IN THE CIRCUIT COURT OF ST. LOUIS COUNTY
STATE OF MISSOURI

JANINE MASSEY, ET AL.,	)	
	)	
Plaintiffs,	)	Case No.: 14SL-CC02359
	)	
v.	)	Division: 16
	)	
THE NORMANDY SCHOOLS COLLABORATIVE, ET AL.,	)	
	)	
Defendants.	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, FINAL ORDER AND JUDGMENT

This court held a hearing on December 18, 2014, pursuant to Plaintiffs' request for declaratory and injunctive relief against all Defendants (on the basis of claims made in their Fourth Amended Petition). Plaintiffs appeared in person and through their attorneys, Joshua Schindler and Richard Gray. Solicitor General James Layton appeared on behalf of the State of Missouri, the State Board of Education and the Missouri Department of Elementary and Secondary Education. Attorneys Melanie Keeney and Celynda Brasher appeared on behalf of the Pattonville, Ritenour, Ferguson-Florissant and Francis Howell School Districts. Attorneys Robert Useted and Leo Human also appeared on behalf of the Ritenour School District. Attorneys Cindy Ormsby, Darrold Crotzer and Angela Gabel also appeared on behalf of the Francis Howell School District. Attorney Dorothy White-Coleman appeared on behalf of the Normandy Schools Collaborative.

The parties submitted proposed orders/judgments on January 9, 2015.

Plaintiff parents – all residents within the boundaries of the former Normandy School District -- seek declaratory and injunctive relief to require Defendants to adhere to the directives of Section 167.131 of the Missouri Revised Statutes ("the transfer statute")[1] and allow their children to transfer to and remain in the schools that those children had previously attended in the 2013-14 school year for the 2014-15 school year. In advance of and during this hearing, the parties submitted various exhibits, including affidavits from the Plaintiffs detailing the reasons for their individualized requests for relief.

This court makes the following Findings of Fact and Conclusions of Law:

I. THE PARTIES

A. **Plaintiffs are the parents/guardians and next friends** of children living within the geographic boundaries of the Normandy Schools Collaborative ("the NSC"). All of the parents and/or guardians who are plaintiffs in this litigation have been granted temporary restraining orders and/or preliminary injunctions to transfer from the NSC to a defendant school district. All of them have timely completed either an "Intent to Return" form or a new transfer application for their child, children or legal wards to transfer out of the NSC for the 2014-15 school year (except for a small number of parents who later requested transfer for their kindergarten students who have older transferring siblings). All of the parents and/or guardians who are plaintiffs in this litigation submitted affidavits setting forth their residency and other eligibility of their child, children or legal wards for the transfer program from the NSC for the 2014-15 school year.

B. **Defendant Normandy Schools Collaborative** is the former Normandy School District, located in St. Louis County.

[1] "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." Section 167.131.1, Revised Statutes of Missouri (RSMo.).

C. **Defendant Missouri State Board of Education** ("the State Board") is responsible for setting policies for the Department of Elementary and Secondary Education ("DESE"), and for making accreditation determinations and related decisions for Missouri public schools and school districts.

D. **Defendant Department of Elementary and Secondary Education** ("DESE") is the department of the State of Missouri responsible for administration and promotion of the policies of the Board throughout the public elementary and secondary schools of Missouri.

E. **Defendants Pattonville, Ritenour, Ferguson-Florissant and Francis Howell School Districts** are school districts in St. Louis County or adjoining counties. Students from the Normandy School District (and now the NSC) have transferred to these and other "receiving school districts."

F. The last defendant is **Defendant State of Missouri.**

II. UNDISPUTED FACTS

The parties agree on most of the relevant facts in this case. For the December 18, 2014 hearing, they filed a detailed "Stipulation of Facts between Plaintiffs and all Defendants regarding Plaintiffs' Petition for Permanent Injunction." This stipulation refers to numerous exhibits that have been admitted into evidence. In reaching its conclusions of law, this court has considered all of the information presented in the noted exhibits.

A. The Normandy School District – and Its "Unaccredited" Status

On September 18, 2012, the State Board gave the Normandy School District the accreditation classification of "unaccredited," as of January 1, 2013.[2] The transfer statute -- Section 167.131 of the Revised Statutes of Missouri ("RSMo.") -- provides that students who reside in a school district that is not deemed accredited may transfer to "an accredited school in another district of the same or an adjoining county." According to the statute, the transferring home school district is responsible for the cost of the child's education. [The Missouri Supreme Court upheld the statute in its *Turner v. School District of Clayton* decision, 318 S.W.3d 660 (Mo. banc 2010), reminding accredited school districts that, if chosen by a transferring student from an unaccredited district, they have no discretion to deny admission to him/her. *Id.* at 662-63.]

Accordingly, for the 2013-14 school year, approximately 930 Normandy students transferred to the schools of defendants Pattonville School District ("Pattonville"), Ritenour School District ("Ritenour"), Ferguson-Florissant School District ("Ferguson-Florissant") and Francis Howell School District ("Francis Howell"), among others.[3] These students included the children of the parent Plaintiffs in this action. All of the Plaintiffs' children successfully completed their 2013-14 school years. (*See* Stipulation, Nos. 13, 15 and 22.)

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[2] There was certainly good cause for doing so. For the period of 2008 through 2012, none of the Missouri School Improvement Program's ("MSIP") student achievement results for mathematics and communication arts (i.e., English) were met in the Normandy School District. These results were generated from scores attained from the standardized "Missouri Assessment Program" ("MAP") tests of students from the third to the eleventh grades. These results were "not high and (did) not show sufficient improvement." A district must meet at least one MAP standard to be even "provisionally accredited." (*See* Exhibit A.)

The Normandy School District's prior track record was hardly impressive. In April, 1996, the School Board deemed the district to be "provisionally accredited" (as determined by a "First Cycle MSIP 1990 – 1996"). The "provisionally accredited" classification continued in March, 2001 (as determined by a "Second Cycle MSIP 1996 – 2001") and in April, 2006 (as determined by a "Third Cycle MSIP 2001 – 2006"). (*See* Exhibit A.)

[3] The Francis Howell School District has, by far, received the most of the transfer students. Approximately 430 transfer students from the Normandy School District completed the 2013-14 school year in Francis Howell. Apart from the students who transferred to Francis Howell, approximately 500 students transferred from the Normandy School District to seventeen other school districts in St. Louis County and adjoining counties for the 2013-14 school year, under the auspices of the transfer statute.

According to 5 CSR 20-100.105(2) of the Missouri Code of State Regulations,[4] DESE must annually review the performance of all school districts in this state. The purpose of such reviews is to guide DESE in determining those districts in need of improvement and in determining the level of intervention, if necessary. The State Board of Education must assign each school district with one of four classification designations: "unaccredited, provisionally accredited, accredited and accredited with distinction." 5 CSR 20-100.105(3).[5] The rule also addresses the means by which the Board can change the designations. In particular, an unaccredited school district could become accredited if it "demonstrated significant change in student performance over multiple years." 5 CSR 20-100.05 (5) (B).[6]

Since the date of the "unaccredited" classification, students in the Normandy School District continued to perform poorly. During the three most recent school years, the "proficiency rates" for mathematics, science and social studies were found to be at "markedly low level(s)." Attendance rates remained "far below the statewide goal of 90% ... with 68.2% of Normandy students (meeting) this standard during the 2014 school year." Discipline incident rates "remained at

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[4] 5 CSR 20-100.105 is the rule that addresses the Missouri School Improvement Program.

[5] In determining the appropriate accreditation level, the State Board uses the Missouri School Improvement Program ("MSIP") which focuses on resource standards (such as class size and course offerings), process standards (that address instructional and administrative processes) and performance standards (that include multiple measures of student performance, such as college/high school readiness, attendance and graduation rates). These standards are used to generate a district's Annual Performance Report ("APR") which designates a certain number of points to determine the district's "accreditation classification." The APR provides "an objective analysis of each district's attainment of the MSIP 5 Performance Standards and Indicators." (*See* Exhibit B, the "Comprehensive Guide to the Missouri School Improvement Program.")

