

Summer 2014

## Missouri's School Transfer Law: Not a Hancock Violation but a Mere Bandage on Wounded Districts

Kimberly Hubbard

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### Recommended Citation

Kimberly Hubbard, *Missouri's School Transfer Law: Not a Hancock Violation but a Mere Bandage on Wounded Districts*, 79 Mo. L. REV. (2014)

Available at: <https://scholarship.law.missouri.edu/mlr/vol79/iss3/8>

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## NOTE

# Missouri's School Transfer Law: Not a Hancock Violation but a Mere Bandage on Wounded Districts

*Breitenfeld v. School District of Clayton*, 399 S.W.3d 816 (Mo. 2013) (en banc)

KIMBERLY HUBBARD\*

### I. INTRODUCTION

In December of 2013, three school districts in Missouri were unaccredited: Kansas City Public Schools, the Normandy School District, and the Riverview Gardens School District.<sup>1</sup> As of August 2014,<sup>2</sup> the Saint Louis Public School District (“SLPS”) had provisional accreditation.<sup>3</sup> SLPS is the district involved in the litigation that is the subject of this Note. Ten other Missouri school districts also had provisional accreditation in July of 2013.<sup>4</sup>

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\* B.A. Political Science, University of Missouri, 2012; J.D. Candidate, University of Missouri School of Law, 2015. I am grateful to Professor Brad Desnoyer for his suggestions and guidance during the writing of this Note and throughout my law school experience. I would also like to thank my dear friend Abby Schneider for her help with the title of this Note. And last, but most certainly not least, special thanks to my family and significant other who love and support me in all of my endeavors.

1. See Barbara Shelly, Op-Ed., *Missouri School Chief Chris Nicastro: KC Schools Recommendation About Integrity*, KAN. CITY STAR (Sept. 28, 2013, 5:21 PM), <http://www.kansascity.com/2013/09/26/4510621/missouri-education-commissioner.html>.

2. The accreditation status of districts is constantly changing, and the transfer statute has been the subject of ongoing debate; therefore, the information in this Note is accurate as of August 2014, but may no longer reflect current accreditation status or current Missouri law.

3. Dale Singer, Op-Ed., *Should Entire School Districts or Just Individual Schools Be Accredited?*, ST. LOUIS BEACON (July 29, 2013, 12:14 AM), [https://www.stlbeacon.org/#!/content/32084/individual\\_school\\_accreditation\\_072613](https://www.stlbeacon.org/#!/content/32084/individual_school_accreditation_072613).

4. *Id.* Public schools in Missouri are given the status of unaccredited, accredited, or provisional accreditation based on fourteen performance standards. Jessica Bock, *State Board Gives Provisional Accreditation for St. Louis Public Schools*, ST. LOUIS POST-DISPATCH (Oct. 16, 2012, 11:45 AM), [http://www.stltoday.com/news/local/education/state-board-gives-provisional-accreditation-for-st-louis-public-schools/article\\_27dc696e-596a-5c4f-a5ad-e5c8d224971f.html](http://www.stltoday.com/news/local/education/state-board-gives-provisional-accreditation-for-st-louis-public-schools/article_27dc696e-596a-5c4f-a5ad-e5c8d224971f.html). A district is given full accreditation by meeting at least nine standards. *Id.* Meeting only five or fewer standards “can mean unaccredited status.” *Id.* Meeting any number of performance standards between five and nine earns a district provisional accreditation. *See id.*

There is a law in Missouri – Missouri Revised Statutes Section 167.131 – that allows students from an unaccredited school district to transfer to an accredited school district, while having their tuition and transportation costs paid for by the unaccredited school district.<sup>5</sup> Students transferring from unaccredited to accredited school districts pursuant to the transfer statute may be rewarded with a better educational experience in the accredited district; however, there are many injurious consequences of the statute. These consequences negatively affect students who have used or will use the transfer statute to transfer districts,<sup>6</sup> accredited districts that receive transfer students,<sup>7</sup> the accreditation system that is used to assess Missouri school districts' performance,<sup>8</sup> and, most of all, unaccredited districts that lose students because of the transfer law.<sup>9</sup>

In *Breitenfeld v. School District of Clayton*, a parent of students residing in the SLPS District brought suit to enforce the transfer law so that her children could attend the neighboring accredited Clayton School District (“Clayton”) using tuition paid for by SLPS.<sup>10</sup> Both SLPS and Clayton argued a defense to the enforceability of the law on the theory of impossibility – that it would be “impossible” for the districts to comply with the law because Clayton could not provide the necessary resources for the transfer students and SLPS could not afford to pay the tuition costs for transfer students.<sup>11</sup> Taxpayers from both SLPS and Clayton intervened to argue that the statute created an unfunded mandate in violation of the Hancock Amendment of the Missouri Constitution.<sup>12</sup> The court upheld the law, rejecting the defense of impossibility and holding that the law did not violate the Hancock Amendment.<sup>13</sup>

This Note first discusses the *Breitenfeld* decision and then explores the prior cases and legislation leading up to the *Breitenfeld* decision. In discussing *Breitenfeld*, this Note describes how the transfer law will affect transferred students, unaccredited districts forced to pay tuition, accredited districts forced to accept transfer students, and the public school accreditation system in Missouri. Finally, this Note proposes that because the adverse consequences outweigh the benefits of the law, action must be taken so that unaccredited school districts can have a fighting chance to become accredited again. Legislative change is necessary because a solution is not forthcoming from the Supreme Court of Missouri, as the court recently affirmed its *Breitenfeld* holding in *Blue Springs R-IV School District v. School District of*

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5. MO. REV. STAT. § 167.131 (2012). This statute will hereinafter be referred to as “the transfer statute” or “Section 167.131.”

6. See *infra* notes 99-106 and accompanying text.

7. See *infra* notes 117-125 and accompanying text.

8. See *infra* notes 126-130 and accompanying text.

9. See *infra* notes 107-116 and accompanying text.

10. 399 S.W.3d 816, 822 (Mo. 2013) (en banc).

11. *Id.* at 822-23.

12. *Id.* at 821-22 (citing MO. CONST. art. X, §§ 16-24).

13. *Id.* at 834, 836.

*Kansas City*.<sup>14</sup> This ruling confirms that attempting to solve the problems the transfer law causes by challenging the law under the Hancock Amendment will be unsuccessful.<sup>15</sup> Proposed in this Note are two other possible options: that lawmakers amend or repeal the law or that administrators change the Missouri accreditation system.

## II. FACTS AND HOLDING

SLPS<sup>16</sup> became unaccredited in 2007.<sup>17</sup> The plaintiff, Gina Breitenfeld,<sup>18</sup> and her two children resided in the SLPS district, but the children had never attended SLPS schools.<sup>19</sup> For the duration of the Breitenfeld children's education, they attended private schools.<sup>20</sup> However, Breitenfeld enrolled her children in Clayton for the 2007-2008 school year pursuant to a tuition agreement between herself and Clayton.<sup>21</sup> After SLPS became unaccredited, Breitenfeld sought payment of tuition by SLPS to Clayton under the transfer law for educating her children during the 2009-2012 school years.<sup>22</sup> The Breitenfelds lived in Clayton for a portion of the time period between 2009 and 2012; however, they resided in the SLPS District for a portion of that time period as well and still owed Clayton tuition for the 2009-2012 school years.<sup>23</sup> When SLPS and Clayton refused to fulfill the obligations under Section 167.131, Breitenfeld initiated this litigation.<sup>24</sup>

SLPS and Clayton objected to the enforcement of the transfer statute, and Clayton counterclaimed against Breitenfeld for the payment of tuition

14. 415 S.W.3d 110, 111 (Mo. 2013) (en banc).

