IN THE SUPREME COURT OF MISSOURI

Appeal No. 89139

BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, ET AL.

Appellants,

vs.

MISSOURI STATE BOARD OF EDUCATION, ET AL.

Respondent

Appeal from the Circuit Court of Cole County
State of Missouri

Honorable Richard G. Callahan, Presiding

REPLY BRIEF OF APPELLANTS BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, ET AL.

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INTRODUCTION

Respondents raise various challenges to Appellants' claims that the "change of control" provision of Section 162.1100.3 violates various constitutional provisions and that the State Board's accreditation decision is void for being based on an unpublished rule instead of the MSIP Standards as required by the State Board's own rule. Each of Respondents' arguments must fail for the reasons detailed below.

ARGUMENT

I. Section 162.1100 violates the constitutional rights of voters by removing elected officials from office mid-term. The General Assembly's authority is limited to the extent it violates the constitutional rights of Missouri citizens.

The post-hoc nullification of votes pursuant to 162.1100.3[1] offends the constitutional right to vote, even where it is foreseeable that the will of the voters

[1] Respondents' note that under Section 162.621.2 the Board maintains the powers of auditing and public reporting. According to the circuit court, these powers "are to be employed in conjunction with the TSD." Cir. Ct. Op. 6. To say that the Elected Board, with no budget and no greater access to information than an ordinary citizen, has some meaningful authority to audit and publicly report on the

will be negated. This Court should follow the Illinois Supreme Court's reasoning in Tully v. Edgar in deciding this question of first impression and hold that Section 162.1100.3 is unconstitutional and void.

A. The General Assembly's authority is limited by the Constitution.

The right to vote is violated where a vote, once cast, has been deprived of its natural and intended effect. App. Br. 48-54. It is irrelevant that voters still have the right to vote. Resp. Br. 8. The General Assembly's discretion with regard to the nature and duration of the powers conferred on school districts is subject to constitutional limitations because the Constitution supersedes the legislative power of the General Assembly. App. Br. 56 (citing Tully v. Edgar, 664 N.E.2d 43, 49 (Ill. 1996) and Preisler v. City of St. Louis, 322 S.W.2d 748, 754 (Mo. 1959)).

While voters may not be entitled to vote for their board of education, the right to elect officials, once granted and exercised, cannot be nullified by the replacement of elected officials with appointed officials. Such a post-hoc

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SAB and the TSD, entities with sufficient power and resources to audit and publicly report, is a legal fiction that cannot be upheld by this Court.

nullification of votes violates the right to vote protected by the Missouri Constitution. App. Br. 46-57; see Three Rivers Junior College District v. Statler, 421 S.W.2d 235, 238 (Mo. 1967) (en banc) ("it is a basic principle that the General Assembly, unless restrained by the constitution, is vested in its representative capacity with all the primary power of the people." (emphasis added)).

Appellants do not argue that "the General Assembly is forever stuck with its initial parameters." Resp. Br. 10. The General Assembly can alter or amend the powers of a school board, however the General Assembly cannot enact legislation which transfers all authority from an elected to an appointed body during the term of office of the elected officials. See Tully, 664 N.E.2d at 51. Such an act would constitute a post-hoc nullification of the right to vote and infringe constitutional rights of voters.

B. Post-hoc nullification of votes is unconstitutional, even if such constitutional violation is forseeable.

Regardless of the "expectation and desire" of the typical voter,[2] Appellants' Point I is about whether the effective removal of elected officials violates the constitutional right of St. Louis voters, not about the forseeability of such an outcome. The General Assembly is limited, not by the expectations of the voters, but by the constitutional right to vote, which must necessarily include the right to have such vote be effective. See Resp. Br. 12; App. Br. 46-57. Section 162.1100.3 effects a post-hoc nullification of votes cast by residents of the City of St. Louis. It is not made constitutional by the fact that voters may have known that their right to vote could later be nullified under the current statutory scheme. The change of control provision is unconstitutional, regardless of whether voters knew of it or not.

[2] Respondents suggest that because Section 162.1100 and 162.621 were in place since 1998, voters went to the polls with the expectation and desire that elected representatives would be removed from office. Resp. Br. 11. While voters are generally aware of the role of an elected school board based on their own experience, the average voter would probably not be aware of the change of control provision of Section 162.1100.

C. **Illinois Supreme Court's Tully decision is persuasive and should be applied in this case of first impression**

The Illinois Supreme Court's decision in Tully v. Edgar stands for the principle that where a state constitution protects the right to vote, it must also protect the right to have a vote fully serve its purpose. Tully, 664 N.E.2d at 49. Elected officials cannot be removed mid-term. Id. at 51. Respondents' argument that the rights of the voters have not been violated because the Elected Board continues to hold office, despite being stripped of any meaningful authority amounts to a legal fiction and cannot be upheld.[3] See Resp. Br. 13-14; App. Br. 51-54 (regarding effective removal of Elected Board).