There are four accreditation classifications: "accredited with distinction" (126 – 140 APR points, i.e., 90% -- 100% of the total possible points); "accredited" (98 – 125 APR points, i.e., 70% -- 89.9% of the total points); "provisionally accredited" (70 – 97 APR points, i.e., 50% to 69.9% of the total points); and "unaccredited" (0 – 69 APR points, i.e., 0% -- 49.9% of the total points). (*See* Exhibit Q.)

[6] Section 161.092(9), RSMo. provides the authority for the State Board to "classify the public schools of the state..., establish requirements for the schools of each class, and formulate rules governing the inspection and accreditation of schools." Section 161.092(14), RSMo. gives the Board the authority to "promulgate rules under which the board shall classify the public schools of the state."

significantly above the state average in the Normandy School District..." Graduation rates were "maintained at a markedly low level" in the school district for the last three years: only 61.5% of students graduated within four years during the 2012 school year, 53.6% of students graduated within four years during the 2013 school year, and 59.7% of students graduated within four years during the 2014 school year. (*See* Exhibit R, the NSC's Accountability Plan.)

In anticipation of taking some drastic measures to address the aforementioned problems, in February of 2014, the State Board directed the commissioner of DESE to establish a Normandy Task Force to govern and operate the Normandy School District. On May 12, 2014, the Task Force issued recommendations relating to "governance structure, advisory committees, system components, community partnerships, educators and leaders."[7] Certain assumptions were made based on "interpretations of relevant state statutes and case law, including Section 162.081.3[8] (re) School District Governance." Section 162.081.3(2)(b) purportedly would make possible, *inter alia*, "the creation of a new Local Education Authority encompassing the Normandy footprint with no accreditation classification." The Task Force's "Guiding Principles" were noted as follows: "Normandy residents should have access to a unified district of high-quality schools that hold students to high expectations." (*See* Exhibit G.)

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[7] The Task Force (comprised of numerous education experts and community leaders) developed an impressive plan "for the operation of schools in the Normandy School District effective July 1, 2004 should the district lapse on or before June 30, 2014." (*See* Exhibit G, the "Normandy Task Force Recommendations," p. 1) The report provided a detailed and comprehensive listing of twelve recommendations to address the Normandy School District's problems. The report created "8-week benchmarks as an assessment process to determine whether the district is moving forward with the Missouri State Improvement Program requirements."

The task force also recommended its own retention until June 30, 2015 "to monitor and consult with the (school board), (the) superintendent and key leaders to ensure that the processes and procedures are working well and strategic MSIP goals and benchmarks are being met." (p. 6) The report also identified five chief goals: "Teaching for Understanding and Learning," "Culture of Caring and Respect," "College and Career Workforce Readiness," "Socio-Emotional and Physical Wellness," "Operational Alignment, Communication and Transparency." (p. 4)

[8]This statute addresses, *inter alia*, the State Board's responsibilities after a school district has been deemed unaccredited.

B. The Normandy Schools Collaborative – "State Oversight District"

On May 20, 2014, the State Board adopted a resolution that "lapsed" the Normandy School District as of June 30, 2014. (*See* Exhibit F.) The May resolution established the Normandy Schools Collaborative ("NSC") as of July 1, 2014, retaining and exercising all authority previously granted to the Board of Education of the unaccredited Normandy School District.[9] Further, pursuant to Section 162.081.3(2)(b), RSMo,[10] the State Board gave the NSC the authority to take any actions necessary for its operation, subject to the advice and consent of the State Board. The minutes from the monthly May meeting made no mention of an effort to change the classification of the NSC at that time.

On June 16, 2014, the State Board addressed the accreditation status of the NSC. The meeting minutes indicate that the State Board voted unanimously to grant "a waiver under Mo. Rev. Stat. Section 161.210," giving the NSC a "new school status as a state oversight district" (as listed on the School Board's June meeting minutes under No. 12319, "Consideration of Classification Determination for the Normandy Schools Collaborative"). (*See* Exhibit H.)

In announcing the creation of the NSC, the State Board indicated that a Normandy Joint Executive Governing Board will "within ninety days of appointment, implement a school improvement plan" and "provide quarterly reports" to the State Board. (*See* Exhibit I.) The announcement also indicated that "the waiver status shall be reviewed based upon the benchmarks established by DESE." Moreover, DESE provided an "Accountability Plan," creating a "Regional

[9] On its website, the State Board indicated that the creation of the NSC "represents an unprecedented step to break the cycle of low achievement and fundamentally change the way Normandy schools will function." (*See* Exhibit I, the State Board's announcement, "Consideration of Classification Determination for the NSC.")

[10] The State Board had other available options, including attaching the territory of the NSC to another district or districts; or establishing one or more school districts within the territory of the NSC. *See* Section 162.081.3(2)(c) and (d), RSMo.

School Improvement Plan (RSIT)" that will conduct "monthly progress monitoring meetings." (*See* Exhibit O.) DESE also established three tangible goals for "Curriculum and Assessment."

Several days later, DESE informed various school districts that they had the option to accept or deny the Normandy transfer students for the 2014-15 school year. Pattonville, Ritenour, Ferguson-Florissant and Francis Howell informed Plaintiffs that they would not accept transfers from the Normandy Schools Collaborative for the 2014-15 school year. (Other school districts willingly accepted the transfers.) Shortly thereafter, the NSC informed Plaintiffs that their children would not be allowed to transfer out of the NSC. (*See* Stipulation of Facts, No. 33.) (Parents were essentially given little more than a few days to make alternative arrangements – such as enrolling in private schools or moving into accredited districts -- to school their children.)

On June 26, 2014, DESE issued an "Updated Operating Policy for Transfers from the Normandy Schools Collaborative" that restricted transfers to students who attended school in the Normandy School District during the 2012-13 school year and transferred out of the Normandy School District for the 2013-14 school year – along with the students' kindergarten siblings. (*See* Exhibit M.) On July 23, 2014, DESE revised its "Updated Operating Policy" by eliminating the requirement that the students must have attended the Normandy School District during the 2012-13 school year. (*See* Exhibit N.)

In July, 2014, DESE issued an "Accreditation Classification" Report. (*See* Plaintiffs' Exhibit O.) The report listed all 520 school districts in the state, dividing them into four "classifications":

1. "Accredited" (with 506 school districts listed);

2. "Provisionally Accredited" (with 11 school districts listed);

3. "Unaccredited" (with 2 school districts listed); and

4. "State Oversight" (with 1 school district -- the NSC -- listed).

No school district in the state was deemed "accredited with distinction," one of the four MSIP classification options. (The MSIP makes no mention of a "state oversight" classification...)

The State Defendants initially did not claim that the new supposed accreditation classification of "state oversight" was the same as the "accredited" classification. Their public comments clearly indicate that they knew that there was a big difference between the two classifications. For example, there was an agenda item voted on by the Board that states that certain benchmarks established by DESE would be necessary to achieve *to return the NSC to full accreditation* . (*See* Plaintiffs' Exhibit I, pp. 1-2). (Emphasis added.) Several of the State Board members indicated that the goal of the new classification was to move the NSC "to provisional first and *ultimately full accreditation*," and that the creation of the NSC was "a worthy *ambition* . . . *to get Normandy accredited.*" (*See* Exhibit H, 108 and 141). (Emphasis added.) A June 16, 2014 statement on the DESE website indicated that "The new district will *not have an accreditation status for three years*... " (*See* Exhibit K, p.1). (Emphasis added.) A letter from DESE to the University City School District on June 18, 2014 stated that "The Normandy Schools Collaborative has been designated as a State Oversight District and will operate *without an accreditation status for up to three years*." (*See* Exhibit L, p.1). (Emphasis added.)

