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Not in My Backyard: Turner v. Clayton and the Battle Over Mandatory Open Enrollment

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NOT IN MY BACKYARD: *TURNER v. CLAYTON* AND THE BATTLE OVER MANDATORY OPEN ENROLLMENT

INTRODUCTION

In America, education is espoused as the great equalizer, a key foundation of the American Dream. But many have come to realize that the American Dream, in terms of education, is more fiction than fact. Since 1980 when President Ronald Reagan commissioned the Nation at Risk report,[1] Americans have faced the reality that education is not the panacea once imagined.[2] The dismal condition of education in America is best evidenced in its inner cities. Although racial segregation in schools has been outlawed since *Brown v. Board of Education*,[3] de facto segregation still reigns in most of America's cities.[4] In a recent documentary entitled *Waiting for Superman*, Davis Guggenheim depicts the seemingly hopeless state of students attempting to attain a good education in America's inner cities.[5]

The film tracks five students through their struggle to attend an excellent school in Washington, D.C., Los Angeles, the Bronx, and Harlem.[6] Most of the students' neighborhood schools are "dropout factories" meaning attendance at those schools reduces the students' likelihood of graduating from high school to only 60 percent.[7] In order to avoid this statistical likelihood, these students and their parents turn to public charter schools and private schools that do provide an excellent education.[8] However, the reality depicted in the film is that not every child can afford, gain admission, or win a lottery to attend an excellent school.[9]

In response to the problem of failing inner city schools, many state legislatures have passed open enrollment statutes allowing students in failing

1. NAT'L COMM'N ON EXCELLENCE IN EDUC., U.S. DEP'T OF EDUC., A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM (1983).

2. PUB. BROAD. SERV., *A Nation at Risk: Are Our Schools Still in Peril?* (Sept. 8, 2008), http://www.pbs.org/wnet/wherewestand/featured/a-nation-at-risk-are-our-schools-still-in-peril/233/.

3. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

4. *See* GARY ORFIELD & SUSAN E. EATON, DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF *BROWN V. BOARD OF EDUCATION* xiii–xix (1996).

5. WAITING FOR SUPERMAN (Paramount Pictures 2010).

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

or unaccredited schools to attend high performing public schools, either within their district or in a neighboring district.[10] The recent Missouri Supreme Court decision in *Turner v. School District of Clayton* controversially enforced Missouri's open enrollment statute,[11] Missouri Revised Statute § 167.131 requires school districts surrounding the City of St. Louis to enroll students from the unaccredited St. Louis Public School ("SLPS") system if they apply for admission.[12] Fourteen other states have mandatory open enrollment statutes with varying degrees of similarity to Missouri's statute.[13] The courts' interpretations of open enrollment statutes in those states, and current education policy, are helpful in analyzing the implications of having a mandatory, inter-district, open enrollment statute in Missouri.

The controversy surrounding Section 167.131 has elicited a debate among Missouri state legislators, St. Louis County and City superintendents, and parents living in both the county and the city, as enforcement of the statute means a possible hemorrhaging of money and students from the city and an inconvenient influx of students to the county.[14] This potential reality is not palatable to most of the stakeholders in the conversation surrounding education in St. Louis, but one crucial component of the conversation that is often missing is the effect of failing schools on students. Much like the students in *Waiting for Superman*, the students trapped in SLPS need a super-human solution to receive an excellent education.[15] Educators, community leaders, and politicians in St. Louis must prioritize the needs of students and enact several changes to the current education system in order to make certain that a child's zip code does not determine his or her life prospects. In spite of the

10. *See* JOINT COMM'N ON EDUC., 95th MO. GEN. ASSEMBLY, A REVIEW OF OPEN ENROLLMENT STATES: POLICIES AND PRACTICES iii (2009); Adam M. Herrmann et al., *Open Enrollment in K-12 Public Education*, 7 EDUC. POL'Y BRIEF 1, 2 (Summer 2009) (describing open enrollment as "intradistrict" when available within the school district in which the student resides and as "interdistrict" when the student may choose to attend a school in another school district; also noting that mandatory open enrollment requires school district participation, while voluntary open enrollment gives school districts the option of participating).

11. Turner v. Sch. Dist. of Clayton, 318 S.W.3d 660, 664 (Mo. 2010) (en banc).

12. MO. REV. STAT. § 167.131 (2012).

13. JOINT COMM'N ON EDUC., *supra* note 10, at 2–13.

14. *See* Dale Singer, *Compromise to Solve School Transfer Suit Couldn't Make the Grade*, ST. LOUIS BEACON (June 9, 2011, 6:39 AM), http://www.stlbeacon.org/issues-politics/95-Education/110756-compromise-to-solve-school-transfer-suit-couldnt-make-the-grade (noting that one estimate put the cost for SLPS at $300 million if all nineteen thousand students living within the city district transfer to county schools); Dale Singer, *If Transfer Law is Upheld, 15,000 Would Leave City, Study Finds*, ST. LOUIS BEACON (Dec. 2, 2011, 1:29 PM), http://www.stlbeacon.org/issues-politics/95-Education/114573-turner-could-mean-exodus-of-15000-students (citing a survey conducted by Terry Jones at University of Missouri-St. Louis commissioned by the Clayton School District).

15. *See* WAITING FOR SUPERMAN, *supra* note 5.

debate surrounding the Missouri Supreme Court's decision in *Turner*, the court correctly interpreted Section 167.131.[16] Although the court based its decision on statutory interpretation and analysis, the decision is also consistent with good education policy for St. Louis.[17] In order to realize the benefit of *Turner*, the Missouri legislature should retain Section 167.131 and enact supplemental statutes. The combination will, in the short term, ensure that every student living in an unaccredited district can attain an education, and, in the long term, guarantee that there are quality school choice options in the city.

This Note will first briefly touch on the history behind de facto racial segregation in St. Louis and the current statistics outlining racial and economic segregation in the city schools to provide a context for *Turner*. It will then, in Part II, discuss the legislative background behind Missouri's mandatory, inter-district open enrollment statute. This Note will, third, discuss the procedural history of *Turner* as well as the opinions of the majority and the dissent. Fourth, this Note will analyze different open enrollment statutes across the country and subsequent case law to gain any available wisdom for applying and interpreting Section 167.131. Finally, this Note will analyze the policy implications of *Turner* and consider possible long-term solutions to the problem that Section 167.131 was enacted to address.

I. PAST AND PRESENT OF EDUCATION IN ST. LOUIS: THE PROBLEM

While a full history and analysis of racial and economic segregation in the City of St. Louis as well as the history of the St. Louis school system is well beyond the scope of this Note, it is instructive to briefly discuss factors that have contributed to the failing school system in the city in order to truly understand the framework of *Turner*. The education system in St. Louis has been drastically affected by white flight from the city beginning in the 1950s.[18] Since then, the city and its schools have become increasingly segregated by race and economic status.[19] To address the segregation of white students in the county and African-American students in the city—in accordance with desegregation litigation—the Voluntary Interdistrict Choice ("VIC") program was established in 1983 to transport African-American city students out to county school districts, and to send white students from the county into certain

16. *See infra* Parts III.B, IV.

17. *See infra* Part V.B.

18. COLIN GORDON, MAPPING DECLINE: ST. LOUIS AND THE FATE OF THE AMERICAN CITY 11 (Glenda Gilmore et al. eds., 2008) (describing St. Louis as one of the most egregious examples of white flight in the nation).

19. *See e.g.*, *id.* at 9; Frank Kovarik, *Mapping the Divide: A Lifelong St. Louisan Grapples with the City's Racial Disparity*, ST. LOUIS MAG. (Dec. 2008), *available at* http://www.stlmag.com/St-Louis-Magazine/December-2008/Mapping-the-Divide/.

schools in the city.[20] SLPS continued to struggle for the next twenty years and finally lost its state accreditation in 2007 as a result of "financial, administrative, and student achievement failures."[21] As of the 2011–2012 school year, 80 percent of students enrolled in SLPS were African-American.[22] In 2011, SLPS had a 62.2 percent graduation rate, with only 31.9 percent of eighth grade students proficient in Math, and 34 percent proficient in Communication Arts.[23] In 2011, SLPS had an average ACT score of 16.6, five points below the state average of 21.6, meaning SLPS has only 10 percent of its students performing at the national average on the ACT.[24] Additionally, 87.4 percent of students in SLPS receive free and reduced lunch.[25] These statistics paint a picture of low-income students trapped in a failing system where just over half will even have the opportunity to go to college.[26] This

20. *See* William H. Freivogel, *St. Louis: Desegregation and School Choice in the Land of Dred Scott*, *in* DIVIDED WE FALL: COMING TOGETHER THROUGH PUBLIC SCHOOL CHOICE 209, 209–10 (2002) ("Missouri had segregated schools for 115 years, much longer than most southern states. For much of that time, blacks weren't just segregated; the act of teaching them was itself illegal . . . . Missouri prohibited slavery in 1865, but the state constitution explicitly mandated separate schools for 'white and colored children' until 1976—a shocking twenty-two years after *Brown*.").

21. Malcolm Gay, *State Takes Control of Troubled Public Schools in St. Louis*, N.Y. TIMES (Mar. 23, 2007), http://www.nytimes.com/2007/03/23/us/23missouri.html (explaining that SLPS was the largest district, composing thirty-five thousand students, to have been taken over by a state and that in 2006; the debt of the district was almost $25 million; and the district had employed six superintendents since 2003). As of the publication of this Note, SLPS had been granted provisional accreditation by the Missouri Department of Elementary and Secondary Education. Jessica Bock, *State Board gives provisional accreditation for St. Louis Public Schools*, ST. LOUIS POST-DISPATCH (Oct. 16, 2012), http://www.stltoday.com/news/local/education/state-board-gives-provisional-accreditation-for-st-louis-public-schools/article_27dc696e-596a-5c4f-a5ad-e5c 8d224971f.html. Because the Missouri Board of Elementary and Secondary Education's grant of provisional accreditation to SLPS did not restore full accreditation to the District, the impact of the provisional accreditation on the *Turner* debate is still unclear. Thus, this Note cannot address whether the grant of provisional accreditation would make Missouri Revised Statute § 167.131 wholly inapplicable to SLPS.

