

IN THE SUPREME COURT OF MISSOURI

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No. SC87980

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INDEPENDENCE-NATIONAL EDUCATION ASSOCIATION,  
INDEPENDENCE-TRANSPORTATION EMPLOYEES ASSOCIATION,  
INDEPENDENCE-EDUCATIONAL SUPPORT PERSONNEL,  
RANDI LOUISE MALLET, and RON COCHRAN,

Plaintiffs/Appellants,

v.

INDEPENDENCE SCHOOL DISTRICT,

Defendant/Respondent.

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RESPONDENT'S BRIEF

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ATTORNEYS FOR DEFENDANT/RESPONDENT

INDEPENDENCE SCHOOL DISTRICT

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**JURISDICTIONAL STATEMENT**

Respondent adopts Appellants' jurisdictional statement.

**STATEMENT OF FACTS**

Respondent adopts Appellants' statement of facts.

## ARGUMENT

### I.

**The Trial Court awarded judgment for Respondent because well-settled and well-reasoned precedents of this Court, including *City of Springfield v. Clouse*, 206 S.W.2d 539 (Mo. 1947), preclude Missouri public employers from entering binding collective bargaining contracts.**

The Trial Court entered judgment for Respondent because Respondent is a public employer and well-settled Missouri law precludes public employers from entering into binding collective bargaining contracts. Although public employees have the right to organize and collectively express their views to their governmental employers through a labor organization of their choosing, they do not have the right to enter into binding contracts with the government regarding matters reserved to legislative bodies. Furthermore, public policy, fundamental principles of democracy and most importantly, the people of Missouri have shaped and supported this prohibition against collective bargaining contracts for decades. Appellants present no argument compelling this Court to overturn *City of Springfield v. Clouse*, 206 S.W.2d 539 (Mo. 1947), a long-standing pillar of Missouri law that has been supported, time after time, not only by this Court, but also by the citizens of Missouri and their elected representatives.

- A. This Court's decision in *City of Springfield v. Clouse*, 206 S.W.2d 539 (Mo. 1947) holds that Missouri public employers may not enter into collective bargaining contracts and such decision is a**



**well-reasoned statement of public policy in that public sector collective bargaining contracts are not in the best interest of the people of Missouri.**

Missouri public employers cannot enter into collective bargaining contracts with their employees. In *City of Springfield v. Clouse*, 206 S.W.2d 539 (Mo. 1947), this Court held that collective bargaining contracts by public employers in Missouri are prohibited by the Missouri Constitution.

- 1. Education should not become the subject of collective bargaining because, as recognized in the Missouri Constitution, educating Missouri children is of paramount importance.**

Missouri's law prohibiting collective bargaining contracts by public school employers is sound public policy because one of the most important duties of a government is to ensure the education of its children. Missouri states this very principle in its Constitution. Article IX, Section 1(a) of the Missouri Constitution states:

A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the general assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this state within

ages not in excess of twenty-one years as prescribed by law.

This provision in the Missouri Constitution makes clear the paramount importance of educating our children. Indeed, Missouri has established a comprehensive statutory scheme for the governance of education in Missouri. *See* Sections 161.092, 171.011, R.S.Mo. 2000.

- 2. Missouri has statutorily established a system for local control of education through a local governing body elected by the people.**

The Missouri General Assembly has enacted a series of laws that further detail local governments' control over public education. Section 161.092, R.S.Mo. states that the state board of education sets and supervises execution of the state's educational policies. In turn, local school boards have authority to adopt rules and regulations regarding education. Section 171.011 R.S.Mo. Local school boards set local school district policies, including personnel policies. *Id.* To allow collective bargaining contracts, by which local boards of education would bind future boards to specified terms and conditions of employment in schools, would be directly contrary to Missouri law.