At the close of the 2013-14 school year, approximately 786 students had stated their intent to transfer again out of the Normandy School District for the 2014-15 school year pursuant to the transfer statute.[11] (As stated in their affidavits, by early 2014, the Plaintiffs had completed the

[11] Of all the school districts, Francis Howell has borne the greatest burden here. 351 students – nearly half of all the Normandy transfer students -- completed "Intent to Return" forms in early 2014 to transfer again to Francis Howell for the 2014-15 school year. The remaining 435 students completed "Intent to Return" forms to seventeen other school districts.

necessary paperwork for their children to return to Pattonville, Ritenour, Ferguson-Florissant and/or Francis Howell, for the 2014-15 school year.) Furthermore, approximately seventy-four new families had applied to have their children transfer out of the Normandy School District for the 2014-15 school year.[12]

An October, 2014 State Board document reflected that the "MSIP" points awarded to the Normandy School District were 10.0 points out of a possible 140.0 points, i.e., 7.1% of the total possible points. (*See* Exhibit D.) As previously indicated, 69 points still warrants an "unaccredited" classification. (A score of 70 points only classifies the school district as "provisionally accredited." In other words, a school district with nearly *seven* times the number of MSIP points that the Normandy School District had four months ago would still be deemed "unaccredited."[13]

Parent Plaintiffs have provided this court with affidavits that describe the irreparable harm that would come to them and their children should they be forced to continue attending school in the NSC. (*See* each Plaintiff's affidavit that has accompanied their "Petition for Appointment of Next Friend.")

On July 14, 2014, Plaintiffs filed the underlying petition. (The petition was ultimately amended on July 22, July 30, September 4 and November 20, 2014.)

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[12] In addition, twenty-four families completed new applications for their children to transfer from the Normandy School District to Francis Howell for the 2014-15 school year. Of these, seven were denied due to failure to meet the residency requirements. The remaining fifty-seven families completed new applications for their children to transfer from the Normandy School District to one of seventeen other school districts.

[13] The 2014 APR for Normandy "awarded" points as follows: for "Academic Achievement," 0.0 points earned out of a possible 56.0 points; for "Subgroup Achievement," 0.0 points earned out of a possible 14.0 points; for "College and Career Ready," 10.0 points earned out of a possible 30.0 points; for "Attendance," 0.0 points earned out of a possible 10.0 points; and 0.0 points earned out of a possible 30.0 points. (*See* Exhibit D, the "2014 LEA Annual Performance Report – Final LEA Summary Report -- Normandy. This data was attained as of Aug. 15, 2014, but not reported until Dec. 3, 2014.)

On August 1, 2014, the State Board amended its June meeting minutes in only one regard, as follows: "Correction of Item No. 12319 Consideration of Classification Determination for the Normandy Schools Collaborative in the minutes of the June 16-17, 2014 meeting of the State Board of Education." An attached page of the June minutes showed a sole revision from the June notation of "...new *school status* as a state oversight district..." to "...new *accreditation* as a state oversight district..." (Emphasis added.) (*See* Plaintiffs' Exhibit P.) (Counsel for the State Board explained that there had been two sets of minutes from the June meeting, and that the incorrect set was initially relied upon for voting by the Board.)

According to Ronald Lankford, Deputy Commissioner of Education for the Office of Financial and Administrative Services for DESE, "If students transfer from the Normandy School Collaborative in numbers equal to or exceeding the 2013-14 school year and at the tuition and transportation costs paid during the 2013-2014 school year, that the Normandy School Collaborative will exceed its operational cash balances effective October 31, 2014, and will not have sufficient funding to sustain school operation for the remainder of the 2014-15 school year." (*See* Defendants' Affidavit, presented at the August preliminary injunction hearing.)

C. <u>The Pending Lawsuit – Plaintiffs' Fourth Amended Petition</u>

On July 14, 2014, some of the plaintiffs filed a petition (that was ultimately amended four times and ultimately included all of the captioned plaintiffs), seeking the following:

1. Declaratory relief (Count V) based upon the assertion that the State Board never actually gave the Normandy Schools Collaborative an "accredited" status (despite the State Board's arguments to the contrary), thereby not providing any authority to prohibit the plaintiffs from transferring out of the NSC;

2. Declaratory relief (Count I) based upon the assertion that the State Board improperly attempted to change the accreditation status of the NSC by disregarding several state statutes and other mandates;

3. Declaratory relief (Count III) based upon the assertion that the State Board improperly attempted to change the aforementioned accreditation status by engaging in rulemaking without following the necessary Missouri procedures;

4. Injunctive relief (Counts VI, II and IV) seeking to prohibit the "receiving school district" Defendants from denying admission to any of the Plaintiffs' children who request to transfer from the NSC. They further seek injunctive relief to require Defendant NSC to pay the costs of tuition for these students who seek to attend schools in the receiving districts during the 2014-15 school year;

5. Temporary injunctive relief that has already been provided by this court. (Count VII).

At the time of the August 6, 2014 hearing (in which the plaintiffs were seeking temporary injunctive relief), only four of the nearly thirty school districts in St. Louis County and St. Charles County – Pattonville, Ritenour, Ferguson-Florissant and Francis Howell – were still declining to take any NSC transfer students for the 2014-15 school year.[14]

On August 15, 2014, this court granted the motion for a preliminary injunction filed by the Second Amended Petition plaintiffs. This court's judgment enjoined the Pattonville, Ritenour and Francis Howell School Districts from denying enrollment to Plaintiffs' children who sought to enroll

[14] From the outset, numerous school districts in St. Louis County willingly accepted transfer students from the Normandy School District, without any court intervention. For the 2014-15 school year, the University City School District had 59 students enrolled; the Ladue School District had 46 students enrolled; the Clayton School District had 28 students enrolled; the Brentwood School District had 23 students enrolled; and the Parkway School District had 18 students enrolled. Normandy students were also attending ten other school districts during the 2014-15 school year. (*See* Exhibit E.)

in school in the respective school districts. (Defendant Ferguson-Florissant had not yet been brought into this lawsuit.) Since that time, numerous additional plaintiffs have joined in the lawsuit. Additional preliminary injunctions have been ordered to include these children (on August 22, 2014; August 25, 2014; September 5, 2014; September 12, 2014; September 22, 2014; September 25, 2014; October 6, 2014; October 22, 2014; November 5, 2014; and November 21, 2014.)

After each preliminary injunction and/or restraining order, Plaintiffs deposited injunction bonds as ordered by this court.

Plaintiffs argue, *inter alia*, that the State Board's decision to deem the NSC a "state oversight" district does not change its "unaccredited status," and even if it did, the State Board did not follow the necessary procedures to do so; therefore, the Plaintiffs' children still have the right to transfer, as Section 167.131, RSMo. prescribes.

The state Defendants maintain that the School Board had the statutory authority to waive the accreditation rules and give the NSC "accreditation as a state oversight district"; accordingly, the NSC should now be deemed "accredited" -- and thus, the transfer statute (Section 167.131, RSMo.) does not apply to those students who reside within the district's boundaries. The Defendant school districts agree with this interpretation, justifying their decisions to deny admission to the NSC students.

D. <u>An Update</u>

After this court's issuance of a preliminary injunction in this case, in August of last year, Pattonville, Ritenour, and Ferguson-Florissant agreed to accept back (for the 2014-15 school year) all students who had transferred from the Normandy School District in 2013-14 and completed the necessary "Intent to Return" forms for the 2014-15 school year.

After this court's issuance of the preliminary injunction, Francis Howell has accepted back only those particular students who have been specifically addressed in the court order that grants them the right to transfer to Francis Howell.

As of December 12, 2014, approximately 3,434 students were enrolled in the NSC.

As of December 17, 2014, the NSC has been paying tuition to receiving districts for approximately 420 students who have transferred out of the NSC for the 2014-15 school year.

The NSC has been providing transportation to Francis Howell for those students who have transferred there from the NSC during the 2014-15 school year.