22. MO. DEP'T OF ELEMENTARY AND SECONDARY EDUC., ST. LOUIS PUBLIC SCHOOLS DISTRICT REPORT CARD (2012), *available at* http://mcds.dese.mo.gov/guidedinquiry/School%20Report%20Card/District%20Report%20Card.aspx?rp:SchoolYear=2012&rp:SchoolYear=2011&rp:SchoolYear=2010&rp:SchoolYear=2009&rp:DistrictCode=115115 [hereinafter DISTRICT REPORT CARD].

23. *Id.*

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

25. DISTRICT REPORT CARD, *supra* note 22; U.S. DEP'T OF AGRIC., NATIONAL SCHOOL LUNCH PROGRAM FACT SHEET 2 (2012), *available at* http://www.fns.usda.gov/cnd/lunch/ ("Children from families with incomes at or below 130 percent of the poverty level are eligible for free meals.").

26. DISTRICT REPORT CARD, *supra* note 22.

tragic reality means that a student living in the City of St. Louis, whose parents likely do not have the means to send him or her to private school, has greatly diminished opportunities in life simply because of where he or she lives.

Almost twenty years ago, the Missouri State Legislature enacted a comprehensive school reform bill that could potentially ensure every student in the state attained an excellent education—even if they resided in an unaccredited district that was racially and economically segregated.[27] Analyzing the legislative history behind that bill is helpful in resolving the complicated issues surrounding the *Turner* suit.

II. LEGISLATIVE HISTORY AND BACKGROUND OF SECTION 167.131

In 1993, the Missouri legislature enacted the Outstanding Schools Act ("Act").[28] The Act included various provisions to reduce class sizes, add an A+ schools program, provide funding for parents as teachers and early childhood development, train teachers, upgrade vocational and technical education, and promote accountability.[29] The legislation also created an "Outstanding Schools Trust Fund" to fund the program.[30]

Concurrently, the Missouri legislature passed Senate Bill 380, codified in Missouri Revised Statute § 143.105,[31] which was "by far the most significant policy and tax change of the decade."[32] The revenue from the tax increase was designed to fund the Outstanding Schools Act and was accompanied by stringent accountability provisions in Missouri Revised Statutes §§ 167.241 and 167.131.[33] The accountability provision in Section 167.131, the subject of the *Turner* suit, provides that,

> (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. (2) 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 . . . . Subject to the limitations of this section, each pupil shall be free to attend the public school of his or her choice.[34]

27. MO. REV. STAT. §§ 160.500, 167.131 (2012).
28. § 160.500.
29. *Id.*
30. *Id.*
31. MO. REV. STAT. § 143.105 (2012).
32. STATE & REG'L FISCAL STUDIES UNIT, MISSOURI TAX POLICY & EDUCATION FUNDING 17 (2003), *available at* http://eparc.missouri.edu/Publication/TaxRef/Reports/Final.pdf.
33. MO. REV. STAT. §§ 167.131, 167.241 (2012).
34. § 167.131.

This accountability provision, among other provisions, was established to ensure that all of the districts in the state were held accountable for school performance and improvement under the Outstanding Schools Act.[35] In drafting Section 167.131, the legislature removed a proposed portion after the last sentence in section two stating that, "[n]o school shall be required to admit any pupil."[36] Accordingly, the legislature deliberately did not give school districts discretion to refuse admission to students asserting their rights under Section 167.131.[37] The accountability provisions were put under the umbrella of the Missouri Schools Improvement Program, which was also responsible for reviewing and accrediting the 522 districts in the state.[38] The School Improvement Program is enforced statewide in order to guarantee all districts in the state are providing students with a certain level of education.[39]

The Committee on Elementary and Secondary Education voted "do pass" on Senate Bill 380 by a fourteen to eleven vote.[40] Although there was some opposition to the bill, the challengers of the bill were not concerned about the accountability provision in Section 167.131, but, instead, were concerned that the tax package accompanying the bill was too expensive and placed too great a burden on business.[41] Additionally, opponents were concerned that the educational reforms in the bill would lead to testing of a "student's values and attitudes rather than academic performance."[42] Proponents of the bill thought it was necessary "to promote adequacy and equity in funding Missouri's Schools," and many individuals and organizations testified in support of the bill, including the Missouri State Board of Education, the Cooperating School Districts of Kansas City and St. Louis, and the Missouri State Teacher's Association.[43] Therefore, the legislative history seems to indicate that there was no opposition to the specific accountability provision now codified in Section 167.131.[44] Moreover, some of the very organizations that supported

35. § 160.500.

36. S.B. 380, 87th Gen. Assemb., 1st Reg. Sess. (Mo. 1993); *see also* Outstanding Schools Act § 160.500 (2012).

37. *See* § 167.131.

38. CONSORTIUM FOR POLICY RESEARCH IN EDUC., MISSOURI ASSESSMENT AND ACCOUNTABILITY PROFILE 10–12 (2000), *available at* http://cpre.org/sites/default/files/assessmentprofile/932_mo.pdf.

39. MO. DEP'T OF ELEMENTARY AND SECONDARY EDUC., STANDARDS AND INDICATORS MANUAL 2 (2004), *available at* http://dese.mo.gov/divimprove/sia/msip/Fourth%20Cycle%20Standards%20and%20Indicators.pdf.

40. Summaries of Senate Bills and Joint Resolutions, S.B. 380, 87th Gen. Assemb., 1st Reg. Sess., at 403 (Mo. 1993).

41. *Id.* at 411.

42. *Id.*

43. *Id.* at 410–11.

44. *See, e.g.*, *id.* at 403–11.

Senate Bill 380 in 1993 now oppose its enforcement.[45] Those organizations either lacked the foresight to imagine a scenario where whole school districts could become unaccredited, or they have changed their position on Section 167.131 based on the public pressure surrounding *Turner*. In part, this change of position could be due to the fact that at that point in Missouri's history only individual schools had lost accreditation, never an entire district.[46] The removal of accreditation from SLPS in 2007 meant that Section 167.131 could take effect for the entire district, and students living throughout the City of St. Louis could transfer to adjoining accredited districts at the cost of SLPS.[47] It is this landscape that gave rise to the *Turner* suit.

III. *TURNER V. SCHOOL DISTRICT OF CLAYTON*

A. Procedural History

The Plaintiffs in *Turner* are parents who reside within the SLPS district, but whose children attend schools in the Clayton School District ("Clayton") pursuant to tuition agreements.[48] In June 2007, after the parents had entered into tuition agreements for the 2007-2008 school year, SLPS lost its accreditation from the state.[49] Clayton subsequently declined to seek payment from SLPS for the students' tuition as the parents requested.[50] The issue on appeal to the Missouri Supreme Court was whether the plain language of Section 167.131 applies as written, requiring unaccredited school districts to pay the tuition costs of its students who choose to attend an accredited school in an adjoining district.[51]

45. Virginia Young, *Dramatic School Plan Offered for Failing Missouri Districts*, ST. LOUIS POST-DISPATCH (Jan. 27, 2012), http://www.stltoday.com/news/local/education/68f313f6-8e58-5dda-ba93-8069a26d8a71.html (explaining that Don Senti, Executive Direct of the Cooperating School Districts of St. Louis, said that county districts will accept city students but want to have discretion to set parameters of admissions to control class size and school quality); John Urkevich, *Turner v. Clayton*, EDUC. TODAY (OCT. 8, 2010), http://educationtoday.wordpress.com/2010/10/ (indicating a coalition, composed of the Cooperating School Districts of St. Louis and Kansas City and the Missouri State Teachers Association, opposed enforcement of Section 167.131 as it is written).

46. Elizabethe Holland, *St. Louis Student's Legal Victory Highlights Unsettled Transfer Issue*, ST. LOUIS POST-DISPATCH (July 21, 2011), http://www.stltoday.com/news/local/education/article_3b823925-6453-5f10-af30-51ac2041cc64.html (explaining that Wellston did not lose its accreditation until 2003, and the St. Louis Public Schools did not lose their accreditation until 2007).

47. MO. REV. STAT. § 167.131 (2012).

48. Turner v. Sch. Dist. of Clayton, 318 S.W.3d 660, 662 (Mo. 2010) (en banc).

49. *Id.* at 663.

50. *Id.*

51. *Id.* at 662–63.

When the case was initially filed in St. Louis County, the circuit court entered an Amended Judgment concluding that Section 167.131 was not applicable to the issue presented in the case, and that there was no legal basis for Plaintiffs' request for declaratory judgment.[52] In so concluding, the circuit court granted the Clayton and St. Louis Public School districts' motions for summary judgment.[53]

Subsequently, the parents and their children raised several points on appeal to the Court of Appeals for the Eastern District of Missouri.[54] They first asserted that Section 167.131 should apply to SLPS because a plain reading of the statute cannot support any other interpretation, and, second, that Senate Bill 781 did not preempt Section 167.131 as applied to SLPS because there was no conflict between the two provisions.[55] Third, Appellants contended Section 167.151 did not limit their rights under Section 167.131 because the discretion given to districts to admit students under 167.151 was specifically revoked for students who asserted their rights under 167.131.[56] Lastly, Appellants asserted the trial court misapplied Section 167.131 as the students resided within the unaccredited SLPS district and attended Clayton schools, thereby obligating Clayton to prepare special tuition bills for the students and requiring SLPS to pay those bills.[57]

The Eastern District Court of Appeals held that having contractually obligated themselves to pay their students' tuition, the Appellants could not rescind the contract.[58] Furthermore, the court reasoned that the contract should be enforced as written because SLPS' subsequent loss of accreditation did not affect the agreement.[59] Consequently, the court found the case was governed by the contract between the parents and the school district, not Section 167.131, and Clayton was under no obligation to issue "Special Tuition Bills" to SLPS for the students' tuition.[60]

The court further opined that while SLPS had lost its accreditation, Section 167.131 makes no mention of an entire district losing its accreditation. Rather, the statute only refers to a board of education of each district that does not maintain an accredited school.[61] The court reasoned, in dicta, that Section

52. Turner v. Sch. Dist. of Clayton, No. ED 92226, 2009 WL 1752140, at *2 (Mo. Ct. App. 2009).

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Turner*, 2009 WL 1752140, at *5.

