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Mr. Roger Kurtz
Executive Director
Missouri Association of School Administrators
3550 Amazonas Drive
Jefferson City, Missouri 65109

Re: Constitutionality of Proposed §§167.826 and 167.828 in Senate Bill 493

Dear Roger:

As you are aware, the Missouri Association of School Administrators (hereinafter, "MASA") recently requested that our law firm opine regarding the constitutionality of certain provisions contained within Senate Bill 493 (hereinafter, "SB 493"). Specifically, MASA requested that our firm determine: (1) whether the State legislature may require a student who desires to transfer to an accredited district or a nonsectarian private school to provide proof that he or she resided in an unaccredited district and within the attendance boundaries of an unaccredited school for a minimum of twelve months prior to applying for a transfer and (2) whether the State legislature may constitutionally utilize public funds generated by a public school district's operating levy to pay tuition for students who decide to attend a nonsectarian private school.

These are complex legal/political issues that will not be resolved anytime soon as these questions lie at the intersection of constitutional law and politics. Below you will find our legal analysis regarding the two questions noted above. As always, if you or any members of MASA have questions or concerns regarding these matters, please do not hesitate to contact me.

Questions Presented:

1. May the Missouri legislature require a student to provide proof that he or she actually resides in an unaccredited district and within the attendance boundaries of an unaccredited school for a minimum of twelve months prior to applying for a transfer to an accredited school or a private nonsectarian school?

The answer to this question ultimately depends upon a court's interpretation of the Equal Protection Clause. At its essence, the twelve (12) month restriction rule proposed in SB 493 is a residency requirement. No constitutional provision, statute or case law expressly prohibits the Missouri legislature from placing additional residency restrictions upon students who desire to transfer using the transfer rule as codified in Mo. Rev. Stat. §167.131. However, a compelling equitable argument does exist. All students in Missouri are entitled to a free public education.

Additionally, all students are subject to compulsory attendance rules - they must go to school. As such, the primary equitable argument against the twelve (12) month restriction rule centers upon the Equal Protection Clause contained within Article 1, § 2 of the Missouri Constitution.

> That all constitutional government is intended to promote the general welfare of the people; that all persons have a natural right to life, liberty, the pursuit of happiness and the enjoyment of the gains of their own industry; that all persons are created equal and are entitled to equal rights and opportunity under the law; that to give security to these things is the principal office of government, and that when government does not confer this security, it fails in its chief design.

SB 493 effectively creates three (3) sub-groups of students within the State of Missouri: (1) those students who reside within an accredited or provisionally accredited district who are entitled to attend an accredited or provisional accredited district; (2) those students who reside within an unaccredited district and have lived in the district for twelve (12) months or more who are free to take advantage of the transfer rule and attend an accredited district; and, (3) those students who live in an unaccredited district for less than twelve (12) months who are not permitted to take advantage of the transfer rule as proposed in SB 493.

Opponents of the restriction rule assert that those students in the first and second categories are treated quite differently under the law as opposed to those in the third category. The students in the first and second categories are free to transfer and attend accredited districts. Those students in the third category are forced to stay in the unaccredited school district and are relegated to biding their time before they may eventually transfer.

Article I, § 2 of the Missouri Constitution assures equal rights and opportunities under the law. *Doe v. Phillips*, 194 S.W.3d 833, 845 (Mo. banc 2006). Like the 14th Amendment of the United States Constitution, Article 1, § 2 of Missouri's Constitution provides that a law may treat different groups differently, but it cannot treat similarly situated persons differently without adequate justification. *Id.* "What constitutes adequate justification for treating groups differently depends on the nature of the distinction made." *Id.* Where the law impacts a "fundamental right," the Missouri Supreme Court applies strict scrutiny, determining whether the law is necessary to accomplish a compelling state interest. *Id.* When the Court finds that a fundamental right is not impacted, it gives an equal protection claim rational-basis review, assessing whether the challenged law rationally is related to some legitimate end. *Id.*

As an aside, proponents of the restriction rule may deny that the three categories of students noted above are similarly situated. This claim, in my opinion, lacks merit as all three groups are students and attend public schools here in Missouri. Thus, they are similarly situated.

Education is not a fundamental right under the United States Constitution's Equal Protection provision. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973). Likewise, education is not considered a fundamental right under the Missouri Constitution's Equal Protection provision as Missouri courts have followed the general federal approach to defining fundamental rights. *See Comm. for Educ. Equal., et al. v. State of Mo., et al.*, 294 S.W.3d 477 (Mo. 2009). Thus, any equal protection claim would be analyzed under a rational-basis review. Thus, it is necessary to determine whether the restriction rule is rationally related to some legitimate end.