Cases identified by Respondents that have failed to follow Tully are distinguishable and should not be followed here. For instance, in the East St. Louis case, a statute provided that school board members failing to follow a valid order of the Financial Oversight Panel are subject to "administrative discipline"

[3] As explained in footnote 1, supra, the powers of auditing and public reporting retained pursuant to Section 162.621.2 are meaningless in that they are not exclusive to the Elected Board, and the Elected Board has no resources and no more right of access to information than an ordinary citizen.

including removal from office. East St. Louis Fed. of Teachers v. East St. Louis Sch. Dist. No. 189 Fin. Oversight Panel, 687 N.E.2d 1050, 1058 (Ill. 1997). In East St. Louis voters elected officials with the expectation that they would be removed for cause. Similar provisions exist in Missouri law. See Mo. Rev. Stat. § 162.631 (providing process for removal for acts of misconduct). Under such provisions, officials trigger their removal by their own acts of misconduct. Here, the event triggering the removal of the Board is the unaccreditation of the District, a decision based on the actions and results of past administrators and Board members before the ousted Board members took office.[4] Further, language from that case quoted by Respondents regarding the nature of school districts as legislatively created entities was not a part of the court's analysis of the voters' rights issues but rather its analysis of whether school districts have standing to bring due process claims. Resp. Br. 14-15; East St. Louis, 687 N.E.2d at 1059.

[4] For all other school districts in Missouri, a district must be classified as unaccredited for two successive years before its corporate organization lapses and the district's board of education is removed from office. Mo. Rev. Stat. § 162.081 (2000). Here, the Elected Board was immediately removed from office upon the District being declared unaccredited.

East St. Louis doesn't alter the Illinois Supreme Court's holding in Tully that the legislature's authority to enact any statute is subject to constitutional limitations, including the fundamental right to vote. Tully, 664 N.E.2d at 49.

The Shook case out of the D.C. Circuit is also inapposite. Resp. Br. 15 (citing Shook v. District of Columbia Fin. Resp. and Mgmt. Asst. Auth., 132 F.3d 775 (D.C. Cir. 1998)). The court in Shook, relying on a previous D.C. Circuit case and distinguishing cases from other jurisdictions protecting votes from nullification based on state law, held that the right to vote for a board of education, granted by Congress, can be taken away by Congress. Id. at 781 (citing Hobson v. Hanson, 265 F.Supp. 902 (D.D.C. 1967)). The Hobson case was decided based on the authority granted to Congress over the District of Columbia under the U.S. Constitution. 265 F.Supp. at 907. Neither Hobson nor Shook involved the rights of voters under state constitutional provisions protecting the right to vote and those cases are therefore not on point in this case.

Finally, the Ohio appellate court cases, East Liverpool and Barnsville, are also distinguishable. Resp. Br. 15-16. These cases challenged a statute requiring a commission to oversee the finances of a school district declared to be in a state

of fiscal emergency, with the board of education retaining all other authority. See East Liverpool Educ. Ass'n v. East Liverpool City Sch. Dist. Bd. of Educ., 893 N.E.2d 916, 922 (Ohio App. 2008); Barnesville Educ. Assoc. OEA/NEA v. Barnesville Exempted Village Sch. Dist. Bd. of Educ., 2007 WL 745095 (Ohio App. Mar. 6, 2007) (unpublished). These Ohio courts declined to follow Tully because Tully involved the removal of a board, as opposed to the loss of only limited financial powers. Id. at 923. The case at bar is factually similar to Tully in that here the Elected Board was removed from office and this Court should apply Tully and declare 162.1100.3 unconstitutional.

II. This Court should follow the current trend in Due Process jurisprudence and find that the Elected Board members have a property interest in their office and that they were denied procedural due process when they were removed from office.

Respondents suggest this Court should follow an outdated and antiquated notion of what constitutes "property" for purposes of due process analysis. Pursuant to Section 162.1100 the members of the Elected Board were removed from office without adequate notice or any opportunity to be heard. For the

reasons explained below and in Point II of Appellants' Brief, such removal violated the Board members' rights to due process under the Missouri and United States Constitutions. See App. Br. 57-80.

A. This Court should follow the current trend and find a property interest in elected office.

Respondents cite to a U.S. District Court case from the Northern District of Illinois, for the proposition that older United States Supreme Court cases held that an elected official does not have a property right in his office. See Brown v. Perkins, 706 F.Supp. 633, 634 (N.D. Ill. 1989) (citing Taylor v. Beckham, 178 U.S. 548 (1900) and Snowden v. Hughes, 321 U.S. 1, 7 (1944)). The court in Brown recognized that under these older cases, no such right was found and went on to discuss how the concept of property interests has since expanded and evolved and ultimately determined due process safeguards were present in that case. 706 F.Supp. at 634. Citing Snowden, the East St. Louis court addressed this same issue and acknowledged that the individual board members may not have a property right to their offices secured by the federal Due Process Clause, but that

an elected official may have a property right in his office if such an interest is given to them under state law. 687 N.E.2d at 1060-61.

Respondents also rely on a Second Circuit case holding that there is no property interest in public office. Resp. Br. 22 (citing Levy v. Velez, 401 F.3d 75 (2nd Cir. 2005)). The court in Levy recognized that "intervening cases have cast a shadow over Taylor and Snowden" and that since then, the U.S. Supreme Court "has adopted a more expansive approach to identifying 'property'". Levy, 401 F.3d at 86-87. This Court should follow the trend in due process jurisprudence acknowledged in Brown and Levy and followed in the large number of jurisdictions cited in Appellants' Brief [5] that have found a property interest in public office. Even if this Court believed that there can be no property interested in elected office under the Fourteenth Amendment due process clause, that does not preclude this Court from finding a liberty interest within the meaning the Missouri due process clause.

[5] See App. Br. 69-71, n.12, n.13, n.14.

