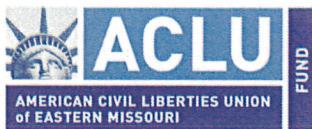


American Civil Liberties
Union of Eastern Missouri
Fund
454 Whittier Street
St. Louis, Missouri 63108
314.652.3114
314.652.3112 (fax)

www.aclu-em.org



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OFFICERS AND DIRECTORS

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President

Daron Smith
Thomas Hayde
Vice Presidents

Bob Waugh
Treasurer

Tom Williams
Superintendent
Kirkwood School District
11289 Manchester Road
Kirkwood, Missouri 63122

Shontaia Riley
Secretary

By Facsimile: (314) 984-0002

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Re: Student Transfers from Unaccredited School Districts
*Rights of Parents and Students Under Missouri Statute,
Supreme Court Precedent, and the Federal Constitution*

Dear Mr. Williams,

We are writing about your district's refusal to enroll certain students from unaccredited school districts in your or an adjoining county. As you are aware, Mo. Rev. Stat. § 167.131 gives such students a right to enroll in your district. The purpose of this letter is to share the ACLU's analysis that the right of parents and students to enrollment is guaranteed under Missouri statute, Missouri Supreme Court precedent, and the due process protections of the Federal Constitution.

I. Missouri Statute and Supreme Court Precedent

As the Supreme Court of Missouri has explained, accredited school districts must accept students from unaccredited districts seeking admission under § 167.131. "The plain and ordinary meaning of the language in § 167.131.2 that 'each pupil shall be free to attend the public school of his or her choice' gives a student the choice of an accredited school to attend, so long as that school is in another district in the same or an adjoining county, and requires the chosen school to accept the pupil." *Turner v. School Dist. of Clayton*, 318 S.W.3d 660, 669 (Mo. banc 2010). Section 167.131.2 "does not give an accredited school chosen by a student discretion to deny admission to that student." *Id.* There is no statutory authority for accredited school districts to deny enrollment to students seeking admission under § 167.131.

According to information we have been provided, your district has denied enrollment to numerous students seeking admission under § 167.131 based on class size policies set by your school board. Missouri statutes do not permit your district to deny enrollment on this basis. The legislature's mandate that you accept all eligible students is unambiguous. For this reason, any guidance you might have

received from the Department of Elementary and Secondary Education that suggests you are acting lawfully is in error. DESE's guidance does not have the force of law. Even if it did, DESE cannot contravene the clear command of the legislature in § 167.131.

II. Pragmatic Issues Related to Increase in Size of Student Body

We understand that compliance with Missouri law does impose some burden on your district, including hiring additional teachers. We do not, however, believe that it is "impossible" for you to comply with § 167.131. In *Breitenfeld v. School District of Clayton*, 399 S.W.3d 816 (Mo. banc 2013), the Supreme Court considered an "impossibility" defense to § 167.131. The court held that there is no affirmative defense of "impossibility" available to defendant school districts that would allow them to refuse compliance with § 167.131. *Breitenfeld*, 399 S.W.3d at 835. Although we appreciate that it will require significant effort for your district to comply with the law, doing so is not impossible and impossibility is not a defense.

III. Federal Due Process Analysis

In addition to the rights of students and parents in unaccredited school districts under Missouri law, your district may be exposed to significant liability because your actions appear to violate the Federal Constitution. Section 167.131 creates a substantive right for parents in an unaccredited school district to enroll their children in an accredited school of their choice, so long as that school is in another district in the same or an adjoining county. In this instance "state law has created in [citizens] an interest substantial enough to rise to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause." *Dobrovolny v. Moore*, 126 F.3d 1111, 1113 (8th Cir. 1997).¹ The right contained in § 167.131 is something to which state law entitles students and their parents; thus, it is a liberty interest of which they cannot be deprived without due process.

Of course, because state law created the liberty interest, "[t]he state 'retains the authority to interpret [the] scope and availability' of any state-conferred right or interest." *Dobrovolny*, 125 F.3d at 1113 (citations omitted). Here the state's highest court has *twice* described the right at issue and left no doubt but that the right exists and the accredited districts have no discretion to deny admission to eligible students. The fact that the statute itself places substantive limitations on the discretion of school officials further highlights that the state has created a liberty interest. See *Hoyle v. Priest*, 59 F. Supp. 2d 827, 836-37 (W.D. Ark. 1999) (citing *Montero v. Meyer*, 13 F.3d 1444, 1448 (10th Cir.1994)).

A legitimate claim to the right to be admitted within your district "must not be arbitrarily undermined." *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). Again, the right to an education in your district for eligible applicants is not created by the Constitution, but rather "[it is] created and [its] dimensions are defined by existing rules or understandings that

¹ "Whether an interest created by state law rises to the level of a 'liberty interest' protected by the Due Process Clause of the Fourteenth Amendment is a matter of federal law." *Montero v. Meyer*, 13 F.3d 1444, 1447 (10th Cir. 1994) (citing *Olim v. Wakinekona*, 461 U.S. 238, 244 n. 5, 103 S.Ct. 1741, 1744 n. 5, 75 L.Ed.2d 813 (1983)).

stem from an independent source such as state law--rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.*; see also *Singleton v. Cecil*, 176 F.3d 419, 422-23 (8th Cir. 1999) ("property interests protected by the Due Process Clause are not created by the Constitution, but rather by independent sources such as state law"). Once such a right is conferred, it must be conferred consistent with the Constitution. See *Meyer v. Grant*, 486 U.S. 414, 420 (1988).

The procedural guarantees of the Due Process Clause may be invoked when, as here, a legitimate claim to a state-created entitlement has been terminated by state-action. **The state-action in question is your district's arbitrary denial of admission to eligible students.** "[T]he core of the concept [of due process is] protection against arbitrary action[.]" *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 845, 118 S. Ct. 1708, 1716, 140 L. Ed. 2d 1043 (1998). In this case, your district has set a deadline to apply, set a maximum number of students who will be allowed to exercise their statutory right, and selected who will be allowed to exercise their right, or not, by lottery—all without any statutory authority. This is the epitome of arbitrary action that terminates a protected property interest.

IV. Request for Resolution

We are certain that your district understands the value of education. All students have a fundamental right to education, and it is the responsibility of the State of Missouri to ensure that all students have access to a quality, free, public education. Missouri has attempted to meet its responsibility, in part, by enacting § 167.131. We understand that there might be reasons to question the wisdom of § 167.131's requirements, some legitimate and some not, and that those requirements impose challenges on both sending and receiving districts. But Missouri law has created a property interest for parents and children who reside in school districts that have lost their accreditation and that interest cannot be disregarded, or diminished, by your district.

We bring our analysis to your attention because we hope your district will choose to abide by Missouri statutes, the decisions of the state Supreme Court, and the Bill of Rights. The ACLU has a mandate to advocate on behalf of parents and students who are placed in circumstances where they are not provided a benefit guaranteed to them by the law. We hope that you will take action to ensure that every eligible student who has sought to enroll in your district pursuant to § 167.131, or who seeks to do so in the coming weeks, is admitted to your district for the coming school year. We are available to discuss this matter and discuss ways in which your district might honor the rights of the parents and children at issue.

Sincerely,



Jeffrey Mittman
Executive Director



Anthony E. Rothert
Legal Director

cc: Chris Koster, Attorney General
Chris Nicastro, Commissioner, DESE