- 3. The purpose of Missouri's public school system is to educate children, not provide employment under terms or conditions demanded by employees.**

The ultimate goal of government and educators is to educate children. *See* Mo. Const., art. I, Sections 8-9 (mandating that the general assembly establish and maintain free public schools, stating that knowledge and intelligence is essential to the preservation of the rights and liberties of the people). A prohibition of collective bargaining by public employees serves this ultimate goal by allowing flexibility for all parties involved to meet the changing educational needs of children and to reach various objectives in the development of a functional and successful education system. Frederick M. Hess & Martin R. West, *A Better Bargain: Overhauling Teacher Collective Bargaining for the 21<sup>st</sup> Century*, Program on Education Policy and Governance, Harvard University, 5 (2006), available at: <http://www.ksg.harvard.edu/pepg/PDF/Papers/BetterBargain.pdf>.

#### **4. Collective bargaining contracts stifle improvements in education.**

Collective bargaining is incompatible with improvements in education. In today's world, growing competition from international counterparts and ever-increasing gap between classes, governments are under increasing pressure to adequately prepare their citizens to face these challenges and succeed in respect to their international counterparts. *Id.* at 5-6. To meet this challenge, our government must be afforded the flexibility to adapt its strategies and policies regarding education. Such a task requires the flexibility to make sound policies and adjustments to terms and conditions of employment. If a government's hands are bound regarding these decisions, meeting the ever-changing demands of

educating our children becomes impracticable. *Id.* at 7 (“The reality is that the interests of union members sometimes clash with those of the students, parents, and taxpayers – especially when it comes to addressing anachronistic work rules, increasing accountability for students’ academic progress, or reconfiguring compensation to reward excellence in the classroom”); *see also* Thomas A. DeMitchell & Thomas Carroll, *Educational Reform on the Bargaining Table: Impact, Security, and Tradeoffs*, 134 Ed. Law Rep. 675, 691 (1999), available at: 134 WELR 675 (stating that “[r]eform treated as just another chip to be bargained with is not in the best interests of education.”).

**5. Collective bargaining contracts benefit employees at the expense of students.**

Collective bargaining by public school employees benefits employees, many times at the expense of students. Unions are focused on protecting the interests of their members and not students. If groups such as transportation and custodial employees can enter collective bargaining contracts more funding will be diverted from the classroom. “The fundamental and legitimate purposes of unions [are] to protect the employment interests of their members.” Hess & West, *supra*, at 6 (quoting Robert Barkley, former executive director of the Ohio Education Association). Unions negotiate contracts through collective bargaining that focus on the needs of employees and not the needs of students. Specifically,

Teachers unions favor existing arrangements that protect jobs, restrict the demands placed on members,

limit accountability for student performance, and safeguard the privilege of senior teachers, not because they benefit students, but because the benefit existing members.

*Id.* Clearly, the focus of collective bargaining is not on student progress or learning.

**6. Collective bargaining contracts thwart the government's ability to provide education.**

The potential impact of collective bargaining contracts threatens to tie the government's hands in regulating all aspects of public schools. Collective bargaining contracts "shape nearly everything public schools do" and "stifle proposed reforms on a variety of fronts." Hess & West, *supra*, at 9. A particularly troubling consequence of collective bargaining agreements is that it becomes difficult for schools to reassign or remove ineffective teachers, to reward highly successful and effective teachers and to find creative solutions to address problem areas in order to improve student learning and performance. *Id.* at 2-3.

**7. Improvements in education are frequently the subjects of collective bargaining contracts, rendering collective bargaining contracts further incompatible with improvements in education.**

Improvements in education are frequently subjects of collective bargaining contracts. *See* DeMitchell & Carroll, *supra* (citing William A. Streshly & Thomas

A. DeMitchell, *Teacher Unions and TQE: Building Quality Labor Relations* (1994); Gene Geisert & Myron Lieberman, *Teacher Union Bargaining: Practice and Policy* (1994)). The potential clash between collective bargaining and educational reform is evident in the aims of federal legislation passed in response to poor academic performance by American school children. See Hess & West, *supra*, at 5.