Since the date of the August hearing, no evidence has been provided to establish that the NSC did not have funding to operate its schools. (The NSC provided no update.) The district definitely faces significant financial challenges. (*See* Exhibit J, DESE's "Transfer Budget Options" chart.)

III. APPLICABLE LAW

A. Declaratory Relief

The circuit courts have the authority to "declare rights, status and other legal relations whether or not further relief is or could be claimed... The declaration may be either affirmative or negative in form and effect, and such declarations shall have the force and effect of a final judgment or decree." Section 527.010, RSMo. To grant a declaratory judgment, the court must be presented with: (1) a justiciable controversy that presents a real, substantial presently-existing controversy admitting of specific relief, as distinguished from an advisory decree upon a purely hypothetical situation; (2) a plaintiff with a legally protectable interest at stake, consisting of a pecuniary or personal interest directly at issue and subject to immediate or prospective consequential relief; (3) a controversy ripe for judicial determination; and (4) an inadequate remedy at law."

Missouri Soybean Ass'n v. Missouri Clean Water Com'n, 102 S.W. 3d 10, 25 (Mo. banc 2003).

This court will first address the declaratory claims (in Counts I, III and V) raised in Plaintiffs' petition. These findings will have a bearing on whether or not injunctive relief (as requested in Counts II, IV and VI) can even be considered.

B. Injunctive Relief

The remedy by "writ of injunction" shall exist to "prevent the doing of any legal wrong whatever, whenever in the opinion of the court an adequate remedy cannot be afforded by an action for damages." Section 526.030, RSMo. To obtain injunctive relief, "a party must prove: (1) that the party has no adequate remedy at law; and (2) that irreparable harm will result if the injunction is not granted." *City of Kansas City v. New York-Kansas Bldg. Assoc., L.P.*, 96 S.W.3d 846, 855 (Mo. App. W.D. 2002). "Irreparable harm is established if monetary remedies cannot provide adequate compensation for improper conduct." *Walker v. Hanke*, 992 S.W.2d 925, 933 (Mo. App. W.D. 1999).

To determine whether or not to grant the injunctive relief sought by Plaintiffs, this court must address whether or not Defendants committed a "legal wrong" that must be prevented. This court will then address whether or not Plaintiffs have an adequate remedy at law. Finally, this court will determine whether or not irreparable harm will result if the injunction is not granted.

In order to determine whether Defendants committed a "legal wrong," this court will consider the complaints raised by Plaintiffs alleging three significant statutory violations. Only upon a finding of a particular wrong can this court consider injunctive relief.

IV. CONCLUSIONS OF LAW

A. Declaratory Claims (Counts I, III and V)

1. Common Factors Underlying Plaintiffs' Declaratory Claims

This court finds that the controversies in question warrant declaratory relief, as Plaintiffs have proven all four necessary elements. *See Missouri Soybean* at 25.

Firstly, this is a "justiciable controversy." *See Barron v. Shelter Mut. Ins. Co.*, 220 S.W.3d 746, 748 (Mo. banc 2007). The children and school districts are facing a "substantial presently-existing controversy" relating to the students' rights to transfer out of the NSC. This is not a hypothetical situation. This decision (similar to the August 15, 2014 decision) will have a direct and immediate effect on the students of the NSC, the NSC itself and the receiving districts.

Secondly, the students have a "legally protectable interest" at stake here – their right to a decent education. Their parents clearly have standing to bring this lawsuit on their behalf to court. They and their parents clearly have standing to bring this lawsuit to court, as they have a personal interest "directly at issue." *See Foster v. State*, 352 S.W.3d 357, 359-60 (Mo. banc 2011).

Thirdly, this controversy is "ripe for judicial determination." *See Lane v. Lensmeyer*, 158 S.W.3d 218, 222 (Mo. banc 2005). Defendants can hardly argue that Plaintiffs' claims are premature. The students' current and future placement for schooling is at issue. The controversy became ripe at the time last summer when the receiving districts refused to allow the NSC students to transfer to their schools.

Finally, there is no adequate remedy at law. If Defendants violated the statutory provisions alleged in the Fourth Amended Petition, monetary damages would not remedy the problems. Money can certainly help provide for a good education. No one has tried to argue, however, that money could ever compensate for a poor education.

Defendants do not seem to disagree that this type of case warrants declaratory relief. They argue, however, that the declarations that Plaintiffs seek are not appropriate because Defendants' actions were proper under the law. This court will now address each action separately.

2. Re Count V: The State Board's decision to call the NSC a "state oversight district" did not change the district's classification to "accredited."

The initial minutes of the Board's June 16, 2014 proceedings state that the Board decided to give the NSC "a new school status as a state oversight district." It is undisputed that on August 1, 2014, the Board attempted to correct the June 16, 2014 minutes by stating it had voted to give the NSC a "new accreditation as a state oversight district." However, neither document, nor for that matter, any document submitted into evidence by the Defendants, states that the NSC is in fact "accredited."

Defendants contend that bestowing the NSC with "a new school status" or "new accreditation" as a "state oversight district" should have the same impact as deeming the NSC "accredited" for purposes of the transfer statute. Clearly the aforementioned designations – "new school status" and "new accreditation as a state oversight district" – are not synonymous with "accredited." "Accredited" is only one recognized type of *accreditation status* used by the Board and DESE. The term "accreditation status" refers to the various "classifications" into which a district may be placed. As previously indicated, the "accreditation classifications" (as listed in DESE's July 2014 report) are "accredited," "provisionally accredited," "unaccredited" and "state oversight."[15] "State oversight" -- at best -- is one type of accreditation classification; "accredited" is another – and completely different – classification.

[15] Note that DESE completely disregarded its own CSR classifications, arbitrarily replacing the "accredited with distinction" classification with "state oversight." The "state oversight" classification made its debut in this report, clearly designed to address the problem in the Normandy School District.

Aware of the dire financial consequences (from paying tuition for all the exiting students to the receiving districts), the State Board understandably wanted to do whatever it could to make the transfer statute inapplicable to the Normandy School District. Indeed, a poorly performing district could hardly afford to lose even one dollar. The Board figured it could either illogically call a horribly failing school district "accredited" or call the NSC something else and boldly announce that the transfer statute would not be applicable. The Board chose the latter approach. Unfortunately for the district, the Board has no authority to waive the application of a state statute.[16]

If the intent of the Board and DESE was to accredit the NSC, it could simply have voted to accredit (or provisionally accredit) the NSC.[17] The Board and DESE hardly had the intention to do so. Indeed, the July, 2014 Classification Report (*See* Exhibit O) did not list the NSC as one of the 506 schools listed as "accredited" or even as "provisionally accredited."

Other evidence also supports the conclusion that the Board never gave the NSC an "accredited" status. An agenda item voted on by the Board states that certain benchmarks established by DESE would be necessary to achieve to return the NSC to full accreditation. (*See* Plaintiffs' Exhibit I, pp. 1-2.) Several Board members claimed to the press that the Board's goal is to move the NSC "to provisional first and ultimately full accreditation," and that "it's a worthy ambition . . . to get Normandy accredited." (*See* Exhibit H, 108 and 141.) On June 16, 2014, DESE released the following statement on its website: "The new district will not have an accreditation

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[16] The State is certainly aware of a solution to its predicament. In DESE's September 10, 2014 "NSC Accountability Plan," it indicated that "new legislation" "recently authorized" the state intervention and alternative governance." (*See* Exhibit R, p.1). Of course, the legislature always has the option to amend the transfer statute and allow the Board to proceed in the manner in which it has attempted to do. Despite DESE's indication, no new legislation has been enacted. What is "new" is the Board's bold approach, to simply announce that the transfer statute does not apply to the NSC's students...

[17] In their trial brief, the State defendants state that "[p]ursuant to its new status, for the time being the Normandy Schools Collaborative maintains an 'accredited school,' and (Section) 167.131.1 does not apply to it." Defendants have provided absolutely no documentation in which the State Board or DESE has actually labeled the NSC "accredited."

status for three years... " (*See* Exhibit K, p.1.) DESE wrote to the University City School District superintendent on June 18, 2014 that "the Normandy Schools Collaborative has been designated as a State Oversight District and will operate without an accreditation status for up to three years." (*See* Exhibit L, p.1.)[18] There was no documentation presented to this court to suggest that at the outset the Board considered its August "resolution" to be an announcement that the NSC is "accredited."