B. Board members have been constructively removed from office and claim a property right in their elected office.

It seems unlikely that this Elected Board which, according to the Respondents and the circuit court, has no financial resources whatsoever, can effectively perform any function. See Resp. Br. 23. Further, the auditing and reporting functions are meaningless functions that, according to the circuit court, are not even held exclusively by the Elected Board. Cir. Ct. Op. 6; see also App. Br. 52-54. The Elected Board lacks the resources and access to information necessary to exercise these functions. Thus, after the transfer of powers to the SAB the Elected Board exists only as an empty shell.

Appellants do not claim a property interest in their powers. Resp. Br. 23. Missouri statutes grant powers to the Board and the voters elect individuals to serve on the Board to exercise those powers.[6] When all of the powers of the

[6] Respondents' argument that Appellants acquired a property interest subject to the unconstitutional "change of control" statute is meritless. Resp. Br. 24-25; App. Br. 57-80. The change of control provision is unconstitutional for the reasons explained herein and in Points I through III of Appellants' Brief. Respondents' suggestion that Appellants have no property interest in their elected office because

Elected Board are removed, those Board members are removed from office. To say they still have the title of Board member with nothing to do or only a token role with no resources or access to information is disingenuous. Further, if school board members did not have a right to notice and a hearing before their removal from office, why would 162.631 provide such a process prior to removal of board members for cause? Appellants urge this Court to follow the modern trend of due process jurisprudence and find that Appellants have a protected property interest in their office which entitles them to due process before removal from office. See App. Br. 64-73.

C. **Appellant Board members were not afforded sufficient due process.**

It is Section 162.1100.3, which removes the Elected Board from office, that is at issue in this case. That statute does not provide any procedural safeguards such as notice or a hearing for the Elected Board members. With regard to the claim that the Board members were on notice by virtue of Section 162.1100.3,

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they took office subject to an unconstitutional provision is logically suspect and must fail.

Board members were also on notice that Section 162.081 gives school districts two years to regain accreditation before they lapse and their board is removed from power. See Resp. Br. 26-31. The Elected Board members had no way of knowing whether the State Board would apply the lapse statute or Section 162.1100.

Respondents note removal from office is automatic under Section 162.1100.3 and therefore assume that Appellants are arguing that they were deprived of a right to be heard on the issue of accreditation. Dr. Bourisaw's meeting with the State Board to discuss accreditation does not satisfy the Board members' rights to a hearing before the deprivation of their property interest in their elected office.[7] No Board member was given any opportunity to be heard by the State Board before being deprived of their elected position. Downs Test. 68-69 (9/25/07).

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[7] Further, even Dr. Bourisaw was denied the opportunity to be heard by the State Board in the months leading up to the accreditation decision. Bourisaw Test. 129-30 (9/25/07).

Respondents argue the Board was provided a hearing through the appeal of the State Board's accreditation decision to the Commissioner of Education.[8] Resp. Br. 30-31. The District's right to appeal the accreditation decision cannot be construed as a sufficient hearing for the individual Board members prior to the loss of their elected office. Respondents try to erase the distinction between the unaccreditation of the District and the effective removal of the Elected Board members. The State Board's accreditation decision, whether properly made or not,[9] is merely the triggering event under the unconstitutional change of control provision of 162.1100.3.

The removal of the Elected Board from office without notice or a hearing violates the individual board members' constitutional right to procedural due process. It is incredulous to argue that Board members have no right to a hearing when their removal is triggered by an accreditation decision based on the

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[8] This appeal of the State Board's accreditation decision is not especially meaningful in light of the fact that appeal is to the Commissioner of Education, an individual appointed by the State Board that serves at the pleasure of the State Board. See Mo. Rev. Stat. § 161.112 (2000).

[9] See Point IV of Appellants Brief and Section IV of this Reply Brief.

performance of past administrators and Board members before the ousted Board members even took office, yet when a Board member is accused of misconduct, Section 162.631 provides for formal notice and a right to a hearing. The circuit court's decision should be reversed and the transfer of powers to the SAB be held void.

III. Section 162.1100 contains a classification applicable only to the Elected Board, which is not afforded the special constitutional treatment of the City of St. Louis.

The circuit court erroneously held that Section 162.1100, which only applies to the Elected Board, is not a "special law" in violation of Article III, Section 40 of the Missouri Constitution. Cir. Ct. Op. 54. Appellants do not suggest this Court narrow cases such as Jefferson County Fire Protection Districts Association v. Blunt, but rather urge this Court to apply such cases in a manner consistent with their reasoning. See Resp. Br. 32 (citing 205 S.W.3d 866 (Mo. 2006)(en banc)). Section 162.1100 applies to the Elected Board, not the City of St. Louis and the law is presumptively unconstitutional because the limitation contained therein creates a closed class.

A. **Section 162.1100 is the primary change of control statute.**

Respondents' incorrectly argue that Section 162.621.2, rather than Section 162.1100, is the controlling and primary "change of control" statute. Resp. Br. 33. Section 162.1100.3 provides:

> In the event that the school district loses its accreditation . . . any powers granted to any existing school board in a city not within a county on or before August 28, 1998, shall be vested with the [SAB] . . . except as otherwise provided in section 162.621.

Mo. Rev. Stat. § 162.1100.3 (2000) (emphasis added). Section 162.621.2 provides:

> [T]he powers granted in subsection 1 of this section shall be vested, in the manner provided in section 162.1100, in the [SAB] if the school district loses its accreditation . . . .

