

# Note

## In Search of a Lasting Solution: *Breitenfeld v. School District of Clayton* and the Future of the Missouri Transfer Crisis in St. Louis

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### INTRODUCTION

On June 11, 2013, the Missouri Supreme Court, in *Breitenfeld v. School District of Clayton*,<sup>1</sup> upheld the validity of the Missouri Unaccredited District Tuition Statute (“the Act” or “the statute”) as applied to the defendant school districts.<sup>2</sup> The Act—passed in 1993 but only recently brought to public attention—provides that an unaccredited school district must pay the tuition of a resident pupil “who attends an accredited school in another district in the same or an adjoining county.”<sup>3</sup> The defendant school districts argued that the Act violated the Hancock Amendment of the Missouri Constitution, and that the Act was unenforceable because compliance was impossible, but the court swept aside those contentions, and refused, once again,<sup>4</sup> to immunize the defendants from the mandates of the statute.<sup>5</sup> On December 10, 2013, the court reaffirmed the Act’s validity in a suit brought by Kansas City taxpayers in *Blue Springs R-IV School District v. School District of Kansas City, Missouri*.<sup>6</sup>

In St. Louis, Missouri, *Breitenfeld* has had a significant impact, and more than 2,000 students from the unaccredited Normandy and

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1. 399 S.W.3d 816 (Mo. 2013) (en banc).

2. *Id.* at 838. The defendants in *Breitenfeld* were the School District of Clayton, the Board of Education of the City of St. Louis, and the Transitional School District of the City of St. Louis. *Id.* at 820 n.2.

3. MO. REV. STAT. § 167.131 (2013).

4. As discussed *infra*, the Missouri Supreme Court upheld the validity of the Act as applied to the same defendants in 2010 in *Turner v. Clayton*. 318 S.W.3d 660 (Mo. 2010) (en banc) (per curiam); see also *infra* Part I.C.

5. *Breitenfeld*, 399 S.W.3d at 838.

6. 415 S.W.3d 110 (Mo. 2013) (en banc). This Note is solely concerned with the transfer crisis as it relates to St. Louis, Missouri, and therefore only discusses *Breitenfeld*.

Riverview Gardens districts have transferred to higher-performing schools in the St. Louis area.<sup>7</sup> Moreover, the Normandy district is approaching bankruptcy, and the Missouri Legislature has considered more than twenty bills addressing the transfer issue.<sup>8</sup> Although the court's opinion in *Breitenfeld* left open the door for a legal challenge in the near future, this Note argues that given the urgency of the situation, the Missouri Legislature will likely resolve the transfer issue before further litigation commences. Ultimately, the Legislature should retain a version of the Act, and ensure that all St. Louis children receive an adequate education.

The remainder of this Note proceeds as follows. Part I places the transfer crisis and the Act in the larger context of efforts to attain educational equality in the City of St. Louis. It also examines the history of the Act, and the Missouri Supreme Court's 2010 decision *Turner v. School District of Clayton*. Part II then briefly summarizes the Missouri Supreme Court's opinion in *Breitenfeld*, and argues that the court properly applied the relevant statutory and case law. Part III discusses the impact of the decision, and predicts that the transfer issue will be resolved by the Legislature before additional litigation begins. A conclusion follows.

## I. BACKGROUND

Although the media has covered the transfer crisis as an isolated incident,<sup>9</sup> the transfer issue is properly understood as a chapter in the long saga of efforts to solve issues of racial and economic segregation—and subsequent educational inequality—in St. Louis, Missouri. This Part traces the history of racially segregated public education in St. Louis up through the present, discusses the passage of the Act, and recounts the Missouri Supreme Court's 2010 decision in *Turner*.

### A. Racial Segregation and Inequality in Public Education

Originally a slave state, Missouri prohibited the education of African-Americans in the nineteenth century.<sup>10</sup> Following the Union's victory in

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7. Alex Stuckey, *Private School Transfer Option Survives Chopping Block in Transfer Law Legislation Debate*, ST. LOUIS POST-DISPATCH, Feb. 26, 2014, [http://www.stltoday.com/news/local/govt-and-politics/alex-stuckey/private-school-transfer-option-survives-chopping-block-in-transfer-law/article\\_6b12eade-5d77-5540-aa4c-851e364a481c.html](http://www.stltoday.com/news/local/govt-and-politics/alex-stuckey/private-school-transfer-option-survives-chopping-block-in-transfer-law/article_6b12eade-5d77-5540-aa4c-851e364a481c.html).