59. *Id.* at *3–4.

60. *Id.* at *4.

61. *Id.* ("The affidavit of Dr. Dan Edwards, Assistant Superintendent for St. Louis Public School District, affies that the 'Saint Louis Public School District maintains, and during the 2007-

167.131 was not relevant as applied to this case because there were still some accredited schools within SLPS.[62] However, the court deferred final decision of the case, "[b]ecause of the general interest and importance of the issues involved" to the Missouri Supreme Court pursuant to Rule 83.02.[63]

1. Majority Opinion

The Missouri Supreme Court decided *Turner v. School District of Clayton* in a per curiam opinion on July 16, 2010.[64] The Missouri Supreme Court reversed the holding of the Court of Appeals for the Eastern District of Missouri and remanded the case to the St. Louis County Circuit Court for implementation of its order.[65] The new trial date was set for March 5, 2012.[66] The majority of the Missouri Supreme Court found that the plain and unambiguous language of Section 167.131 mandates that adjoining districts accept students from the unaccredited SLPS system should those students choose to enroll.[67] However, in terms of the parents' tuition agreements with Clayton, the court found that the contracts did not fail for lack of consideration, and the parents were not entitled to restitution of their tuition.[68]

The Court's analysis focused on statutory construction, district accreditation, the applicability of Senate Bill 781, the applicability of Section 167.020, and finally the meaning of Section 167.131.[69] The court first reviewed its previous jurisprudence on statutory construction, determining the seminal rule of statutory construction is to "ascertain the intent of the legislature from the language used and to consider the words used in their plain and ordinary meaning."[70] Applying this framework of statutory construction, the court resolved that, "Considering only the plain and ordinary language of §

2008 school year did maintain, high schools that were and are accredited by . . . a widely recognized and respected organization involved in reviewing educational curricula and staff and accrediting both colleges and high schools.'").

62. *Id.*

63. *Id.* at *5.

64. Turner v. Sch. Dist. of Clayton, 318 S.W.3d 660, 660 (Mo. 2010) (en banc).

65. *Id.* at 670.

66. Elisa Crouch, *In Suit, City Firefighters Target School Districts*, ST. LOUIS POST-DISPATCH (Jan. 25, 2012), http://www.stltoday.com/news/local/education/st-louis-firefighters-sue-school-districts-over-transfers/article_2a2af1c8-4622-11e1-89dc-0019bb30f31a.html (explaining that in addition to the *Turner* suit, an action has been filed in St. Louis Circuit Court by firefighters required to live in the city that have been sending their kids to parochial schools to avoid failing schools in the city).

67. *Turner*, 318 S.W.3d at 669.

68. *Id.*

69. *Id.* at 664–69.

70. *Id.* at 665 (citing State *ex rel.* Unnerstall v. Berkemeyer, 298 S.W.3d 513, 519 (Mo. 2009) (en banc)).

167.131, the uncontested facts show that § 167.131 applies to [SLPS] under the circumstances present in this case."[71]

In responding to the assertion that Sections 167.020 and 167.131 needed to be reconciled, the court reasoned, "[i]f by any fair interpretation both statutes may stand, there is no repeal by implication and both statutes must be given their effect."[72] The court declined to further analyze the legislative history in order to glean wisdom for applying Section 167.131 because the chief rule of statutory interpretation is to "give effect to the legislative intent as reflected in the plain language of the statute . . . ."[73] Moreover, the court did not defer to the Missouri Department of Elementary and Secondary Education's interpretation of the statute because "[c]ourts do not look to agency interpretations when a statute is unambiguous."[74] Ultimately, the court determined the distinction between unaccreditation of one school versus unaccreditation of an entire district was immaterial under the statute because "[t]he fact that the entire [SLPS] District lost its accreditation in 2007 necessarily means that it no longer maintains any accredited schools."[75] Accordingly, the court found the only relevant issue under Section 167.131 was whether the state board of education had classified the district as unaccredited.[76]

Regarding the applicability of Senate Bill 781, Sections 162.1060 and 162.1100 were provisions contained in SB 781 that went into effect after SLPS' desegregation order.[77] The court determined Senate Bill 781 should not operate to exclude the application of Section 167.131 to SLPS because there is no textual conflict between the two laws; instead, Senate Bill 781 applies concurrently with Section 167.131.[78] The court rejected the argument that the desegregation purpose of Section 162.1060, to create the urban voluntary transfer program, would be undermined by application of Section 167.131.[79]

Additionally, the court rejected Clayton's request to harmonize Sections 167.020 and 167.131 in order to make the "shall" in 167.131 a "may."[80] As discussed *supra*, the court found, "[t]he prior version of §167.131.2 provided 'but no school shall be required to admit any pupil.'"[81] The legislature

71. *Id.*

72. *Id.* at 667 (quoting Silcox v. Silcox, 6 S.W.3d 899, 903 (Mo. 1999) (en banc)).

73. *Turner*, 318 S.W.3d at 668.

74. *Id.* at 669 n.9 (citing Blue Springs Bowl v. Spradling, 551 S.W.2d. 596, 599–600 (Mo. 1977) (en banc)).

75. *Id.* at 665.

76. *Id.*

77. *Id*. at 666 n.4.

78. *Id.* at 667.

79. *Turner*, 318 S.W.3d at 666 n.6.

80. *Id.* at 668.

81. *Id*. at 669.

removed this language specifically taking away any discretion of the receiving school to deny admission under the circumstances of this case.[82] Thus, the majority reasoned that if the legislature wanted Section 167.131 to be discretionary they would have left the language of the bill unchanged and not added mandatory language.[83] Moreover, the majority found that "to the extent [the two statutes] conflict, the specific statute, [Section 167.131], prevails over the general statute, [Section 167.020]."[84] Lastly, the majority found there was no need to look to Section 167.020 because the language of Section 167.131 is clear and unambiguous.[85] The Missouri Supreme Court reversed the trial court's judgment and remanded the case.[86]

2. Judge Breckenridge's Opinion

Judge Breckenridge, joined by Judges Russell and Stith, concurred in part and dissented in part.[87] Judge Breckenridge disagreed with the majority's conclusion that Section 167.131 compelled Clayton to admit the students, and instead, reasoned that Section 167.020 gave Clayton discretion to decide whether to admit students.[88] In addition, Judge Breckenridge argued that Sections 167.131 and 167.020 must be harmonized, as they are in conflict.[89] If harmonized, Judge Breckenridge determined Section 167.020 does not exempt pupils seeking admission under Section 167.131 from the waiver requirements.[90] Requiring a waiver means a school district, like Clayton, has discretion pursuant to Section 167.020 to decide whether to admit students seeking admission under Section 167.131.[91] Further justifying this interpretation, Judge Breckenridge cited the Missouri Department of Elementary and Secondary Education's interpretation that school districts have discretion in admitting students residing in unaccredited schools under Section 167.131.[92]

82. *Id.* (citation omitted).
83. *Id.*
84. *Id.* at 668.
85. *Turner*, 318 S.W.3d. at 668–69.
86. *Id.* at 670; *see* discussion *infra* Part III.C.
87. *Turner*, 318 S.W.3d. at 670.
88. *Id.*
89. *Id.* at 671.
90. *Id.* at 672; MO. REV. STAT. § 167.020 (2012) (explaining that when a nonresident pupil requests a waiver, the district *may* grant the request for a waiver of any requirement of subsection two or *may* reject the request for a waiver in which case the pupil shall not be allowed to register).
91. *Turner*, 318 S.W.3d at 673.
92. *Id.* at 674.

Judge Breckenridge expressed concern for the possible implications of enforcing Section 167.131 as a mandatory statute.[93] Specifically, she reasoned that,

> Under the majority's interpretation of the relevant statutory provisions, school districts in St. Louis County would be required to accept pupils from the transitional school district even if the number of pupils seeking admittance exceeded their capacity or if St. Louis County school districts ha[d] difficulty collecting tuition payments from the transitional school district.[94]

In this way, Judge Breckenridge indicated that her conclusion, unlike that of the majority, "presumes the legislature did not intend to enact an absurd law and favors a construction that avoids unjust or unreasonable results."[95] Therefore, the dissenting judges would have affirmed the trial court's judgment in favor of the Clayton School District.[96]

B. Turner's Consistency with Prior Missouri Supreme Court Precedent

The majority in *Turner* complied with prior Missouri Supreme Court precedent by interpreting Section 167.131 according to its plain and ordinary meaning.[97] The *Turner* majority cited *State ex rel. Unnerstall v. Berkemeyer* as supplying the seminal rule of statutory construction in Missouri.[98] *Berkemeyer* involved an intestate will governed by Missouri Revised Statute § 473.050.[99] In that case, Judge Wolff, writing for a unanimous court, analyzed three main principles of statutory interpretation to arrive at the court's conclusion.[100] He wrote that, "[t]he primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider the words used in their plain and ordinary meaning."[101] Furthermore, the court "may review . . . earlier versions of the law, or examine the whole act to discern its evident purpose, or consider the problem the statute was enacted to remedy."[102] Lastly, Judge Wolff stated it is presumed "that the legislature did not insert verbiage or superfluous language

93. *Id.* at 675.

94. *Id.*

95. *Id.* (quoting Care & Treatment of Schottel v. State, 159 S.W.3d. 856, 842 (Mo. 2005) (en banc)).

96. *Id.* at 676.

97. *Turner*, 318 S.W.3d at 665.

98. *Id.* at 665 (citing State *ex rel.* Unnerstall v. Berkemeyer, 298 S.W.3d 513, 519 (Mo. 2009) (en banc)).

99. *Berkemeyer*, 298 S.W.3d at 518.

100. *Id.* at 519.

101. *Id.* (citing State *ex rel.* Nixon v. QuikTrip Corp., 133 S.W.3d 33, 37 (Mo. 2004) (en banc)).

