” and giving credit again for the same kids when they were reported on “Screen 22.” Tr. II, at 124. Thus, the District was giving credit for TWICE as many career education course credits as it was entitled to. Tr. II, at 118-20; 124. This impact is displayed in Exhibit 257 (Def. Vol. II), which was provided and explained to the District on May 23, 2007.

The erroneously inflated numbers in the December 1 preliminary APR were nearly 15% higher than the numbers that had been reflected in the November 1 preliminary APR, Exh. 87 (Def. Vol. I) at p.2, an increase that Ms. Kemna knew was far in excess of

the impact that a proper accounting for the Clyde C. Miller Academy would have had.⁴ Tr. II, at 124. Ms. Kemna testified that, had she seen the December 1 APR before it was given to the District she would have recognized immediately it was mistaken and she would not have let the District see the new numbers until she had checked and corrected them. Tr. II, at 125. But, Ms. Kemna was on vacation at the time and had no opportunity to check the preliminary report before the District saw it. Tr. II, at 125. Worse, the DESE employee who gave the December preliminary APR had no understanding of this data or of the problem DESE and the District had been trying to solve regarding the Clyde C. Miller Academy. Thus, he had no reason to know immediately that the data was wrong as Ms. Kemna would have. Tr. II, at 125-26.

⁴ DESE's analysis of Standard 9.4(2) is expressed as a percentage or fraction in which the numerator is the number of junior and senior credits earned in approved career education courses district-wide, and the denominator is the total number of credits earned by juniors and seniors district-wide. As described above, the numerator in the December 1 APR was erroneous because it counted all the Clyde C. Miller Academy students' career education credits twice. But, the distortion was even worse than anyone knew in December because DESE would later determine that the Clyde C. Miller Academy students also were being omitted from the calculation of the denominator as well as the numerator, further inflating the percentage in the December 1 preliminary APR far beyond the District's actual performance. DESE caught and corrected this error prior to generating the March APR that was presented to the SBOE. Tr. II. at 126-27.

Once Ms. Kemna saw the erroneous December preliminary APR, she set about finding out why it was wrong. Tr. II, at 126. When she discovered the double counting, she told individuals at the District about it in December 2006 and in January 2007. Tr. II, at 128. She decided to rely on the change in the software, which now counted “Screen 20” entries from the Clyde C. Miller Academy despite its “area career center” building code, and thus instructed the District to report all career education at the Academy ONLY on “Screen 20.” When trouble-shooting the obviously flawed December APR, Ms. Kemna found that the District, in reporting all courses on both “Screen 20” and “Screen 22,” had created some discrepancies. Tr. II, at 129. Therefore, she instructed the District to determine what the proper numbers were, and to report them only on “Screen 20.” No one at the District disputed Ms. Kemna’s conclusion as to why the December APR was wrong, or disagreed with her decision as to how to fix the problem. Tr. II, at 129-30.

On February 1, 2007, Ms. Kemna wrote Superintendent Bourisaw setting out exactly what had happened with the December calculation for Standard 9.4(2), and telling her what was being done to correct the inaccurate calculation of both the numerator and the denominator. Exh. 74 (Def. Vol. I) p. 1. Superintendent Bourisaw did not respond to this letter, or advise Ms. Kemna that the District disagreed with her conclusion or her method for fixing the problem. Tr. II, at 133. Ms. Hartman, who sent the District’s response to Ms. Kemna’s February 1 letter did not challenge Ms. Kemna’s statements concerning Standard 9.4(2) and, in fact, Ms. Hartman said that the District would be responding to the procedures for fixing the problem that Ms. Kemna had laid out when

the responsible District employee returned from family leave. Exh. 75 (Def. Vol. I) at pp. 1-2. The only response from the District on this point later was to comply with Ms. Kemna's requests to reconcile prior reports and ensure that all "Screen 20" reports for Clyde C. Miller Academy were accurate. Tr. II, at 133-35. Ms. Kemna testified that she was confident that the data presented to the SBOE on March 22, 2007, was accurate and complete, and testified that no one has suggested since that time that that data was anything but accurate and complete. Tr. II, at 135-36.

By the time of trial, the District had had six months within which to prepare its own study showing that it met the Career Education Standard but, despite having access to all of the relevant data, it did not do so. Tr. Vol. II at 45-49, 135-36. Instead, the District still maintained in March of 2007 (as it does in this lawsuit) that it should be given the benefit of the mistaken passing grade reported on the erroneous December preliminary APR even though it had not earned it.

College Placement: Whereas the District's dispute regarding the Career Education standard is based solely on its desire to cling to an erroneous preliminary report that should never have been issued, the District's dispute regarding the College Placement Standard stems from its insistence that it be allowed to mix-and-match data collected using two wholly dissimilar and incompatible methodologies in such a way as to make it appear that the District has greatly increased its college placement performance without any demonstrated actual increase in performance or benefit to students. Petitioners have admitted from the outset that there has been no actual improvement in performance. Rather, the apparent improvement, Petitioners admit,

“occurred because the Board hired National Student Clearinghouse to track graduates.”
Amended Petition, ¶ 69.

DESE generated the November 3 preliminary APR using College Placement data provided by the District for the five years ending 2004-05. All of this data had been collected using surveys filled out at each high school by which counselors would track graduates six months after graduation and determine how many had gone on to a 2-year or 4-year colleges or technical schools, which surveys were then reported – in the aggregate – to DESE for use in calculating the District’s performance under Standard 9.4(3). This is the same method used by nearly every other school district. Tr. II, at 92.

Between DESE’s calculation of the November 3 preliminary APR and the calculation of the December 1 preliminary APR, the District changed the numbers it had already reported for 2003-04 and 2004-05. The District replaced those numbers, gathered using its survey methodology, with data the District had purchased from the National Student Clearinghouse, which claims to “cross-check” graduates’ names with enrollment databases all across the country. Tr. II, at 88-89. The District’s “new” college placement numbers for 2003-04 and 2004-05 were as much as 33% higher than the numbers the District had previously reported for the same years. Exh. 259 (Def. Vol. II) at p.7. Moreover, the “new” college placement numbers for 2003-04 represented a sudden 25% increase from the college placement numbers reported for 2002-03. *Id.*

DESE informed the District that, as its computations and assessments for Standard 4.2(3) required five years of data, all five years had to be reported using the same methodology. Exh. 68 (Pet. Vol. V) at p.1. Thus, if the District desired to use the

Clearinghouse data for 2003-04 and 2004-05, it must also assemble Clearinghouse data for the preceding three years so that apples-to-apples comparisons could be made. This was not a new position taken by DESE, as it had previously informed the District of the 5-year rule in the context of another, unrelated data set. *See* Exh. 69 (Def. Vol. I) at p.1 (Kemna email to Bourisaw and others dated November 30, 2006: “For MSIP purposes, unless hours of absence are available by grade level for each of the past five years, we cannot use hours of absence data to calculate an attendance rate for your district.”).

In addition to advising the District that it needed to supply Clearinghouse data for all five years being studied, DESE advised the District that, because the Clearinghouse data reflected much higher college placement rates than the previous methodology, the District would need to provide additional, student-level information so that DESE could verify and confirm that the Clearinghouse data was accurate. Tr. II, at 137. Ms. Kemna provided numerous records from her department, made available to the District in discovery, in which similar requests were made of many, many other districts. Tr. II, at 154-56. A summary of this correspondence between DESE and various school districts regarding DESE requests for confirming student-level data, and DESE requests for data spanning all five relevant years, was introduced as Exh. 265 (Def. Vol. III).