8. *Id.*

9. See, e.g., Elisa Crouch, *Normandy Seventh-Graders March in Support of Their District*, ST. LOUIS POST-DISPATCH, Mar. 14, 2014, [http://www.stltoday.com/news/local/education/normandy-seventh-graders-march-in-support-of-their-district/article\\_b2a78271-0872-5946-bd2a-c07b258f9853.html](http://www.stltoday.com/news/local/education/normandy-seventh-graders-march-in-support-of-their-district/article_b2a78271-0872-5946-bd2a-c07b258f9853.html).

10. Act of Feb. 16, 1847, § 1, 1847 Mo. Laws 103 (“No person shall keep or teach any school

the Civil War, Missouri altered its laws and allowed for the separate education of black children,<sup>11</sup> and the Missouri Constitution of 1945 provided for the segregated education of students based on race.<sup>12</sup> The segregated schools provision remained part of the Missouri Constitution until 1976, despite its nullification by a 1954 Attorney General opinion, and the majority of statutes implementing the constitutionally mandated segregation were on the books until 1957.<sup>13</sup>

Prior to *Brown I*, the St. Louis Board of Education, in 1947, expressed its intent to implement a plan that would desegregate the public school system.<sup>14</sup> Unfortunately, however, the “heart of that plan was said to be the ‘neighborhood school concept.’”<sup>15</sup> In other words, students were assigned to public schools close to their homes, and the redrawn attendance zones coincided with the boundaries of racially homogenous neighborhoods.<sup>16</sup> Not surprisingly, the plan failed to desegregate the St. Louis public school system.<sup>17</sup>

On February 18, 1972, members of the Concerned Parents of North St. Louis filed suit in the Eastern District of Missouri on behalf of all black school children in the St. Louis public schools and alleged “that the Board of Education and its administrators had ‘effected and perpetuated racial segregation and discrimination’ in the operation of the public schools . . . in violation of the Fourteenth Amendment.”<sup>18</sup> The parties entered into a consent decree in 1975—which was approved by the district court later that year—but several groups, including the St. Louis chapter of the NAACP, objected and moved to intervene.<sup>19</sup> Ultimately, the Eighth Circuit permitted the intervention, and after the district court found no constitutional violation following a thirteen-week trial, the Eighth Circuit reversed with a strong command: “Segregation in the elementary and secondary schools in St. Louis must now be eliminated.”<sup>20</sup>

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for the instruction of negroes or mulattoes, in reading or writing, in this State.”); Kimberly Jade Norwood, *Minnie Liddell’s Forty-Year Quest for Quality Public Education Remains a Dream Deferred*, 40 WASH. U. J.L. & POL’Y 1, 5 (2012).

11. See, e.g., Act of June 11, 1889, § 7051a, 1889 Mo. Laws 226; Act of Feb. 17, 1865, § 13, 1865 Mo. Laws 170.

12. MO. CONST. of 1954, art. IX, § 1(a).

13. *Adams v. United States*, 620 F.2d 1277, 1280 (8th Cir. 1980) (citation omitted).

14. Norwood, *supra* note 10, at 6.

15. *Adams*, 620 F.2d at 1281.

16. *Id.*

17. *Id.*

18. *Id.*

19. Norwood, *supra* note 10, at 13.

20. *Adams*, 620 F.2d at 1291.

After the appointment of a Special Master,<sup>21</sup> the parties entered into a settlement agreement in 1983 with three major components: (1) the implementation of a voluntary inter-district transfer of 15,000 black students from St. Louis City to suburban schools; (2) the establishment of magnet schools in the City; and (3) quality education and capital improvements for the children remaining in the predominantly single-race schools in the City.<sup>22</sup>

Following the United States Supreme Court's decisions in *Oklahoma City Board of Education v. Dowell*<sup>23</sup> and *Freeman v. Pitts*,<sup>24</sup> the Attorney General of Missouri sought a declaration that the St. Louis public schools had attained unitary status.<sup>25</sup> The district court appointed Dr. William Danforth, former Chancellor of Washington University St. Louis, as "Settlement Coordinator," and in 1999, the parties reached a final settlement agreement.<sup>26</sup> The agreement was set to expire at the end of the 2008–2009 school year, allowed for voluntary participation in desegregation efforts, and permitted "the State to phase out its funding obligations under the 1983 [s]ettlement."<sup>27</sup> A July 2007 agreement extended voluntary participation until the 2013–2014 school year, and at the time of this writing, fourteen school districts continue to participate voluntarily in desegregation efforts.<sup>28</sup> Nevertheless, racial minorities and low-income students remain trapped in the failing St. Louis public schools. In 2011, the St. Louis public school system had a graduation rate of 62.2%, and an average ACT score of 16.6, five points lower than the state average.<sup>29</sup> Further, 87.4% of students attending the St. Louis public schools are recipients of free and reduced lunch.<sup>30</sup> As these statistics illustrate, St. Louis public school students have significantly inferior educational opportunities.