15. *See id.*

16. The SLPS district is normally operated by the Board of Education of the City of St. Louis. *Breitenfeld*, 399 S.W.3d at 819 n.2. The Transitional School District of the City of St. Louis operated SLPS after it became unaccredited. *Id.* SLPS will be used to refer to the unaccredited and transitional school district for the rest of this Note to alleviate confusion. This district is also known as the St. Louis City School District.

17. *Id.*

18. Breitenfeld did not begin the lawsuit as the only Plaintiff; however, by the time the first case, *Turner v. School District of Clayton*, 318 S.W.3d 660 (Mo. 2010) (en banc), was remanded by the Supreme Court of Missouri, all other plaintiffs had removed themselves from the litigation for various reasons. *Id.* at 821 n.7.

19. *Id.* at 837 n.32.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at 837 n.32. The trial court calculated the amount owed to Clayton as \$49,133.33; however, the trial court did not use the transfer statute formula to calculate those tuition costs. *Id.* The Supreme Court of Missouri remanded the case for the trial court to determine the amount owed to the Clayton School District using the formula established by the transfer statute. *Id.* at 837-38.

24. *Id.* at 821.

costs.<sup>25</sup> Taxpayers from Clayton and one taxpayer from SLPS were allowed to intervene in the case by the lower court in order to represent the position that the transfer statute violated the Hancock Amendment of the Missouri Constitution because it was an “unfunded mandate.”<sup>26</sup> An unfunded mandate occurs when the state government requires the local government to undertake any new or increased activities without providing the funding for those activities.<sup>27</sup> The Hancock Amendment prohibits the state government from doing this.<sup>28</sup> In response to the contention that the transfer statute violated the Hancock Amendment, Breitenfeld argued that the transfer statute “[did] not create a new or increased activity or service within the meaning of the Hancock Amendment” and therefore was constitutional and should be enforced.<sup>29</sup>

Both SLPS and Clayton raised the defense of “impossibility of compliance” as the basis for which they should have been allowed to disregard the transfer statute.<sup>30</sup> The school districts introduced evidence of their operation costs of complying with the transfer statute based on the Jones Report, “a 2011 statistical study estimating the likelihood that students would transfer under [the transfer statute] from the unaccredited SLPS to certain adjoining St. Louis County school districts.”<sup>31</sup> The report was used in lieu of data based on actual transfers under the statute because no “transfers from SLPS to an accredited school district in St Louis County actually had occurred.”<sup>32</sup>

Relying on Jones Report data, the SLPS superintendent testified “that the estimated [S]ection 167.131 tuition and transportation costs for the student transfers . . . could be as high as \$262 million.”<sup>33</sup> According to the superintendent, these estimated transfers would make it “impossible for SLPS to maintain or improve its current attendance and academic achievements and adequately educate remaining students.”<sup>34</sup> The Jones Report estimates also

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25. *Id.* at 821-22.

26. *Id.* at 821, 824; *see* MO. CONST. art. X, §§ 16-24.

27. *See Breitenfeld*, 399 S.W.3d at 826-27.

28. MO. CONST. art. X, § 16.

29. *Breitenfeld*, 399 S.W.3d at 827.

30. *Id.* at 822.

31. *Id.*

32. *Id.* The Jones Report was a study done by a university professor in which telephone survey participants were asked to rank seven identified “school selection factors” by importance. *Id.* at 822 n.11. Participants in the Jones Report were also informed of the six St. Louis County school districts whose students performed the highest on a State assessment test. *Id.* Participants were then “asked if one of these districts or another district would be their ‘first choice.’” *Id.* The Jones Report was challenged at trial by Breitenfeld as being “too speculative and not backed by any other research.” *Id.* However, the testimony of a school administrator established that the report “provided the only available information for SLPS and the St. Louis County school districts to use in planning for potential [S]ection 167.131 transfers.” *Id.*

33. *Id.* at 823.

34. *Id.*

worried Clayton officials because, as one Clayton administrator testified, the school district would more than double in size with the estimated transfers making it “impossible without years of advance planning and construction to accommodate the 3,567 transfer students that the Jones Report estimated would enroll in Clayton.”<sup>35</sup>

The trial court agreed with the taxpayer interveners, finding “that [S]ection 167.131 was unenforceable as to the defendant school districts because it was an ‘unfunded mandate’ in violation of the Hancock Amendment.”<sup>36</sup> In holding that the transfer statute violated the Hancock Amendment, the lower court said the statute “created new and increased activity or service for school districts over and above what was required in 1980.”<sup>37</sup> The trial court also agreed with the defendant school districts that it would be “impossible” for them to comply with the statute.<sup>38</sup> Judgment was entered in favor of Clayton against Breitenfeld on the claim of unpaid tuition owed by Breitenfeld to educate her children totaling \$49,133.33.<sup>39</sup>

The Supreme Court of Missouri reversed the trial court’s decision.<sup>40</sup> It held that the transfer statute did not violate the Hancock Amendment and determined that the defense of impossibility was not available to the defendant school districts in this case.<sup>41</sup>

The court held that under Section 167.131 if a school district was required to provide only a “greater frequency” of existing activities or services and not new services or an increased level of services, the statute did not violate the Hancock Amendment if the district could not prove that the mandate was unfunded beyond speculative evidence.<sup>42</sup> The court reasoned that because SLPS had received provisional accreditation, the situation would not reach the “‘impossibilities’ claimed by the defendant school districts,” which involved thousands of students.<sup>43</sup> Therefore, the defense of impossibility was not available to the school districts,<sup>44</sup> and the districts were required to comply with Section 167.131.<sup>45</sup>

The court remanded the case to the trial court, ordering the trial court to recalculate the amount of tuition SLPS owed Clayton according to the formula in the transfer statute.<sup>46</sup> At the close of the litigation, the Breitenfeld children continued to attend Clayton.<sup>47</sup>

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35. *Id.*

36. *Id.* at 823-24.

37. *Id.* at 824.

38. *Id.* at 825.

39. *Id.* at 837 n.32.

40. *Id.* at 838.

41. *Id.* at 834, 836.

42. *Id.* at 831.

43. *Id.* at 836.

44. *Id.*

45. *See id.* at 835.

46. *Id.* at 838.

47. *See id.* at 837 n.32.

Following the ruling in *Breitenfeld*, an unaccredited school district in Missouri must pay tuition for its students to attend an accredited district, and accredited districts must accept students transferring from unaccredited districts because the law requiring the districts to do so is constitutional.<sup>48</sup>

### III. LEGAL BACKGROUND

This Part first discusses the transfer statute and its history. It then explains the Hancock Amendment of the Missouri Constitution. Finally, it delves into various challenges previously brought against the transfer statute on several grounds.

#### *A. Transfer Statute: Section 167.131*

Section 167.131 was originally enacted in 1931<sup>49</sup> and as of 1980 – a date that is important for Hancock Amendment reasons<sup>50</sup> – the statute addressed only Missouri school districts that educated students between kindergarten and eighth grade.<sup>51</sup> A 1993 revision of the statute changed the language slightly,<sup>52</sup> resulting in two important consequences: the statute no longer provides receiving school districts the discretion to accept or reject students,<sup>53</sup> and the statute now applies to “any district that does not maintain an accredited school.”<sup>54</sup>

The transfer statute’s current language states in pertinent part:

[T]he board of education of each district in this state that does not maintain an accredited school pursuant to the authority of the state board of education to classify schools as established in [S]ection 161.092 shall pay the tuition of and provide transportation consistent with the provisions of [S]ection 167.241 for each pupil resident therein who attends an accredited school in another district of the same or

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48. *See id.* at 826-28.

49. Kimberly Jade Norwood, *Liddell Is Forty: Commemorating the Desegregation Movement in St. Louis, and a Look at the Future of Urban Education: Article: Minnie Liddell’s Forty-Year Quest for Quality Public Education Remains a Dream Deferred*, 40 WASH. U. J.L. & POL’Y 1, 37 n.173 (2012).