Mo. Rev. Stat. § 162.621.2 (2000) (emphasis added). Section 162.621.1 grants the primary powers of the Elected Board. Section 162.621.2 was only added by SB781 to avoid inconsistency between Sections 162.1100 and 162.621.

Further, 162.621.2 clearly states that the powers of the Elected Board shall transfer "in the manner provided in section 162.1100." Not only does this language implicitly recognize that 162.1100 is the primary change of control provision, it also limits the effectiveness of Section 162.621.2 to be dependent upon Section 162.1100. The repeal of Section 162.1100.3 would prevent any change of control under either statute, but the repeal of Section 162.621.2 would not.

B. "City not within a county" is only constitutionally permissible in legislation addressing the City of St. Louis.

This Court has only refused to entertain "special law" attacks on statutes employing the "city not within in a county" limitation because:

> St. Louis City is given specific recognition in Art. IV, § 31,[10] of the Constitution of Missouri as being sui generis, a unique entity in a unique class. Legislation enacted to address the class of which St. Louis City is the only member is therefore not special legislation within the meaning of Art. III, § 40.

[10] Recognizing City of St. Louis as both a city and a county.

Zimmerman v. State Tax Comm'n, 916 S.W.2d 208, 209 (Mo. 1996) (en banc). Thus, St. Louis is afforded special treatment in the area of local and special legislation because of the City's special status under the Missouri Constitution. Though the SLPS District and the Board are defined by the same boundaries as the City, they are separate entities that do not enjoy its unique constitutional attributes and the reason for exempting St. Louis from the Constitution's prohibition on local and special laws is inapplicable to the Board of Education.

Respondents' claim that "hundreds" of statutes use the phrase "city not within a county" is irrelevant to determining the constitutionality of this statute. Resp. Br. 36. Furthermore, the majority of those statutes relate to the City of St. Louis itself and are therefore constitutionally sound. Even statutes such as 162.571 (creating the Board of Education of the City of St. Louis) and 160.011 (defining "metropolitan school district" as any school district the boundaries of which are coterminous with the limits of any city which is not within a county) use "city not within a county" to describe the City itself, and makes the boundaries of the District dependent on those of the City. The fact that some other statutes use

the "city not within a county" designation does not change the fact that Section 162.1100.3 is an unconstitutional special law.

C. Section 162.1100 is facially special.

The threshold issue under this Court's special laws analysis is whether the statute is "facially special" (and therefore presumptively unconstitutional) meaning the limitations contained therein are "based on close-ended characteristics, such as historical facts, geography, or constitutional status." Jefferson County, 205 S.W.3d at 870.

Respondents' contend that this law is not facially special because there are two school districts in a city not within a county, the SLPS District and the TSD. Resp. Br. 39. Under this interpretation, Section 162.1100 must be applicable to both the SLPS District and the TSD. This argument is not feasible and illogical. Under Respondents' proposed understanding of this statute and of the SAB, should the TSD lose its accreditation (which it has), any powers granted to the SAB vest in the SAB. This makes no sense.

Furthermore, the change of control provision refers to the powers granted to "any existing school board in a city not within a county on or before August 28,

1998." Whereas the Elected Board is created and defined as a "Board of Education," the SAB is not. Mo. Rev. Stat. §§ 162.571, 162.1100. Furthermore, the SAB had no active members and was not an existing board on or before August 28, 1998. Thus, not only is Respondents' proposition that the change of control provision applies to the Elected Board and the SAB inherently illogical, it cannot be read in the manner Respondents propose.

Respondents also suggest the class is open because, under 162.081.4 the State Board could establish new districts in any lapsed territory. Mo. Rev. Stat. § 162.081.4 (2000). Section 162.1100.3 transfers powers of an existing school board on or before August 28, 1998. No other school board existed in a city not within a county on or before August 28, 1998 and therefore no other school board held powers on or before August 28, 1998. The class to which the statute applies is closed as a matter of history and the statute is facially special and presumptively unconstitutional. This Court must find Section 162.1100 unconstitutional and the effect of its application void.

IV. The State Board violated its accreditation rule by not basing its decision on the MSIP Standards. The State Board's decision is void because it was based on an analysis under an unpublished invalid rule.

Respondents' arguments regarding the documents[11] involved in the accreditation decision misstate the State Board's process and DESE's role in unaccrediting the District. DESE's UYAPR Manual is an invalid unpublished rule the State Board utilized in making its accreditation decision. This Court should

[11] The three documents relevant to this issue consist of: the State Board's MSIP Rule (Ex. 1), published by the State Board and describing the process for the State Board's accreditation decision; the State Board's Standards and Indicators Manual (Ex. 2) which is incorporated by reference into the State Board's MSIP Rule and contains the Standards which the State Board is required to analyze in classifying districts; and DESE's UYAPR Manual (Ex. 3), which is an invalid unpublished rule containing calculations and additional requirements relating to the Performance Standards which DESE and the State Board utilized in classifying the District as unaccredited.

hold that the State Board's accreditation decision is void and that the transfer of powers to the SAB is therefore a nullity.[12]

A. DESE's UYAPR Manual is not incorporated in the MSIP Rule and is not a valid basis for the State Board's decision.

Respondents argue that because DESE's UYAPR Manual is referenced in the State Board's MSIP Rule that it is incorporated into that Rule.[13] Resp. Br. 51-52. This argument was never raised by the Respondents before the circuit court and it is odd to suggest that the State Board would try to incorporate by reference a document DESE created and that DESE is to utilize. The State Board's MSIP Rule does incorporate by reference an outside document, and it does so explicitly.