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21. For a detailed account—written by the Special Master—of the process of arriving at the settlement agreement, see D. Bruce La Pierre, *Voluntary Interdistrict School Desegregation in St. Louis: The Special Master's Tale*, 1987 WIS. L. REV. 971.

22. Norwood, *supra* note 10, at 19–20.

23. 498 U.S. 237 (1991).

24. 503 U.S. 467 (1992).

25. Norwood, *supra* note 10, at 22.

26. *Id.* at 23–24.

27. *Id.* at 24, 27–28.

28. *Id.* at 28–29.

29. MO. DEP'T OF ELEMENTARY & SECONDARY EDUC., ST. LOUIS PUBLIC SCHOOLS DISTRICT REPORT CARD (2012), available at <http://mcds.dese.mo.gov/guidedinquiry/District%20and%20Building%20Student%20Indicators/District%20ACT.aspx?rp:District=115115>.

30. *Id.*

### B. Passage and History of the Act

The Missouri Legislature enacted the Outstanding Schools Act in 1993 and established much of the education policy that exists in Missouri today.<sup>31</sup> The Outstanding Schools Act “include[d] provisions relating to reduced class size, the A+ schools program, funding for parents as teachers and early childhood development, teacher training, the upgrading of vocational and technical education, measures to promote accountability[,] and other provisions.”<sup>32</sup> Section 167.131 of the Outstanding Schools Act—the section at issue in *Breitenfeld* and referred to as “the Act” in this Note—was designed as an accountability measure and provides as follows:

The 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 section 161.092 shall pay the tuition of and provide transportation consistent with the provisions of section 167.241 for each pupil resident therein who attends an accredited school in another district of the same or an adjoining county.<sup>33</sup>

This provision was crafted to ensure that school districts were held accountable for implementing the mandates of the Outstanding Schools Act.<sup>34</sup> In addition, the Legislature specifically rejected a version of the accountability provision that would have given accredited school districts discretion as to whether to admit students seeking to transfer out of their unaccredited districts.<sup>35</sup> As discussed *infra*, the defendants in *Turner* asserted that they had discretion in this regard.

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31. Lindsay L. McClure-Hartman, Note, *Not in My Backyard: Turner v. Clayton and The Battle Over Mandatory Open Enrollment*, 32 ST. LOUIS U. PUB. L. REV. 199, 203 (2012).

32. MO. REV. STAT. § 160.500.1 (2013).

33. *Id.* § 167.131.1. The statute also provides the rate of tuition to be charged to the unaccredited district:

The rate of tuition to be charged by the district attended and paid by the sending district is the per pupil cost of maintaining the district’s grade level grouping which includes the school attended. The cost of maintaining a grade level grouping shall be determined by the board of education of the district but in no case shall it exceed all amounts spent for teachers’ wages, incidental purposes, debt service, maintenance and replacements. The term “debt service”, as used in this section, means expenditures for the retirement of bonded indebtedness and expenditures for interest on bonded indebtedness. Per pupil cost of the grade level grouping shall be determined by dividing the cost of maintaining the grade level grouping by the average daily pupil attendance. If there is disagreement as to the amount of tuition to be paid, the facts shall be submitted to the state board of education, and its decision in the matter shall be final. Subject to the limitations of this section, each pupil shall be free to attend the public school of his or her choice.

*Id.* § 167.131.2.

34. McClure-Hartman, *supra* note 31, at 204.

35. *Id.* (citing S.B. 380, 87th Gen. Assemb., 1st Reg. Sess. (Mo. 1993)).

Surprisingly, there seems to have been no opposition to the accountability provision, and opponents were instead concerned with other aspects of the bill.<sup>36</sup> Only when the St. Louis public schools became unaccredited in 2007 did the Act come to the public's attention.

C. *Turner v. School District of Clayton: the Missouri Supreme Court Upholds the Act*

Due to the poor performance of the St. Louis public schools, the Missouri Board of Education transferred control of the district from the St. Louis school board to a transitional school district in January 2007, and unaccredited the St. Louis public school district in February.<sup>37</sup> In June 2007, the St. Louis public school district's unaccreditation took effect.<sup>38</sup> Jane Turner, Susan Brunner, Gina Breitenfeld, and William Drendel lived within the boundaries of the district, and had entered into personal tuition agreements with the Clayton school district—a wealthier suburban school district—so that their children could attend school in Clayton for the 2007–2008 school year.<sup>39</sup> Once the St. Louis public school district lost its accreditation, the parents asked the Clayton school board to charge the transitional school district for their children's tuition pursuant to the Act.<sup>40</sup> When Clayton declined, the parents filed suit against the transitional school district, the Clayton school district, and the board of education for the City of St. Louis.<sup>41</sup> The circuit court granted the defendants' separate motions for summary judgment.<sup>42</sup>