102. *Id.* (quoting United Pharmacal Co. of Mo. v. Mo. Bd. of Pharmacy, 208 S.W.3d 907, 911–12 (Mo. 2006) (en banc).

in a statute."[103] Using these principles, the court compared the precursor statutes to Section 473.050, and analyzed how the statute and its predecessors have historically been applied in order to clear up ambiguities of timing in the statute.[104]

Several recent Missouri Supreme Court decisions also indicate that the court must ascertain and give effect to the intent of the legislature from the plain and ordinary meaning of the statute's language.[105] Specifically, the court in *MC Development Co., LLC v. Central R-3 School District of St. Francois County* found that absent any ambiguity in a statute the court must read the statute in its "plain, ordinary and usual sense."[106] Therefore, the court's recent case law pertaining to statutory construction indicates statutes should be interpreted based on their plain and ordinary meaning if they are unambiguous.[107] *Turner* echoed these precedents in finding that the plain and ordinary language of Section 167.131 and the uncontested facts demonstrated that 167.131 applied to SLPS.[108] Accordingly, the *Turner* majority complied with prior Missouri Supreme Court precedent in finding the unambiguous language of Section 167.131 must be interpreted based on its plain and ordinary meaning.[109]

C. Remanded Judgment: Breitenfeld v. School District of Clayton[110]

After the Missouri Supreme Court found Section 167.131 constitutional, the court remanded the case to the St. Louis County Circuit Court to

103. *Id.* (quoting Hyde Park Hous. P'ship v. Dir. of Revenue, 850 S.W.2d 82, 84 (Mo. 1993) (en banc).

104. *Id.*

105. *See* Hayes v. Price, 313 S.W.3d 645, 654 (Mo. 2010) (explaining that in interpreting statutes the Missouri Supreme Court ascertains the intent of the legislature from the plain and ordinary language used and, if possible, gives effect to that intent); State v. Moore, 303 S.W.3d 515, 520 (Mo. 2010) (explaining that the primary goal, when interpreting a statute, "is to give effect to the legislative intent as reflected in the plain language of the statute."); MC Dev. Co. v. Cent. R-3 Sch. Dist. of St. Francois Cnty., 299 S.W.3d 600, 604 (Mo. 2009); State *ex rel.* Koster v. Olive, 282 S.W.3d 842, 848 (Mo. 2009) (holding that the primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to the intent if possible, and to consider the words in their plain and ordinary meaning).

106. *MC Dev. Co.*, 299 S.W.3d at 604.

107. *Hayes*, 313 S.W.3d at 654; *Moore*, 303 S.W.3d at 520; *MC Dev. Co.*, 299 S.W.3d at 604; *Koster*, 282 S.W.3d at 848.

108. Turner v. Sch. Dist. of Clayton, 318 S.W.3d 660, 668–69 (Mo. 2010) (en banc).

109. *Hayes*, 313 S.W.3d at 654; *Moore*, 303 S.W.3d at 520; *MC Dev. Co.*, 299 S.W.3d at 604; *Olive*, 282 S.W.3d at 848.

110. During the pendency of the lawsuit, the initial named plaintiff, Jane Turner, dropped out of the lawsuit as both of her children graduated from Clayton High School. Gina Breitenfeld became the new named plaintiff because she has two daughters currently attending Clayton schools. DJ Wilson, *An Unsolvable Equation?*, ST. LOUIS MAG., Aug. 2012, at 213, 214.

implement its order.[111] Before trial, Clayton taxpayers joined with the Clayton School District as parties to the lawsuit, allowing a Hancock Amendment challenge to Section 167.131.[112] The taxpayers challenged the constitutionality of Section 167.131 based on the impossibility of compliance defense associated with the Hancock Amendment.[113] The circuit court sent down its order on May 1, 2012, holding that Section 167.131 is unconstitutional because it violates the Hancock Amendment.[114] Breitenfeld appealed directly to the Missouri Supreme Court and oral argument in the case is scheduled for February 27, 2013.[115]

IV. MANDATORY OPEN ENROLLMENT STATUTES ACROSS THE COUNTRY

Despite the current battle over Section 167.131, Missouri is not the only state that has enacted a mandatory, inter-district, open enrollment statute. Fourteen other states have enacted open enrollment statutes with varying degrees of similarity to Section 167.131.[116] Analyzing how a few states have formulated and interpreted open enrollment statutes similar to Missouri's statute is useful as the Missouri legislature reconsiders Section 167.131 in light of the *Turner* decision. Other states' statutes vary in the degree of discretion given to receiving districts to set guidelines for transfer including: capacity, transportation, and funding among others.[117] For example, in ten of the fourteen states the statute requires parents to provide transportation for the student to the border of the receiving district.[118] As this could be an impediment to transfer for many low-income parents, nine states include provisions to reimburse low-income parents for transportation costs.[119] Additionally, nine of the fourteen states allow the receiving district discretion to develop a policy of standards for acceptance of non-resident pupils, including capacity or financial hardship to the district.[120] However, researchers

111. *Turner*, 318 S.W.3d at 670.

112. King-Willmann v. Webster Groves Sch. Dist., 361 S.W.3d 414, 416–17 (Mo. 2012), *rev'd en banc* (stating the Hancock Amendment prevents the state legislature from enacting an unfunded mandate, which can only be challenged by taxpayers).

113. *See* Breitenfeld v. Sch. Dist. of Clayton, No. 12SL-CC00411, slip op. at 13–14 (St. Louis City. Cir. Ct. May 1, 2012).

114. *Id.* at 13.

115. *Id.*, *appeal docketed*, SC92653 February 27, 2013. *See also* SUPREME COURT OF MO., *Docket for February 2013*, *available at* http://www.courts.mo.gov/SUP/index.nsf/fe8feff4659e0b7b8625699f0079eddf/4c3e8dee500a0e0d86257ad4007fbbf7?OpenDocument.

116. JOINT COMM'N ON EDUC., *supra* note 10, at 2–9 (summarizing open enrollment statutes in the following states: Arizona, Arkansas, Colorado, Connecticut, Delaware, Georgia, Iowa, Minnesota, Nebraska, Oklahoma, South Dakota, Utah, Washington, and Wisconsin).

117. *Id.* at 2.

118. *Id.* at 5–6.

119. *Id.*

120. *Id.* at 6–7.

have indicated that when receiving districts are allowed to determine capacity there are often minimal spaces left for open enrollment students—greatly diminishing the efficacy of an open enrollment statute.[121] Lastly, the statutes vary the most in designating how to fund transfer students.[122] Some states provide that the sending district must pay the receiving districts, while others provide that students will be counted in the attendance of the receiving district to increase the receiving district's amount of state aid.[123]

Minnesota enacted the earliest open enrollment statute in 1988 and Georgia enacted the most recent statute in 2009.[124] While open enrollment is not a new concept, it is intensely debated as a possible means of education reform for failing schools across the country.[125] There is still little empirical research regarding open enrollment because the variations in states' open enrollment laws make comparative research difficult.[126] The state statutes discussed herein are only those most similar to Missouri's open enrollment statute, which have been interpreted by a court and can partially elucidate the statutory interpretation issues presented in *Turner*.

The Colorado Court of Appeals found in *Bradshaw v. Cherry Creek School District* that statutes should be interpreted by giving the statutory language its plain and ordinary meaning.[127] Thus, if the statute's meaning is unambiguous the court should not look to legislative intent or other interpretive aids.[128] Furthermore, the same court, a few years later, interpreted a statute

121. Lois André-Bechely, *Public School Choice at the Intersection of Voluntary Integration and Not-So-Good Neighborhood Schools: Lessons from Parents' Experiences*, 41 EDUC. ADMIN. Q. 267, 281 (Apr. 2005) ("Before determining open-enrollment spaces, schools must accommodate resident students, students on continuing permits, magnet programs, all special education needs, and various other nonnegotiable programs. Consequently, some schools had no available space for open enrollment."); Erin Dillon, *Lost in Transit: Low-Income Students and Massachusetts' Statewide School Choice Program*, EDUC. SECTOR (Sept. 5, 2008), http://www.ed ucationsector.org/publications/lost-transit (noting that several affluent suburban districts surrounding Boston chose not to accept transfers and finding this consistent with other voluntary open enrollment programs—if it is an option, affluent suburban districts are less likely to participate).

122. JOINT COMM'N ON EDUC., *supra* note 10, at 7–9.

123. *Id.* at 7–8 (addressing another state statute that provides that the receiving district will obtain the amount of money needed to educate a student in the sending district, unless it is more than the cost of tuition in the receiving district, in which case the extra money goes into a designated "School Choice Fund").

124. *Id.* at 13.

125. *See* Herrmann et al., *supra* note 10, at 1 ("Although choice options are becoming more commonplace in the public education arena, their efficacy continues to be intensely debated.").

126. *See* André-Bechely, *supra* note 121, at 269; *see also* Dillon, *supra* note 121, at 9.

127. Bradshaw v. Cherry Creek Sch. Dist. No. 5, 98 P.3d 886, 889 (Colo. App. 2003) (citing Town of Telluride v. Lot Thirty-Four Venture, L.L.C., 3 P.3d 30 (Colo. 2000)).

128. *Id.*

involving inter-district transfers.[129] When interpreting the statute the court indicated that, "only when the statute is ambiguous do we consider prior law, legislative history, the consequences of a particular construction, and the fundamental purpose of the statute."[130] Like the Missouri Supreme Court in *Turner*, Colorado courts have given deference to legislative construction of an open enrollment statute, and interpreted the words of the statute in accordance with their plain and ordinary meaning.[131]

In Connecticut, the state legislature enacted a mandatory, inter-district open enrollment statute in order to decrease racial and economic isolation in Connecticut's inner cities.[132] In *Sheff v. O'Neil*, the Connecticut Superior Court enforced the open enrollment statute noting, "with the strong demand to attend Hartford public schools as evidenced by the 1,065 suburban students applying . . . the Reverse Choice program will likely be essential in reducing racial, ethnic, and economic isolation in the Hartford schools."[133] Thus, the Connecticut Superior Court found that the plain language of the statute gave effect to the legislative intent and the policy behind the statute.[134]

In Iowa, the legislature enacted a mandatory open enrollment statute requiring sending school districts to pay the receiving districts the cost per pupil of educating a student in that district, including local real estate tax revenues.[135] In *Exira Community School District v. State*, the appellants challenged the constitutionality of the statute.[136] In that case, the Iowa Supreme Court found that, "[i]f it chooses . . . the legislature can—without constitutional impediment—terminate a school district's existence. And when the legislature enacted open enrollment legislation, it knew full well that its ultimate effect might mean the demise of some smaller schools."[137] Ultimately, the court found that it should not judge the wisdom of the legislature's policy decision to create an open enrollment statute, but interpret the statute as it was written.[138]

129. Ridgeview Classical Sch. v. Poudre Sch. Dist. R-1, 214 P.3d 476, 479–80 (Colo. App. 2008).

130. *Id.* at 481 (citing Branch v. Colo. Dep't of Corr., 89 P.3d 496, 498 (Colo. App. 2003)).