50. *See infra* notes 60-63 and accompanying text.

51. Brief of Taxpayer Respondents, *Blue Springs Sch. Dist. v. Sch. Dist. of Kan. City*, 415 S.W.3d 110 (Mo. 2013) (en banc) (No. SC92932), 2013 WL 4790465, at \*2.

52. *See Turner v. Sch. Dist. of Clayton*, 318 S.W.3d 660, 669 (Mo. 2010) (en banc) [hereinafter *Turner II*]; Brief of Taxpayer Respondents, *supra* note 51, at \*2.

53. *Turner II*, 318 S.W.3d at 669.

54. Brief of Taxpayer Respondents, *supra* note 51, at \*2 (emphasis added) (internal quotation marks omitted).

*an adjoining county . . . each pupil shall be free to attend the public school of his or her choice.*<sup>55</sup>

The Supreme Court of Missouri has ruled that the transfer law applies to any district that, as a whole, has been classified as unaccredited by the state board of education or that maintains at least one school which has been classified as unaccredited by the state board.<sup>56</sup> The court has also ruled that the statute does not allow discretion of the receiving district to accept or reject a transferring student, as evidenced by the clear intent of the legislature in removing the discretionary language from the transfer statute in 1993.<sup>57</sup>

Section 167.241 of the Missouri Revised Statutes – which is mentioned in the transfer law – sets out guidelines regarding transportation of pupils, stating that districts that are required to provide pupils with transportation pursuant to the transfer statute need only provide transportation to an accredited school district that is designated by the unaccredited district.<sup>58</sup>

### *B. The Hancock Amendment*

The Hancock Amendment to the Missouri Constitution was enacted in 1980 during a period of time when many similar fiscal reforms were emerging across the United States.<sup>59</sup> This kind of statute is known as a “tax and expenditure limit” (“TEL”), and attempts to limit tax burdens on state citizens.<sup>60</sup> Missouri’s TEL – the Hancock Amendment – prohibits the state from requiring “any new or expanded activities by counties and other political subdivisions without full state financing, or from shifting the tax burden to counties and other political subdivisions.”<sup>61</sup> Further, the state cannot reduce “the state financed proportion of the costs of any existing activity or service required of counties and other political subdivisions.”<sup>62</sup> The amendment also provides that “any taxpayer of the state, county or other political subdivision shall have standing to bring suit in a circuit court of proper venue and additionally, when the state is involved, in the Missouri Supreme Court, to enforce [the Hancock Amendment].”<sup>63</sup>

Missouri courts have stated that the purpose of the Hancock Amendment is to “limit taxes by establishing tax and revenue limits and expenditure limits for the state and other political subdivisions which may not be exceed-

55. MO. REV. STAT. § 167.131 (2012) (emphasis added).

56. *Turner II*, 318 S.W.3d at 665.

57. *Id.* at 669.

58. MO. REV. STAT. § 167.241 (2012).

59. Jonathan G. Bremer, Note, *Pulling the Taxpayer's Sword from the Stone: The Appropriation Requirement of Missouri's Hancock Amendment*, 77 MO. L. REV. 481, 484 (2012).

60. *Id.*

61. MO. CONST. art. X, § 16.

62. *Id.* at § 21.

63. *Id.* at § 23.

ed without voter approval.”<sup>64</sup> Put differently, “[t]he Hancock Amendment aspires to erect a comprehensive, constitutionally-rooted shield to protect taxpayers from the government’s ability to increase the tax burden above that borne by the taxpayers on November 4, 1980.”<sup>65</sup> The amendment proposes to prohibit the state from reducing the proportion of state funding to a county or other political subdivision for a state mandated activity or service after November 4, 1980 – the day the Hancock Amendment was enacted.<sup>66</sup>

Missouri courts have long evaluated challenges to statutes under the Hancock Amendment using the two-part test laid out in *Miller v. Director of Revenue*: “[B]y its plain language, a violation of [the Hancock Amendment] exists if both (1) a new or increased activity or service is required of a political subdivision by the State and (2) the political subdivision experiences increased costs in performing that activity or service.”<sup>67</sup> The court in *Miller* articulated that a challenge to a statute under the Hancock Amendment that is based on “speculation and conjecture, fails to overcome the presumption of constitutionality which [all Missouri statutes] enjoy[.]”<sup>68</sup> The court articulated in *Neske v. City of St. Louis* that simply increasing the cost of an existing responsibility would not satisfy the first prong of the unfunded mandate test, which requires a new or increased activity or service.<sup>69</sup>

### C. Challenges to the Transfer Statute

Challenges to the transfer statute have been limited in nature. Before *Breitenfeld*, the Supreme Court of Missouri had never decided the transfer statute’s validity under a Hancock Amendment challenge. However, the transfer statute was previously invoked in litigation regarding parents’ restitution for tuition payments already incurred to send their children to an accredited district<sup>70</sup> and regarding who had standing to bring a Hancock Amendment challenge against the statute.<sup>71</sup>

In *Turner v. School District of Clayton* (“*Turner I*”), parents who resided in SLPS, and whose children attended Clayton pursuant to a tuition agreement, requested that Clayton charge SLPS for their children’s tuition.<sup>72</sup> This occurred after SLPS became unaccredited and the parents believed

64. *Rohrer v. Emmons*, 289 S.W.3d 600, 603 (Mo. Ct. App. 2009).

65. *Id.*

66. *Bremer*, *supra* note 59, at 487.

67. 719 S.W.2d 787, 788-89 (Mo. 1986) (en banc).

68. *Id.* at 789.

69. 218 S.W.3d 417, 422-23 (Mo. 2007) (en banc).

70. *See Turner II*, 318 S.W.3d 660, 663 (Mo. 2010) (en banc); *Turner v. Sch. Dist. of Clayton*, No. ED 92226, 2009 WL 1752140, at \*1 (Mo. Ct. App. June 23, 2009) [hereinafter *Turner I*].

71. *King-Willmann v. Webster Groves Sch. Dist.*, 361 S.W.3d 414, 416-17 (Mo. 2012) (en banc).

72. *Turner I*, No. ED 92226, 2009 WL 1752140, at \*1.

SLPS was responsible for the payments to Clayton under Section 167.131.<sup>73</sup> Clayton declined to comply with the parents' request, and the parents brought suit against Clayton and SLPS.<sup>74</sup> The parents sought a declaratory judgment stating that SLPS was responsible for paying their children's tuition pursuant to Section 167.131 after SLPS lost its accreditation in 2007.<sup>75</sup> Both the trial court and the Missouri Court of Appeals for the Eastern District ruled that the transfer statute was inapplicable to the case because the children were attending Clayton schools pursuant to a tuition agreement between the school district and the parents.<sup>76</sup> The Court of Appeals required the parents, rather than the unaccredited district, to pay the tuition to Clayton, because the parents were contractually obligated to do so under the tuition agreement.<sup>77</sup> The Court of Appeals transferred the case to the Supreme Court of Missouri, pursuant to Rule 83.02, "[b]ecause of the general interest and importance of the issues involved."<sup>78</sup>

The case argued before the Supreme Court of Missouri after transfer was also called *Turner v. School District of Clayton* ("*Turner II*").<sup>79</sup> The Supreme Court in *Turner II* disagreed with the lower courts in *Turner I*, stating, "It is clear that [Section] 167.131 applies to [SLPS], that it required [Clayton] to admit the students and that it mandates the transitional school district to pay the students' tuition."<sup>80</sup>

First, the court looked to the plain language of the transfer statute to determine that it applied to SLPS in the case at bar: "Because the plain and ordinary language of [Section] 167.131 does not limit its application [to situations in which an individual school and not a whole district loses accreditation] as urged by the transitional school district, there is no need to analyze the legislative history of the statute."<sup>81</sup> Therefore, the court held that SLPS was in fact unaccredited for purposes of the transfer statute and that the situation fell within the statute's plain language.<sup>82</sup>

Second, the court addressed Clayton's argument that a district retained discretionary power to admit transfer students pursuant to Section 167.020 and, therefore, admittance was not mandatory as the language of Section 167.131 might suggest.<sup>83</sup> The court treated this argument the same way it treated the argument that the transfer statute did not apply: "The plain and ordinary meaning of the language in [Section] 167.131 that 'each pupil shall be free to attend the public school of his or her choice' gives a student the

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73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at \*4-5.