The District never provided Clearinghouse data for each of the five years being reviewed by DESE even though it had ready access to that data. Tr. II, at 138; Exh. 61 (Def. Vol. I) at p. AGO1869 (“The Clearinghouse can provide up to 6 years historical data” and “Clearinghouse can provide a 1 week turnaround time of graduate follow-up data to SLPS”) (emphasis in original). No explanation was given for this failure, and the

evidence showed that the Clearinghouse was ready, willing and able to provide such information in short order.

Moreover, the District was unwilling, or unable, to provide the student-level data DESE needed to confirm that the Clearinghouse data submitted for 2003-04 and 2004-05 was correct. The District submitted some verifying data, but less than a full set. Tr. II, at 138-39. DESE evaluated the information provided, and reported to the SBOE on March 22 all of the data that it could verify. Exhibit 259 (Def. Vol. II), at page AGO2043, sets forth these various numbers reported by the District under Standard 9.4(3). The top of this page describes that five years of data that the District had provided prior to the November 3 preliminary APR. The middle of the page shows that the District, prior to the December 1 preliminary APR, changed the data for the last two years, but only those two years, replacing the old data with the new, and much higher, Clearinghouse data. Finally, the page sets forth the numbers reported to the SBOE in March 2007 based on the actual college placement rates that DESE could verify with the student-level information the District had provided by that time.

The final numbers presented to the SBOE in March, though lower than the District's original November numbers, are remarkably consistent with those earlier numbers in terms of their internal relationships. More important, nothing the District presented to DESE prior to March 2007, or later in its administrative appeal, or even at trial, suggested that the District's actual performance had undergone any material increase between 2003 and 2004 and thus the increase in the data the District reported for those two years prior to the December preliminary APR was due entirely to the District

change in data collection methodologies, *i.e.*, the apples-to-oranges comparison, rather than any improvement in performance. Tr. II, at 145-46.

The District, in its administrative appeal materials submitted at the end of May 2007, attempted to supplement its college placement data. This “new new” data is summarized in Exh. 24 (Pet. Vol. III) at Tab 5. These numbers do not match the numbers the District provided prior to the November preliminary APR, nor do they match the numbers the District provided prior to the December preliminary APR, nor do they correspond to the data submitted to DESE prior to the final March APR. The District not only submitted Clearinghouse data, augmented by its own “phone surveys,” it submitted an entirely new, and previously unmentioned set of data for 2000-01 based on the old counselor surveys. The key fact, however, is that even giving the District the benefit of all this “new new” data, completely unverified and unverifiable, the District still did not meet DESE’s minimum performance levels for Standard 9.4(3). The only way the District can claim success is to manipulate the numbers to give itself credit for “improvement” between 2003 and 2004. Tr. II, at 145-46. But, there was no material improvement in actual performance at that time and, as Superintendent Boursaw admitted, because the apparent improvement was entirely the result of the change in methodologies used to create the numbers being reported. Accordingly, the numbers reported to the SBOE in March 2007 were correct at that time, and nothing the District has shown since casts any real doubt on DESE’s conclusion that the District’s college placement performance did not meet DESE’s lowest threshold for acceptable performance under that Standard.

Finally, it should be noted that Ms. Kemna provided all of the data to the SBOE, as well as a complete description of the dispute. Had the SBOE concluded that the District should get the benefit of changing methodologies in mid-stream, and had the SBOE believed the District was entitled to claim credit for “improvement” in performance from 2003 to 2004 even though no other data supports that claim and the District itself admits that the sole cause for the statistical increase was its change in methodologies, the SBOE could have determined that the District “Met” Standard 9.4(3). It had all the information necessary to do so but, as explained below, whether it did so or not would not have made any difference given the District’s remarkably poor performance in so many other areas.

Why Standards 9.4(2) and 9.4(3) matter: Before DESE could recommend to the SBOE that the District be declared “Provisionally Accredited” again, it had to be convinced that the District had “Met” at least six of the fourteen performance standards. Instead, DESE concluded that the District only “Met” four standards. Thus, for the District to cast any doubt on DESE’s assessment, it must show that DESE was wrong with respect to both Standards 9.4(2) and 9.4(3). At trial, the District failed to prove that DESE was in error with respect to either standard. On the contrary, DESE’s evidence plainly demonstrated that the District met neither standard. And, even if the District had shown that DESE’s evaluations were in error, such a showing only casts doubt on DESE’s work and does not necessarily impugn the SBOE’s independent accreditation decision which, though informed by DESE’s work, was not bound by it.

Moreover, under 5 CSR 50-345.100(8) the SBOE was authorized to declare the

District “Unaccredited” in March of 2007 even if the District had met DESE’s criteria in BOTH of the disputed standards because the District had twice before been declared “Provisionally Accredited.” 5 CSR 50-345.100(8)(A) (SBOE “may lower a district’s accreditation if a district fails to gain full accreditation after being designated provisionally accredited twice sequentially”) (emphasis added). Districts in such circumstances must, upon re-review three years after the last provisional accreditation, demonstrate enough improvement in performance to justify full accreditation or face the loss of accreditation altogether. Because, in March of 2007, the District faced this “up-or-out” provision of the Rule, the SBOE had clear grounds to declare the District unaccredited because the City Board does not even attempt to argue that the District had earned full accreditation.

F. The SBOE’s Decisions on March 22, 2007

Based on the information provided by the Advisory Committee, reviewed by the SBOE at its January 2007 meeting, and based on the information provided to it by DESE at its March 2007 meeting, the SBOE voted to declare the District “Unaccredited” on March 22, 2007. Exh. 271 (Def. Vol. III) at p.4. It delayed the effective date of that decision until June 15, 2007 in order to allow the current year to come to a close with the least amount of disruption while preserving the maximum amount of time for the TSD, which would assume responsibility for the operation and control of the District from the City Board on June 15, to accomplish the transition prior to the beginning of the 2007-08 school year. Tr. II, at 203-04. Also at the March 2007 meeting, the SBOE fulfilled its role under Section 162.1100 by nominating to the Governor an individual to serve as

CEO of the District and member of the TSD once the loss of accreditation went into effect on June 15, 2007. Exh. 271 (Def. Vol. III) at p.4. This nomination was acknowledged favorably by the Governor on March 22, but was not formally communicated to the Governor until April 22, 2007. Exh. 215 (Pet. Vol. VII) at p.1.

**G. The Governor's Appointment
of Mr. Sullivan as District CEO.**

The Governor announced on March 22 that he “accepted the nomination” by the SBOE of Mr. Rick Sullivan to serve on the TSD as CEO of the District. The Governor, however, did not actually appoint Mr. Sullivan to the position until June 15, 2007. Exh. 216 (Pet. Vol. VII) at p.1. In fact, the Governor could not have appointed Mr. Sullivan any earlier than June 15 because there was no vacancy on the TSD and no position on the TSD for which to appoint Mr. Sullivan because Section 162.1100.3 only allows the Governor to make such an appointment “upon the loss of accreditation.” Here, because of the SBOE’s decision to delay the effective date of its decision, the statutory condition precedent, *i.e.*, the District’s loss of accreditation, did not occur until June 15, 2007. As the State Defendants argued on the Petitioners’ original application for a Temporary Restraining Order, had the Petitioners succeeded in preventing the SBOE’s decision from taking effect, the loss of accreditation would have occurred and the Governor’s appointment would not and could not have been made.