In reaching this conclusion, the Court does not have to decide whether the Board properly amended the June 16, 2014 minutes five days before the preliminary injunction hearing in this case, or whether the amendment truly reflects the Board's vote on that day. Rather, whether the NSC has "status" or "accreditation" as a "state oversight district" is of no consequence. Simply put, the overwhelming evidence leads to the inescapable conclusion that the NSC was never accredited – on either day.

The State Board's argument that its label of "accreditation as a state oversight district" is the equivalent of "accredited" completely defies logic. The MSIP levels were created to ensure that school districts are accountable to their children. No entity would know this more than the State Board which knows it had no basis whatsoever to label such a failing school district "accredited." *None* of the documentation (until this lawsuit began) suggests otherwise. To call a school district with the lowest APR in the state – by far – "accredited" makes no sense whatsoever. A school district must meet certain benchmarks as set out in Section 162.081, RSMo and

[18] Other indications that the Board had no plans to deem the NSC "accredited" include the Normandy Transition Task Force's June 2014 announcement that the new governance will have "no accreditation classification." (*See* Exhibit G.)

5 CSR 20-100.105(3) before it is worthy of the Board's designation of "accredited." (*See* Exhibit I.)[19] In 2013, the Normandy School District had an 11.7% APR score, and in 2014, NSC was assessed at an unbelievably low 7.1% APR score. (*See* Exhibits B and D.). These dismal scores are far below the 50% APR scores that are required for DESE to recommend that an unaccredited school district be elevated even to the "provisionally accredited" category. (*See* Exhibit Q.)

Regardless of the propriety of calling the NSC "accredited," the fact of the matter is that the Board never called the NSC "accredited." No evidence was ever presented to this court to show that the State Defendants *ever* stated in writing that the NSC is "accredited." Merely giving the NSC a new classification label – a label not found in any Missouri statute or rule – certainly does not make it "accredited." The State Defendants' efforts to circumvent the statutory process leaves this court with no other option than to find that the Defendants committed "legal wrongs" which need to be addressed by this court. The transfer statute clearly still applies.

Based on the foregoing analysis, this court finds that Plaintiffs have met their burden to obtain the declaratory relief that they seek in Count V of their petition. Accordingly, this court declares that the NSC is not an accredited school district and, accordingly, is subject to the requirements of the transfer statute, Section 167.131, RSMo. All defendants, therefore, are subject to the requirements of Section 167.131. To the extent that if conflicts with the directives in Section 167.131, the State Board's "Operating Policy for Transfers from the Normandy Schools Collaborative" is deemed null and void.

[19] In their trial brief, the State Defendants attempt to justify the "reclassification," noting the unfairness of carrying over "a prior accreditation status of a substantially different district to the reformed entity." The State Defendants then provide examples of such unfairness: when a district is dissolved, divided or merged. This is hardly the case here. The boundaries for the Normandy School District and the Normandy Schools Collaborative are identical. The children and the schools are the same. Most significantly, the statistics regarding only these same children (not ones that hypothetically were merged into a successful school district, for example) clearly demonstrate that they are not exhibiting any signs of achieving academic success as of this date. The Defendants' complaints are unwarranted.

3. *Re Count I: The State Board did not have the authority to deem the Normandy Schools Collaborative "new accreditation as a state oversight district," as the State Board did not comply with the requirements of Section 162.081, RSMo.*

Even if the Board had deemed the NSC to be "accredited" in June and August, 2014 (which this court has previously found it had not), Plaintiffs must still prevail because the Board's actions did not comply with the many statutory requirements necessary to change an accreditation classification from "unaccredited" to "accredited." Defendants maintain that the State Defendants complied with Section 161.210, RSMo (hereinafter, "the waiver statute"). This court disagrees. There was no compliance whatsoever.[20]

The waiver statute, in relevant part, states that "[n]otwithstanding any provision of law to the contrary, the state board of education is hereby granted authority to waive or modify any administrative *rule* adopted by the state board or policy implemented by the department of elementary and secondary education." Section 161.210.1. *(Emphasis added.)* The statute grants the Board the authority to waive or modify any administrative *rule* adopted by the Board or DESE; Section 161.210.1, however, does not grant the Board the authority to waive or modify any *statute*. The Board, therefore, can exercise its authority to waive any accreditation rules it wants, as long as it complies with the pertinent accreditation statutes. Accreditation statutes that apply to the Board's actions regarding the NSC include Sections 162.081 and 161.092 of the Missouri Revised Statutes.

[20] This court is stunned with the State Defendants indication in its Trial Brief that "Plaintiffs are unable to show that the Defendants have failed to comply with any requirement of Section 162.081.3." This representation was made shortly after Defendants concede that they were not fully compliant (as to "reviews and recertifications," "public comments," and "annual reports.")

Missouri statutes make it abundantly clear that the State Board does not have unfettered discretion in classifying school districts. Section 161.092(9), RSMo provides that the State Board shall "classify the public schools of the state *subject to limitations provided by law*..."[21] (Emphasis added.) One of those laws is Section 162.081.

Section 162.081 provides the procedures that DESE and the State Board must follow to change the status of a school district after it has been classified as "unaccredited." Neither DESE nor the Board has met the requirements of Section 162.081 to change the NSC's status.[22]

As to DESE, Section 162.081.2 demands that DESE "conduct at least two public hearings at a location in the unaccredited school district regarding the accreditation status of the school district." The evidence presented to this court showed that two public hearings were scheduled within the Normandy School District on November 11 and December 11, 2013. (*See* Exhibit C.) This court heard no evidence that the hearings were actually conducted. (This court does not question, however, the State Defendants' attorney's post-hearing representation that the hearings were actually held.)

[21] This court notes that Section 161.092 – the statute that provides the powers and duties of the State Board – only uses the qualifier "subject to limitations provided by law" when addressing one power (and not the other fourteen): the power to classify the public schools. Obviously the legislature was very careful to make sure that Section 162.081's directives (and any other pertinent statutes) be followed by the Board.

[22] Defendants have argued that granting relief to Plaintiffs would unwind the lapsing of the Normandy School District and the creation of the NSC, both of which occurred pursuant to Section 162.081. Plaintiffs seek no such relief. The failure to take the required steps to make the NSC accredited, as set forth in Section 162.081, speaks to the accreditation status of the NSC, not to its creation or Normandy School District's lapse.

Section 162.081.2 also indicates that the hearings "shall provide an opportunity to convene community resources that may be useful or necessary in supporting the school district as it attempts to return to accredited status..." The Defendants presented no evidence that the Board provided such an opportunity.

The DESE statute also indicates that DESE may "request the attendance of stakeholders and district officials to review the district's plan to return to accredited status..., offer technical assistance; and facilitate and coordinate community resources." While this portion of the statute gives DESE some discretion in determining how the hearing should be conducted, the message is clear: much needs to be done to return to an "accredited status." Connections need to be made. Partnerships need to be fostered. Support needs to be put into place. This cannot happen overnight.

As to the State Board, Section 162.081.3 requires the State Board, in this situation, to "determine an alternative governing structure for the district" that includes the following:

1. a rationale for the decision to use an "alternative form of governance" and "in the absence of the district's achievement of full accreditation, the state board of education shall review and recertify the alternative form of governance every three years"; and
2. a method for the residents of the district "to provide public comment after a stated period of time or upon achievement of specified academic objectives"; and
3. "expectations for progress and academic achievement, which shall include an anticipated time line for the district to reach full accreditation"; and
4. "annual reports to the general assembly and the governor on the progress towards accreditation..., including a review of the effectiveness of the alternative governance."