77. *Id.* at \*5.

78. *Id.*

79. *Turner II*, 318 S.W.3d 660 (Mo. 2010) (en banc).

80. *Id.* at 664.

81. *Id.* at 665.

82. *Id.* at 664-65.

83. *Id.* at 668-69.

choice of an accredited school to attend . . . and requires the chosen school to accept the pupil.”<sup>84</sup> The court said this reading of the statute was especially supported by the statute’s legislative history because a prior version of the statute included language stating that “no school shall be required to admit any pupil.”<sup>85</sup> Because the legislature specifically removed this discretionary language, the schools were mandated to admit transfer students under Section 167.131.<sup>86</sup>

After analyzing the plain language of Section 167.131, the court held that the statute applied to SLPS and that Clayton did not have discretion to admit or deny transfer students under the statute. Therefore, SLPS was responsible for paying tuition for all four families’ children to attend Clayton.<sup>87</sup>

Two years later, in *King-Wilmann v. Webster Groves School District*, the Supreme Court of Missouri was presented with a challenge to the transfer statute which alleged that the statute violated the Hancock Amendment by creating an unfunded mandate.<sup>88</sup> In a similar situation to that of *Turner II*, the plaintiff in *King-Wilmann* sought to be enrolled in an accredited school district, Webster Groves, when the school in her place of residence became unaccredited pursuant to the transfer statute.<sup>89</sup> Webster Groves asserted the defense that Section 167.131 violated the Hancock Amendment “by requiring a new activity or service without full state financing.”<sup>90</sup>

The Supreme Court of Missouri found that Webster Groves, as a school district and not a taxpayer, did not have standing to assert the provisions of the Hancock Amendment as a defense.<sup>91</sup> The language of the amendment was clear that “any taxpayer’ of the state, county or other political subdivision shall have standing to bring suit to enforce the Hancock Amendment.”<sup>92</sup> In making its decision, the court looked to its previous ruling in *Fort Zumwalt School District v. State*, where the court found that only taxpayers could bring suit to enforce the Hancock Amendment and that a school district was not a taxpayer.<sup>93</sup> Webster Groves attempted to argue that, because it was using the Hancock Amendment as a defense rather than bringing suit itself, its case was distinct from *Fort Zumwalt*.<sup>94</sup> However, Webster Groves’ argument did not succeed.<sup>95</sup> Therefore, in *King-Wilmann*, the court did not decide the issue of whether Section 167.131 violated the Hancock Amendment because it found

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84. *Id.* at 669.

85. *Id.* (quoting MO. REV. STAT. § 167.131.2 (1986)).

86. *Id.*

87. *Id.* at 664.

88. 361 S.W.3d 414, 416 (Mo. 2012) (en banc).

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* (citing MO. CONST. art. X, § 23).

93. *Id.* at 416-17 (citing *Fort Zumwalt Sch. Dist. v. State*, 896 S.W.2d 918, 921 (Mo. 1995) (en banc)).

94. *Id.* at 417.

95. *Id.*

that Webster Groves did not have standing.<sup>96</sup> The first time the court confronted this issue was in *Breitenfeld* in June of 2013.<sup>97</sup>

#### IV. INSTANT DECISION

In *Breitenfeld v. School District of Clayton*, the court held that the school transfer statute did not constitute an unfunded mandate in violation of the Hancock Amendment of the Missouri Constitution.<sup>98</sup> The Honorable Mary R. Russell wrote the unanimous opinion articulating that the transfer statute did not violate the Hancock Amendment because the education requirement imposed no new or increased activity or service and because the transportation mandate of the statute was not proved to be “unfunded.”<sup>99</sup>

The court began its analysis by laying out the two-part test a Missouri court uses to determine if a statute violates the Hancock Amendment: “if both: (1) the State requires a new or increased activity or service of political subdivisions; and (2) the political subdivisions experience increased costs in performing that activity or service,” a violation exists.<sup>100</sup>

The court then explained what was necessary for both prongs to be met.<sup>101</sup> The first prong of the test is satisfied if “the State requires local entities to begin a new mandated activity or to increase the level of an existing activity beyond the level required on November 4, 1980.”<sup>102</sup> A statute that requires “continuance of an existing activity or service” does not meet the first prong of the test, nor does “increased frequency of undertaking a given activity or service” by virtue of “more requests for performance of an existing activity or service.”<sup>103</sup> The second prong of the test is met when “political subdivisions experience increased costs in performing the new activity or service at issue because the State provides insufficient funding to offset the full costs of compliance.”<sup>104</sup>

The court’s analysis determined that neither the requirement of the unaccredited districts to pay tuition for students to attend accredited schools nor the requirement of the accredited schools to accept the transfer students met the first prong of the unfunded mandate test because the education requirements were not new or increased.<sup>105</sup> Both districts were required to “provid[e] eligible students in grades K-12 a free public education” before the transfer statute was enacted, and both school districts “simply would be con-

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96. *Id.* at 416-17.

97. *Breitenfeld v. Sch. Dist. of Clayton*, 399 S.W.3d 816 (Mo. 2013) (en banc).

98. *Id.* at 834.

99. *Id.* at 831, 834.

100. *Id.* at 826 (emphasis added).

101. *Id.* at 826-27.

102. *Id.* at 826.

103. *Id.* at 826-27.

104. *Id.* at 827.

105. *Id.* at 828.

tinuing to provide those services even if [S]ection 167.131 transfers were effectuated.”<sup>106</sup> The court also stated that the level of services provided by Clayton would not be increased because of an influx of transfer students, but rather the school district would be providing the same level of services to more students – merely providing the services with “greater frequency.”<sup>107</sup>

The court held that because the districts were not required to provide new or increased services or activities under the school transfer law, the first prong of the unfunded mandate test was not met and therefore the transfer statute’s educational requirements did not violate the Hancock Amendment.<sup>108</sup> The Supreme Court of Missouri reversed the trial court’s decision inasmuch as the trial court found that the transfer statute “create[d] an unfunded mandate for providing educational services.”<sup>109</sup>

The court then justified its decision that Section 167.131 did not violate the Hancock Amendment by determining that the Hancock Amendment did not prohibit local-to-local burden-shifting of an existing activity or service.<sup>110</sup> Rather, its purpose was to “prohibit burden-shifting from the State to a local entity.”<sup>111</sup> The transfer statute, according to the court, shifted the existing responsibility of educating students among local political subdivisions.<sup>112</sup> It was not the Hancock Amendment’s purpose to “prevent this local-to-local shifting of responsibilities” because the “overall purpose of the Hancock Amendment was to prevent the State from avoiding taxation and spending limitations by shifting its responsibilities to local governments.”<sup>113</sup> Therefore, because the transfer statute only “reallocate[s] responsibilities . . . among school districts . . . the purpose of Hancock [was] not fundamentally violated.”<sup>114</sup>

Next, the court conceded that one section of the school transfer law did meet the first prong of the unfunded mandate test.<sup>115</sup> That section required the unaccredited school district to provide transportation to students wishing to transfer to a district of the unaccredited district’s choice.<sup>116</sup> This transportation mandate of the transfer statute was found to be “new” by the court because it “alter[ed] the statutory provision of providing transportation ‘within’ a school district and require[d] the unaccredited school district to provide [S]ection 167.131 transfer students transportation to out-of-district schools.”<sup>117</sup> The mandate was especially new for SLPS because previous

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106. *Id.* at 828, 830.