Because the Governor’s appointment of Mr. Sullivan occurred after the General Assembly had adjourned in mid-May, it was a “recess appointment.” Thus, Mr. Sullivan took office immediately subject to his later confirmation by the Senate. The Governor’s

handling of the Sullivan appointment conformed with law and gubernatorial practice. When the General Assembly convened in August in extraordinary session, the Governor submitted Mr. Sullivan's name to the Senate along with many others. Exh. 219 (Pet. Vol. VII) at p.1., The Senate returned several of these appointments, including Mr. Sullivan's appointment, to the Governor on August 28, 2007. While Mr. Sullivan's appointment was treated in this respect the same as many others during the 2007 Special Session, and appears to have been handled in the same way as many prior appointments by this Governor and prior Governors. Exh. 206 (Pet. Vol. VI) (Deposition Governor's Office Appointments Officer Reiss) p. 45-48, a decision as to the legal effect of the nonaction and withdrawal of the appointment during the special session is not necessary for this Court to decide the issues presented in this case. The Governor's appointment of Mr. Sullivan on June 15, 2007 was in accord with Missouri law.

II. Conclusions of Law

At trial, the parties presented in painstaking detail all of the evidence that was considered by DESE in making its recommendation to the SBOE regarding the District's accreditation classification, as well as all of the evidence that had been presented to the SBOE by the District, DESE, and the Advisory Committee on the condition and performance of the District. The Court was presented with each of the Petitioners' claims as to why the result reached by the SBOE was unconstitutional, illegal or unfair, and the Court had the opportunity to adjudge the credibility of the witnesses on those few factual issues where the testimony differed. Following trial, the parties were given the opportunity to brief the legal and factual issues, and extensive oral argument was also

presented. On the basis of all of the foregoing, the Court concludes that none of the Petitioners' claims is well-founded and the Petitioners are entitled to no relief. Specifically, though the Court concludes that DESE's UYAPR Manual is a "rule" within the meaning of Section 536.010(6) and should have been promulgated, the Court also concludes that DESE's failure to do so is an insufficient basis upon which to void the conclusion reached by the SBOE in the fulfillment of its statutory duty to make accreditation classification decisions. The SBOE's decision was well-informed and based upon competent information. The SBOE acted neither arbitrarily nor capriciously, but discharged its responsibilities reasonably in the midst of a situation as difficult for the regulators as the regulated. Because the Petitioners' constitutional and other challenges fair no better, the Court finds for the State Defendants on all counts.

A. DESE's UYAPR Manual is a Rule and Should Have Been Promulgated.

Section 536.010(6) provides that the term "Rule" means each agency statement of general applicability that implements, interprets, or prescribes law or policy." Although it is true that "[n]ot every generally applicable statement or "announcement" of intent by a state agency is a rule," *Baugus v. Director of Revenue*, 878 S.W.2d 39, 42 (Mo. banc 1994), the Missouri Supreme Court has often summarized which "generally applicable" statements must go through the promulgation process:

Rulemaking "involves the formulation of a policy or interpretation which the agency will apply in the future to all persons engaged in the regulated activity." . . . In distinguishing between rules and general statements of

policy, it has been said that an agency statement is a rule “... if it purports in and of itself to create certain rights and adversely affects or serves by its own effect to create rights or require compliance, or otherwise to have the direct and consistent effect of law.” Stated more simply, as explained by one federal court, “a properly adopted substantive rule establishes a standard of conduct which has the force of law.”

Missouri Soybean Ass’n v. Clean Water Commission, 102 S.W.3d 10, 23 (Mo. banc 2003).

DESE’s UYAPR Manual meets this test. DESE’s Manual was intended to apply to each of the state’s 524 school districts. Though the SBOE does not make an accreditation decision on every district every year, DESE performs an analysis of every district’s performance under the MSIP Rule Performance Standards every year, and the results of this analysis are published as that district’s APR for that year. The Manual sets forth DESE’s interpretation of each Performance Standard, and implements DESE’s scoring system and minimal scores for each year. Because the UYAPR Manual meets the statutory definition of “rule” under Section 536.010(6), DESE should have employed the “notice and comment” promulgation procedures set forth in Section 536.021.

The District argues that, because DESE failed to promulgate the UYAPR Manual, then the SBOE’s accreditation decision must necessarily be void. This does not follow. True, our Supreme Court has held many times that “a failure to promulgate a rule as required voids the decision that should have been promulgated as a rule.” *Dept. of Soc. Svcs. V. Little Hills Healthcare*, 226 S.W.3d 637, 643 (Mo. banc 2007). Those cases,

however, arise predominantly out of “contested case” reviews under Section 536.100. In fact, Chapter 536 expressly recognizes that an agency’s failure to promulgate rule is uniquely likely to arise in a “contested case:”

If it is found in a contested case by an administrative or judicial fact finder that a state agency's action was based upon a statement of general applicability which should have been adopted as a rule, as required by sections 536.010 to 536.050 . . . then the administrative or judicial fact finder shall award the prevailing nonstate agency party its reasonable attorney's fees incurred prior to the award, not to exceed the amount in controversy in the original action.

§ 526.021.9 (Cumm. Supp. 2005).

As noted above, Petitioners’ claims do not arise under Chapter 536, either as an “uncontested case” review under Section 536.150, or a “contested case” review under Section 536.100. Instead, Petitioners seek merely a declaratory judgment as to whether the SBOE’s actions – and only the SBOE’s actions – were arbitrary or capricious, or so lacking in basis or reason as to be void. Accordingly, the *Little Hills Healthcare* line of cases does not apply.

More important, the *Little Hills Healthcare* line of cases is distinguishable on the grounds that, in those cases, the agency that failed to promulgate the rule is the same agency as the one whose decision is being reviewed. Here, it was DESE that failed to promulgate the UYAPR Manual, but the decision to declare the District unaccredited was made by the SBOE. The Court specifically finds that the evidence clearly established

that the question of the District’s accreditation was not only committed to the SBOE – and not DESE – by statute, but that the SBOE exercised its discretion independent of DESE and made a thorough and diligent review of the facts and circumstances surrounding the District and its increasingly dismal performance when, during the period from January to March of 2007, the SBOE was confronted with the question of the District’s accreditation.

Accordingly, though the Court concludes that DESE’s UYAPR Manual is a “rule” and should have been promulgated, the Court also concludes that this is an insufficient basis upon which to void the SBOE’s decision to declare the District unaccredited. *Cf. Missouri NEA v. Missouri State Board of Education*, 34 S.W.3d 266, 286-87 (Mo. banc 2000), (DESE “guidelines” that were not promulgated did not undermine decision statutorily committed to, and actually made by, the SBOE).

B. The SBOE Acted Lawfully, Reasonably and Was Neither Arbitrary nor Capricious in Declaring the District Unaccredited.

Petitioners claim that the SBOE’s decision declaring the District unaccredited should be overruled on the following grounds: (1) that the SBOE lacked any authority to address the District’s accreditation until 2008-09 because the District had been reviewed in 2003-04; (2) that DESE required college placement information of the District that it does not require of other districts, and DESE should have accepted the District’s “mix-and-match” collection of data under that standard even though it was collected using two dissimilar methodologies; (3) that DESE should be estopped from advising the SBOE that the District did not meet the Career Education Standard because

DESE mistakenly advised the District in December 2006 that it had met the Standard; (4) that the SBOE unlawfully initiated a state “takeover” of the District without the two-year “grace period” provided to other districts; and (5) that the SBOE should have excused the District’s chronic and persistent poor performance because of the socio-economic demographics of its students.