131. *See* Turner v. Sch. Dist. of Clayton, 318 S.W.3d 660, 670 (Mo. 2010) (en banc).; *Bradshaw*, 98 P.3d at 889; *Ridgeview Classical Sch.*, 214 P.3d at 481.

132. Sheff v. O'Neil, No. X07CV894026240S, 2010 WL 1233971, at *1–2 (Conn. Super. Ct. Feb. 22, 2010) *opinion modified on reargument* Sheff v. O'Neill, No. X07CV894026240S, 2011 WL 1566975, at *1 (Conn. Super. Ct. Apr. 8, 2011) (removing only one sentence from the previous opinion).

133. *Id.* at *7.

134. *See id.* at *5.

135. Exira Cmty. Sch. Dist. v. Iowa, 512 N.W.2d 787, 792 (Iowa 1994).

136. *Id.*

137. *Id.* at 795.

138. *Id.*

Additionally, in South Dakota the state supreme court reasoned that the findings of the state board of education "reflect over-reliance on open enrollment in the Sioux Falls School District as a cure-all for all of the concerns raised by the Petitioners . . . if open enrollment were a panacea for all such concerns, the legislature would have repealed the boundary change statutes when it passed the open enrollment law. It did not do so."[139] Thus, the South Dakota Supreme Court found that the open enrollment statute could stand, but that it had to be read in conjunction with subsequent boundary change statutes implemented by the legislature.[140]

Most of the case law in states that have similar open enrollment statutes indicates that the Missouri Supreme Court was correct in looking to the plain and ordinary meaning of Missouri's open enrollment statute and in giving deference to the legislature's policy determinations.[141] Only the court in South Dakota reasoned that the open enrollment statute had to be read in conjunction with other statutes,[142] but even this does not conflict with the Missouri Supreme Court's decision in *Turner*.[143] The Missouri Supreme Court found that older statutes did not conflict with Section 167.131, and if they did then the legislature's choice to replace a "may" with a "shall" was given deference as purposeful legislative intent.[144] Therefore, the Missouri Supreme Court's ruling in *Turner* was consistent with both its prior precedent and relevant case law in other states.

V. THE POLICY IMPLICATIONS OF *TURNER* AND POSSIBLE "*TURNER* FIXES"

Since the Missouri Supreme Court followed its prior precedent and other states' relevant statutory analyses in interpreting Section 167.131 according to its plain and ordinary meaning in *Turner*, it properly applied the law in reaching its decision.[145] However, analyzing the merits of the statute as policy is an entirely different and more complicated question. There are no simple solutions to this question, which partially explains why the Missouri state legislature has been unable to come up with a so-called "*Turner* fix."[146] With Kansas City Public Schools losing accreditation on January 1, 2012, the

139. Johnson v. Lennox Sch. Dist., 649 N.W.2d 617, 625 (S.D. 2002); *see* Yankton Ethanol, Inc. v. Vironment, Inc., 592 N.W.2d 596, 599 (S.D. 1999) ("There is a presumption against a construction which would render a statute ineffective or meaningless.").

140. *Johnson*, 649 N.W.2d at 625.

141. *See supra* Part III.

142. *See Johnson*, 649 N.W.2d at 625; *see also Yankton Ethanol Inc.*, 592 N.W.2d at 599.

143. Turner v. Sch. Dist. of Clayton, 318 S.W.3d 660, 668–69 (Mo. 2010) (en banc).

144. *Id*.

145. *See id*. at 670.

146. *See* Elisa Crouch, *Pressure Grows for Action on School Transfers*, ST. LOUIS POST-DISPATCH (Jan. 13, 2012), http://www.stltoday.com/news/local/education/9e816e22-165b-524c-a9f7-cbadf1991cac.html; Holland, *supra* note 46.

number of unaccredited districts in Missouri rises along with the pressure to come up with a solution to the "*Turner* problem."[147] This Section will analyze "*Turner* fixes" that have been proposed by Missouri legislators, and make recommendations regarding lasting solutions to failing schools and educational inequity in St. Louis.

Once *Turner* was remanded to the St. Louis County Circuit Court, the trial date for the case was postponed several times.[148] It was commonly understood that the court continued to postpone the trial date hoping the legislature would find a solution, as this is a traditionally legislative issue.[149] Despite extensive discussion regarding the *Turner* issue during the legislative sessions that ended in May of 2011 and 2012, the legislature has not found a tenable solution.[150] The pressure to produce a solution continues to increase, as parents seeking to enroll their children in county districts turn to the courts—filing two additional cases in Webster Groves[151] and the City of St. Louis[152] regarding enforcement of Section 167.131. Though controversial, the *Turner* decision has brought issues of educational inequality to the forefront of political discussion in the St. Louis area.

Ultimately, the Missouri legislature should retain Section 167.131 because it will force the entire St. Louis community to unite around the common goal of ensuring that all students have access to a quality education. In addition to retaining Section 167.131, the legislature should enact additional provisions increasing charter schools in the City of St. Louis and providing tax-credit

147. Crouch, *supra* note 146.

148. *Turner*, 318 S.W.3d at 670; Crouch, *supra* note 146. Kris Wernowsky, *Turner Exits School Transfer Case; Trial Gets Delayed*, CLAYTON-RICHMOND HEIGHTS PATCH (Sept. 13, 2011), http://clayton-richmondheights.patch.com/articles/turner-exits-school-transfers-case-trial-gets-delayed.

149. *See, e.g.*, Holland, *supra* note 46; Dale Singer, *Lots of Talk, Little Action by Missouri Lawmakers on Education*, ST. LOUIS BEACON (May 17, 2011), http://www.stlbeacon.org/issues-politics/95-Education/110374-lots-of-talk-little-action-by-missouri-lawmakers-on-education (stating that reportedly many of the legislators could not set aside their differences of opinion to come up with a bill that revised or removed Section 167.131).

150. Singer, *supra* note 149; *see also* Virginia Young, *Ruling Derails Bills on Missouri Schools*, ST. LOUIS POST-DISPATCH (May 7, 2012), http://www.stltoday.com/news/local/education/ruling-derails-bills-on-missouri-schools/article_aa338a4a-0f7d-5ffa-9f53-11e06679576f.html (explaining that when the legislature was close to a compromise regarding a "*Turner* fix" the St. Louis County Circuit Court handed down a judgment finding Section 167.131 unconstitutional, derailing any further efforts for compromise or reform).

151. Holland, *supra* note 46 (stating that St. Louis County Judge Wallace issued a writ of mandamus enforcing a city student's right to attend school in Webster Groves pursuant to the Missouri Supreme Court's ruling in *Turner*). The Missouri Supreme Court reversed and remanded the case holding that questions of material fact precluded judgment on the pleadings and the school district did not have standing to raise a Hancock Amendment defense to Section 167.131. King-Willmann v. Webster Groves Sch. Dist., 361 S.W.3d 414, 416–17 (Mo. 2012).

152. Crouch, *supra* note 146.

scholarships to students below a certain income level living in the SLPS district. In this way, the legislature can ensure every student in St. Louis, regardless of race or economic status, has access to a quality education now and in the future.

A. Proposed Solutions to the "Turner Problem"

Members of the Missouri legislature have proposed several possible solutions to what they have deemed the *Turner* issue.[153] In spite of the legislature's inability to compromise on any proposed "*Turner* fix," there is a collective fear of an exodus of students from the city who are currently in both public and private schools into the adjoining county districts.[154] The fear is that this potential exodus could bankrupt SLPS and cause a financial ripple effect for the state.[155] Thus, many Missouri legislators seem to agree that an alternative to the current statute is needed, but they are unable to agree on what the alternative ought to entail.[156] Several state representatives and senators from St. Louis County proposed the three bills discussed herein.

Representative Rick Stream from the suburban city of Kirkwood proposed House Bill 763 during a legislative session in 2011.[157] The purpose of the Bill was "to repeal section 167.131, and to enact in lieu thereof one new section relating to school enrollment options for students from unaccredited districts . . . ."[158] Specifically, this Bill would have given more discretion to receiving districts by allowing them to calculate the amount of tuition they should receive, establish criteria for admission of non-resident students, and limit transfers to students whose specific grade level had become unaccredited.[159]

However, House Bill 763 would ultimately be ineffective for students trapped in failing city schools because it comes from a distinctly suburban perspective, and values giving admission discretion to county schools above ensuring that students living in the unaccredited SLPS district can attain a better education. The foundation of a mandatory, inter-district, open enrollment statute is that it is just that: mandatory. While several other states have capacity conditions on mandatory open enrollment,[160] by giving receiving districts discretion to create admissions criteria, including capacity, House Bill

153. *Id.*
154. Holland, *supra* note 46.
155. *Id.*
156. *Id.*
157. Singer, *supra* note 149.
158. H.B. 763, 96th Gen. Assemb., 1st Reg. Sess., at 1 (Mo. 2011).
159. *Id.* at 1–2.
160. JOINT COMM'N ON EDUC., *supra* note 10, at 6–7.

763 would dramatically decrease the number of students allowed to transfer.[161] Representative Stream likely included a discretionary component in his Bill because he represents the county interest of being able to control what outsiders come into the district and how many are allowed to come.[162] Additionally, this Bill would give discretion to receiving districts, which would limit Hancock Amendment challenges to Section 167.131.[163] Hancock Amendment challenges are based on the argument that if receiving school districts are forced to build more facilities and hire more teachers to accommodate the influx of students from unaccredited districts, the money that accompanies those students under the statute might not be enough to fund the needed changes.[164] However, proponents of Section 167.131 argue that tuition money from the sending district, as required by the statute, would be sufficient to cover such costs.[165] Regardless of the debate over funding, this proposed bill is stymied by the fundamental problem haunting the *Turner* debate: county districts do not want the burden of educating city children. This viewpoint espoused by county districts is not wholly unfounded, as education has always been a traditionally local concern over which local taxpayers want to keep control.[166] Yet, the entire purpose of Section 167.131 is to make certain that students, even if they have the misfortune of living in an unaccredited district, have access to a good education.[167] House Bill 763 would not help the students Section 167.131 was enacted to protect, and would, therefore, be ineffective.