107. *Id.* at 831.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at 831-32.

115. *Id.* at 833.

116. *Id.* at 832.

117. *Id.* at 833.

transportation requirements exempted “metropolitan district[s].”<sup>118</sup> Therefore, this section met the first prong of the unfunded mandate test because SLPS had to provide transportation for transfer students to a different school district where they had not provided any transportation before.<sup>119</sup>

The court rejected SLPS’s argument that the transportation section of the transfer statute violated the Hancock Amendment because the second prong of the unfunded mandate test was not met.<sup>120</sup> The court opined that the second prong is only met if there is proof that the mandate is unfunded.<sup>121</sup> SLPS provided no evidence beyond speculation in regard to the costs of complying with the transportation section of the transfer statute.<sup>122</sup> The court found that “[e]vidence that is merely speculative cannot support a finding of an unfunded mandate in violation of the Hancock Amendment.”<sup>123</sup> Thus, the Supreme Court reversed the trial court and found that the transportation section of the transfer statute did not constitute an “unfunded mandate” in violation of the Hancock Amendment.<sup>124</sup>

The court finished its decision by addressing the defendant school district’s attempt to raise the defense of impossibility.<sup>125</sup> The districts claimed it would be impossible for each to comply with the transfer statute because Clayton could not provide the necessary resources for the transfer students and SLPS could not afford to pay the tuition costs for transfer students.<sup>126</sup> The court analyzed this defense by first concluding that it was usually used in the contract law context but had been used before as a “valid excuse[] for noncompliance with a statute.”<sup>127</sup> Next, the court determined that in order to apply the concept of impossibility as a defense, the party asserting it must have “demonstrated that virtually every action possible to promote compliance with the contract [or statute] ha[d] been performed.”<sup>128</sup> The court declined to address this issue, however, finding that the “impossibilities” the school districts claimed could no longer occur in light of SLPS gaining conditional accreditation in 2012, thereby narrowing the case at hand to only the two Breitenfeld children.<sup>129</sup> According to the court, the districts complying with the transfer statute in the case of just those two children “[did] not yield the ‘impossibilities’ claimed by the defendant school districts.”<sup>130</sup> The Su-

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118. *Id.*

119. *Id.*

120. *Id.* at 833-34.

121. *Id.* at 833.

122. *Id.* at 834.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 835-36 (citing *Egenreither ex rel. Egenreither v. Carter*, 23 S.W.3d 641, 646 (Mo. Ct. App. 2000)) (internal quotation marks omitted).

128. *Id.* at 835.

129. *Id.* at 836.

130. *Id.*

preme Court reversed the decision of the trial court to accept the impossibility defense raised by the defendant school districts.<sup>131</sup>

The Supreme Court of Missouri reversed the trial court's decision in its entirety and remanded the case for proceedings not inconsistent with its decision.<sup>132</sup>

## V. COMMENT

The Supreme Court of Missouri's ruling in *Breitenfeld* and the law itself have detrimental effects on the transferred students, the unaccredited school districts forced to pay tuition, the accredited school districts forced to receive the transferred students, and Missouri's accreditation system. Students transferring from the unaccredited district to the accredited district are the only beneficiaries of the transfer law, and the benefit to them hardly outweighs the burdens to the school districts and the accreditation system. The fact that the law results overwhelmingly in negative consequences weighs in favor of amending or repealing the law – steps that must be taken by the Missouri legislature.

### A. *The Transfer Law and Breitenfeld's Ramifications*

Students that transfer, unaccredited districts, districts receiving transfer students, and the accreditation system all experience troublesome consequences from the enforcement of the transfer law. It is also foreseeable that the ruling in *Breitenfeld* may result in abuses of the transfer law.

While it is the decision of the student and his or her parent(s) to transfer from an unaccredited district to an accredited one, the student and his or her family are put in somewhat of a Catch-22. The transferred students were intended to benefit from the transfer law because they would be receiving a "better" education, but there are negative consequences to transferring students from an unaccredited district to an accredited one under the transfer law.

Students from unaccredited districts could be at a different learning level than their counterparts in the accredited district to which they choose to

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131. *Id.* Further, the Supreme Court of Missouri determined that the taxpayer intervenors had been properly allowed to intervene under Rule 52.12(b) and that there was no abuse of the trial court's discretion in that regard. *Id.* at 837. The Supreme Court also reversed the trial court's decision to award attorney fees to the intervenors because the intervenors no longer had a successful Hancock Amendment challenge that warranted the award of attorney fees. *Id.* On the issue of tuition owed by *Breitenfeld* to the Clayton school district, the Supreme Court ordered the tuition be recalculated to reflect that SLPS, rather than *Breitenfeld*, would be responsible for some, if not all, of the tuition costs under the transfer statute because it was enforceable. *Id.* at 837-38.

132. *Id.* at 838.

transfer.<sup>133</sup> Parents of students in some accredited districts have been outspoken with their concerns that students from unaccredited districts “might struggle to keep pace academically.”<sup>134</sup> Some students may be behind other students his or her age in the new district, while some students might be performing at higher levels.<sup>135</sup> Either student could easily be short-changed by a new district that might not take the time to lend extra help to the struggling student or to properly place an advanced student.<sup>136</sup> Students in both of these situations will be negatively affected, and the transfer law will not fulfill its intended purpose, which according to Chris Nicastro, the Commissioner of Education, is to provide the transferring students with a better education than they would have received in their own unaccredited district.<sup>137</sup>

Transfer students could also face instability as a result of the transfer law. Some transferring students may have to travel up to thirty miles to attend an accredited school district.<sup>138</sup> An hour commute in the morning plus an hour commute in the evening is a heavy burden to a child, adding to the difficulties that arise from trying to assimilate into a new district.<sup>139</sup> Additionally there is the possibility that the student will have to return to his or her home district if that district regains accreditation. These are some of the many potential hardships a student may face while trying to obtain a better education.<sup>140</sup> These factors might make a potential transfer student's parent(s) think twice before deciding to send a child to an accredited district under the transfer law; this decision becomes even harder when the choice is between these disadvantageous consequences and a substandard education.

There are adverse consequences imposed also on both the unaccredited districts forced to pay tuition and transportation costs and the accredited districts forced to accept the transferring students. Although an exact number is not known, according to Kelvin Andrews, superintendent of SLPS, students fled from SLPS in “alarming numbers” when it became unaccredited in 2007.<sup>141</sup> As of the writing of this Note, the situation facing the unaccredited

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133. Dale Singer, *Lawmakers Ponder Changes to Missouri School Transfer Law*, ST. LOUIS BEACON (July 5, 2013, 7:09 AM), [https://www.stlbeacon.org/#!/content/31729/legislative\\_transfer\\_changes\\_070313](https://www.stlbeacon.org/#!/content/31729/legislative_transfer_changes_070313).

134. John Eligon, *In Missouri, Race Complicates a Transfer to Better Schools*, N.Y. TIMES (July 31, 2013), [http://www.nytimes.com/2013/08/01/us/in-missouri-race-complicates-a-transfer-to-better-schools.html?pagewanted=all&\\_r=1&](http://www.nytimes.com/2013/08/01/us/in-missouri-race-complicates-a-transfer-to-better-schools.html?pagewanted=all&_r=1&).