[12] Respondents' discussion of the standard of review (Resp. Br. 46-49) reaches the same conclusion as Appellants in their Brief, that a court reviewing a circuit court's review of a non-contested administrative agency decision is the same as any other judgment in judge-tried case but Respondents misstate the law by claiming there is no difference in the standard applied by the circuit court and this court. Resp. Br. 47; App. Br. 91.

[13] The circuit court held that DESE's UYAPR Manual is a rule that should have been noticed and published pursuant to Section 536.021. Cir. Ct. Op. 31-32.

The published MSIP Rule, which casually references DESE's "annual MSIP" explicitly incorporates the Standards and Indicators Manual:

> (1) . . . incorporated by reference and made a part of this rule the *Missouri School Improvement Program (MSIP) Standards and Indicators Manual* . . . Anyone interested in viewing or requesting a copy of the MSIP Manual (Revised September 2004) may contact the School Improvement and Accreditation Section . . . .

Ex. 1. The State Board clearly expressed its intent to incorporate by reference its Standards and Indicators Manual and included information regarding access to the incorporated materials pursuant to Section 536.021.2(3). The State Board would not go to such lengths to incorporate the State Board's Standards and Indicators Manual into its MSIP Rule, and then incorporate another document only by casual reference. This argument was never raised before the circuit court and it is only brought now because the circuit court found DESE's UYAPR Manual was an unpublished rule.[14]

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[14] As described later in this Brief, the State did not appeal that finding and cannot do so now. Infra at 34.

The State Board may expect DESE to use scoring guides and forms in reviewing school districts. That does mean that the scoring guide, found in DESE's UYAPR Manual is not a rule that DESE should have noticed and published. Further, the State Board's MSIP Rule requires the State Board to use the MSIP standards, described in detail in its Standards and Indicators Manual, in classifying school districts. Ex. 1, 2. The State Board is not authorized to use DESE's UYAPR Manual in making accreditation decisions.

Regardless of how DESE utilizes its UYAPR Manual, the fact remains that the District was evaluated in terms of whether it met certain standards as determined under that invalid unpublished rule.[15] As this Court held in its recent decision in Department of Social Services v. Little Hills Healthcare, decisions of an administrative agency based on an unpublished invalid rule, such as the State

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[15] The circuit court's findings of fact include an in-depth review of whether certain performance standards were "met" or "not met" as determined under DESE's invalid UYAPR Manual. Cir. Ct. Op. at 16-27. However the requirement that a district must meet a certain number of performance standards, as well as the calculations for determining whether such standards are met or not met are found exclusively in DESE's UYAPR Manual. See App. Br. 108-09.

Board's accreditation decision, are void. 236 S.W.3d 637, 643 (Mo. 2007) (en banc).

DESE's role is not merely "advisory" because the District's performance was evaluated in terms of DESE's analysis and conclusions regarding performance as measured pursuant to its unpublished UYAPR Rule. See Resp. Br. 55; App. Br. 105-116. While Respondents state the State Board is free to ignore DESE's recommendations and evaluate a school district's performance differently, that is not how the State Board proceeded here. Resp. Br. 55, 78. The State Board left it to DESE to analyze the District's performance under DESE's UYAPR Manual and adopted DESE's analysis. See App. Br. 105-16. Thus, the District was evaluated and unaccredited based on an invalid rule, the State Board's accreditation decision is void and the transfer of control to the TSD and SAB is a nullity.

B. The State Board did not analyze Resource and Process Standards because the State Board's accreditation decision was based on DESE's UYAPR Manual.

By failing to analyze Resource and Process Standards, the State Board failed to follow its own administrative rule. See Resp. Br. 56. Instead of considering the MSIP Standards as they are described in the MSIP Standards and Indicators Manual, as required by the MSIP Rule, the State Board relied on DESE's analysis under the UYAPR Manual and other factors outside of the MSIP. The State Board's failure to analyze two of the three types of MSIP Standards highlights the fact that the State Board did not follow its own rule.

Nothing in the record suggests, nor did Respondents argue before the circuit court, that the State Board ordered a "re-review" limited to Performance Standards, excluding Resource and Process Standards and nothing in the State Board's MSIP Rule suggests that a re-review should be anything other than a full review. See Resp. Br. 57-58. Under the State Board's MSIP Rule, the State Board is required to classify school districts based on all three types of standards of the MSIP Rule. Ex. 1. Only Performance Standards were analyzed in 2006

because prior to 2006, DESE changed its UYAPR Manual by eliminating review of Resource and Process Standards and limiting its accreditation review to only Performance Standards. App. Br. 109 n.16.

C. The State Board cannot base its accreditation decision on factors outside of the MSIP Standards.

The State Board's accreditation decision was arbitrary and capricious to the extent it was based on factors outside of the MSIP.[16] The State Board's MSIP Rule requires the accreditation decision to be based on the standards of the MSIP Rule, which incorporates the Standards and Indicators Manual and its description of the Resource, Process and Performance Standards by which school districts are to be evaluated and classified. Here the State Board utilized information provided

[16] The State Board proffered three reasons at trial for its decision to unaccredit the District: 1) the District's achievement with regard to the MSIP Performance Standards; 2) the District's financial condition, and 3) "disarray" of District leadership. Herschend Test. 191-93, 213, 221 (10/2/07). The circuit court found that the State Board's decision was based on the information provided by the Advisory Committee and the information provided by DESE at the March 22, 2007 meeting. Cir. Ct. Op. 28.

by the Advisory Committee and DESE's evaluation of the District pursuant to DESE's UYAPR Manual. In so doing, the State Board based its accreditation decision on an unpublished rule and other factors outside of the MSIP Standards, contrary to the State Board's MSIP Rule.