161. *See* André-Bechely, *supra* note 121, at 281; Dillon, *supra* note 121 (explaining that if open enrollment is optional affluent suburban districts are less likely to participate); JOINT COMM'N ON EDUC., *supra* note 10, at 7 (citing Dillon).

162. *See* Singer, *supra* note 149.

163. Holland, *supra* note 46; MO. CONST. art. X, §§ 16–24.

164. *See* Crouch, *supra* note 146 (explaining that this fear has been confounded by a recent University of Missouri - St. Louis study speculating that 13,500 city children currently attending private and parochial schools would transfer to suburban schools); Kevin Murphy, *Judge Says District Must Enroll City Student*, WEBSTER-KIRKWOOD TIMES (July 22, 2011), http://www.websterkirkwoodtimes.com/Articles-i-2011-07-22-176110.114137-Judge-Says-District-Must-Enroll-City-Student.html.

165. *See* Rachel Heaton, *'No Magic Bullet' Will Solve Concerns Over Turner v. Clayton School District*, CLAYTON-RICHMOND HEIGHTS PATCH (June 18, 2011), http://clayton-richmondheights.patch.com/articles/no-magic-bullet-will-solve-concerns-over-turner-v-clayton-school-district.

166. *See* Milliken v. Bradley, 418 U.S. 717, 746–47 (1974) (finding it was improper to impose a multidistrict remedy for single-district de jure segregation in the absence of findings that the other included districts had failed to operate unitary school systems or had committed acts affecting segregation); *see also* Missouri v. Jenkins, 515 U.S. 70, 101–02 (1995) (finding there were limits to inter-district remedies and to a court's ability to craft remedies affecting individual school districts).

167. *See* MO. DEP'T ELEMENTARY & SECONDARY EDUC., *What Happens When a School District Becomes Unaccredited?*, http://dese.mo.gov/divimprove/sia/msip/unaccredited.html (last visited Jan. 10, 2013).

In addition, Representatives McNary, Dieckhaus, and Stream, among others, proposed House Bill 994, which also attempted to achieve a "*Turner* fix."[168] The purpose of this Bill was to repeal Section 167.131 and to add five new statutes in its place.[169] The first alteration to the current form of Section 167.131 would be to accredit individual schools and districts separately.[170] In effect, this would remove the current *Turner* issue because not *every school* in SLPS is unaccredited, although the district as a *whole* is unaccredited.[171] Similar to Senator Cunningham's proposal discussed *infra*, this Bill would allow an accredited district or cooperative association of districts to sponsor or operate a charter school in an unaccredited district.[172] The bill would provide buildings for the expansion of charter schools from the pool of vacant buildings that has increased as SLPS' enrollment has steadily decreased.[173] Moreover, the bill creates a corporation, which would be in charge of coordinating transfers of students from an unaccredited district to an accredited one.[174] The corporation would then be expected to publicize the open enrollment time frame and assign students to schools based on available seats and transportation needs.[175] Finally, this Bill would provide vouchers to students living in an unaccredited district who choose not to attend one of the above types of public schools.[176] Under this Bill, the schools accepting vouchers must not require religious classes or give scholarships based on membership in a religious institution, and the performance of students using a voucher must be measured by a national or state assessment.[177] Despite support for this Bill, it was weighed down by divisive partisan issues such as vouchers

168. H.B. 994, 96th Gen. Assemb, 1st Reg. Sess., at 1 (Mo. 2011), *available at* http://www.house.mo.gov/billsummary.aspx?bill=HB994&year=2011&code=R (At the time, Representative Dieckhaus was Chairman of the Joint Interim Committee on School Accreditation and the Committee for Elementary and Secondary Education).

169. *Id.* at 1.

170. *Id.*

171. Chad Garrison, *Statistics Paint Both Rosy and Alarming Picture of St. Louis Public Schools*, RIVERFRONT TIMES (Jan. 22, 2012), http://blogs.riverfronttimes.com/dailyrft/2011/03/st_louis_public_schools_performance_statistics.php (stating that all of the high schools in SLPS are accredited by the North Central Association, while the district as a whole remains unaccredited).

172. *See* H.B. 994, 96th Gen. Assemb, 1st Reg. Sess., at 1 (Mo. 2011), *available at* http://www.house.mo.gov/billsummary.aspx?bill=HB994&year=2011&code=R.

173. *Id.* at 2; *see* ST. AUDITOR'S REP., REVIEW OF THE ST. LOUIS PUBLIC SCHOOL DISTRICT ii (2004) ("Total district enrollment has steadily declined over the past 15 years by 12 percent . . . .").

174. H.B. 994, 96th Gen. Assemb, 1st Reg. Sess., at 1 (Mo. 2011), *available at* http://www.house.mo.gov/billsummary.aspx?bill=HB994&year=2011&code=R.

175. *Id.*

176. *Id.* at 3.

177. *Id.*

and charter schools and did not gain widespread acceptance in the legislature.[178]

Senator Jane Cunningham, Executive Director of the Cooperating School Districts of Greater St. Louis Don Senti, and the Superintendent of the Special School District John Cary, also attempted to create a potential three-part solution to the *Turner* issue prior to the first legislative session of 2012.[179] Cunningham then proposed the plan as Senate Bill 706 in 2012.[180] The first component of the plan would give students living in an unaccredited district a tax-credit scholarship, up to the per pupil expenditure in their home district, to attend a private school.[181] Senator Cunningham cites City Academy, a high-performing private school on St. Louis' Northside, as an example of the type of school where the proposed scholarships could be used.[182] The second provision of the plan would give county districts the ability to sponsor charter schools in the city, "either individually or under the umbrella of the Cooperating School Districts."[183] Third, county schools would have discretion to decide how many students from unaccredited districts they would accept based on current enrollment and desired class size, subject only to the approval of the Missouri Department of Elementary and Secondary Education.[184] Lastly, when Senator Cunningham proposed Senate Bill 706 to the legislature, she added a provision directing the Missouri Department of Elementary and Secondary Education to establish a clearinghouse that would assist "students in unaccredited districts transfer to an accredited district, a charter school, a virtual school or a non-public school using a Passport scholarship."[185]

178. CHILD. EDUC. COUNCIL OF MO., *School Choice 'Turner Fix' Supported in House Education Committee* (Apr. 15, 2011), http://www.cec-mo.org/missouri-legislation/school-choice-turner-fix-supported.

179. *See* Singer, *supra* note 149; Young, *supra* note 45 (explaining that the three-part plan was subsequently proposed to the legislature by Cunningham, but contains all the components suggested by Cunningham, Senti, and Cary).

180. S.B. 706, 96th Gen. Assemb., 2d Reg. Sess., at 1 (Mo. 2012).

181. *Id.* at 2. (Senator Cunningham has titled the tax-credit scholarship the "Passport Scholarship Program").

182. Singer, *supra* note 149; CITY ACAD., *Tuition and Financial Aid*, http://www.cityacademyschool.org/FinancialAid_88.aspx (last visited Jan. 10, 2013) ($3,500 average tuition contribution per pupil); CITY ACAD., *Who We Are at a Glance*, http://www.cityacademyschool.org/WhoWeAreAtAGlance_93.aspx (last visited Jan. 10, 2013) (stating that the school, founded by Don Danforth III, holds high academic standards and sends graduates to high performing private schools in the County and City).

183. *See* Singer, *supra* note 149.

184. *Id.*

185. Dale Singer, *Proposals Could Bring Dramatic Changes to Missouri Schools*, ST. LOUIS BEACON (Feb. 04, 2012), http://www.stlbeacon.org/issues-politics/95-Education/115671-proposals-could-bring-dramatic-changes-to-missouri-schools.

Senator Cunningham believes this compromise balances a city student's right to an education and the county districts' need to maintain control over local schools.[186] The most controversial part of the plan is the tax-credit scholarship component because—to many members of the education establishment—it resembles vouchers that could be used for parochial schools as well as non-sectarian private schools.[187] Secondarily, Senti indicated that school districts across the state feared charter schools would capture enrollment from their districts, and did not want to support that provision of the plan either.[188] These concerns are not wholly unfounded and contribute to why this plan, as a whole, would be ineffective as a "*Turner* fix."

Senate Bill 706 would ultimately be ineffective because the tax credit scholarships it outlines are not limited to families at a certain income level and are not limited to students who currently attend an unaccredited school.[189] The bill only stipulates that the student must reside in the unaccredited district in order to receive a scholarship.[190] Consequently, this provision does not target the population most in need of education scholarships because any parents—even those who already send their child to private school and have the means to continue doing so—would be able to take advantage of the tax-credit.[191] However, providing tax credit scholarships specifically to low-income students in the city so they could attend a private school that best meets their needs would help improve access to quality educational options. Additionally, this proposed Bill, like House Bill 763, grants discretion to the receiving county districts to determine admissions criteria for accepting students from unaccredited districts.[192] In making Section 167.131 discretionary, these proposals will dramatically decrease the efficacy of the statute and completely remove its strength as an accountability statute.[193] Finally, the clearinghouse provision that Senator Cunningham added to her proposed bill would be a useful provision in ensuring that all students and parents are well informed about the accredited school choice options available to them.[194] In this way, parents can make enrollment decisions in the best interest of their child with complete knowledge of the available options.

All of these proposals contain useful ideas that could potentially aid in providing quality educational options in the city and equalizing the disparity

186. *See id.*

187. *See id*; *see also* Young, *supra* note 45.

188. *See* Singer, *supra* note 14.

189. S.B. 706, 96th Gen. Assemb., 2d Reg. Sess., at 1 (Mo. 2012). (Senator Cunningham has dubbed the tax-credit scholarship the "Passport Scholarship Program").