In a per curiam opinion, the Missouri Supreme Court held that “[s]ection 167.131, a straightforward and unambiguous statute, was specifically written to apply to the factual scenario of this case.”<sup>43</sup> The court rejected Clayton's arguments, and held: that the Act applied to the transitional school district; that the Act did not conflict with, and was not preempted by, other statutes; and that the Clayton school district was required to admit students seeking to transfer and had no discretion in this regard.<sup>44</sup> The court ultimately reversed and remanded the case to the

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36. *Id.*

37. Justin D. Smith, Note, *Hostile Takeover: The State of Missouri, The St. Louis School District, and the Struggle for Quality Education in the Inner City*, 74 MO. L. REV. 1143, 1144, 1146 (2009).

38. *Id.* at 1146.

39. *Turner v. Sch. Dist. of Clayton*, 318 S.W.3d 660, 663 (Mo. 2010) (en banc) (per curiam).

40. *Id.*

41. *Id.*

42. *Id.* at 663–64.

43. *Id.* at 664.

44. *Id.* at 664–69.

circuit court.<sup>45</sup> As discussed below, the court would see the case again in less than three years.

## II. *BREITENFELD V. SCHOOL DISTRICT OF CLAYTON*

### A. *The Facts of the Case and the Missouri Supreme Court's Opinion*

After the Missouri Supreme Court decided *Turner*, critics opined that the decision could lead to “absurd consequences” in terms of the costs unaccredited school districts would be forced to incur in paying for the tuition and transportation of students seeking to transfer to accredited districts under the Act.<sup>46</sup> In addition, as the dissent noted in *Turner*, “the majority’s interpretation [of the Act] . . . would . . . require[] [accredited districts] to accept pupils from the transitional school district even if the number of pupils seeking admittance exceeded their capacity or if [accredited] school districts have difficulty collecting tuition payments from the transitional school district.”<sup>47</sup>

Following the remand in *Turner*, the circuit court allowed taxpayers from Clayton and the City of St. Louis to intervene in the case to raise a Hancock Amendment challenge to the Act—the Hancock Amendment prohibits unfunded mandates by preventing the Missouri Legislature from shifting funding responsibilities from the State to the local level.<sup>48</sup> The defendant school districts’ evidence on remand highlighted the costs associated with complying with the Act.<sup>49</sup> For example, the superintendent of the St. Louis public schools testified that the tuition and transportation costs of complying with the Act “could be as high as \$262

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45. *Id.* at 670.

46. Missy McCoy, Note, *Unconditional Acceptance: The Supreme Court of Missouri's Interpretation of Missouri Revised Statutes Section 167.131*, 76 MO. L. REV. 941, 959 (2011); see also *Turner*, 318 S.W.3d at 675 (Breckenridge, J., concurring in part and dissenting in part) (“[T]his opinion’s interpretation avoids the absurd consequences that would result if the majority’s interpretation of section 167.131 prevails.”).

47. *Turner*, 318 S.W.3d at 675. *Turner* also seemingly nullifies portions of the Safe Schools Act, MO. REV. STAT. § 160.261 (2013), which gives school districts discretion in deciding whether to admit transfer students in order to allow districts the opportunity to deny admittance to a potentially dangerous and violent student. McCoy, *supra* note 46, at 965. Further, a larger problem looms. The St. Louis public schools receive State dollars according to each school’s average daily attendance. If a resident of the City decides to transfer to a school outside of the City under the Act, the St. Louis public schools receive no State money for the child, but still must pay the receiving district. Norwood, *supra* note 10, at 56. If a large number of students transfer, the school district would likely go bankrupt. *Id.*

48. *Breitenfeld v. Sch. Dist. of Clayton*, 399 S.W.3d 816, 821 (Mo. 2013) (en banc). Further, only one *Turner* plaintiff—Breitenfeld and her two children—remained in the litigation, thus explaining the case’s change in name. *Id.*

49. *Id.* at 822.

million.”<sup>50</sup> The circuit court held that the Act was unenforceable as applied to the defendant school districts because it constituted an unfunded mandate in violation of the Hancock Amendment and because “it would be ‘impossible’ for the defendant school districts to comply with” the Act.<sup>51</sup> The State and Breitenfeld appealed, and the Supreme Court of Missouri assumed jurisdiction of the case before disposition by the court of appeals because of the importance of the issue involved in the case pursuant to article V, section 10 of the Missouri Constitution.<sup>52</sup>