These claims have no basis in law, each was overwhelmingly refuted at trial, and no one of them – nor the collection of them – is a sufficient basis to overturn the SBOE’s decision. The burden of establishing that an administrative body acted arbitrarily or capriciously is a high one. *See Psychiatric Healthcare Corp. v. Department of Social Services*, 100 S.W.3d 891, 904-05 (Mo. App. W.D. 2003) (“Arbitrary and capricious means willful and unreasoning action, without consideration of and in disregard of the facts and circumstances”). The tests for “arbitrary and capricious” vary in their restatement, but uniformly share not only the imposing nature of the burden to be carried by challengers but also the respect courts show for administrative agencies working within complex areas committed by law to agency discretion:

An administrative agency acts unreasonably and arbitrarily if its decision is not based on substantial evidence. Whether an action is arbitrary focuses on whether an agency had a rational basis for its decision.

Capriciousness concerns whether the agency's action was whimsical, impulsive, or unpredictable. To meet basic standards of due process and to avoid being arbitrary, unreasonable, or capricious, an agency's decision

must be made using some kind of objective data rather than mere surmise, guesswork, or “gut feeling.” An agency must not act in a totally subjective manner without any guidelines or criteria.

Missouri NEA, 34 S.W.3d at 281 (emphasis added) (citations omitted).

Petitioners have not met this high and exacting standard.

**1. The SBOE Acted Reasonably and Lawfully
In Reviewing the District in March of 2007.**

Petitioners contend that, because the District had been declared “provisionally accredited” as part of its regularly scheduled review regarding the 2003-04 school year, the SBOE lacked the authority to review the District’s accreditation again until the 2008-09 school year. This argument not only assumes the right of failing district to continue to fail without intervention for up to five years, it is plainly contradicted by the MSIP Rule itself. The MSIP Rule provides, in pertinent part, as follows:

The [SBOE] may consider changing a district’s classification designation after its regularly scheduled review or upon its determination that the district has:

(A) Failed to implement its school improvement plan at an acceptable level;

.....

(D) Altered significantly the scope or effectiveness of the programs, services or financial integrity upon which the original classification was based.

5 CSR 50-345.100(5).

The SBOE – based on the Advisory Committee Report as well as the information provided by DESE and the District itself – had ample, even overwhelming, cause to conclude that an immediate review was warranted. The evidence before the SBOE was sufficient to support the SBOE’s conclusion that the District had not implemented its comprehensive school improvement plan adequately and that both the academic performance and the financial condition of the District were deteriorating. The SBOE acted reasonably in concluding that, if the conditions at the District worsened, they could endanger the welfare of more than 30,000 students and even the likelihood that the District could survive to its next “regular” review.

A “comprehensive school improvement plan” (“CSIP”) is required anytime a district is given a classification of “Provisionally Accredited” or “Unaccredited.” Even though the District had been declared “Provisionally Accredited” in 2003-04, and was declared “Provisionally Accredited” in October 2000 as well, Dr. Bourisaw admitted at trial that, in December of 2006, “the District did not have one [a CSIP], and we needed to expedite that process” *Id.* In fact, Petitioner Downs admitted that, when he joined the City Board in 2006 there was no CSIP in place, Tr. I at 56, and that Dr. Bourisaw had advised the City Board in September 2006 that “state regulations required the district that was provisionally accredited such as St. Louis to have a CSIP.” Tr. I, at 81. If the District had never adopted a CSIP after its provisional accreditation in 2000-04, then the SBOE obviously was entitled to conclude that no CSIP had been adequately implemented. This result is no different even though the District attempted

to adopt a CSIP in December 2006, which it forwarded to the SBOE in January 2007. Tr. I at 148. By that time, the Community Advisory Committee's Report had been issued and it was clear that the SBOE would be re-evaluating the District's accreditation. The District's last-ditch actions were not sufficient to deprive the SBOE of its authority to do an mid-cycle review of the District under 5 CSR 50-345.100(5)(A).

In addition to the District's failure to have – let alone adequately implement – a CSIP, the SBOE also was entitled to do an mid-cycle assessment of the District's accreditation under 5 CSR 50-345.100(5)(D). The evidence before the SBOE simply could not be ignored. The District's academic performance and its financial condition were deteriorating. Petitioners argue – in essence – that the SBOE was legally required to ignore a bad situation and hope it did not become worse. Such an argument lacks merit.

Finally, the MSIP Rule speaks directly to districts such as St. Louis that have been classified as "Provisionally Accredited" twice in a row, and the Rule requires a mid-cycle review after three years. The MSIP Rule further provides that the SBOE may declare the District "Unaccredited" if it has not been able to raise its performance sufficiently to merit full accreditation. Subsection (8) of the MSIP Rule states:

A school district designated provisionally accredited twice sequentially . . . will be designated provisionally accredited for three (3) years at which time a re-review will be conducted. A district's accreditation designation may not be raised more than one (1) level during a re-review.

(A) The board may lower a district's accreditation if a district fails to gain full accreditation after being designated provisionally accredited twice sequentially.

5 CSR 50-345.100(8).

In 2003-04, the SBOE declared the District unaccredited. This was the second time sequentially that the District had been so classified. Three years later, 2006-07, the District was re-reviewed and, far from "gaining full accreditation," DESE's analysis showed that the District's academic performance was continuing to deteriorate. Thus, under Subsection (8)(A) of the MSIP Rule, the SBOE was permitted to declare the District "Unaccredited."

This Court is persuaded that the SBOE's decision to declare the District "Unaccredited" was the proper outcome even if the District had "Met" both of the disputed Performance Standards described above. Even with those two standards "Met," the District still only barely re-qualified to be "Provisional Accredited" and thus was far short of the performance levels necessary to "gain full accreditation." Once a district is provisionally accredited two times in a row, it must move up to full accreditation in three years or the SBOE can declare it "Unaccredited" regardless of whether it might still be performing at "provisionally accredited" levels. Moreover, because the evidence showed that the District met neither the College Placement nor Career Education Standards and therefore the District only met 4 of the 14 total areas measured, the District's loss of accreditation was appropriate even without the operation of Subsection (8).

Regardless of whether Subsection (8) is applied to affirm the SBOE's ultimate decision, there is no doubt that Subsection (8) not only allowed the SBOE to conduct a mid-cycle review of the District in 2006-07, Subsection (8) required the District to do so.

**2. DESE's Data Requests to the District Were Entirely
In Keeping with DESE Practice Toward All Districts.**

As set forth in the Facts section above, the District originally reported College Placement data for 2004 and 2005 of 718 and 720 graduates, respectively. Exh. 259 (Def. Vol. I) at p. 2043. This resulted in College Placement percentages for those two years of 43.8% and 44.5%, respectively, both of which are consistent with the past performance of the District and its 5-year average of 46.7%. *Id.*

In November 2006, after the November 3 preliminary APR had been prepared but before the December 1 preliminary APR was calculated, the District changed its College Placement numbers for 2004 and 2005. Instead of 718 and 720 graduates entering college in those two years, the District was now reporting that 956 and 904 graduates from 2004 and 2005 entered college, respectively. *Id.* These new numbers resulted in percentages of 58.3 and 55.9, or a increase of 10-15 percentage points over the District's prior numbers for the same years, and 8-10 percentage points higher than the District's performance in prior years.