As to the first requirement for the State Board, this court could not find a document to address the Board's rationale for the decision to use an "alternative form of governance." (The State Defendants claim that this rationale is in the "Normandy Task Force Report and Recommendations.") Nonetheless, no one disputes why the NSC was created. This court, however, notes that there has been no evidence of any review and recertification by the Board. The statute provides the time for when such a procedure should occur: "every three years."[23] The statute does not require the hearings to merely occur "within three years" after the lapse (as the State suggests); the statute requires the hearings to occur "every three years."[24] The hearings should thusly occur at a time when the district can make its case that it should be accredited. Indeed, the three-year review process contemplated by the statute makes it very clear that full accreditation cannot be immediate.[25]

As to the second requirement, the State Board failed to establish a method for the residents of the district "to provide public comment after a stated period of time and upon achievement of specified academic objectives." The State Board did not comply with this requirement, providing no evidence at the hearing as such. The implication here is obvious: certainly no unaccredited school district should be deemed accredited until, at the very least, some sort of academic achievement has occurred. The State certainly had no achievement to report at the hearing. In fact, the most recent data that was presented at the December hearing reflected an even grimmer

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[23] Defendants indicate in their trial brief that "Although that review in not required until 2017, the Board has started periodic reviews." Such reviews are extraordinarily premature, of course, occurring a few short months after the unaccredited NSC's creation. Being "on track" (as the State maintains) is not sufficient. This court notes again that it has not received any documentation from the State Defendants that purports to be reviews as is required.

[24] This three-year period is in general accord with the three-year period of review for altering a school district's accreditation status. (*See* Section 162.081.3(2)(b)a.).

[25] The State Defendants note in their trial brief that "Although ... review is not required until 2017, the Board has started periodic reviews." This court finds that a meaningful review process in three years makes sense. A review after a mere few months of state oversight makes no sense whatsoever.

situation than that which was presented at the August hearing: i.e., an APR score for the NSC that is more than *seven* times lower than the lower range of the provisionally accredited classification. This court also notes that the State Defendants provided no indication of a "stated period of time" for public comment, as this second requirement mandates.

As to third Section 162.081.3 requirement, the State Board must provide "expectations for progress and academic achievement, which shall include an anticipated time line for the district to reach full accreditation." Exhibits Q and R (which includes an NSC Accountability Plan) clearly demonstrate the Board's compliance with the statutory requirement to provide "expectations for progress and academic achievement." Once again, however, the implication is clear: progress and academic achievement must actually occur before an upgraded accreditation status can be achieved. Common sense makes it clear that sustained progress should be required before a school district can be accredited.[26]

Finally, Section 162.081.3 requires the State Board to submit "annual reports to the general assembly and the governor on the progress towards accreditation..., including a review of the effectiveness of the alternative governance." The State Board has provided no such reports, stating that it expects to submit them in the future.[27] While this court believes that the State Board intends

[26] In the State Defendants' Trial Brief, they make it very clear that their recent "Accountability Plan" has a timeline: "A Normandy LEA (i.e., a Local Education Agency) will be held accountable for meeting accreditation standards within three years." While the State has established that it has complied with Section 162.081.3(2)(b)c, by revealing its accountability plan, it essentially revealed that it has not complied with its own plan – meeting accreditation standards cannot possibly be done in the very near future. Indeed, the NSC has understandably not done anything to meet these standards in such a short period of time. Even if the State had the requisite plans, it must show some success. Plans and goals are not the same as progress and academic achievement.

[27] The State Defendants indicate in their trial brief that "the State Board will make such reports when there is a year on which to report. But even at this point, months after the Plaintiffs filed their initial Petition, we are more than half a year away from such a report even being possible." One cannot argue with this point. However, this court is trying to determine what the State believes the objective is for writing such reports. It obviously has no intention of using them as they were meant to be used – to address progress and determine what needs to be done next to attain

to submit the reports, this particular statutory requirement is not fulfilled until the reports are actually submitted. Again, the time period built into the statute for submission of annual reports indicates that achieving full accreditation is obviously a step reached at the end of a process, not at the beginning of it.[28]

Simply put, Section 162.081 understandably demands that once a school district is deemed unaccredited and its corporate organization is lapsed, the State Board must satisfy many demands to change that district's "unaccredited" classification. The State Board has only just begun this process. It clearly cannot simply deem NSC "accredited" to bypass the transfer statute. The State Board concedes that it has not complied with all of Section 162.081's requirements, maintaining instead that it is "on track" or that it is too early to engage in or complete a particular mandated process. The waiver statute does not recognize such explanations. All of the Section 162.081 procedures must be followed. No exceptions are mentioned. To restore the NSC's accreditation status to "accredited," the State Board must follow all of the applicable Section 162.081 directives.[29] It has not done so.[30]

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accreditation...At the very least, the earliest that the statute suggests that a district would be ready to accomplish this task after the first hearing would be one year after the state oversight began.

[28] This court notes that the Board has already developed a review process, as is described in the "Normandy Task Force Recommendations." (*See* Exhibit G and footnote no. 7) This very impressive report suggests "8-week benchmarks as an assessment process" and the need to monitor the district "to ensure that the processes and procedures are working well." (*See* Exhibit G.) This court is unaware of whether the NSC has adopted the Task Force's recommendations.

This court also notes that the NSC has not provided it with a "school improvement plan" (which was supposed to be completed in September of 2014) or any "quarterly reports" (that were supposed to be submitted to the State Board). (*See* Exhibit I.) Further, DESE's "Accountability Plan" does not seem to have been followed. This court has not received any "Regional School Improvement Team (RSIT)" monthly progress reports. (*See* Exhibit O.)

To summarize, the State has not provided *any* documentation of benchmarks, assessments or compliance reports since the creation of the NSC. Clearly it is too early to make any sort of assessment of the NSC's accreditation status. Nonetheless, the NSC has not even submitted the reports that the Task Force recommended to be submitted to the State Board by now.

[29] This case is drastically different than the case cited by Defendants, *Board of Education of the City of St. Louis, et al. v. the Missouri State Board of Education, et al.*, 271 S.W.3d 1 Mo. 2008), in which the Missouri Supreme Court upheld

Based on the foregoing analysis, this court finds that Plaintiffs have met their burden to obtain the declaratory relief that they seek in Count I of their petition. Accordingly, this court declares that the State Board must classify the NSC. Further, this court declares the NSC to be classified as "unaccredited" until such time that it achieves a different status – either provisionally accredited, accredited or accredited with distinction.

4. Re Count III: The State Board did not follow proper rulemaking procedures in waiving the accreditation regulations as to the Normandy Schools Collaborative.

Under Missouri law, a rule is an "agency statement of general applicability that implements, interprets, or prescribes law or policy . . . ." Section 536.010(6), RSMo. Changes in statewide policy are rules within the meaning of Chapter 536. *NME Hospitals, Inc. v. Dept. of Social Svcs.*, 850 S.W.2d 71, 74 (Mo. banc 1993).

Promulgation of a rule requires compliance with the rulemaking procedures specified in Section 536.021, RSMo. *NME* at 74. Section 536.021, RSMo provides that "(n)o rule shall hereafter be made, amended or rescinded unless such agency shall first file with the secretary of state a notice of proposed rulemaking and subsequent order of rulemaking." The purpose of the notice procedure is to "allow opportunity for comment by supporters or opponents of the measure, and so to induce a modification. To neglect the notice....or to give effect to a proposed rule before the time for comment has run...undermines the integrity of the procedure." *NME* at 74. Failure to comply with rulemaking procedures renders the purported rule void. *Id.*

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the State Board's decision to "un-accredit" the St. Louis Public School District. The Court deferred to the State Board's decision, noting the plaintiffs' "very high burden" to successfully invalidate an agency decision. *Id.* at 18. Unlike the situation with the *City of St. Louis* case, there are significantly different hurdles for the State Board when it changes a classification from "unaccredited" to "accredited" (as opposed to *vice versa*). Section 162.081, RSMo. is one of them.