**8. Collective bargaining contracts drain schools' limited financial resources at the expense of children.**

Collective bargaining contracts can have a devastating financial impact on school districts. Missouri schools, in particular, face precarious financial situations. See Michael Podgursky & Matthew G. Springer, *K-12 Public School Finance in Missouri: An Overview*, Federal Reserve Bank of St. Louis Regional Economic Development, Vol. 2, Number 1, p. 31 (2006). A recession in 2001 led to a large decline in tax revenue in many states, including Missouri. *Id.* Missouri has been slow to recover from this economic recession and voters are consistently unwilling to pass measures that will raise tax rates and increase the budgets of schools. See *id.* (citing Thomas J. Kane, et al., *State Fiscal Constraints and Higher Education Spending: The Role of Medicaid and the Business Cycle* (2003)). In 1980, Missouri voters passed the Hancock Amendment “which limits the growth of state revenues to the growth of state per capita personal income.” *Id.* (citing Russ Hembree, *The Hancock Amendment: Missouri's Tax Limitation Measure*, Report 49-2004, University of Missouri, Truman School of Public

Affairs, Missouri Legislative Academy, (2004)). Missouri school finances have been and continue to be the subject of financial dispute and further strains on school finance will add to the precariousness of this situation. *Id.*

History has shown that collective bargaining increases the financial strain on schools. W. Richard Fossey, *Inability to Pay Salaries Under Collective Bargaining Agreements – U.S. Bankruptcy Court as a School District’s Option*, 50 Ed. Law Rep. 651 (1989), available at: 50 WELR 651 (stating “[b]eginning in the late 1970s, a number of school districts found themselves unable to pay salary obligations under collective bargaining agreements” because of “taxpayers’ revolts, declining enrolment, shrinking state revenues or other forces beyond a school district’s control.”). The disastrous impact collective bargaining can have on schools is demonstrated by the plight of two school districts who were forced to initiate bankruptcy proceedings in response to their inability to meet the demands of collective bargaining contracts. For example, in 1983, the San Jose Unified School District was forced to file for bankruptcy in the face of oppressive collective bargaining contracts. *Id.* at 657-58.

Similarly, in 1986, Alaska’s Copper River School District was also forced to file for bankruptcy in response to oppressive collective bargaining contracts. *Id.* at 653. This event was precipitated by the exceptionally high salary schedule afforded to Copper River School District teachers. *Id.* The School District began to experience financial difficulties and could no longer to afford to maintain such a

high payroll for its teachers. *Id.* The School District explored several options to solve its financial crisis.

First, the School District entered negotiations with the union to alter the terms of the contract. *Id.* When these negotiations were unsuccessful, the School District then sought a one-time emergency appropriation from the Alaska legislature. *Id.* Unfortunately, this did not solve the greater issue, which was “insufficient revenues to pay teachers’ salaries under the collective bargaining agreement.” *Id.* Finally, the School District requested that the Alaska Department of Education allow the schools to close early. *Id.* This request was unsuccessful, leading the School District to file a bankruptcy petition. *Id.* (citing letter from Deputy Commissioner of Education to Copper River School District Superintendent, January 28, 1987).

The School District made drastic budget cuts and through bankruptcy proceedings reached a plan to cut teachers’ salaries. *Id.* at 654 (citing Consent Order Modifying Plan dated April 8, 1988, Order Confirming Plan dated April 8, 1988, and Waiver executed by Copper Valley Teachers’ Association dated April 8, 1988 filed in *In Re Copper River School District*, No. 3-86-00830 (Bankr. D. Alaska, filed Dec. 22, 1986)). Not surprisingly, this decision caused great anger among the union and teachers. *Id.* (citing Anchorage Daily News, May 26, 1987). However, the School District’s decision and its subsequent plan to cut teachers’ salaries did not negatively impact the quality of education it provided. *Id.* By reallocating the school’s financial resources, the school district increased its per-



pupil expenditures and for the 1986-1987 school year, the standardized test scores of the students in the school district were among the highest in the state. *Id.* (citing Copper River School District Superintendent's Report, March 5, 1988).