The District claimed that the difference between the old data and the new data was due solely to the District's use of a new methodology for collecting the 2004 and 2005 data. "The Board explained the improvement occurred because the Board hired

National Student Clearinghouse (NSC) to track graduates.” Amended Petition at ¶ 69. Because DESE’s analysis of College Placement data requires five years of data, and because DESE performs an average of those five years and awards points based on increases from year to year, it is essential that the data for each of the five years be fairly comparable, *i.e.*, that it be gathered using the same methodology. Accordingly, DESE told the District that, if it was going to change methodologies, the District must provide all five years of data using the new methodology.

At trial, Superintendent Bourisaw first contended that the District never knew of DESE’s request prior to February 1 of 2007. Tr. I at 207. But Dr. Bourisaw later admitted that she sent an email on November 28, 2006, in which she acknowledged that Ms. Kemna had requested that all five years of data be supplied using the new “Clearinghouse” methodology. *Id.* (referring to Exh. 68 (Pet. Vol. V) at p.1). Upon questioning by the Court, Dr. Bourisaw admitted that the District could have gotten five years of data from the Clearing but that the District never attempted to do so – not prior to March nor even up to the time of trial. Tr. I at 204-06. *See also* Exh. 61 (Def. Vol. I) at p. AGO1869 (“The Clearinghouse can provide up to 6 years historical data” and “Clearinghouse can provide a 1 week turnaround time of graduate follow-up data to SLPS”) (emphasis in original). Finally, Dr. Bourisaw admitted to the Court that, if the District had gotten this data from the Clearinghouse – and perhaps only if the District had done so – the question of whether the District met the standard using five years of data all collected with the same methodology could have been resolved with certainty. Tr. I at 206. It was the District’s choice not to get this information.

Accordingly, DESE's request that the District provide five years of data all collected using the same methodology was fair and reasonable in light of the use to which DESE put that data. Data collected using two dissimilar methodologies cannot fairly be compared to determine whether college placement is "increasing" as the MSIP Rule requires. Exh. 2 (Pet. Vol. I) at p. 27.

DESE also requested that the District provide student-level data that could be used to verify or confirm the rates at which District graduates were, or were not, entering colleges. This request was separate from DESE's request that the District provide all five years of college placement from the Clearinghouse so that apt comparisons could be made. And this request was made for a different reason. Prudence demanded that DESE perform some audit of the Clearinghouse results because the District's "new" methodology was generating substantially higher college placement numbers than its "old" methodology had generated for the very same years. The particulars of this request are set forth in Ms. Kemna's letter dated February 1, 2007. Exh. 74 (Def. Vol. I) at p.2. The District provided some of this data for some of the years in question, but did not supply all of the data for any single year. Using the data provided, Ms. Kemna reported to the SBOE in March 2007 only that data which had been verified. It was substantially lower than the data the District wanted to use, and even lower than the data the District had originally reported. Exh. 259 (Def. Vol. II) at p.7.

DESE's request for confirming data from the District was in keeping with how it treats all data changes from all Districts. Ms. Kemna provided numerous records from

her department, made available to the District in discovery, in which similar requests were made of many, many other districts. A summary of this correspondence between DESE and various school districts regarding DESE requests for confirming student-level data, and DESE requests for data spanning all five relevant years, was introduced as Exh. 265 (Def. Vol. III).

Accordingly, neither the fact nor the extent of DESE's data requests to the District were unusual. The requests were, in fact, completely in keeping with DESE practices toward all districts. Such requests, therefore, cannot be used by the District in support of their claim that the SBOE acted arbitrarily or capriciously.

3. DESE Properly Concluded that District Did NOT Meet the Career Education Performance Standard.

At trial, Superintendent Bourisaw admitted that the District has available to it all of the information necessary to calculate the percentage of credits in approved career education courses as compared to the total number of credits taken by juniors and seniors in the District. But, the District chose not to do so. Unlike the dispute over college placement, the District has not even attempted to supplement the data and try and prove that more courses were taken than DESE calculated. Instead, the District's only argument that it met this standard is that, in a preliminary APR generated on December 1, 2006, DESE mistakenly reported that the standard had been met.

The reason for the mistake – for which both the District and DESE can be said to responsible – was repeatedly explained to the District beginning in December orally to District staff, in writing to Dr. Bourisaw on February 1, 2007, orally to Dr. Bourisaw on

March 22, 2007, in written detail complete with spreadsheet on May 23, 2007, and numerous times since this litigation began. All of the District's explanations have been consistent and never once has anyone suggested that the numbers reported to the SBOE on March 22, 2007, were incorrect.

But, it simply cannot be reasonably argued that the SBOE was arbitrary and capricious in relying DESE's proper analysis of data that no one, then or now, has shown or even attempted to show was inaccurate. In fact, this is the very antithesis of "arbitrary and capricious" conduct. *Psychiatric Healthcare Corp.*, 100 S.W.3d at 904-05 ("Arbitrary and capricious means willful and unreasoning action, without consideration of and in disregard of the facts and circumstances"). Nor can DESE have acted arbitrarily or capriciously in finding the mistake once it had been committed, correcting it, and proceeding on the basis of the corrected data. Accordingly, the argument that DESE must be bound to wrong data, and that SBOE must be bound to the same, must fail.

4. The SBOE Did NOT Initiate a State "Takeover" – the General Assembly, not the SBOE, Decided Whether and What Consequences Should Attend the District's Failures.

Section 162.081.1 RSMo (Cumm. Supp. 2006) provides that, "[w]henver any school district in this state . . . is classified unaccredited for two successive school years by the state board of education, its corporate organization shall lapse." The District construes this to mean that all school districts get a two-year "grace period" following loss of accreditation before anything can happen. In fact, Petitioners allege that the

SBOE has violated this statute by re-establishing the TSD to operate the district without waiting an additional two years. Amended Petition at ¶ 277. Thus argument lacks merit.

To be sure, Section 162.081.1 applies to the District just as it applies to all other school districts. If after the end of the 2008-09 school year, the District is again declared unaccredited, the District will lapse. At that point, Section 162.081.4 allows the SBOE to (1) appoint a special administrative board to operate the schools, or (2) break up the District and allocate its schools to surrounding districts, or (3) create a new district or districts inside the old District's boundaries to educate the City's children. But the SBOE has not yet been presented with, nor has it made, those decisions.

What makes this situation unusual is Section 162.1100, which provides that control over and operation of the District shall pass immediately to the TSD (if one has then been established or re-established) upon the District's loss of accreditation. The transfer of control pursuant to Section 162.1100 is immediate, and it is separate from and does not purport to supersede or supplant the "lapse" process outlined in Section 162.081. True, Section 162.1100 applies only to St. Louis, but it was enacted in Senate Bill 781 (1998) ("SB781") along with many other changes to law specific to St. Louis that were designed to produce an additional \$60 million in annual state and local funding to the District over and above what the District would have if it were treated "like any other school district."

Senate Bill 781 was enacted to provide a basis for a settlement in the long-running St. Louis City desegregation lawsuit, and it was successful in that all parties

agreed to the 1999 Desegregation Settlement Agreement in February of 1999 which was based on, and which triggered the effective date of, the provisions of SB781 described above. In addition to the provisions of SB781 allowing the District to access so much additional local and state revenue, SB781 also created the TSD process in Section 162.1100 in case the District was not able to improve its performance and lost its accreditation.