In a unanimous opinion for the court, Judge Mary R. Russell rejected both of the circuit court’s rationales. First, the court held that the Act did not create an unfunded mandate in violation of the Hancock Amendment.<sup>53</sup> The Hancock Amendment is violated 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.”<sup>54</sup> As for the statutory mandate that Clayton and the St. Louis public schools provide eligible students a free education, the court reasoned that the Missouri Constitution provides that the State shall provide a free public education, and that therefore, there was “nothing ‘new’ . . . about either [the transitional school district] or Clayton providing eligible students in grades K–12 a free public education.”<sup>55</sup> Similarly, the court explained that “there [was] nothing ‘increased’” because “the *level* of services provided (K–12) by Clayton is not changed, even if the district provides the services to more students—in effect, with greater *frequency*.”<sup>56</sup> Rather, the court reasoned, the Act “merely shifts the responsibility for an existing activity or service among local political subdivisions,” and the Hancock Amendment does not prohibit local-to-local shifting of responsibilities.<sup>57</sup> As for the transportation mandates of the Act (i.e., that unaccredited districts pay the transportation costs of pupils transferring to accredited districts), the court acknowledged that the requirements were indeed “new,” but held that the St. Louis public schools were “left with only speculative evidence related to the costs of compliance with [the Act’s] transportation mandates and whether the new mandates would cause [the

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50. *Id.* at 823.

51. *Id.* at 823–25.

52. *Id.* at 820 n.3, 825.

53. *Id.* at 828–34.

54. *Id.* at 826.

55. *Id.* at 828.

56. *Id.* at 830–31 (emphasis in original).

57. *Id.* at 831.

St. Louis district] to experience unfunded increased costs.”<sup>58</sup>

Second, the Missouri Supreme Court reversed the circuit court’s acceptance of the impossibility defense proffered by the defendant school districts.<sup>59</sup> The court reasoned that “‘transfers [were] not looming for these districts,’” and while “‘there might be an ‘impossibility’ defense when the 1,000th student tries to enroll, . . . there is no such defense today.”<sup>60</sup> In addition, the court declined to issue an advisory opinion on the issue, and “reject[ed] the argument that this issue will evade review if not addressed here.”<sup>61</sup>

### *B. Analysis*

In holding that the Act did not violate the Hancock Amendment, and that the defendants had failed to show that compliance with the Act would be impossible, the Missouri Supreme Court properly applied the relevant statutory and case law. This Section explains, in greater detail, why the decision was correct.

#### 1. Hancock Amendment Challenges

The relevant portions of the Hancock Amendment—sections 16 and 21—provide as follows:

The state is prohibited 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>62</sup>

. . . .

A new activity or service or an increase in the level of any activity or service beyond that required by existing law shall not be required by the general assembly or any state agency of counties or other political subdivisions, unless a state appropriation is made and disbursed to pay the county or other political subdivision for any increased costs.<sup>63</sup>

The language of the Amendment can be distilled down to a two-part test, which provides, as noted above, that the Hancock Amendment is violated if (1) the State requires political subdivisions to take on a “new or increased activity or service”; and (2) the political subdivisions, in performing the activity or service, experience unfunded, increased

58. *Id.* at 832, 834.

59. *Id.* at 834.

60. *Id.* at 836 (quoting State’s brief).

61. *Id.* The court also held that the intervenors properly were permitted to intervene, reversed the intervenors’ attorneys’ fee awards, and held that the tuition due to Clayton would need to be recalculated on remand. *Id.* at 836–37.

62. MO. CONST. art. X, § 16.

63. MO. CONST. art. X, § 21.

costs.<sup>64</sup> Two aspects of the Act—the mandated educational requirements and the transportation mandates—were challenged as violating the Hancock Amendment.<sup>65</sup> The court found that the educational requirements were not “new” or “increased” under the first prong, and that the defendants had failed to show that the transportation mandates would cause the defendants to experience unfunded increased costs under the second prong.<sup>66</sup> Both holdings were firmly grounded in the straightforward application of the text of the Hancock Amendment, and the relevant case law interpreting the Amendment.

With regard to the educational requirements of the Act, the Missouri Supreme Court has previously stated in clear terms that “[w]here there is no mandate that [a political subdivision] take on a new responsibility, but only a continued responsibility for it to fund an existing activity according to a previously-existing formula, there is no Hancock violation.”<sup>67</sup> The Missouri Constitution—in a provision long predating the Hancock Amendment—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.<sup>68</sup>

Given this constitutional language, and the statutes implementing the Missouri Constitution’s mandate,<sup>69</sup> both Clayton and the City of St. Louis had a clear obligation—long before the passage of the Act—to provide K–12 educational services to eligible students. Therefore, the Act did not impose an obligation to perform a “new” service because the defendants were previously required to operate K–12 schools.

In addition, the Act did not force the defendants to take on an “increased” activity or service. Both before and after the passage of the Act, the defendants had an obligation to provide K–12 educational

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64. *Breitenfeld*, 399 S.W.3d at 826.