135. Singer, *supra* note 133.

136. *Id.*

137. See Elisa Crouch, *Missouri Legislators Hear Pleas to Address School Transfer Law*, ST. LOUIS POST-DISPATCH (Oct. 2, 2013, 12:15 AM), [http://www.stltoday.com/news/local/education/missouri-legislators-hear-pleas-to-address-school-transfer-law/article\\_718d44fa-ad93-5541-97b3-1fae15d008b3.html](http://www.stltoday.com/news/local/education/missouri-legislators-hear-pleas-to-address-school-transfer-law/article_718d44fa-ad93-5541-97b3-1fae15d008b3.html).

138. Shelly, *supra* note 1.

139. *Cf. id.*

140. Eligon, *supra* note 134.

141. Kelvin R. Adams, *St. Louis Public Schools Have Come Far in Five Years*, ST. LOUIS POST-DISPATCH (Sept. 20, 2013, 12:00 AM), <http://www.stltoday.com/>

districts of Normandy and Riverview Gardens shows that students transferring out of those districts number 1,189 and 1,451 respectively.<sup>142</sup> In the Kansas City Public Schools' situation, where a case based on the transfer statute was decided by the Supreme Court of Missouri shortly after *Breitenfeld*, estimates showed that as many as 7,759 students might have left that district to attend nearby accredited districts.<sup>143</sup> However, this mass exodus never occurred because the Kansas City Public School district was granted provisional accreditation in early August of 2014.<sup>144</sup>

The largest effect on the unaccredited districts is possible bankruptcy or insolvency.<sup>145</sup> According to Commissioner of Education Chris Nicastro, "The transfer program as it's currently conceived is not sustainable. It bankrupts sending school districts."<sup>146</sup> Normandy School District's superintendent claims the transfer law "kill[s] schools like [Normandy] indirectly because they're taking the resources. [The law will] negatively impact [Normandy] because of the financial side."<sup>147</sup> These school officials' statements are reflected in the statistics.<sup>148</sup> The Normandy and Riverview School Districts are expected to spend \$30 million on tuition for transferring nearly 1,200 students.<sup>149</sup> The lack of funds remaining in the unaccredited district leaves little opportunity for students who stay to get the quality education they deserve, according to Nicastro.<sup>150</sup> The Normandy district was projected to be financially insolvent as early as March of 2014.<sup>151</sup> The state took over the district in the summer of 2014 to save it from bankruptcy and, as of August 2014, the Normandy district was considered "credited with state oversight," which meant students could no longer transfer out of the district under Section

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news/opinion/columns/st-louis-public-schools-have-come-far-in-five-years/article\_e3adbea3-0877-538c-b7a4-0d6e8f19faf3.html.

142. Associated Press, *Missouri Supreme Court Hears Transfer Case: Suburban Districts Argue They Can't Handle Influx of Enrollment*, KMBC (Oct. 2, 2013, 7:46 PM), <http://www.kmbc.com/news/kansas-city/missouri-supreme-court-hears-transfer-case/-/11664182/22245438/-/nflhfrz/-/index.html>.

143. *Id.*; see Brief of Taxpayer Respondents, *supra* note 51, at \*10 (emphasis added).

144. Joe Robertson, *Kansas City School District Gains Provisional Accreditation*, KAN. CITY STAR (Aug. 6, 2014, 1:50 PM), <http://www.kansascity.com/news/local/article1158397.html>.

145. Shelly, *supra* note 1; Crouch, *supra* note 137.

146. Shelly, *supra* note 1.

147. Eligon, *supra* note 134.

148. See Alan Scher Zagier & Heather Hollingsworth, *Missouri School Transfer Ruling Opens Old Wounds*, YAHOO! NEWS (Aug. 8, 2013, 11:47 AM), <http://news.yahoo.com/missouri-school-transfer-ruling-opens-old-wounds-071804741.html>.

149. *Id.*

150. Marshall Griffin, *Missouri Education Leader Says Student Transfer Law Will Financially Cripple Unaccredited Schools*, ST. LOUIS PUB. RADIO (Oct. 1, 2013, 11:54 PM), <http://news.stlpublicradio.org/post/mo-education-leader-says-student-transfer-law-will-financially-cripple-unaccredited-schools>.

151. Crouch, *supra* note 137.

167.131.<sup>152</sup> This change did not occur, however, until the detrimental effects of the transfer law were already felt within the Normandy district: the school board voted to lay off 103 teachers and to close one of its elementary schools at the end of October 2013 in order to save money.<sup>153</sup>

One only needs to look back to 2010 to see more crippling financial effects of the transfer law in action.<sup>154</sup> The Wellston School District in the St. Louis area lost accreditation in 2003 and finished reimbursing school districts for transferring students' tuition seven years later when it shut down.<sup>155</sup> This is just one example of how the transfer law is detrimental to the unaccredited districts that are forced to pay tuition for transferring students.

The school transfer law is also detrimental to the accredited school districts to which students choose to transfer. Similar to concerns aimed at the transfer students themselves,<sup>156</sup> school districts receiving transfer students may see negative effects as a result of transfer students entering at different academic levels than their current student counterparts.<sup>157</sup> Parents and administrators worry that teachers will have to "slow down to allow students from struggling districts to catch up."<sup>158</sup> This slower pace could ultimately hurt the education of current students at the accredited districts.<sup>159</sup> There are concerns that students transferring into the accredited district might have lower test scores, bringing down the accredited district's average scores, and that the additional time spent helping the transfer students catch up could result in current district students achieving lower scores because of the "slow down" in curriculum.<sup>160</sup>

Accredited districts forced to accept transfer students under the transfer law are also negatively affected by overcrowding. Many studies have shown a link between smaller class size and greater student achievement.<sup>161</sup> The school transfer law is likely to result in larger class sizes in accredited dis-

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152. Emily Wax-Thibodeaux, *At Brown's Impoverished High School, Students Try to Make Gains Against Odds*, WASHINGTON POST (Aug. 25, 2014, 8:00 AM), [http://www.washingtonpost.com/politics/at-browns-impoverished-high-school-students-try-to-make-gains-against-odds/2014/08/25/d8a33842-2b98-11e4-994d-202962a9150c\\_story.html](http://www.washingtonpost.com/politics/at-browns-impoverished-high-school-students-try-to-make-gains-against-odds/2014/08/25/d8a33842-2b98-11e4-994d-202962a9150c_story.html).

153. Dale Singer, *Normandy Board Votes Not to Pay Tuition Bills for Transfer Students*, ST. LOUIS BEACON (Oct. 24, 2013, 10:23 PM), [https://www.stlbeacon.org#!/content/33388/normandy\\_tuition\\_payments\\_102413?coverpage=4202](https://www.stlbeacon.org#!/content/33388/normandy_tuition_payments_102413?coverpage=4202).

154. See Zagier & Hollingsworth, *supra* note 148.

155. *Id.*

156. See sources cited *supra* notes 133-140 and accompanying text.

157. See Eligon, *supra* note 134.

158. *Id.*

159. Singer, *supra* note 133.

160. See Eligon, *supra* note 134; Zagier & Hollingsworth, *supra* note 148.

161. See *How Important Is Class Size?*, GREATER SCHOOLS.ORG, <http://www.greaterschools.org/find-a-school/defining-your-ideal/174-class-size.gs?page=all> (last visited June 3, 2014).

tricts as more students leave the unaccredited districts.<sup>162</sup> This is especially true because the accredited districts are unable to turn transfer students away; a district must accept all students wishing to transfer under the law, which could result in an influx of thousands of students in the accredited districts.<sup>163</sup> Clayton argued to the Supreme Court of Missouri in *Breitenfeld* that “it would be impossible for [the district] to provide the educational facilities and resources necessary to educate the potentially thousands of additional students.”<sup>164</sup>

Perhaps the most far-reaching consequences of the transfer law are the potential negative consequences on the Missouri accreditation system. First, the transfer law nearly eliminates students’ incentive to perform in a way that would help their districts maintain accreditation<sup>165</sup> and may create a kind of “unaccredited domino effect.” Schools become accredited or lose their accreditation based on a variety of factors including academics, attendance, and graduation rates.<sup>166</sup> A school district’s academic performance, attendance, and graduation rates are directly influenced in part by the choices of its students. Therefore, a student who received low grades and/or failed to attend school regularly in the unaccredited school district that transfers from that unaccredited district to an accredited one may continue to receive low grades and/or fail to attend school regularly in the accredited district.<sup>167</sup> There is little point in having an accreditation system if students that may contribute to the cause of the district being unaccredited can transfer to an accredited district once their district becomes unaccredited. The transfer law creates little incentive for students to care about whether their district becomes unaccredited and could create an “unaccredited domino effect” wherein district after district loses accreditation, rendering the system almost irrelevant. Eliminating student accountability also undermines the accreditation system and places the sole responsibility of accreditation status on the teachers and administration.