So, the District cannot argue that the SBOE has deprived it of a two-year “grace period” under Section 162.081. The General Assembly did that, not the SBOE. And, Section 162.1100 does not destroy the District’s corporate existence, as Section 162.081 does, it merely transfers responsibility for and control over the schools to the TSD. The City Board continues to exist, to be elected, and to perform its statutory duties. Section 162.1100 merely has the effect of limiting those duties from and after the date on which the City Board fails to keep the District accredited. Accordingly, the Petitioners’ argument that the SBOE acted arbitrarily and capriciously by not giving the District an additional two years before invoking Section 162.1100. Section 162.1100 invokes itself, and its consequences followed immediately once the SBOE made its decision to declare the District “Unaccredited.”⁵

⁵ It should be noted that, from a practical perspective, the District has already had its two-year “grace period” and thus there is not even an appearance of unfairness in the operation of Section 162.1100. As described above, the 1999 Settlement Agreement prohibited the SBOE from declaring the District unaccredited – and thus leaving the City

**5. The SBOE Was Neither Arbitrary nor Capricious
In Applying the Same Standards to the District
As to Every Other School District.**

The District also argues that the SBOE acted arbitrarily by not excusing the District's poor performance on account of the socio-economic demographics of its students. Amended Petition at ¶ 87. Such an argument, however, is a policy-type argument rather than a legal argument as the District does not have a constitutional right to special treatment.

As detailed in preceding sections, the SBOE and DESE treated the District just as any other school district. But, the fact that the District's failings – both academic and financial – endanger more than 30,000 students rather than 300 or 30 was not lost on DESE or the SBOE either. The magnitude of the impact of future failures at the District cannot help but to have served to heighten the sense of importance of the issues facing the SBOE and the risks of inaction. Nor was the SBOE ignorant, on the other hand, of the difficulties facing the district. Dr. Bourisaw made a presentation to the SBOE in November 2006 concerning the challenges facing the District and how the District would meet them. Exh. 36 (Pet. Vol. IV). Ultimately, the SBOE chose to hold the District to

Board subject to the immediate loss of control under Section 162.1100 – prior to June 30, 2002. Therefore, when DESE recommended the loss of accreditation in 1999, the SBOE could not act. The District took advantage of this delay and was able to qualify for provisional accreditation when it was re-reviewed in 2000.

the same standards as all other districts. That decision, however, was not “arbitrary and capricious.”

C. Petitioners Cannot Succeed On Claims Relating to the Governor’s Appointment of the District CEO Under Section 162.1100 - Count IV.

This claim is based on Petitioners’ mistaken assertion that Governor Blunt appointed Rick Sullivan to be the Chief Executive Officer of the TSD on March 22, 2007, while the Senate was still in session. Petitioners argue: (a) because Mr. Sullivan was not confirmed during that legislative session, he cannot take office on the TSD until he is confirmed next January, and (b) because §162.1100 provides that no power transfers to the TSD until the Governor’s appointee takes office, the City Board can retain control until January 2008 or, perhaps, indefinitely. This argument cannot succeed however, because, the record clearly establishes that the Governor appointed Mr. Sullivan to the TSD on June 15, 2007. Though the SBOE nominated Mr. Sullivan for this position and the Governor announced that he had favorably received that nomination in March, the fact remains that Section 162.1100 does not allow the Governor this appointment until “the loss of accreditation,” which did not occur until June 15, 2007.

In sum, Mr. Sullivan’s appointment to the position of CEO was a recess appointment when it was made on June 15, 2007. Accordingly, he took office immediately and will serve until the 30th day after his nomination is submitted to the Senate and not returned by it to the Governor as occurred during the August 2007 special session. Mr. Sullivan’s appointment was handled exactly as this Governor and his predecessors have handled thousands of previous appointments.

D. Petitioners Have Failed to Establish Any of Their Remaining Constitutional Claims.

Petitioners raise a variety of other constitutional claims challenging the validity of the SBOE’s determination to reclassify SLPS as unaccredited or the validity of the Section 162.1100, or both. As set forth below, each of these claims is meritless.

1. Standard for Constitutional Challenges of State Statutes

The law is clear in Missouri that every statute enjoys a strong presumption of validity, and a court may only find a statute unconstitutional if “it clearly contravenes a specific constitutional provision.” *Weinschenk v. State*, 203 S.W.3d 201, 210 (Mo. banc 2006).

2. Voting Right Claims – Counts VII, IX, XIV, XXI

Petitioners allege that the appointment of the TSD deprives voters in the St. Louis school district of certain constitutional rights related to voting. However, each of these claims fail because, as a legal and factual matter, the existence of the TSD in no way implicates the voting rights of St. Louis voters. Voters in the St. Louis school district have the same ability to vote in elections for the St. Louis School Board after the appointment of the TSD as they did prior thereto, and there is certainly no evidence in the record to the contrary.

In Count VII, Petitioners allege that the appointment of the TSD pursuant to §162.1100 divests voters of “political power” in violation of Article I, Section 1 of the Missouri Constitution. First Amended Petition at ¶106. In Count IX, Petitioners allege the appointment of the TSD divests voters of their “right to regulate and police the

internal government” in violation of Art 1, Section 3. First Amended Petition at ¶133. In Count XIV, Petitioners argue that the appointment of the TSD deprives St. Louis voters of the “right of suffrage”, in violation of Article I, Section 25. First Amended Petition at ¶187. In Count XXI, Petitioners allege that §162.1100 strips voters of the right to vote for members of the St. Louis School Board in violation of the United States Constitution, Amendments XV, XIX and XVI. First Amended Petition at ¶¶256, 259.

It is undisputed that after the appointment of the TSD, the City Board continues to exist as an entity under Missouri law. After listing the powers of the City Board, and transferring those powers to the TSD upon a loss of accreditation, §162.621 specifically provides that the City Board “shall, at all times, retain auditing and public reporting powers.” §162.621.2, RSMo. The continued existence of the City Board is buttressed by the evidence presented at trial, that it continues to hold meetings, take votes, and make public statements. Simply put, there is nothing in the appointment of the TSD that has nullified any school board elections, disenfranchised any voter, or prevented any candidate from seeking a position on the City Board. For this reason alone, these voting rights claims are completely meritless.

Another basis for this determination is the fact that the St. Louis School Board is a creature of state statute, §162.571, RSMo., and its powers are established and enumerated by state statute, §162.621, RSMo. Accordingly, the Missouri General Assembly acts squarely within its plenary power when it limits those powers, as it did in enacting §162.1100, RSMo. *Savannah R-III School District v. Public School Retirement Sys. of Mo.*, 950 S.W.2d 854, 859 (Mo. banc 1997) (citing *Jones*, 653 S.W.2d at 185) (statute not

unconstitutional under retroactive statute as such constitutional provision only protects private persons, not governmental entities). If the General Assembly is able to create an entity and determine its powers, there can be no “voting rights” prohibition on modifying those enumerated powers. *See Three Rivers Junior College District of Poplar Bluff v. Statler*, 421 S.W.2d 235, 238 (Mo. banc 1967) (absent a constitutional restraint, the General Assembly “is vested in its representative capacity with all the primary power of the people”).

3. Equal Protection Claim – Count VIII

Petitioners claim that they have been mistreated by the State Defendants in a variety of ways, and that such mistreatment violates the Equal Protection Clause in the Missouri Constitution because similarly situated districts were not subject to such mistreatment.