[30] In its Trial Brief, the State Defendants indicate that granting some of the relief sought by Plaintiffs would "wreak havoc" – and at a "considerable cost" to the community. This court will not engage in speculation, unsupported by any evidence presented at the hearing. It is not proper for this court to make its decision based upon the possible negative ramifications of its order. This court must rule solely based upon the law.

In taking its actions regarding the Normandy Schools Collaborative, the State Board cited its broad authority to waive or modify its own rules (but as indicated before, not statutes) as well as DESE's policies. This court recognizes that authority. Section 161.210, RSMo. This court also recognizes, however, that Section 161.210 must be read alongside Section 536.010(6), which specifically states that a rule includes "the amendment or repeal of an existing rule." Section 536.010(6), RSMo. *See Greenbriar Hills Country Club v. Director of Revenue*, 47 S.W.3d 346, 356 (Mo. banc 2001).

This court must determine whether or not the State Board engaged in rulemaking when it reclassified the NSC (thereby waiving the necessary accreditation regulations). If so, its waiver of the accreditation regulations is void. The Missouri courts have provided much guidance in determining whether or not an agency has engaged in rulemaking. Some considerations include:

1. Was the statement (i.e., the "June/August Resolution" that labelled the NSC with a status or classification of "state oversight") "generally applicable" (and therefore a rule) or intended to apply only to a "specific set of facts"?
2. Does the statement have a "future effect" (and is therefore a rule)?
3. Does the statement affect a party's legal rights (and is therefore a rule)?
4. Did the agency promulgate the statement as a rule?

This court will first address the first consideration: whether or not the June/August Resolution was "generally applicable." Section 536.010.6, RSMo. requires that a statement be of "general applicability" to be a rule. Similarly, Section 536.010.6(b), RSMo. states that an agency statement is not a rule if it is an interpretation "with respect to a specific set of facts and intended to apply only to that specific set of facts." Several Missouri cases analyze the "general applicability" issues, focusing on how general the applicability must be. At first glance, the facts in the cases

would not seem to support findings of "general applicability." The Missouri Supreme Court, however, has repeatedly addressed this issue, giving a clear understanding of what the term means. In its decisions in *NME* and *Dep't of Soc. Servs., Div. of Med. Servs. v. Little Hills Healthcare, L.L.C.*, 236 S.W.3d 637, 640 (Mo. 2007), the Court found certain state statements by the Missouri Medical Services Division to be "generally applicable" (and therefore, rules) even though they did not apply to all patients or all hospitals.

Like *NME* and *Little Hills*, the "June/August Resolution" is "generally applicable" to a target population – here, all school children in the Normandy School Collaborative. To be generally applicable, the resolution need not apply to all Missouri schoolchildren. Indeed, the disputed protocols in *NME* and *Little Hills* only applied to hospitals/providers that were Medicaid providers, rather than to all hospitals/providers. The Court found that these protocols were rules, as they were "generally applicable" within the subset of Medicaid providers. Similarly, the State Board's resolution is "generally applicable" to the subset of Missouri students who live within the borders of the Normandy Schools Collaborative.

The second consideration that this court must make pertains to whether or not the June/August Resolution had a "future effect." The Missouri Supreme Court has indicated that for an agency statement to be a rule, it must have a "future effect" on as yet unspecified facts. *See, e.g. NME at* 74. In *Little Hills*, DMS argued that its determination of the estimated Medicaid day payments did not amount to a rule because DMS annually changed its calculation formula; consequently, DMS argued, there was no future effect. The Court rejected this argument, stating "DMS's choice to annually update or change its calculation methods does not change the fact that its methods could apply indefinitely in the future." *Little Hills*, 236 S.W.3d at 643.

The June/August Resolution does not designate a time frame. Regardless, the Court's rationale in *Little Hills* suggests that even if the Normandy Schools Collaborative plans to change this resolution annually, the current policy can still be considered to have a "future effect" on as yet unknown facts.

The third consideration for this court is whether or not the June/August Resolution affected the Plaintiffs' legal rights. To be considered a "rule," an agency statement must have some significant impact, or direct potential for impact, on a party's legal rights. "Implicit in the concept of the word 'rule' is that the agency declaration has a *potential, however slight, of impacting the substantive or procedural rights* of some member of the public. Rulemaking, by its nature, involves an agency statement that affects the rights of individuals in the abstract." [Emphasis added.] *Baugus v. Dir. of Revenue*, 878 S.W.2d 39, 42 (Mo. 1994). The "potential impact" on the rights of some members of the public must flow directly from the supposed "rule" (and not from possible future contingencies). *Missouri Soybean Assn. v. Missouri Clean Water Comm'n*, 102 S.W.3d 10, 14, 24 (Mo. 2003).

The new resolution from the State Board directly affects the legal rights of students in the NSC area and the rights and obligations of receiving school districts. As *Baugus* indicates, all that the Plaintiffs need to establish is that the resolution has a potential – however slight – of impacting the rights of a student in the NSC. Certainly, Plaintiffs have met that burden.

Finally, this court must determine whether or not the State Board promulgated the June/August Resolution as a rule. Even a statement that seems to fit the definition of a rule under Section 536.010.6 RSMo is not a rule if the agency making the statement has not attempted to promulgate the statement as a rule. *United Pharmacal Co. of Missouri Inc. v. Missouri Bd. of*

Pharmacy, 159 S.W.3d 361, 365 (Mo. 2005). If a statement is not a rule, then it is "merely an expression of the [state agency's] interpretation of law without any force or legal effect." *Id.*

The Missouri Supreme Court addressed this issue in *Missouri Association of Nurse Anesthetists, Inc. v. State Board of Registration for Healing Arts*, 343 S.W.3d 348, 352 (Mo. 2011), finding that a letter by the State Board of Healing Arts was "merely an expression of the Board's position and is (therefore) without force and effect. (Consequently), it is a non-binding statement issued by the Board and does not have the force or effect of law." *Id.* at 352-53. The Court ultimately found that the letter was not a "rule." *Id.* at 357.

In the situation at hand, the State Board did not merely mention its reclassification on its website. It did not merely send a letter to the NSC providing an advisory opinion. The State Board's resolution was promulgated as a rule, intending to immediately affect the rights of many NSC students.

In summary, the "June/August Resolution" was clearly a rule. First, it was a statement of "general applicability," as interpreted by the Missouri Supreme Court. Second, the Resolution had a "future effect." Third, the Resolution affected the plaintiffs' legal rights. And last, the Resolution was promulgated as a rule. Accordingly, the State Board could only promulgate such a rule through appropriate measures – which it failed to do.

When the State Board created the new accreditation classification of "state oversight district" in its "June/August Resolution," it should have followed the rulemaking procedure required by Section 536.021, RSMo. (*See NME,* 850 S.W.2d 70 at 74.) Section 536.021 requires that the State Board, at least in part, file notice of its proposed rulemaking and subsequent final order of rulemaking with the Missouri Secretary of State. Section 536.021.1, RSMo. The proposed

rulemaking and final order of rulemaking would then be "published in the Missouri Register by the secretary of state as soon as practicable." *Id.* Further, Section 536.021 provides that "after the final order of rulemaking has been published in the Missouri Register, the text of the entire rule shall be published in full in the Missouri code of state regulations. No rule, except an emergency rule, shall become effective prior to the thirteenth day after the date of publication of the revision to the Missouri code of state regulations." Section 536.021.8, RSMo.

In taking its actions regarding NSC, the State Board turned to its statutory waiver authority. Section 161.210. However, as was discussed in the previous subsection, the Board has the authority to waive or modify its own rules, but it cannot waive or modify statutes.[31] The rulemaking statutes in Chapter 536 apply to the State Board. Those statutes include Section 536.010(6), which specifically states that a rule includes "the amendment or repeal of an existing rule." *See Greenbriar Hills Country Club v. Dir. of Revenue*, 47 S.W.3d 346, 356 (Mo. banc 2001). Therefore, even under its authority under the waiver statute to waive ("repeal") or modify ("amend") existing rules that pertain to the Board and DESE, the Board must follow rulemaking procedures in doing so, due to the requirements of Section 536.010(6).