In order to determine if the restriction rule is rationally related, it is necessary to determine the purpose behind the proposed restriction rule. From information gleaned through officials associated with MASA, lobbyists connected to education and our own education clients, it has been deduced that the true purpose behind the restriction rule is to ensure that parents and students residing just outside of unaccredited districts do not attempt to "game" or unfairly take advantage of the transfer rule. Put simply, it has been asserted, and there is apparently information which supports this allegation, that parents of students who reside in less affluent districts or who have children who attend provisionally accredited districts are signing rental agreements within the unaccredited district but never actually living within the unaccredited district who then take advantage of the transfer rule. It has been alleged that this gaming of the system ultimately results or will eventually result in financial hardship to said unaccredited districts.

To allege that a law violates the Equal Protection Clause, the "challenger bears the burden to show that the law is wholly irrational." *Treadway v. State*, 988 S.W.2d 508,511 (Mo. banc 1999). Opponents of the restriction rule assert that it serves no legitimate end and, is thus, wholly irrational in that it unfairly applies a rule to students who do not wish to game the system but have not lived within the unaccredited district's boundaries for twelve (12) months or more. Opponents propose that there are less restrictive means or methods available to prevent students from gaming the transfer rule without being as overly inclusive. One method discussed would be to simply have unaccredited districts police the transfer system more stringently (i.e., make individual determinations regarding whether parents and students are actually residing within the transfer district).

Proponents of the restriction rule assert that it produces a legitimate end as it will deter and/or prevent parents or students from abusing the transfer rule. As the restriction rule serves this purpose and will potentially produce this result, proponents advance that it satisfies the rational-basis test. Further, it is well held that "The legislature is afforded broad discretion in attacking societal problems." *Treadway*, 988 S.W.2d at511. The rational basis standard prevents the courts from over-writing the legislature's judgment with its own regarding "the wisdom, social desirability or economic policy underlying a statute." *Mo. Prosecuting Attorneys and Circuit Attorneys Ret. Sys. v. Pemiscot Cnty.*, 256 S.W.3d 98, 102 (Mo. banc 2008). This is especially important because a rational legislature can base its classifications on "any number of

considerations." *Batek v. Curators of University of Missouri*, 920 S.W.2d 895, 899 (Mo. banc 1996).

Whether a court of law determines that the restriction rule is wholly irrational remains to be seen. However, while it most certainly a close call, in my estimation, it appears likely that the restriction rule would pass the rational-basis test given the supportive case law discussed above.

2. May the Missouri legislature constitutionally require that tuition for students who decide to attend a nonsectarian private school be paid using funds received by the sending district from their operating levy for school purposes?

No, the Missouri legislature may not constitutionally require unaccredited districts to pay tuition from their operating levy. The Missouri Constitution provides as follows:

> A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the general assembly *shall establish and maintain free public schools for the gratuitous instruction of all persons in this state* within ages not in excess of twenty-one years as prescribed by law.

Mo. Con. Art. IX, § 1(a). (emphasis added).

> The proceeds of all certificates of indebtedness due the state school fund, and all moneys, bonds, lands, and other property belonging to or donated to any state fund for public school purposes, and the net proceeds of all sales of lands and other property and effects that may accrue to the state by escheat, shall be paid into the state treasury, and securely invested under the supervision of the state board of education, *and sacredly preserved as a public school fund the annual income of which shall be faithfully appropriated for establishing and maintaining free public schools, and for no other uses or purposes whatsoever*.

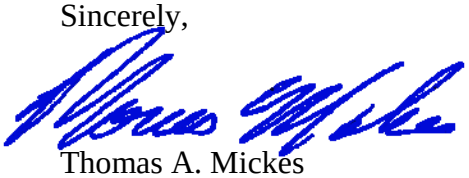
Mo. Con. Art. IX, § 5. (emphasis added).

The provisions above clearly require that free public schools be made available for the gratuitous instruction of all persons within the stated age limitations and that funds set aside to fund public schools be appropriated for establishing and maintaining free public schools, and for no other purpose. Thus, the instant provision in SB 493 is unconstitutional on its face as it seeks to take public funds designated solely for public schools and apply those funds to nonsectarian private schools.

Members of the legislature have expressed the opinion that local operating levy funds do not fall within the definition of "public school fund" governed by Article IX, § 5 of the Missouri Constitution. However, in both *McVey v. Hawkins*, 258 S.W.2d 927 (Mo. 1953) and *Paster v. Tussey*, 512 S.W.2d 97, 101-02 (Mo. 1974), the Missouri Supreme Court equated "public school fund" with all public funds. Thus, this argument does not pass muster.

Nonetheless, efforts exist to divert public funds that were designated for public school districts to nonsectarian corporate operators in an effort to sidestep Article IX, § 5. Recently, the St. Louis Public School District began accepting bids from nonprofit organizations. It appears that St. Louis Public would annex these nonsectarian private schools into the District but would maintain little oversight over said schools as a way to navigate around Article IX, § 5.

Sincerely,



Thomas A. Mickes

TAM/cc