Petitioners’ claims of disparate treatment are as follows. First, they assert that during the accreditation process DESE demanded more information from SLPS than from similarly situated districts. *See* First Amended Petition at ¶115. Second, Petitioners complain that, under §162.1100, the City Board was divested of certain powers immediately upon losing accreditation while other districts are given a two year window to improve their performance. *See* First Amended Petition at §117. The individual Petitioners claim to have been damaged by such action because students will be negatively affected in the future by attending school in an unaccredited district. *See* First Amended Petition at ¶120. Finally, Petitioners who are taxpayers assert damage “by the unlawful use of tax dollars to unaccredit the district and by residing in an unaccredited

school district.” *Id.*

Despite Petitioners’ claims, the facts presented at trial – which are set forth and discussed extensively in prior sections – tell an altogether different story and, in fact, establish that SLPS, nor any of the Petitioners, did not suffer any disparate treatment. In addition, a school district is not a “person” having a constitutional right to equal protection. *Committee for Educational Equality v. State*, 878 S.W2d 446, 450 n. 3 (Mo. Banc 1994) (school district cannot assert equal protection claim against state). Finally, this claim cannot be made on behalf of the individual Petitioners because they failed to prove any constitutional injury stemming from the State Defendants’ actions.

4. Due Process Claims – Counts II, X, XXVII

In addition to due process claims based on the allegedly “arbitrary and capricious” action of the SBOE and/or DESE, the City Board asserts a variety of due process claims under Article 1, Section 10 of the Missouri Constitution. In Count II, it asserts that the performance standards in the MSIP Rule are unconstitutionally vague because a person of ordinary intelligence would not know what is required or prohibited. First Amended Petition at ¶35. In Count X, it complains that it did not receive notice and an opportunity for a hearing prior to the SBOE’s accreditation decision. First Amended Petition at ¶¶143-45. Finally, in Count XXVII, the City Board alleges that §162.1100 is unconstitutionally vague regarding its powers and obligations relative to the TSD. First Amended Petition at ¶ 335.

Claims that rules or statutes are unconstitutionally vague are grounded in the due process clauses in the Fifth and Fourteenth Amendments to the United States Constitution

and Article I, Section 10 of the Missouri Constitution. *Psychiatric Healthcare Corp. of Missouri v. Department of Social Services*, 100 SW.3d. 891, 903 (Mo. App. W.D. 2003).

The evidence at trial demonstrated unequivocally that each of these claims must fail. No one testified that there was any confusion over the methods used by DESE to evaluate the District's performance, nor could they as the UY-APR manual describes these methods in great detail. Though the City Board is not entitled to pre-determination notice and an opportunity to be heard, the evidence shows that the City Board's representatives were aware beginning in at least September 2006 that the SBOE was preparing to address the District's accreditation and Dr. Bourisaw appeared before the SBOE in November of 2006 and repeatedly pleaded in writing for the SBOE not to declare the District unaccredited. Finally, the plain language of Section 162.1100, when read with Section 162.621 amended in the same bill, shows that all power and control over the district transferred to the TSD upon the District's loss of accreditation, save only the City Board's powers of auditing and public reporting.

These three due process claims all fail for the additional reason that, as a matter of law, school districts do not have due process rights. *Committee for Educational Equality v. State*, 878 S.W.2d 446, 450 n. 3 (Mo. Banc 1994) (a school district is not a "person" have the constitutional right to due process); *Jackson County v. State*, 207 S.W.3d 608, 614 (Mo. banc 2006) (vagueness doctrine stems from due process clause and political subdivisions lack due process rights). The individual Petitioners' claims fail because individual Petitioners fail to allege or establish the deprivation of a liberty or property interest implicated by the enforcement of the MSIP standards. *See Fitzgerald v. City of*

Maryland Heights, 796 S.W.2d 52, 56 (Mo. App. E.D. 1990) (deprivation of liberty or property interest required for due process claim). Common sense dictates that students and parents simply do not have a liberty or property interest implicated by the application of the MSIP process for the accreditation of school districts, nor any constitutionally protected interest in having the District labeled as “accredited” when the facts clearly establish that the performance of the District has not earned that status.

5. Special Law Prohibitions – Counts XV, XVI

In Counts XV and XVI, Petitioners assert that because §162.1100 only applies to the St. Louis School District, it constitutes a “special law” in violation of Article III, Sections 40 and 41 of the Missouri Constitution. *See* First Amended Petition at ¶¶196, 200, 206 and 209. However, these two claims may be easily dispensed with because a recent Missouri Supreme Court opinion makes it clear that the special law prohibition does not apply to the City of St. Louis. For that reason, a statute only governing a school district in the City of St. Louis does not constitute a special law within the meaning of these two constitutional provisions.

In *Jefferson County Fire Protection Districts Assoc v. Blunt*, 205 S.W3d 866, 872 (Mo. banc 2006), the Missouri Supreme Court determined that a law governing fire protection districts within a certain narrow population range violated the special law prohibition. However, in so ruling, the court expressly excluded the classification at issue in this case from its holding. The Court first noted that many Missouri statutes concern “a city not within a county”, a class of which St. Louis is the only member. Accordingly, because the Missouri Constitution recognizes St. Louis as a unique entity,

such a classification does not constitute a special law. *Id.* at 872 n.6. Similarly, because §162.1100 concerns school districts in “a city not within a county”, it cannot be deemed an unconstitutional special law.

6. Open Courts Claim – Count XII

In Count XII, Petitioners assert that the appointment of the TSD prevents Board and other Petitioners from exercising their right to judicial review of SBOE’s decision to declare District unaccredited, in violation of Article 1, Section 14 of the Missouri Constitution. *See* First Amended Petition at ¶165.

However, the Open Courts provision of the Missouri Constitution only prohibits laws that unreasonably or arbitrarily bar individuals or classes of individuals from accessing the courts in order to enforce recognized causes of action. Put another way, it only applies to judicial or legislative acts that impose procedural bars to access to Missouri courts. *Missouri Highway and Transportation Commission v. Merritt*, 204 S.W.3d 278, 285 (Mo. App. E.D. 2006). Accordingly, because there is nothing in §162.1100 that presents a procedural bar to judicial review of the SBOE’s accreditation decision regarding the St. Louis School District, the statute does not conflict with this constitutional provision. This, coupled with the fact that Petitioners are in the process of seeking judicial review of this decision in this court in this proceeding at this time, indicates the lack of basis for this claim.

7. Unconstitutional Taking –Count XIII

In this claim, the City Board contends that the appointment of the TSD, pursuant to §162.1100, deprived it of certain property without compensation or due process, in

violation of Article 1, Section 15. First Amended Petition at ¶175. However, this constitutional provision concerns unreasonable searches and seizures and has absolutely no relevance to the facts of this case. Whether this citation was erroneous or not, the State Defendants are entitled to judgment on this claim. *See Missouri Highway and Transportation Commission v. Merritt*, 204 S.W.3d 278, 284 (Mo. App. E.D. 2006) (to properly raise a constitutional claim it is necessary to specifically designate the constitutional provision alleged to have been violated)

Should the Court excuse this error, and presume that Petitioners are trying to allege a Taking Clause claim under Article 1, Section 26, it fails as well because the Takings Clause, on its face only restricts takings of “private property”. Mo. Const., Art I, Section 26 (“That private property shall not be taken or damaged for public use without just compensation.”). In addition, any property rights that the City Board has are established by state statute, see §162.571, RSMo, so the General Assembly acts within its plenary power when it acts to modify those same property rights. *See Three Rivers Junior College District of Poplar Bluff v. Statler*, 421 S.W.2d 235, 238 (Mo. banc 1967) (absent a constitutional restraint, the General Assembly “is vested in its representative capacity with all the primary power of the people”).