The State Board simply did not follow the rulemaking requirements of Section 536.021. Similar to the Division of Medical Services in the *NME* case, the State Board undermined the integrity of the rulemaking procedure. As *NME* indicates, the failure to comply with rulemaking procedures renders the purported rule void. *Id.* at 74.[32]

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[31] This court notes the Defendants' argument that the State Board is granted the authority "to waive or modify any administrative rule adopted by the state board..." "*notwithstanding* any provision of law to the contrary." While this language appears to conflict with Section 536.010(6), this court finds that this language could not possibly give the Board the authority to disregard or change a state statute. Clearly, the Board can waive or modify any of its own rules.

[32] A more in depth discussion of the pertinent case law in this subsection is contained in this court's August 15, 2014 Order/Judgment.

Based on the foregoing analysis, this court finds that Plaintiffs have met their burden to obtain the declaratory relief that they seek in Count III of their petition. Accordingly, this court declares that the State, the State Board and DESE engaged in invalid rulemaking, and as such, they could not give the NSC an accreditation status different than the four classifications noted in 5 CSR 20-100.105(3). Further, this court declares that the only applicable status for the NSC is "unaccredited."

B. Injunctive Claims (Counts II, IV and VI)

Based on the foregoing analysis, Plaintiffs surely have proven – through "clear proof" – that they should receive injunctive relief.[33] They have met all three of the elements through "clear proof"[34] as required by Section 526.030, RSMo and pertinent case law (such as *City of Kansas City* at 855).

Firstly, they have established that Defendants have committed "legal wrongs" that must be prevented. This court has established in the Declaratory Relief section of its order the wrongs that Defendants have committed.

Secondly, Plaintiffs clearly have no adequate remedy at law. Plaintiffs simply seek a decent education. Monetary damages can never serve as a substitute for such an objective. This court has already addressed this element in the Declaratory Relief section of this Judgment.

Lastly, Plaintiffs will suffer irreparable harm if the request for injunctive relief is denied. Granted, Plaintiffs have not provided much evidence to quantify the irreparable harm a child receives from an inferior education. Indeed, it does not seem as if such harm could ever be quantified. This court, however, need not measure the harm. It must merely find that such harm

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[33] Note that the injunctive relief sought by Plaintiffs is the same for all three counts.

[34] Plaintiffs' burden of proof is enhanced, requiring "clear proof." *See Community Title Co. v. Roosevelt Federal Savings and Loan Ass'n*, 670 S.W. 2d 895, 900 (Mo. App. E.D. 1984).

will exist if Plaintiffs' request for injunctive relief is denied. There is little doubt that a child – and his or her community -- are harmed if he or she does not receive an adequate education. As Nelson Mandela once said, "Education is the most powerful weapon which you can use to change the world." Normandy children have the right to have a better chance of changing the world too.[35]

The school accreditation structure itself supports Plaintiffs' claims of irreparable harm. The pertinent statutes recognize that accredited schools are better for students than non-accredited schools. By enacting the transfer statute, the people of Missouri, through their legislature and the Governor, recognized that leaving children in unaccredited school districts with no option to transfer from those districts, is harmful to those children. According to Section 167.131, every child in an unaccredited school district has the right to transfer to a school in an accredited school district. Every child deserves not to wait for the implementation and proven success of any well-intentioned program the State might offer.[36] As the transfer statute makes abundantly clear, every child deserves to be enrolled in a non-failing school district -- now. It simply is not clear how long it will take to get the NSC "on track" (a term regularly used by the State Board) and then to accreditation (i.e., the "finish line" – a term that the State Board will hopefully be using soon).

In this case, the NSC is not merely "unaccredited": it is abysmally unaccredited. The Normandy School District's 2012 APR was 11.1 percent of all possible points. Incredibly, the APR rating for the NSC worsened to an unbelievable 7.1 percent in 2014. Yet, Defendants wish to force students to remain in this failing district. To force students who seek little more than an adequate education to remain in this unaccredited district – rather than allow them to continue their education

[35] This court does not want to suggest that Defendants are unsympathetic to the plight of Plaintiffs' children. They all recognize the problem. The State Defendants' creation of the NSC obviously demonstrates their concern. This court merely finds that Defendants could not take the steps that they did – and that Plaintiffs deserve to take immediate drastic measures, as state law prescribes.

[36] This court clearly believes that if the Task Force's plan is fully implemented, the school district will be accredited soon – but not for a matter of years. No child, however, can afford to wait for that to happen.

in accredited school districts -- will cause them irreparable harm. This harm cannot be repaired after the fact.

Based on the foregoing analysis in the previous section of this Judgment, this court finds that Plaintiffs have met their burden for injunctive relief as to Counts VI, II and IV. The particular wrongs are described in the first subsection of the Declaratory Relief section of this Judgment (addressing Count V, I and III). Accordingly, this court grants Plaintiffs' request for a permanent injunction prohibiting the "receiving district" Defendants from denying admission to any of the Plaintiff students who request transfer from the NSC. Further, this court grants Plaintiffs' request for a permanent injunction requiring Defendant NSC to pay the costs of tuition for these students who attend school in the receiving districts during the 2014-15 school year.

V. THE ORDER AND JUDGMENT

WHEREFORE, IT IS HEREBY ORDERED that Plaintiffs' request for declaratory relief (pursuant to Counts I, III and V) is **GRANTED.**

FURTHER IT IS ORDERED that Plaintiffs' request for a permanent injunction (pursuant to Counts II, VI and VI) is **GRANTED**.

IT IS FURTHER ORDERED that Plaintiffs' request for a preliminary injunction (pursuant to Count VII) is **DENIED AS MOOT.**

FURTHER, THIS COURT DECLARES that the NSC is not an accredited school district and, accordingly, is subject to the requirements of the transfer statute, Section 167.131, RSMo. Further, this court declares that all defendants are subject to the requirements of Section 167.131. To the extent that if conflicts with the directives in Section 167.131, the State Board's "Operating Policy for Transfers from the Normandy Schools Collaborative" is declared null and void.

THIS COURT FURTHER DECLARES that the State Board must classify the NSC. Further, this court declares the NSC to be classified as "unaccredited" until such time that it achieves a different status – either provisionally accredited, accredited or accredited with distinction.

THIS COURT FURTHER DECLARES that the State, the State Board and DESE engaged in invalid rule-making, and as such, they could not give the NSC an accreditation status different than the four classifications noted in 5 CSR 20-100.105(3). Further, this court declares that the only applicable status for the NSC is "unaccredited."

IT IS FURTHER ORDERED that Plaintiffs' request for a permanent injunction prohibiting the "receiving district" Defendants from denying admission to any of the Plaintiffs' children who request to transfer from the NSC is **GRANTED.**

IT IS FURTHER ORDERED that Plaintiffs' request for a permanent injunction requiring Defendant NSC to pay the costs of tuition for these students who attend school in the receiving districts during the 2014-15 school year is **GRANTED.**

This court makes no determination that Section 536.087, RSMo applies to this proceeding, or that if it does, that this court will award Plaintiffs' fees and expenses. This court notes, however, that if Plaintiffs wish to argue that Section 536.087 applies, they have thirty days from the date of this judgment to submit an application to this court for such fees and expenses.

SO ORDERED:

Michael D. Burton

Michael D. Burton, Circuit Judge, Div. 16

2/11/15

Date – February 11, 2015

CC: Attorneys of Record:

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James Layton, Attorney for the State of Missouri, the State Board of Education and the Missouri Department of Elementary and Secondary Education;

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Robert Useted and Leo Human, Attorneys for the Ritenour School District;

Cindy Ormsby, Darrold Crotzer and Angela Gabel, Attorneys for the Francis Howell School District; and

Dorothy White-Coleman, Attorney for the Normandy Schools Collaborative.