**9. Collective bargaining contracts hinder compliance with the No Child Left Behind Act.**

In recognition of deficiencies in our nation's education systems, Congress passed the Elementary and Secondary Education Act, also known as the No Child Left Behind Act, in 2001 with the goal of increasing academic performance by United States children. 20 U.S.C. § 6301 (2001). Part of this act is to require teacher accountability for low academic performance by students. *Id.* Because unions exist to promote the interests of teachers, they can be expected to oppose holding teachers accountable for the performance of their students and make this opposition a common subject of negotiations. *See DeMitchell & Carroll, supra*, at 676 (1999) (citing DeMitchell & Fossey, *The Limits of Law-Based School Reform: Vain Hopes and False Promises*, (1997)) stating that “[a]ny proposed reform strategies that affect terms and working conditions of unionized employees must be bargained in the those school districts that have collective bargaining. Since any meaningful change in schools must affect teachers’ work, any significant reform efforts must intersect the business of unions – collective bargaining.”). Therefore, the goals of unions representing teachers are incompatible with education reform and allowing collective bargaining regarding the terms and

conditions of educators' employment will result in the stifling of attempts to improve the quality of education through accountability.

**B. *Clouse* is well-settled, legally well-reasoned and is supported by principles of democratic government.**

**1. *Clouse* was based in large part on the fundamental policy of our State's government that elected bodies are in the best position to represent the people because they are, and ought to remain, directly accountable to the people.**

One justification for the Court's decision in *Clouse* was that public employer collective bargaining contracts violate the nondelegation doctrine. *Clouse*, 206 S.W.2d at 542-543. Missouri's government follows the nondelegation doctrine to ensure that important decisions are made by the governing legislative body, which is the political body most accountable to the people. As stated by Justice Donnelly in his dissent in *Menorah Medical Center v. Health and Educational Facilities Authority*, 584 S.W.2d 73 (Mo. 1979) (Donnelly, J., dissenting), "[o]ur system of government becomes basically flawed when our governors are permitted to assume direction of the lives of the governed without accountability to them." Justice Donnelly feared the result Appellants now urge this Court to reach: that critical policy decisions entrusted to the local legislative body will be bargained away to unelected third parties who are unaccountable to the people.

**a. Public employers are in the best position to protect the public.**

Missouri public employers exist to protect the rights of Missouri citizens. The governing body of the public employer has been chosen by the citizens and is therefore solely responsible for establishing the terms and conditions of its employees. *See Clouse*, 206 S.W.2d at 545. As Franklin D. Roosevelt stated:

The very nature and purposes of Government make it impossible for administrative officials to represent fully or to bind the employer in mutual discussions with Government employee organizations. The employer is the whole people, who speak by means of laws enacted by their representatives in Congress. Accordingly, administrative officials and employees alike are governed and guided, and in many instances restricted, by laws which establish policies, procedures, or rules in personnel matters.

*Id.* at 542-43.

**b. Important policy decisions such as the terms and conditions of public employment should not be delegated to private parties or groups.**

The nondelegation doctrine prohibits collective bargaining contracts by public employers because collective bargaining is essentially delegation of legislative authority to private parties. As stated in *Clouse*, collective bargaining in public employment “would mean government by private agreement and not by laws made by the representatives of the people.” *Id.* at 544. In the present case, Appellants argue that it is proper for public bodies to enter into collective bargaining contracts. Such contracts violate the nondelegation doctrine as well as principles of democratic government, by impermissibly delegating legislative decisions of public policy to unelected bodies.

**2. By becoming public employees, individuals give up the right to enter into collective bargaining contracts with their employer.**

As a precondition of serving the public, public employees relinquish certain rights retained by private employees. *Id.* at 542. As stated in *Clouse*, public employees voluntarily give up certain rights, such as collective bargaining, to serve the greater good and to ensure the public welfare. *Id.*

**a. Public employees have alternative means for voicing employment grievances and proposing terms and conditions of employment.**

Although collective bargaining agreements in public employment are prohibited under Missouri law, public employees have considerable means

available to them to influence the terms and conditions of public employment. Public employees have the right to organize themselves. U.S. Const. amend. I; Mo. Const., art. I, §§ 8-9. Such employee organizations can propose changes in their work environments, including changes to the terms and conditions of their collective employment. *Clouse*, 206 S.W.2d at 543. These rights were amplified with the adoption of the Missouri Public Sector Labor Law, which adopted specific mandates by which public employers must discuss the terms and conditions of the employment with their employees. *See* Sections 105.500-105.530, R.S.Mo. 2000.