190. *Id.* at 2.

191. *See id.*

192. *Id.* at 6.

193. *See* André-Bechely, *supra* note 121, at 267; *see also* Dillon, *supra* note 121.

194. *See* Singer, *supra* note 14.

between city and county schools. However, there has to be enough political will to enact change and there must be solutions that are student-centered. A true solution to the problem of failing city schools will be a combination of some of the reforms being discussed, and a change in attitude from an "Us versus Them" mentality to a collective of county and city leaders acting in the best interest of all students.

B. Possible Lasting Solutions to Educational Inequity in St. Louis

All of the proposed *Turner* fixes share a common flaw: each proposal acquiesces to a repeal of Section 167.131. All of the proposed solutions began with representatives and senators representing county constituents.[195] Although representing county interests is obviously not inherently negative, it can become negative when it comes at the cost of ensuring that city students, who have been marginalized for so long,[196] have access to an excellent education. An effective way to rid St. Louis of the "Us versus Them" mentality that has existed since white flight began in the 1950s,[197] is to put both the City and the County of St. Louis in an equal position of needing to guarantee all City students have access to an excellent education. Michelle Rhee, an education reform advocate and former Chancellor of Washington D.C. Public Schools, often quotes Warren Buffet's advice to her about the fastest way to solve educational inequality in America: "Make private schools illegal and assign every child to a public school by random lottery."[198] By making this very simple and radical change, Buffet wisely reasons that all parents, both high and low-income, would be invested in making sure all schools were excellent because they would not know to which school *their* child could randomly be assigned.[199] This reality of human nature contributes to the "Not in My Backyard" phenomenon.

So long as wealthy and relatively privileged parents can send their children away from failing schools—either by moving to the county or sending their student to a private school—there will never be an investment in the city schools that serve predominately poor and African-American students with low

195. *See* Singer, *supra* note 149.

196. *See* Freivogel, *supra* note 20, at 210; *see also* DISTRICT REPORT CARD, *supra* note 22 (exhibiting extremely low achievement statistics indicating that students in SLPS continue to be marginalized).

197. *See* Kovarik, *supra* note 18.

198. David Boaz, *Would the Schools Look Better if They Outlawed All Competitors?*, CATO INST. (Sept. 14, 2010, 6:16 PM), http://www.cato-at-liberty.org/would-the-schools-work-better-if-they-outlawed-all-competitors/; *see also* ST. LOUIS SPEAKER SERIES, http://www.maryville.edu/2011/03/2011-2012-st-louis-speakers-series-announced/ (last visited Jan. 10, 2013) (Rhee quoted Warren Buffet's key to equalizing education throughout her 2011-2012 speaking tour).

199. *See* Boaz, *supra* note 198.

social capital.[200] The last thing that parents who have moved to the county, to provide their child with a better education, want is to have the same problems they left in the city follow them to the county. County schools want to control the flow of open enrollment from the city because they do not want the burden of educating city children.[201] The perception, which is not unfounded, is that city students bring with them problems from home, the potential of uninvolved parents, special education needs, poor nutrition, and all the costs associated with educating a child living in poverty.[202] Consequently, county parents and students do not want these problems of the city ending up *in their backyards*—at their schools.

However, this isolationism comes at a cost. St. Louis was once a vibrant city with a thriving culture and a sizeable population.[203] Now the population has fallen to 319,294 and the total population has decreased by over eight percent since 2000.[204] St. Louis Mayor Francis Slay often cites statistics that young professionals are moving into the city at growing rates, but population leach continues to occur when those same professionals begin to have families with school-aged children.[205] The city continues to lose population chiefly for the reason that it has a failing school system.[206]

200. Robert D. Putnam, *The Prosperous Community: Social Capital and Public Life*, 13 AM. PROSPECT 1, 5 (Spring 1993), *available at* http://xroads.virginia.edu/~HYPER/DETOC/assoc/13putn.html ("The erosion of social capital is an essential and under-appreciated part of the diagnosis. Although most poor Americans do not reside in the inner city, there is something qualitatively different about the social and economic isolation experienced by the chronically poor blacks and Latinos who do."); Robert G. Croninger & Valerie E. Lee, *Social Capital and Dropping Out of High School: Benefits to At-Risk Students of Teachers' Support and Guidance*, 103 TCHRS. C. REC. 548, 548 (2001), *available at* http://www.tcrecord.org/content.asp?ContentID=10776 (explaining that poor and minority students need more guidance from teachers because they go into school with less social capital specifically as it pertains to graduating from high school and attending college).

201. *See* Singer, *supra* note 14.

202. *See* Crouch, *supra* note 146 (quoting Education Commissioner Chris Nicastro stating, "[T]he challenges associated with educating the urban core—poverty, socioeconomic factors, family dysfunction and so forth—will not be addressed simply by dispersing the children."); *see* Mark R. Warren, *Communities and Schools: A New View of Urban Education Reform*, 75 HARV. EDUC. REV. 133, 134 (2005) (arguing it is difficult if not impossible for children to learn well if they "lack adequate housing, healthcare, nutrition, and safe and secure environments, or if their parents are experiencing stress because of their low wages and insecure employment . . . .").

203. *See* Susan Saulny, *Hopes for a Renaissance After Exodus in St. Louis*, N.Y. TIMES (April 17, 2007), http://www.nytimes.com/2007/04/17/us/17stlouis.html?pagewanted=all ("From a peak of nearly 860,000 residents in 1950, St. Louis had lost more than half a million people by 2000, a depopulation not unlike the devastating postwar exodus from Detroit.").

204. U.S. CENSUS BUREAU, *State and County Quick Facts St. Louis (city)*, http://quickfacts.census.gov/qfd/states/29/29510.html (last visited Jan. 10, 2013) (reflecting population data from 2010).

205. Dale Singer, *Lawmakers Hear Plight of St. Louis Students at Education Hearing*, ST. LOUIS BEACON (Nov. 17, 2011), http://www.stlbeacon.org/issues-politics/95-Education/114287-

In the last fifteen years, there has been a movement to rebuild the city, but the vision of what St. Louis could be will never come to fruition if the county and city do not ban together with similar initiative to fix the city school system.[207] The "Us versus Them" mentality will not change to a collective mentality until the counties surrounding St. Louis are forced to contend with the problems of the city. Therefore, solving the "*Turner* problem" by repealing Section 167.131 or making it discretionary will not solve the problem of failing schools in the city, because it will mean that county residents can continue to turn a blind eye to the problems of the city.[208] As the Warren Buffet philosophy indicates, the fastest way to get county residents involved in rebuilding the city schools is to make sure they are faced with the issues of the city in their backyards.[209] Alternatively, the legislature could enact a statute that would unify St. Louis County and the City, solving many of the cities' problems, including the unaccredited school system.[210] Similar unification efforts between city and county have occurred in other places in America—including, Memphis and Shelby County and Indianapolis and Marion County—with differing degrees of incorporation and success.[211] However, this reform seems to be the most threatening proposal of all, and is only nominally

lawmakers-hear-plight-of-st-louis-students-at-education-hearing (reporting that St. Louis City Mayor Francis Slay explained to a panel of Missouri legislators at an education hearing, "We need to retain people . . . but once they have children, they are moving somewhere else. I'm here to advocate for what works to offer the families and children of St. Louis quality public school choices—today, not 10 years from now but today.").

206. *See id.*

207. *See* Susan Saulny, *supra* note 203.

208. *See* David Boaz, *supra* note 198.

209. *See id.*

210. *See History of Unification Efforts: The Long History of Efforts to Unify St. Louis City and County*, ST. LOUIS POST-DISPATCH (Dec. 20, 2010), http://www.stltoday.com/business/local/history-of-unification-efforts/article_25e0c2ac-7be7-5071-958e-39f781cee18d.html [hereinafter *History of Unification Efforts*] (demonstrating that the divide between St. Louis City and St. Louis County began at the City's initiative in 1876 and has remained despite several different efforts to unify); *See* E. TERRENCE JONES, FRAGMENTED BY DESIGN: WHY ST. LOUIS HAS SO MANY GOVERNMENTS 85–87 (2000) (indicating that City leaders have considered combining City and County statistics in order to boost St. Louis' standing nationally and improve perception of the City's overall health).

211. *See* SHELBY CNTY. BD. OF EDUC., http://www.scsboard.org/ (last visited Jan. 10, 2013); *see also* Zack McMillin, *Collaboration essential to unification of Memphis, Shelby County school systems, officials say*, COMMERCIAL APPEAL (Sept. 4, 2011 12:00 AM), http://www.scsboard.org/; *see* INDIANA PUBLIC MEDIA, *Moment of Indiana History: Unigov*, http://indianapublicmedia.org/momentofindianahistory/unigov/ (last visited Jan. 10, 2013).

being discussed by city and county civic leaders, and is not considered a legitimate *Turner* solution by legislators.[212]

Ultimately, Section 167.131 should not be repealed, but supplemented with other statutory provisions that will ensure students in the city have access to an excellent education right now and in the future. No one contends that it is ideal for students to travel far from their homes to get an excellent education, thus, provisions must be enacted to ensure quality school choice options are available in the city.[213] However, those options will not come to fruition overnight. Excellent charter school models often add one grade to the school each year to make certain their school model and student enrollment are sustainable.[214] Charter schools sponsored by private organizations or the city or county schools districts should be encouraged and given legislative pathways, but they cannot be expected to become well-functioning schools immediately. When discussing an increase in the number of charter schools, it must also be coupled with a discussion of increased accountability.[215] Charter schools, by design, have more freedom than public schools to innovate and compete with traditional public schools.[216] However, with freedom must come the price of showing academic achievement within a few years after the charter school opens. If charter schools are not held immediately and directly accountable for student achievement by their authorizers and the district, there will be several more low-performing charter schools in the city—like the now defunct Imagine schools.[217] There are already some positive examples of flourishing

212. *See History of Unification Efforts*, *supra* note 210 (reporting that St. Louis City Mayor Francis Slay and St. Louis County Executive Charlie Dooley are sympathetic to the idea, with Major Slay supporting the city being incorporated into the county as the 92nd municipality).