65. *Id.* at 828, 832.

66. *Id.* at 828, 834.

67. *Neske v. City of St. Louis*, 218 S.W.3d 417, 423 (Mo. 2007) (en banc), *overruled on other grounds by* *King-Willmann v. Webster Groves Sch. Dist.*, 361 S.W.3d 414 (Mo. 2012) (en banc).

68. MO. CONST. art. IX, § 1(a). This provision has its roots in Missouri’s territorial charter enacted in 1912 which stated: “[K]nowledge, being necessary to good government and the happiness of mankind, schools and the means of public education shall be encouraged and provided for[.]” *Breitenfeld*, 399 S.W.3d at 828 n.24 (citing *Territorial Laws of Missouri*, vol. I., ch. IV, sec. 14 (page 13) (approved June 4, 1812) (internal quotation marks omitted)).

69. *See, e.g.*, MO. REV. STAT. 160.051.1 (2013) (“A system of free public schools is established throughout the state for the gratuitous instruction of persons between the ages of five and twenty-one years.”).

services. As noted by the court, if the Act causes Clayton to educate transfer students from unaccredited districts, Clayton would merely educate with greater *frequency*, but the *level* of services would remain the same—Clayton would still provide K–12 educational services.<sup>70</sup>

Moreover, the Act does not impose a “new or increased activity or service” because the responsibility for the existing service of K–12 education is merely shifted between political subdivisions, and the Hancock Amendment prohibits only the shifting of a burden from the State to a local entity. As the Missouri Supreme Court noted in *Berry v. State*, the Hancock Amendment “prohibits ‘the state’ from shifting the tax burden from itself to counties and other political subdivisions.”<sup>71</sup> Such State-to-local burden shifting did not occur with the passage of the Act—rather, the Act provides that upon a loss of accreditation by a particular school district, the burden of educating those students may shift to an accredited school. Nothing about this scheme runs afoul of the Hancock Amendment.

With regard to the transportation mandates of the Act, the court acknowledged that the Act’s requirement that unaccredited school districts provide transportation to transfer students was indeed “new” for purposes of the first prong of the Hancock Amendment analysis.<sup>72</sup> Prior to the passage of the Act, school districts were only required to provide transportation “within” the district, and the Act requires unaccredited districts to provide transportation to schools outside the district.<sup>73</sup> The defendants failed to show, however, that the “new” transportation mandates resulted in unfunded, increased costs, and therefore did not satisfy the second prong of the analysis.<sup>74</sup> At trial, the defendants’ evidence of increased operation costs rested solely in the Jones Report, “a 2011 statistical study estimating the likelihood that students would transfer under section 167.131 from the unaccredited [St. Louis public schools] to certain adjoining St. Louis County school districts.”<sup>75</sup> Breitenfeld and the State challenged the methodology of the Report at trial, and showing the existence of an unfunded mandate requires “specific proof . . . and . . . cannot be established by mere common sense, or speculation and conjecture.”<sup>76</sup> As discussed by the court, the

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70. *Breitenfeld*, 399 S.W.3d at 831.

71. 908 S.W.2d 682, 685 (Mo. 1995) (en banc).

72. *Breitenfeld*, 399 S.W.3d at 832.

73. *Id.* at 833.

74. *Id.* at 834.

75. *Id.* at 822.

76. *Sch. Dist. of Kansas City v. State*, 317 S.W.3d 599, 611 (Mo. 2010) (en banc) (internal quotation marks omitted).

defendants would have needed to choose designated accredited districts where students could transfer, and then compare the costs of transporting students to schools in the City with the costs of transporting students to the designated accredited schools.<sup>77</sup> The defendants, however, failed to identify designated accredited districts or compare costs, and the Jones Report's predictions as to how many students would transfer from the St. Louis public schools, and to which schools they would transfer, were entirely speculative. Therefore, the court correctly determined that the defendants had failed to show that the Act would force them to incur increased, unfunded costs.

## 2. The Impossibility Defense

At trial, and on appeal, the defendants argued that the Act was unenforceable because compliance would be impossible.<sup>78</sup> Clayton asserted that it would be impossible for it to accommodate and educate “the potentially thousands of additional students the Jones Report projected would avail themselves of” the Act, and the St. Louis public schools maintained that it would not be able to afford the transportation costs of the students looking to transfer, and that its resources would be depleted, preventing it from educating the students remaining in the City's schools.<sup>79</sup>

As an initial matter, it is unclear whether the defendants should have been permitted to plead an impossibility defense.<sup>80</sup> Assuming that the defense was available, however, the defendants failed to show that large numbers of transfers were “looming.”<sup>81</sup> The St. Louis public schools received provisional accreditation in October of 2012, and therefore, the only relevant transfer students for purposes of the impossibility defense were Breitenfeld's two children.<sup>82</sup> These two children certainly could not cause the “impossible” situation predicted by the defendants.<sup>83</sup> Given its provisional accreditation, the St. Louis public schools are currently under no obligation to pay for the transportation or tuition of transfer students, and while Clayton may find it impossible to educate a large number of students transferring from other unaccredited districts in the

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77. *Breitenfeld*, 399 S.W.3d at 834.