**b. Passage of Missouri Public Sector Labor Law streamlined the process by which Missouri public employees exercise their rights to assemble, express their employment grievances, and propose terms or conditions of employment.**

In 1965, the Missouri Legislature adopted Sections 105.500-105.530 R.S.Mo. (amended in 1967) (hereinafter referred to collectively as “Missouri Public Sector Labor Law”). The passage of this law, contrary to Appellants’ contention, did not change Missouri’s prohibition of collective bargaining contracts. In fact, the Missouri Public Sector Labor Law strengthened Missouri’s ban on collective bargaining contracts while further delineating the rights of public employees. *See State ex rel. Missey v. City of Cabool*, 441 S.W.2d 35, 41 (Mo. 1969) (“...the prior discretion in the legislative body to adopt, modify or reject

outright the results of the discussions is untouched. The public employer is not required to agree but is required only to 'meet, confer and discuss', a duty already enjoined upon such employer prior to the enactment of this legislation").

The Missouri Public Sector Labor Law sets out the procedure by which public employees through a labor organization may present proposals regarding the terms or conditions of employment to their employer with the assurance that some action will be taken on the matter frequently referred to as the "meet and confer" process. See Section 105.520, R.S.Mo. Specifically, public employees, through their representative, voice their grievances and proposals to a representative of the public body, who discusses the concerns and then transmits them in written form to the public body itself. Section 105.520, R.S.Mo., *see also Curators of Univ. of Missouri v. Pub. Serv. Employees Local No. 45, Columbia*, 520 S.W.2d 54, 57 (Mo. 1975). The public body is then obligated by law to acknowledge, discuss and take some action on the written concerns of the employees whether it be to adopt, modify or reject the concerns. Section 105.520, R.S.Mo. This "meet and confer" procedure is distinguished from collective bargaining, in that the result of the discussions between the employees' representative and the public body **does not** result in a binding contract with the government. See *State ex rel. Missey*, 441 S.W.2d 35 (Mo. 1969) ("...the prior discretion in the legislative body to adopt, modify or reject outright the results of the discussions is untouched"). The public body retains the discretion to adopt, modify or reject the proposals that resulted from the discussion with the

employees' representative. Section 105.520, R.S.Mo. Therefore, this scheme does not violate Missouri's ban against collective bargaining.

**3. Local governing bodies have the exclusive power to set terms and conditions of public employment.**

The Court's decision in *Clouse* was based on the principle that the local governing body is the only body with the power to set the terms and conditions of employment. *See Clouse*, 206 S.W.2d at 542. Missouri local governments have legislative bodies that exercise part of the legislative powers of the state. *Id.* at 545 (citing *City of Springfield v. Smith*, 19 S.W.2d 1 (Mo. 1929), *Ex parte Lerner*, 218 S.W. 331 (Mo. 1920) and cases cited; *see also* Section 171.011, R.S.Mo. (empowering the school board of each school district to make "all needful rules and regulations for the organization, grading and government in a school district.")). Under Missouri law, the setting and regulating of the terms and conditions of employment is a legislative function. *Clouse*, 206 S.W.2d at 545. Only elected bodies may exercise legislative functions. *Id.*

**4. A collective bargaining contract by a public employer constitutes an unlawful delegation of legislative authority.**

A collective bargaining contract requires the local governing body to delegate part of its legislative authority away to a private group. *Clouse*, 206 S.W.2d. at 545. In *Clouse*, the Court stated that "...legislative discretion cannot be lawfully bargained away and no citizen or group of citizens has any right to a contract for any legislation or to prevent legislation." *Id.* at 543. If any other body

or group were to set the terms and conditions of public employment, such a delegation of power would constitute an unlawful delegation of the local governing body's legislative authority to regulate public employment. *Id.* at 545.

Collective bargaining with public employees constitutes an unlawful delegation of legislative authority in violation of the aforementioned principles because, by its very definition, collective bargaining requires negotiations between union representatives and employers, the purpose of which is "to reach agreements and to result in **binding contracts** between unions representing employees and their employer" regarding the terms and conditions of public employment. *Id.* at 543 (emphasis added). In straightforward terms, the Court set out the basis for this rule:

Indeed Defendants' counsel recognizes (as did the sponsors of Section 29 in the Constitutional Convention) that wages and hours must be fixed by statute or ordinance and cannot be the subject of bargaining. In the argument in this case, en banc, it was conceded that a city council cannot be bound in any such bargaining; that it must provide the terms of working conditions, tenure and compensation by ordinance; and likewise by ordinance may change any of them the next day after they have been established.