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162. See Zagier & Hollingsworth, *supra* note 148.

163. Singer, *supra* note 133.

164. *Breitenfeld v. Sch. Dist. of Clayton*, 399 S.W.3d 816, 834 (Mo. 2013) (en banc).

165. This argument is not meant to suggest that the students alone are or should be responsible for maintaining a district’s accreditation or even that the responsibility is or should be placed primarily on their shoulders, but, rather, that students and their choices are one of many contributing factors. Poverty, violent neighborhoods, home life, and other potential influencers that are out of a student’s control do play a role in the decision-making processes of youth; therefore, it is perhaps these issues, and not the students making some kind of conscious decision not to care, which are at the very root of why districts become unaccredited to begin with. That topic is beyond the scope of this Note.

166. Crouch, *supra* note 137; see also *supra* note 4.

167. See Singer, *supra* note 133.

Second, the transfer law also creates incentives to circumvent the entire accreditation system.<sup>168</sup> Decision-making officials no doubt consider all the negative consequences the school transfer law has on an unaccredited district. This might urge the officials to give an unaccredited district its provisional accreditation sooner than it should,<sup>169</sup> or could perhaps influence officials to refrain from giving unaccredited status to a district.<sup>170</sup> Such a situation nearly occurred when Chris Nicastro had to decide in September of 2013 whether or not to give Kansas City Public Schools provisional accreditation.<sup>171</sup> As one opinion piece that discussed the *Blue Springs* case and Chris Nicastro's decision pointed out, "[c]ompared with the chaos that will befall the Kansas City and outlying school districts if transfers begin, provisional accreditation seemed like a better alternative, even though it would be jumping the gun on the process."<sup>172</sup> If officials take a similar position that the "chaos" is just not worth it and "jump the gun," the accreditation system will be rendered worthless. "It doesn't do any good to have an accountability system if you compromise its integrity," Nicastro said.

In 2013, Kansas City Public Schools remained unaccredited, despite a higher score on its annual performance report.<sup>173</sup> The district received provisional accreditation in August 2014.<sup>174</sup> It is uncertain whether the possibility of transfers and the costs and other consequences associated with them weighed into the decision, as Kansas City Public Schools were able to improve upon their previous positive performance report.<sup>175</sup>

The Supreme Court of Missouri did not take any of these policy considerations into account when deciding the *Breitenfeld* case.<sup>176</sup> The only issues that were even addressed by the court were the negative effects on the respective school districts sending and accepting transfer students.<sup>177</sup> The court acknowledged but did not accept the argument that the school districts would experience adverse effects from the transfer laws, making it impossible for the districts to comply with the laws.<sup>178</sup> While the court pointed out that education statutes are to be liberally construed, it found that changes of public policy "in the province of the General Assembly" pointed it in a different direction in construing the transfer law.<sup>179</sup>

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168. See Shelly, *supra* note 1.

169. *Id.*

170. See Norwood, *supra* note 49, at 52.

171. Shelly, *supra* note 1.

172. *Id.*

173. Robertson, *supra* note 144.

174. *Id.*

175. See *id.*

176. *Breitenfeld v. Sch. Dist. of Clayton*, 399 S.W.3d 816, 829 n.25 (Mo. 2013) (en banc).

177. See *id.* at 834-36.

178. *Id.*

179. *Id.* at 829 & n.25.

The court decided on its own, without giving a reason, that its task in the *Breitenfeld* case “[could] not be to determine the fairness of [S]ection 167.131 as a matter of public policy, but rather . . . [must be] to assess whether the statute violates the Hancock Amendment by imposing an unfunded mandate.”<sup>180</sup> According to the court, if the statute gave students easier access to education without violating the Hancock Amendment, then the statute was constitutional, “regardless of any policy rationales advanced in the parties’ arguments.”<sup>181</sup> Though the court’s decision that the transfer law does not violate the Hancock Amendment seems to stand on solid ground, some of these public policy rationales merit some recognition by the court in order to find that the transfer law is inapplicable in some situations, including that of the *Breitenfeld* case.

One final consequence of *Breitenfeld* is possible abuse of the transfer law to exploit the public education system. The law is aimed at allowing students in unaccredited districts the opportunity to have a “better” education.<sup>182</sup> However, this principle is not implicated when the students using the transfer law to obtain tuition payments have never attended unaccredited schools. All of the children of the parents involved in *Breitenfeld* already attended accredited public schools or private schools.<sup>183</sup> Rather than being an opportunity for a child to receive a “better” education, the use of the transfer law in such a situation seems like a way to get a “free ride” where one was prepared to pay tuition expenses anyway.

Similarly, because of the mandate of the transfer law requiring a school to accept any student transferring under the law, what is to stop citizens of Missouri, or surrounding states for that matter, from moving to unaccredited districts like SLPS to take advantage of the law?<sup>184</sup> It is well-known that one of the most important considerations for a family in deciding where to live is the school district in the area.<sup>185</sup> A rational person who weighed the costs and benefits of moving to an unaccredited district with lower housing prices and the ability to send her children to a prestigious school district like Clayton<sup>186</sup> for free would likely determine it is well worth the costs of such a move to

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180. *Id.* at 829 n.25.

181. *Id.*

182. See Crouch, *supra* note 137.

183. *Breitenfeld*, 399 S.W.3d at 837 n.32.

184. See Missy McCoy, Note, *Unconditional Acceptance: The Supreme Court of Missouri’s Interpretation of Missouri Revised Statutes Section 167.131* Turner v. School District of Clayton, 318 S.W.3d 660 (Mo. 2010) (*En Banc*) (*Per Curiam*), 76 MO. L. REV. 941, 965-67 (2011).

185. *Id.* at 966.

186. The Clayton School District, and Clayton High School in particular, is consistently ranked very high in the U.S. News Best High School Rankings. In 2014, U.S. News ranked it the second highest in the state of Missouri and it ranked number 244 in the entire nation. *Best High Schools in Missouri*, U.S. NEWS & WORLD REPORT, <http://www.usnews.com/education/best-high-schools/missouri> (last visited Aug. 26, 2014).

live at a lower cost and send her children to an accredited district using the transfer law.<sup>187</sup> Those who take this route and those who were already in SLPS and invoked the transfer law would have no incentive to help SLPS become accredited again, but rather would be incentivized to keep SLPS unaccredited for the duration of their children's education. It is unlikely that this is the result intended by the legislature.

### *B. How to Alleviate the Problems*

Unfortunately, change is unlikely to be initiated by the Supreme Court of Missouri because its hands are tied. Its ruling in *Breitenfeld* rests on solid reasoning supported by precedent, and the court recently affirmed the validity of this ruling in *Blue Springs R-IV School District v. School District of Kansas City*.<sup>188</sup> Despite the inability of the Supreme Court to solve the problems created by the transfer law, all of these problems can be alleviated if changes are made by Missouri lawmakers.