D. **Void for vagueness claim is preserved for appeal and DESE's UYAPR Manual cannot form a basis for arguing the MSIP Standards are not unconstitutionally vague.**

Respondents argue that the MSIP Rule cannot be challenged as void for vagueness because Point Relied On IV does not expressly mention the State or Federal due process clauses. Point IV clearly states that the circuit court erred in upholding the State Board's accreditation decision because, among other reasons, "the MSIP standards, standing alone, are too vague to adequately inform a district what is required for accreditation . . . ." App. Br. 89. Thus, the vagueness issue is identified in Point IV and Appellants dedicated four pages of their Brief to a discussion of this issue. App. Br. 116-120. The issue is not merely "casually referenced" in Appellants' argument. Resp. Br. 65. Rule 84.04(d) provides that the points relied on shall "state concisely the legal reasons for the appellant's

claim." The rule does not require citation to the constitutional provision on which the vagueness doctrine is based.

Respondents incorrectly argue that the MSIP rule is not void for vagueness because DESE's UYAPR Manual describes how the Performance Standards are evaluated. Resp. Br. 67. Without that document, the standards found in the State Board's Standards and Indicators Manual are unconstitutionally vague, however requiring DESE's UYAPR Manual to clarify these standards invalidates the accreditation decision as being based on an invalid rule.[17] Under either circumstances, the decision of the State Board cannot stand.

E. State Board's decision is void because based on an invalid rule.

Respondents' argue that the State Board's accreditation decision should stand because "the UYAPR Manual is not a 'rule' under Section 536.010. Resp. Br. 69. The circuit court analyzed the issue and held that DESE's UYAPR

[17] Further, the standards discussed at trial and analyzed by the circuit court were met under the plain language of Standards 9.4.2 and 9.4.3 because performance was "high or increasing." See Standards and Indicators Manual, Ex. 2. Only by applying the calculations found in DESE's UYAPR Manual could the State Board and circuit court determine these standards were not met. App. Br. 113-16.

Manual is an unpublished rule. Cir. Ct. Op. 31-32. Respondents never filed an appeal or a cross-appeal to dispute that holding and are now precluded from challenging the circuit court's decision on this issue.[18] Respondents' argument that DESE did not need to promulgate its rule because it was incorporated by reference into the State Board's MSIP Rule must also fail for the reasons explained herein, supra at 26-27.

Respondents claim, without authority, that the failure of one agency to promulgate a rule cannot render a decision of another agency void. Resp. Br. 77. As explained, decisions of an administrative agency based on an unpublished invalid rule are void. Little Hills Healthcare, 236 S.W.3d at 643. The State Board's accreditation decision is void because the State Board relied on DESE's unpublished rule.

Respondents' reliance on the Missouri NEA v. Missouri State Board Bd. of Education case is misplaced. See Resp. Br. 77. In that case the "guidelines" DESE presented to the State Board were held not to constitute a rule which must

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[18] Even if this issue could be considered on appeal, the UYAPR Manual is a rule for the reasons explained by the circuit court. Cir. Ct. Op. 31-32.

be published but were instead a compilation of past reasons for granting exemptions to statutory budget constraints for school districts. 34 S.W.3d 266, 286-87 (Mo. Ct. App. 2000). Further, no evidence was presented that those guidelines were utilized in that case. Id. Conversely, DESE's UYAPR Manual provides generally applicable standards for determining the accreditation status of all Missouri school districts that was utilized by the State Board in making accreditation decisions. App. Br. 105-116. Indeed, Respondents argue and the circuit court found that it was used by the State Board to make its decision. See Cir. Ct. Op. 14-28.

Respondents also question whether the UYAPR Manual being "void" means the calculations therein cannot be performed or must be performed differently. Resp. Br. 78. Respondents miss the point that the calculations – and all of the other standards found only in DESE's UYAPR Manual – cannot be utilized by the State Board in making its accreditation decision, and because the State Board's decision was based on the measure of Performance Standards contained in the UYAPR Manual, that decision is void. Finally, it is irrelevant

that the State Board was not required to accept DESE's analysis and base its decision on an unpublished invalid rule, it is only relevant that they did so.[19]

The issue here is not the District's actual performance, but whether the State Board's decision was based on an invalid rule, as opposed to its own published rule. See Resp. Br. 80. Respondents cite an Iowa case holding that an agency's failure to promulgate a medicaid manual did not void the agency decision. Resp. Br. 81 (citing Fears v. Iowa Dept. Human Services, 382 N.W.2d 473, 476 (Iowa App. 1985)). That decision is not relevant here, as this Court reached the opposite conclusion in 2007 when it held that an administrative agency decision based on an unpublished rule is void. Little Hills Healthcare, 236 S.W.3d at 643.