78. *Id.*

79. *Id.* at 834–35.

80. As explained by the court, the defense of impossibility is typically confined to the realm of contract law. *Id.* at 835. The defendants argued that this defense should be extended to the statutory context, and cited *George v. Quincy, Omaha & K.C.R. Co.*, 167 S.W. 153 (Mo. Ct. App. 1914), and *Egenreither ex rel. Egenreither v. Carter*, 23 S.W.3d 641 (Mo. Ct. App. 2000), in support. *Id.*

81. *Id.* at 836.

82. *Id.*

83. *Id.*

future, that time has not yet arrived. Under these circumstances, the court was correct to reject the defendants' impossibility defense.

### III. IMPACT

Although the St. Louis public schools received provisional accreditation in 2012, the two unaccredited school districts in St. Louis—Riverview Gardens and Normandy—have struggled to keep afloat following the *Breitenfeld* decision. Over 2,000 students have transferred to accredited school districts, and Normandy—owing \$15 million in tuition and transportation costs—is on the verge of bankruptcy.<sup>84</sup> Riverview Gardens, while still solvent, has inched closer to financial collapse.<sup>85</sup>

In response to the crisis, Missouri lawmakers have considered more than twenty bills aimed at rescuing the struggling unaccredited districts, and reforming the Act more generally.<sup>86</sup> The proposals have been wide ranging, and have suggested, for example: that accreditation be determined on a school-by-school basis rather than by district; that students in unaccredited districts be given the option of transferring to private, non-sectarian schools; and that transfers be halted if a school district lapses, placing the schools under direct State control.<sup>87</sup> In an effort to resolve a more immediate issue, the Missouri Legislature allocated \$2 million to Normandy in April 2014 to enable the district to keep its doors open through the end of the academic year.<sup>88</sup>

Given these pressing concerns and the flurry of legislative activity, it is easy to overlook the fact that the *Breitenfeld* opinion left open the door for possible challenges to the Act through litigation. Although the defendants in *Breitenfeld* failed to show with the requisite specificity that the transportation mandates of the Act created increased and unfunded

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84. Elisa Crouch, *New State Plan Could be a Roadmap for Normandy Schools*, ST. LOUIS POST-DISPATCH, Mar. 22, 2014, [http://www.stltoday.com/news/local/education/new-state-plan-could-be-a-roadmap-for-normandy-schools/article\\_c80ea124-6bc3-5a0a-af98-cb4c041eac32.html](http://www.stltoday.com/news/local/education/new-state-plan-could-be-a-roadmap-for-normandy-schools/article_c80ea124-6bc3-5a0a-af98-cb4c041eac32.html) [hereinafter *New State Plan*].

85. Elisa Crouch, *School Transfer Compromise in the Works in Missouri Legislature*, ST. LOUIS POST-DISPATCH, Mar. 10, 2014, [http://www.stltoday.com/news/local/education/school-transfer-compromise-in-the-works-in-missouri-legislature/article\\_f14087a9-ae92-5913-a8ae-66779332d66a.html](http://www.stltoday.com/news/local/education/school-transfer-compromise-in-the-works-in-missouri-legislature/article_f14087a9-ae92-5913-a8ae-66779332d66a.html) [hereinafter *Compromise in the Works*].

86. *New State Plan*, *supra* note 84.

87. *Compromise in the Works*, *supra* note 85; Alex Stuckey, *Missouri Senate Passes Transfer Law Legislation*, ST. LOUIS POST-DISPATCH, Feb. 27, 2014, [http://www.stltoday.com/news/local/govt-and-politics/alex-stuckey/missouri-senate-passes-transfer-law-legislation/article\\_82e703df-a236-5217-bbe4-748468671936.html](http://www.stltoday.com/news/local/govt-and-politics/alex-stuckey/missouri-senate-passes-transfer-law-legislation/article_82e703df-a236-5217-bbe4-748468671936.html).