8. SBOE Limited to Supervision of Instruction

In the Public Schools – Count XVII

Petitioners claim that §162.081.3, which allows the SBOE to appoint a special administrative board to supervise a school district, exceeds the SBOE’s constitutional authority under Article IX, Section 2a. to “supervise[e] . . . instruction of the public

schools”. See First Amended Petition at ¶216. This argument must be rejected because Section 162.081.3 has no relevance to this case and because the SBOE’s decision to re-establish the TSD is plainly authorized by §162.1100, RSMo, which statute is not inconsistent with the Board’s broad constitutional authority. *See Doe v. Philips*, 194 S.W.3d 833, 841 (Mo. banc 2006) (“statute is presumed to be valid and will not be declared unconstitutional unless it clearly contravenes some constitutional provision”).

9. Power to Tax – Count XVIII

Petitioners contend that if §162.1100 denies the City Board the ability to levy and collect taxes, it violates Article X, Sections 1 and 2 of the Missouri Constitution. First Amended Petition at ¶228. However, these two provisions in no way limit the General Assembly’s authority to limit a political subdivision’s power to levy taxes. For that simple reason, this claim fails.

Article X, Section 1 provides that “[t]he taxing power may be exercised by . . . other political subdivisions under powers granted to them by the General Assembly” Though Article 10, Section 11(b) sets certain taxing limits, the General Assembly legislated significant taxing power guidelines to school districts in Chapter 164. Accordingly, the General Assembly clearly acts within its constitutional mandate in acting to affect this taxing authority by passing legislation that transfers this authority to the TSD. *See Berry v. State*, 908 S.W.2d 682, 685 (Mo. banc 1995) (General Assembly may withdraw from a political subdivision any previous delegation of taxing authority).

10. Limitations on Local Tax Rates – Count XIX

In Count XIX, Petitioners contend that if the TSD alters taxation amounts

established by Art X, Section 11(b) of the Missouri constitution, it does so in violation of that provision. First Amended Petition at ¶239. However, this claim is easily dispensed with because Petitioners did not present any evidence whatsoever that TSD has, or even intends, to alter constitutionally limited taxation amounts.

11. Interference with Contract – Counts XI and XX

In these two Counts, the City Board asserts that the re-establishment of the TSD will cause the St. Louis School District to breach certain contracts with third parties and vendors, in violation of Article I, Section 13 of the Missouri Constitution. First Amended Petition at ¶¶156, 248. These claims fail because Petitioners failed to produce any evidence at trial of any specific SLPS contract being impaired by the appointment of the TSD. In addition, because nothing in the text of §162.1100 invalidates any contracts, should such hypothetical contract impairment take place in the future, any cause of action would lie not against the State Defendants but against whatever entity is in fact acting to impair the contract. For these two reasons, these claims are devoid of merit.

12. Procedural Due Process – Count XXVI

In Count XXVI, Petitioners who are members of the St. Louis School Board claim they were deprived of the liberty or property interest in their elected positions as Board members without procedural due process. See First Amended Petition at ¶¶326-27. But this claim fails because they are unable to establish the deprivation of a liberty or property interest stemming from any conduct of the State Defendants.

It is undisputed that § 162.1100 does not eliminate the St. Louis School Board as an existing and functioning entity. In fact, under §162.621, the City Board continues to

have certain responsibilities, and the undisputed facts presented at trial are that the City Board is continuing to have meeting, take votes, and make public statements. The City Board's powers are set by statute, *see* §162.621, so the General Assembly is certainly entitled to modify those powers without implicating any liberty or property rights. In short, any liberty or property interest that City Board members may have in their positions is in no way affected by the application of Section 162.1100, which simply altered their powers but did not eliminate their positions.

For this reason, St. Louis School Board members have not pointed, and cannot point, to a deprivation of any liberty or property interest. Therefore, it is unnecessary for State Defendants to provide them with any type of process in connection with the re-establishment of the TSD or the application of Section 162.1100 which followed. *See State ex rel. Donelon v. Division of Employment Security*, 971 S.W.2d 869, 874(Mo.App. W.D. 1998) (due process claim requires the claimant to have been “deprived of a liberty or property interest”).

F. Petitioners Have Failed To Prove Their Claims That The TSD Can Exercise Only Limited Powers.

Petitioners' final set of claims require a determination of which powers of the City Board vested with the TSD on June 15, 2007, and which will remain with the City Board. None of these claims are relevant to the legality of the SBOE action challenged in this case, *i.e.*, the declaration that the District is unaccredited.

Petitioners' principle claim in this regard is that only powers existing on and not re-enacted subsequent to August 28, 1998, will transfer to the TSD. This claim is

wholly contradicted by law. First, the tortured reading of Section 162.1100.3 needed to produce Petitioners' desired result is contradicted by the plain language of that provision inasmuch as nothing in that provision purports to say that only such powers will be transferred. At most, the provision only addresses such powers as it defines, *i.e.*, those powers granted on or before August 28, 1998, but the provision says nothing about whether powers outside that definition are also transferred.

The fact that Section 162.1100.3 is silent as to any powers granted after August 28, 1998 is in sharp contrast to the provisions of Section 162.621.2, which is the District's own organic statute. This statute speaks directly to the disposition of "all powers" granted in Section 162.621.1 and plainly directs that all of these powers will transfer to the TSD upon the District's loss of accreditation save only "auditing and public reporting powers." § 162.621.2.

Finally, even if Petitioners' construction of Section 162.1100.3 is correct and the TSD did not and cannot assume any new power enacted by the General Assembly after August 28, 1998, Petitioners' long laundry list of powers is a gross exaggeration because that list consists mainly of powers that existed on and before that date. *See* Amended Petition at ¶ 96. For Petitioners to prevail on this argument – and for the list of powers not transferred to be anywhere near as long or serious as Petitioners contend – an "old" power granted prior to August 28, 1998, that is contained in a statute that was amended in some respect after that date, must somehow become a "new" power that does not transfer to the TSD. *Compare, e.g.*, House Bill 297 (2005) (power to appoint a superintendent is long standing and bill only changes the maximum contract term) *with*

Amended Petition ¶ 96 (listing power “to appoint the superintendent of schools” as a “new” power that does not transfer to the TSD).

Petitioners’ argument that a subsequent amendment renders even unchanged provisions of the amended statute into a new enactment is expressly rejected by Section 1.120, which states: “The provisions of any law or statute which is reenacted, amended or revised, so far as they are the same as those of a prior law, shall be construed as a continuation of such law and not as a new enactment.” [Emphasis added.] Accordingly, Petitioners’ claim in this respect must also fail.

CONCLUSION

For all of the foregoing reasons, this Court finds for the State Defendants on each and every count in the Amended Petition. The Amended Petition is hereby ordered dismissed with prejudice in its entirety. This Court also denies Petitioners’ Motions for Preliminary and Permanent Injunctions, and declares that the challenged actions of the SBOE were fully lawful and effective and that the June 15, 2007, transfer of control over the operation of the District from the City Board to the TSD as required by Sections 162.1100 and 162.621 was complete, constitutional and is in full effect, reserving to the City Board only the concurrent power of auditing and public reporting.

Richard G. Callahan
Circuit Court Judge, Division II