The State Board's MSIP Rule requires the State Board to classify school districts based on the standards of the MSIP, which includes Resource, Process, and Performance standards. See Ex. 1, 2. Instead, the State Board based its

[19] Further, Respondents' argument that Appellants cannot now challenge the State Board's decision because they beseeched the State Board in November 2006 to ignore DESE's analysis and recommendations (based on DESE's invalid UYAPR Manual) is illogical. Resp. Br. 79.

decision to unaccredit the District primarily on standards and calculations of DESE's unpublished UYAPR Manaul, as well as an Advisory Committee's Report, which was used primarily to justify the re-establishment of the Transitional School District. Without DESE's UYAPR Manual, much of the MSIP Standards are unconstitutionally vague, but by utilizing the UYAPR Manual to interpret its own vague standards the State Board relies on an invalid unpublished rule. Under either scenario the State Board's decision cannot stand.

V. Appellants' challenge to the State Board's accreditation decision is brought pursuant to Section 536.150 and, even if it weren't Little Hills Healthcare still applies.

The circuit court properly held that DESE's UYAPR Manual is a rule that should have been noticed and published and noted that, under this Court's recent decision in Little Hills Healthcare, a decision based on an invalid rule is void. Cir. Ct. Op. at 31-32. The circuit court erroneously tried to avoid application of Little Hills Healthcare by arguing Appellants' claims did not arise under Chapter 536. Appellants' Petition was a petition for review under 536.150; it was entitled a "Petition for Review and Declaratory Judgment" and sought judicial review of the

State Board's noncontested case accreditation decision. See App. Br. 127-34. No "liberal construction" of the Petition is needed here because it clearly qualifies as a 536.150 petition. Resp. Br. 83.

Further, the circuit court erroneously concluded that if Appellants' Amended Petition was not brought pursuant to Chapter 536 the holding of Little Hills Healthcare would not apply. Cir. Ct. Op. 33. That case stands for a simple principle of law that applies in the context of the State Board's reliance on the unpublished UYAPR Manual. Decisions of an administrative agency based on an invalid rule are void. 236 S.W.3d at 643. Nothing in Little Hills Healthcare requires the words "petition for review pursuant to 536.150" to appear in the petition. Id. The State Board relied on DESE's unpublished rule in making its accreditation decision. Thus, the State Board's accreditation decision is void.

Respondents next argue that Appellants do not have standing under 536.150 because the Board is not a "person" under 536.150. Resp. Br. 83. "Person" is not defined for purposes of Chapter 536. See Mo. Rev. Stat. § 536.010. Section 1.020 of the Missouri Statutes provides that "as used in the statutory laws of this state . . . the word 'person' may extend and be applied to

bodies politic and corporate . . . ." Mo. Rev. Stat. § 1.020(11) (2000). Thus, unless defined more narrowly a particular chapter, the term "person" is to be read broadly. Furthermore, the fact that so many legislative enactments refer specifically to "natural persons" clearly demonstrates that the General Assembly knows how to limit a statute's application to "individuals." See, e.g., Mo. Rev. Stat. §§ 67.1600, 105.470, 130.054.

Respondents' argument also disregards the fact that political subdivisions have been allowed to invoke the protections of Chapter 536. See, e.g.; State ex rel Riordan v. Dierker, 956 S.W.2d 258 (Mo. 1997) (en banc); Taney County v. Empire District Electric Co., 309 S.W.2d 610 (Mo. 1958). In addressing whether a county had standing in a contested case, this Court reasoned that counties levy taxes and therefore have a "vital interest in all questions relating to the levy and assessment of taxes" and therefore had standing under Section 536.100 to challenge an action of the State Tax Commission. In re St. Joseph Lead Co., 352 S.W.2d 656, 661 (Mo. 1961). The Court further noted that: "It is not suggested that there is any impropriety, in a moral or ethical sense, in allowing political units

the right of judicial review and no practical reasons of unfairness are advanced." Id.

Respondents cite St. Francois County School District R-III v. Lalumondier, for the proposition that Appellants lack standing to seek review of the State Board's decision. Resp. Br. 84 (citing 518 S.W.2d 638 (Mo. 1975) (en banc). In Lalumondier, this Court held that a school district did not have standing to challenge the valuation determinations of the county board of equalization relating to non-district property because there was a statute in place limiting the right of appeal to the state tax commission to property owners. Id. at 640. There is no statute addressing the right to appeal the decision of the State Board of Education.[20] The Court's holding in Lalumondier is limited to review of assessment decisions regarding another party's property by county boards of equalization. See, e.g., State ex rel. School District of the City of Independence v. Jones, 653 S.W.2d 178, 188 (Mo. 1983)(en banc).

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[20] The Court in Lalumondier also held that the school district did not have standing under Section 536.150 because the assessment decisions regarding another party's property did not affect the rights, duties or privileges of the school district. Id. at 643.

The school district in that case was attempting to protect the public interest, and not an interest unique or private to the school district, because it related to property privately held by another property owner. Conversely, the State Board of Education's decision here directly impacts upon the Appellants. The reasoning of Lalumondier cannot be applied where no statute limiting the right to appeal is present and where the challenge is to the State Board's decision which very clearly affects the District's Board, students, residents, and taxpayers.

Finally, in State ex rel. School District of Independence v. Jones, this Court expressly acknowledged "[p]ublic policy favoring judicial review of administrative decisions at the request of those aggrieved is firmly established in this state and extends to political subdivisions" and that "absent legislation to the contrary and so long as in furtherance of its duties a school district is empowered to initiate any action that would be available to a private individual in the same circumstances." Resp. Br. 86; Jones, 653 S.W.2d at 186-89. Jones clearly supports the proposition that the Elected Board does have standing here. Furthermore, individual appellants – specifically, elected Board members, parents, students, taxpayers and voters – are clearly affected by the State Board's

accreditation decision, yet under Respondents' theory, no party would have the right to challenge the State Board's use of an unpublished invalid rule in making accreditation decisions.