88. David A. Lieb, *Mo. Legislature Sets Aside \$2M for Normandy Schools*, ST. LOUIS POST-DISPATCH, Apr. 8, 2014, <http://stlouis.cbslocal.com/2014/04/08/mo-legislature-sets-aside-for-normandy-schools/>.

costs in violation of the Hancock Amendment, Riverview Gardens and Normandy could likely make that showing now with little difficulty. Similarly, assuming that a court of law permits a challenger school district to raise an impossibility defense to compliance with the Act, a school district nearing bankruptcy would likely have a strong likelihood of proving that it is (1) unable to afford the transportation and tuition payments of transferring students and (2) incapable of educating the students remaining in the district. (In contrast, an accredited school district such as Clayton likely would still be unable at this time to prove that it is unable to accommodate transferring students.) Of course, an insolvent school district will find it difficult to finance litigation, but if it is able to do so, and given the importance of the issue, the matter potentially could be decided in an expedited fashion, allowing the district to rescue itself from financial ruin.

Despite this opportunity for unaccredited school districts to escape compliance with the Act, the transfer crisis will likely be resolved legislatively before litigation commences. Given the Missouri Supreme Court's reaffirmance of the validity of the Act in *Blue Springs* in December 2013, the Legislature has committed itself to tackling the issue, and while the House and the Senate have failed to find common ground in the proposals proffered so far, it is likely only a matter of time before a lasting solution is reached.

Fortunately, none of the proposed bills have advocated the outright repeal of the Act,<sup>89</sup> and while the current state of K–12 education in Missouri is unstable, legislators would be wise to ensure that a version of the Act remains in place. As discussed in Part II.A, *supra*, St. Louis has a long history of failed efforts to provide an adequate education to all of its children, and the inequality of education offered to students throughout the greater St. Louis metropolitan area has been exacerbated—as in many other cities and states<sup>90</sup>—by the local funding mechanism for public education. Although the Missouri Supreme Court declined to find the funding formula unconstitutional in 2009 in *Committee for Educational Equality v. State*,<sup>91</sup> the Act, properly altered,

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89. *Compromise in the Works*, *supra* note 85 (“[L]awmakers are more interested in setting parameters around the transfer law than they are in eliminating it entirely.”).

90. *See, e.g.*, *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1182 (Ill. 1996) (“[P]laintiffs seek a declaratory judgment that to the extent that the statutory school finance scheme ‘fails to correct differences in spending and educational services resulting from differences in [local taxable wealth]’ the scheme violates our state constitution’s equal protection clause . . . , prohibition against special legislation . . . and education article.”); *see also* MICHAEL J. KAUFMAN & SHERELYN R. KAUFMAN, *EDUCATION LAW, POLICY, AND PRACTICE: CASES AND MATERIALS* 116 (3d ed. 2013) (“[L]itigants have challenged school finance systems in [forty-five] states.”).

91. 294 S.W.3d 477 (Mo. 2009) (en banc).

has the potential to allow students of all races and backgrounds the opportunity to transcend the circumstances of their birth. Indeed, the Act promises that no child will be forced to attend an unaccredited school.

Moreover, making the Act a permanent part of Missouri's educational policy may well do wonders for the City of St. Louis more generally. While critics fear that the Act will bankrupt City schools and further decrease the population of St. Louis,<sup>92</sup> allowing students to transfer to accredited school districts will undoubtedly create a more highly educated citizenry. The students allowed to transfer pursuant to the Act may well return to and revitalize their former communities, and serve as role models for future generations.<sup>93</sup> The Missouri Constitution's provision for K–12 public educational services recognizes the value in the “general diffusion of knowledge and intelligence”<sup>94</sup> to the flourishing of the State as a whole. Retention of the Act, in some form, may move St. Louis—and Missouri more generally—closer to achieving the goal of providing to all of its citizens “the most important function of state and local government[,]”<sup>95</sup> and rejuvenate the City of St. Louis.

#### CONCLUSION

This Note has shown that *Breitenfeld* was correctly decided by the Missouri Supreme Court, despite the fact that the decision has thrown K–12 education in St. Louis (and Missouri as a whole) into crisis. The Missouri Legislature will likely arrive at a lasting solution in the near future, and if the Act is permitted to remain a part of Missouri's educational policy, St. Louis may finally be able to offer an adequate education to all of its citizens.

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92. Norwood, *supra* note 10, at 55–58. In addition, according to the Jones Report, “the statute could promote more segregated public schools in both the [C]ity and in the receiving suburbs” as a large number of white students “would transfer to suburban schools” if given the opportunity. *Id.* at 58.

93. See Camille Phillips, *Research on Revitalized St. Louis Neighborhoods Shows Pathways to Renewal*, ST. LOUIS PUB. RADIO (Oct. 24, 2013, 4:37 PM), <http://news.stlpublicradio.org/post/research-revitalized-st-louis-neighborhoods-shows-pathways-renewal> (discussing the renewal and revitalization of certain St. Louis neighborhoods and expressing optimism regarding the maintenance of relatively stable communities in the City).

94. MO. CONST. art. IX, § 1(a).

95. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).