The Supreme Court of Missouri had the opportunity to decide *Blue Springs R-IV School District v. School District of Kansas City* in December of 2013.<sup>189</sup> Similar to the Clayton taxpayers in *Breitenfeld*, taxpayers from five Kansas City area school districts brought a suit against Kansas City Public Schools ("KCPS") and the State of Missouri.<sup>190</sup> The taxpayers claimed that the accredited districts they lived in were being unconstitutionally required to provide new and increased levels of activities by educating the students transferring from the unaccredited KCPS.<sup>191</sup> The taxpayers argued that the Supreme Court should overrule *Breitenfeld* by striking down the transfer statute under the Missouri Constitution based on the argument that the increased cost of an activity constitutes an increase in the level of services, thus violating the Hancock Amendment.<sup>192</sup>

The court dismissed this argument in *Breitenfeld* using a one-sentence footnote: "[T]o the extent that *School District of Kansas City v. State* suggests in dicta that an increased cost of performing an existing activity or service itself can result in a Hancock violation, it is incorrect."<sup>193</sup> The court in *Blue Springs R-IV School District* rejected this argument again stating, "The holding in *Breitenfeld* is determinative. Section 167.131 does not mandate a new or increased level of activity but merely reallocates responsibilities among school districts."<sup>194</sup> The court went on to explain again that there was nothing new about requiring districts to provide free K-12 public education, even

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187. *See id.*

188. 415 S.W.3d 110, 111 (Mo. 2013) (en banc).

189. *Id.*

190. *Id.* at 111.

191. *Id.*

192. *Id.* at 114.

193. *Breitenfeld*, 399 S.W.3d at 826-31 & n.23.

194. 415 S.W.3d at 111.

if a specific district was being required to provide it to more students, resulting in a higher cost to the district.<sup>195</sup> Thus, rather than taking the opportunity to fix the veritable cornucopia of issues the transfer law was already causing and will inevitably cause in the future, the Supreme Court of Missouri followed its precedent and reaffirmed its ruling in *Breitenfeld*.<sup>196</sup>

Accordingly, the only option for solving the problems created by the transfer law and the rulings in *Breitenfeld* and *Blue Springs R-IV School District* is change from lawmakers. The ill-effects of the law far outweigh any benefits, and parents, taxpayers, and educators around Missouri have demanded and continue to demand that state representatives rewrite the law.<sup>197</sup> One change, proposed by Missouri Senator Jamilah Nasheed,<sup>198</sup> would require accreditation to be administered on a school-by-school basis, rather than on a district-wide level.<sup>199</sup> This would facilitate transfers of students from one school to another within that district instead of from one district to another.<sup>200</sup> Under the proposed law, “[the district with one unaccredited school] gets to keep that funding to educate [its] own kids” instead of the money going to a completely different district.<sup>201</sup>

The legislature passed a bill in May 2014 that repealed the transfer law and replaced it with a law containing language similar to Senator Nasheed’s proposed idea for accreditation based on individual schools and not entire districts.<sup>202</sup> The law also would have allowed students from unaccredited public schools to transfer to private, nonsectarian schools.<sup>203</sup> Governor Nixon vetoed the bill in June 2014 in part because it would allow for public money to be used to pay private school tuition and because he did not think it

195. *Id.* at 114.

196. *Id.*

197. Alan Scher Zagier, *School Leaders Ask Missouri Lawmakers For Transfer Fix*, KAN. CITY STAR (Sept. 23, 2013, 6:55 PM), <http://www.kansascity.com/2013/09/23/4503663/school-leaders-ask-missouri-lawmakers.html>; see also Dale Singer, *Nixon Vetoes School Transfer Bill, Citing Public Money for Private Schools and Other Concerns*, ST. LOUIS PUB. RADIO (June 24, 2014, 5:31 PM), <http://news.stlpublicradio.org/post/nixon-vetoes-school-transfer-bill-citing-public-money-private-schools-and-other-concerns>.

198. Ms. Nasheed is a senator elected in 2012 from St. Louis City and serves on the Joint Committee of Education. *Missouri State Senator Jamilah Nasheed*, MO. SENATE, <http://www.senate.mo.gov/13info/members/mem05.htm> (last visited June 8, 2014).

199. Colin Reischman, *Statutory Changes to Student Transfer Law Likely Coming in 2014*, MO. TIMES (Oct. 4, 2013), <http://themissouritimes.com/7158/statutory-changes-student-transfer-law-likely-coming-2014/>.

200. *Id.*

201. *Id.*

202. S.B. 493, 97th Gen. Assemb., 2d Reg. Sess. (Mo. 2014).

203. Marshall Griffin, *Wide-Ranging Student Transfer Bill Passed by Mo. Senate Committee*, ST. LOUIS PUB. RADIO (Feb. 20, 2014, 9:37 PM), <http://news.stlpublicradio.org/post/wide-ranging-student-transfer-bill-passed-mo-senate-committee>.

provided answers to the school transfer law problems but would instead create new problems.<sup>204</sup>

Given the numerous negative ramifications of the transfer law and the Supreme Court of Missouri's decisions in *Breitenfeld* and *Blue Springs R-IV School District*, it is obvious that the law must be replaced.

In the meantime, there is a possibility that litigation regarding the constitutionality of the transportation section of the transfer law could be successfully challenged by taxpayers as a Hancock violation. The court in *Breitenfeld* determined that the transportation provided for in the law was a new activity under the first prong of the unfunded mandate test to prove a Hancock violation.<sup>205</sup> However, the court was unable to find a Hancock violation in *Breitenfeld* because of the speculative nature of the evidence offered to prove the second prong of the unfunded mandate test.<sup>206</sup> If a taxpayer challenger brought concrete evidence to the table of the costs the transportation would entail, the court could perhaps find a Hancock violation. Successfully litigating this aspect of the transfer law could provide some relief for the unaccredited school districts while legislators draft a bill that will fix the problems and will be signed into law by the Governor.

## VI. CONCLUSION

The court in *Breitenfeld* upheld the school transfer law against a Hancock Amendment challenge.<sup>207</sup> This holding and the school transfer law have numerous unwelcome consequences that do not justify the law's continuing operation as it presently exists. In *Blue Springs R-IV School District*, the Supreme Court of Missouri affirmed its ruling in *Breitenfeld*, cementing the fact that school districts will not be able to find reprieve from paying tuition for transferring students or accepting transfer students into a district that cannot accommodate them.<sup>208</sup> Missouri lawmakers must not only agree on a change to the law, but they must also agree on a change that the Governor will sign. Only time will tell what becomes of Section 167.131.

The transfer law is just a bandage stuck on the overwhelming problem of underperforming and unaccredited school districts. It is a tragedy for Missouri's students that its legislature and Governor cannot find and agree on a solution. By enacting and enforcing the transfer law, unaccredited districts have little to no hope of ever becoming accredited again. Although it is beyond the scope of this Note, determining the underlying reasons that explain why districts become unaccredited is where the real solution to providing the

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204. Letter from Jay Nixon, Mo. Governor, to Jason Kander, Mo. Sec'y of State (June 24, 2014), available at [governor.mo.gov/sites/default/files/legislative\\_actions/veto\\_letters/SB%20493%20veto.pdf](http://governor.mo.gov/sites/default/files/legislative_actions/veto_letters/SB%20493%20veto.pdf); Singer, *supra* note 197.

205. 399 S.W.3d 816, 832-34 (Mo. 2013) (en banc).

206. *Id.* at 834.

207. *Id.* at 831.

208. 415 S.W.3d 110, 111-12 (Mo. 2013) (en banc).

best possible public education to Missouri's youth lies; it does not lie under the bandage of the transfer law.