Appellants' challenge to the State Board's accreditation decision seeks judicial review of a non-contested case administrative decision pursuant to Section 536.150, and even if it did not, the holding of Little Hills Healthcare applies here. Respondents' arguments that Appellants do not have standing is meritless and based on case law that stands for a far more limited legal principle than Respondents suggest. This Court should rule that the State Board accreditation decision was based on an invalid rule and is void.

VI. This Court should give Section 162.1100 its plain and ordinary meaning and not apply rules of statutory construction that would twist the meaning of the Statute to create illogical results.

Section 162.1100.3[21] is plain and unambiguous and therefore principles of statutory construction are not necessary to interpret it. The statute only transfers powers held by the Elected Board on or before August 28, 1998. Appellants'

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[21] Respondents again argue that Section 162.621, and not 162.1100 is the principal "change of control" statute. Appellants have explained herein why this contention is incorrect. Supra at 20-21.

acknowledgement than all of the powers of the Elected Board have transferred to the SAB is based on the circuit court's conclusion that Appellants are without any power aside from the shared and empty functions of auditing and public reporting. Resp. Br. 89-90. Such acknowledgement does not alter our contention that this conclusion is incorrect.

If "statutory language is clear, unambiguous, and admits of only one meaning, there is no room for construction and the legislature is presumed to have intended what the statute says." Resp. Br. 91. In the event the District loses its accreditation, "any powers granted to any existing school board in a city not within a county on or before August 28, 1998, shall be vested with the [SAB]." Mo. Rev. Stat. § 162.1100.3 (2000). This statutory provision is clear and unambiguous and expressly limits the transfer of powers to those granted to the Elected Board on or before Augsut 28, 1998.[22] Id. Appellants have not addressed why the General Assembly chose to bifurcate powers in this manner because this question is not at issue in this case. The issue here is what powers transfer to the SAB under the plain language of Section 162.1100.3. See Resp. Br. 94.

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[22] The fact that the Truly Agreed and Finally Passed SB 781 provided that "any powers granted . . . on or before the effective date of this section . . . ." and that the date limitation was added by the Revisor of Statutes is irrelevant. See Resp. Br. 92-93, n.22. The statute would have the exact same meaning under either verbiage because the effective date of the statute was August 28, 1998.

Furthermore, it is irrelevant that the date limitation does not appear in Section 162.621.2 because Section 162.1100.3 is the operative change of control statute and Section 162.621.2 expressly states that powers shall vest "in the manner provided in Section 162.1100." Supra at 20-21; Resp. Br. 94. Thus, it is not necessary for the date limitation to appear in both statutes. Section 162.621 only references the change of control provision of Section 162.1100 so as not to create an inconsistency between the two statutes.

Respondents urge this court to apply the "last antecedent rule" of statutory construction and read Section 162.1100 to mean that the "on or before August 28, 1998" date limitation should refer only to school boards existing on or before August 28, 1998. Resp. Br. 95. Such a reading would twist the plain meaning of Section 162.1100. Where "statutory language is clear, unambiguous, and admits of only one meaning, there is no room for construction and the legislature is presumed to have intended what the statute says." Corvera Abatement Tech. Inc. v. Air Conservation Comm'n, 973 S.W.2d 851, 858 (Mo. 1998) (en banc). Section 162.1100.3 is not ambiguous. It clearly provides for the transfer of power granted to any existing board on or before August 28, 1998. Any contrary construction would require an illogical reading of the plain language of the statute.

Under Respondents' proposed reading, Section 162.1100.3 would apply to both the Elected Board and the SAB. The SAB came into being on August 28, 1998, the effective date of SB 781 and is the managing board of a school district located in a city not within a county. Mo. Rev. Stat. § 162.1100 (2000). Under

Respondents' proposed construction of the statute, Section 162.1100.3 could actually transfer the powers of the SAB to the SAB. Such a reading is inherently illogical and cannot be adopted by this Court.

This Court should give Section 162.1100 its plain and ordinary meaning and not apply rules of statutory construction that would twist the plain language and meaning of the statute to create illogical results. This Court should hold that the Elected Board retains the powers to collect the desegregation sales tax and to collect and expend the debt service levy because these powers were granted by the voters after August 28, 1998 and therefore such powers remain with the Elected Board. App. Br. 139-42.

CONCLUSION

For the reasons discussed herein, the Final Judgment of the circuit court should be reversed and the transfer of powers to the Special Administrative Board be held void with a declaration that the Elected Board retains all powers necessary to govern and oversee the District pursuant to Chapter 162 of the Missouri Statutes.

Respectfully submitted this 20th day of October, 2008.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the foregoing Brief and a disk in compliance with Rule 84.06(g) were mailed on this 20th day of October, 2008 by first-class mail, postage pre-paid, to:

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06

The undersigned hereby certifies that the foregoing Brief complies with the limitations set forth in Rule 84.06(b) and that the number of words in the Brief is 7,597. The undersigned relied on the word count feature of the firm's word processing system to arrive at that number.

The undersigned further certifies that the labeled disk, filed concurrently herewith, has been scanned for viruses and is virus-free pursuant to Rule 84.06(g).

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