*Id.* Collective bargaining is incompatible with the nondelegation doctrine. *See id.* at 545. For a local governing body to enter into a binding contract with an unelected third party in which certain terms and conditions of public sector employment are irrevocably established would strip the local governing body of its legislative power. *See id.*

**5. The Court in *Clouse* properly held that the framers of the Missouri Constitution did not intend for public employers to enter into collective bargaining contracts.**

The framers of the Missouri Constitution did not intend for public employers to enter collective bargaining contracts. In fact, the individual who proposed Section 29 of the Missouri Constitution, Honorable R.T. Wood, who was also the President of the State Federation of Labor, stated that: “I don’t believe there is anyone in the organization that would insist upon having a collective bargaining agreement with a municipality setting forth wages, hours and working conditions.” *Clouse*, 206 S.W.2d.at 543. Based on this statement by Mr. Wood, the very individual who proposed Section 29 of the Missouri Constitution, it is difficult to entertain any argument that the framers intended the very opposite of what Mr. Wood stated in proposing and including in the Missouri Constitution Section 29. *See id.*

At the time the Missouri Constitution was drafted, even the strongest supporters of labor did not believe public employees should have the right to engage in collective bargaining. Franklin D. Roosevelt, widely considered the

symbol of unionization and one of its staunchest supporters, stated in a letter that was read during the debates while drafting the Missouri Constitution that “collective bargaining, as usually understood, cannot be transplanted into the public service.” *Id.* at 542.

This case is not one of first impression. A mere two years after the adoption of the 1945 Constitution, this Court carefully reviewed the intention of the framers of the Constitution and determined that Article I, Section 29 was not intended to authorize collective bargaining contracts in public employment. *Id.* at 539-47. Nearly sixty years later, Appellants demand that this Court conclude that the entire Missouri Supreme Court, which was unanimous in its decision in *Clouse*, misunderstood the intent of the drafters. Appellants’ contentions defy the logic of the circumstances and ignore the intent of the framers of the Missouri Constitution.

**6. The validity and authority of *Clouse* is well-settled.**

In *Clouse*, the Court reviewed a declaratory judgment action in which a group of city employees, represented by unions, sought a declaration of their right to enter into binding collective bargaining contracts with the city regarding the terms and conditions of their employment. *Clouse*, 206 S.W.2d at 541. The Court held that the Missouri Constitution prohibited the city from entering into such contracts and prohibited any public employer from entering into a collective bargaining contract. *Id.* at 542.

**7. This Court has revisited *Clouse* on numerous occasions and each time has affirmed its reasoning.**

Appellants argue that *Clouse* should be overruled because it “rests on theories of nondelegation of legislative power and separations of powers that were popular at the time but have long been discredited.” Appellants’ Br. at 14. Appellants ignore, however, that this Court has revisited *Clouse* in virtually every decade since it was decided and on each occasion has refused to change its ruling. See *Glidewell v. Hughey*, 314 S.W.2d 749, 756 (Mo. 1958) (holding that city could not constitutionally enter into binding collective bargaining contracts regarding the terms and conditions of public employment with labor unions, because doing so would constitute an unlawful delegation of legislative authority, citing *Clouse*); *State ex rel. Missey*, 441 S.W.2d at 41 (holding that the Missouri Public Sector Labor Law is constitutional because it is in line with *Clouse*, in that it does not authorize public employee collective bargaining and the general assembly “must have had the intent to enact this legislation in accord with constitutional principles previously enunciated in *Clouse*”); *Curators of Univ. of Missouri*, 520 S.W.2d at 57-58 (upholding Missouri Public Sector Labor Law as constitutional because it does not offend the principles stated in *Clouse* prohibiting collective bargaining by public employees); *Sumpter v. City of Moberly*, 645 S.W.2d 359 (Mo. 1983) (holding, based on *Clouse*, that Missouri’s public employees do not have a right to engage in collective bargaining and therefore, the city could unilaterally change the terms of a memorandum of understanding

reached with an association representing certain city employees); *Morrow v. City of Kansas City*, 788 S.W.2d 278, 280-81 (Mo. 1990) (holding that a city is not authorized to enter into a collective bargaining agreement with its employees); *Akin v. Director of Revenue*, 934 S.W.2d 295, 299 (Mo. 1996) (holding that, under *Clouse*, delegation of power to make a law is void as unconstitutional). *Clouse* is well-settled.