213. *See* Singer, *supra* note 149 (quoting then Rep. Tishaura Jones, who was a part of the voluntary transfer program between St. Louis and St. Louis County, stating, "I don't want my son on a bus for an hour and a half each way. I don't want city kids to go through what I went through just to get a good education. I know we can try to find solutions for local education in the city . . . .").

214. *See* David Hunn, *Model St. Louis School Meets its First Real Test*, ST. LOUIS POST-DISPATCH (April 20, 2010), http://www.stltoday.com/news/local/education/model-st-louis-school-meets-its-first-real-test/article_0487b6a4-bbec-54bf-a587-2284215b9741.html; *see also* JAY MATHEWS, WORK HARD. BE NICE.: HOW TWO INSPIRED TEACHERS CREATED THE MOST PROMISING SCHOOLS IN AMERICA 89, 112 (2009) (outlining the unique and successful Knowledge Is Power Program (KIPP) model, which is composed of a longer school day, longer school year, and building on one grade level a year).

215. MO. CHARTER PUB. SCH. ASS'N, *MCPSA Applauds Governor Nixon's Signing of SB 576* (June 27, 2012), http://www.mocharterschools.org/advocacy/missouri-legislature/ (praising the signing of the new bill as creating increased accountability in charter schools and among their sponsors).

216. *See* Joseph P. Viteritti et. al., *School Choice: How an Abstract Idea Became a Political Reality*, 8 BROOKINGS PAPERS ON EDUC. POL'Y 137, 143–47 (2005).

217. Elisa Crouch, *Charter Schools Show Uneven Results*, ST. LOUIS POST-DISPATCH (Aug. 14, 2011), http://www.stltoday.com/news/local/education/article_257a26a9-a103-5183-97cc-067e

charter schools in the city such as KIPP, St. Louis Charter School, and City Garden Montessori among others.[218] These schools can become a model for new charter schools entering the city.

In addition to increasing the number of available, well-functioning charter schools in the city there should be tax credits available for parents to send their child to a private school.[219] Although tax credits are politically volatile, the United States Supreme Court found that they did not violate the Establishment Clause in *Zelman v. Simmons-Harris*.[220] The scholarships at issue in *Zelman* were enacted to provide low-income, minority students who were trapped in the failing Cleveland City School District with access to a quality education.[221] Similar to SLPS, the Cleveland Public Schools have been among the worst performing schools in the nation for several decades.[222] The circumstances involved in *Zelman* are, thus, similar to the current education landscape in St. Louis, giving the Missouri legislature a precedent for enacting tax-credit scholarships to ensure low-income, minority students in the City of St. Louis have access to a quality education.[223] Moreover, it will take a combination of measures to ensure that every student living in the city has access to a quality education.[224] If city parents have the option to send their child to a county school, a charter school, a St. Louis public school, or a private school they will have many options to choose from to best meet the individual needs of their child. A student who needs the environment that a private school provides should not be foreclosed from attendance simply because his or her parents cannot afford it. There are several private schools in the city that cater to city

c0fde828.html ("Just 4 percent of pupils at Imagine Academy of Careers Elementary in the south part of the city passed the state math exam. And just 5.4 percent at downtown's Imagine Academy of Cultural Arts—touted as Imagine's gifted program . . .— tested proficient or advanced in reading.").

218. CITY ST. LOUIS MO., *Mayor-Endorsed Charter Schools*, http://stlouis-mo.gov/government/departments/mayor/initiatives/education/Charter-Schools-in-St-Louis.cfm#mayorEndorsed (last visited Jan. 10, 2013).

219. *See* S.B. 706, 96th Gen. Assemb., 2d Reg. Sess., at 2–3 (Mo. 2012) (demonstrating that tax credit scholarships are ultimately a useful portion of Cunningham's proposed bill).

220. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 662–63 (2002) (holding that the Ohio Pilot Scholarship Program, a program enacted for the valid secular purpose of providing educational assistance to poor children in a demonstrably failing public school system, did not violate the Establishment Clause).

221. *Id.* at 644 ("The majority of [the children in Cleveland Public Schools] are from low-income and minority families. Few of these families enjoy the means to send their children to any school other than an inner-city public school.").

222. *Id; see also supra* Part I (discussing the problems facing St. Louis public education both historically and presently).

223. CHILD. EDUC. COUNCIL MO., *Scholarship Tax Credit FAQs* (Jan. 1, 2011), http://www.cec-mo.org/special-needs-education/scholarship-tax-credit-faqs.

224. *See* Dale Singer, *supra* note 149 (detailing the various efforts across St. Louis relating to improving education).

students and also have impeccable student achievement records such as: City Academy and Crossroads College Preparatory School.[225] Another benefit of combining several measures together is that SLPS will need to become a successful school system that produces high student achievement results or it will be forced out of existence.[226] In the end, this result would not be because all of its students left the city for the county, but because they did not put student achievement first and could not compete for enrollment with a myriad of other entities.

By leaving Section 167.131 in place and enacting supplemental provisions students would have the opportunity to attain an excellent education right now and in the future. Students could immediately assert their rights under Section 167.131 to attend a high-performing school in the county.[227] Additionally, the charter school provision would increase the amount of school choice options in the city and ensure those schools are held directly accountable for performance and given the freedom to innovate in order to directly meet the needs of city students.[228] Lastly, the tax credit provision would guarantee that students who would not otherwise have access to a private education could attain one if it is the best option for their education.[229] Although *Turner* has been controversial since it was handed down in 2010, the decision has forced city and county leaders to come together and try to create solutions to the education problems in the city.[230] If Section 167.131 were to be repealed, that would no longer be true and the city would be as isolated as ever—facing the challenging problem of what to do for kids trapped in a failing school system. While some other states' open enrollment statutes gave school districts discretion in admitting students, a discretionary open enrollment statute would not work in St. Louis because of its divided history and the extreme population and social-capital drain that has occurred in the city.[231]

225. *See* CITY ACAD., *Academic Program*, http://www.cityacademyschool.org/AcademicProgram_52.aspx (last visited Jan. 10, 2013); *see also* CROSSROADS C. PREPARATORY SCH., *Educational Philosophy*, http://www.crossroadscollegeprep.org/academics/educational_philosophy.html (last visited Jan. 10, 2013).

226. *See* Andy Smarick, *The Turnaround Fallacy*, 10 EDUC. NEXT 21, 25–26 (2010), *available at* http://educationnext.org/files/ednext_20101_20.pdf (describing the importance of shutting down low-performing schools and starting fresh with new school models and new school leaders).

227. MO. REV. STAT. § 167.131 (2012).

228. *See* Joseph P. Viteritti, et. al., *supra* note 216, at 143, 147.

229. *See* Singer, *supra* note 149 (summarizing the key aspects of Cunningham's bill, including the establishment of the Passport Scholarship Program, which provides financial assistance for non-public elementary or secondary schools to students in unaccredited public school districts).

230. *See id.*

231. *See* discussion *supra* Parts I, V.B.

Retaining Section 167.131 also serves the critical function of making sure that all students living in the city can gain a quality education now. While it is unquestionably important to invest in the long-term success and infrastructure of SLPS, that investment does not help students who are getting an inadequate education right now. Although the United States Supreme Court in *San Antonio Independent School District v. Rodriguez* determined that a certain level of education was not a constitutional right,[232] there is a question of whether a student living in an unaccredited district is gaining an education at all. The Missouri State Constitution provides that every student is entitled to a free, public education.[233] It is arguable whether students in SLPS, where dropping out is more common than going to college and only 10 percent of students perform at the national average on the ACT, are gaining an education at all.[234] It is imperative that legislators leave Section 167.131 in place, in addition to enacting long-term solutions, in order to fulfill their constitutional duty to students in SLPS.

VI. CONCLUSION

The Missouri Supreme Court's decision in *Turner v. School District of Clayton* has changed the education debate and landscape in St. Louis. St. Louis' history of racial and economic segregation necessitates a drastic solution to the dismal education system in the city. It is unclear whether the legislature that enacted Section 167.131 in 1993 knew exactly how the statute could function almost twenty years later.[235] But it is clear that the legislature intended the statute to be an accountability provision guaranteeing that Missouri schools used the large amount of money they received from the state to actually produce student achievement results.[236] Consequently, the Missouri Supreme Court interpreted Section 167.131 consistent with the plain and ordinary meaning of the statute, showing fidelity to its prior precedent, and, as a result, gave effect to the true legislative intent behind the statute.[237] The court's interpretation of Section 167.131 was further proven to be correct based on an analysis of open enrollment statutes in other states and subsequent case law interpretation.[238] As open enrollment statutes vary greatly from state to state, there is no one way for Missouri to enact or enforce an open

232. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 29–31 (1973).
233. MO. CONST. art. IX, § 1(a).
234. *See supra* text accompanying notes 22–26.
235. *See supra* Part II.
236. *Id.*
237. *See supra* Parts II, III.
238. *See supra* Part V.

enrollment statute.[239] Thus, Missouri is free to craft and enforce a statute that best meets its unique needs.

Ultimately, the needs of students in SLPS are best met by ensuring that they can attain a quality education right now, no longer being deprived of their right to an education merely by virtue of where they live. In order to make sure every student in St. Louis has access to a quality education, the Missouri legislature should retain Section 167.131 as it is written, allowing students in the city to transfer to adjoining accredited districts.[240] Retaining the statute would ensure students in the city are not deprived of their rights now, but it must also be coupled with provisions providing quality education options in the future.[241] Therefore, increasing quality charter schools in the city and enacting tax-credit scholarships will provide students with options beyond the traditional public school in the city.[242] The traditional public schools in SLPS will then be forced to either compete with the increasing number of quality schools in the city or they will become—as they currently fear—bankrupt.[243] Ultimately, the controversy surrounding *Turner* and the resulting education debate in the city and counties of St. Louis provides a unique opportunity for the city and counties to pool talent, money, time, and political will to solve the education problems that have faced St. Louis for decades. Yet, without a breakdown of the "Not in My Backyard" phenomenon, city students will continue to be isolated and forgotten in a failing school system, and the problems that have plagued St. Louis since the 1950s will continue to haunt its future.

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239. *See* discussion *supra* Part V.A.

240. *See* discussion *supra* Part V.B.

241. *Id.*

242. *Id.*

243. *Id.*

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