The people of Missouri have also spoken on the issue of public sector collective bargaining and have rejected it. In the November, 5, 2002, election, the people of Missouri declined to pass a constitutional amendment that would have given firefighters and related employees the right to bargain collectively. *Missouri Results (Graphic)*, St. Louis Post Dispatch, Nov. 7, 2002, A14. This makes it even clearer that Missouri's prohibition against collective bargaining by public employees is supported by the people of Missouri.

## II.

**The Trial Court awarded judgment to Respondent because the Respondent Board was, and should continue to be, authorized to rescind memoranda of understanding in that it is a basic principle of our government that legislative bodies maintain full discretion to amend, repudiate or rescind policies and agreements regarding terms or conditions of employment.**

**A. Respondents were authorized to rescind the memoranda of understanding under Missouri law.**

**1. A legislative body cannot bind its own hands with respect to future legislation regarding the terms or conditions of employment.**

The memoranda of understanding at issue in this case, like all policies and regulations of the Respondent School District, were binding on the Respondent only if formally adopted, and then remained effective only until formally repealed or amended. As stated in *City of Springfield v. Clouse*, 206 S.W.2d 539, 541-543 (Mo. 1947), a local governing body “must provide the terms of working conditions, tenure and compensation by ordinance; and that it likewise by ordinance may change any of them the next day after they have been established.”

Political subdivisions have the right to amend or repeal their laws, policies and regulations, as has been recognized by Missouri courts throughout our history. See *Birmingham Drainage Dist. v. Chicago B. & Q. R. Co.*, 202 S.W. 404, 409 (Mo. 1917) (stating that the right to enact statutes includes the right to modify or limit the statute’s application); see also *Fraternal Order of Police Lodge No. 2 v. City of St. Joseph*, 8 S.W.3d 257, 262-63 (Mo. Ct. App. W.D. 1999); *Mid-State Distributing Co. v. City of Columbia*, 617 S.W.2d 419, 431 (Mo. Ct. App. W.D. 1981). Under Missouri law, no legislative body may bind itself to adopt or continue any legislative act. See *Clouse*, 206 S.W.2d at 545 (“...no legislature could bind itself or its successor to make or continue any legislative act.”). Therefore, the Board was free to repeal the policies and memoranda in question.

Appellants argue that *Sumpter v. City of Moberly*, 654 S.W.2d 359 (Mo. 1983) impermissibly extended *Clouse* by holding that “legislatively authorized agreements...may be unilaterally changed or repudiated...” See Appellants’ Br. at 23. Appellants ignore the principles discussed by this Court in *Clouse* that demonstrate that legislative bodies cannot bind themselves indefinitely and cannot be required to seek approval from an unelected third party before taking legislative action. *Sumpter* did not impermissibly extend *Clouse*. Rather, *Sumpter* represents an accurate statement of the law which holds that legislatures are free to amend, adopt or repudiate legislatively authorized agreements. *Sumpter*, 645 S.W.2d at 363.

Further, the Court in *Sumpter* is clear in its adherence to the principles outlined in *Clouse* and cases citing it. In *Sumpter*, the Court quoted the case of *Curators of the Univ. of Missouri v. Pub. Serv. Employees Local No. 45*, 520 S.W.2d 54, 58 (Mo. 1975), stating that “[t]he General Assembly of Missouri may see fit in the future to amend the Public Sector Labor Law and to amend its requirements beyond the boundaries set in *Clouse*.” *Sumpter*, 345 S.W.2d at 361 (citing *Curators*, 520 S.W.2d at 58). The holding in *Curators*, according to the Court in *Sumpter*, “...clearly indicates that the Court did not consider that the Public Sector Labor Law as then drafted provided for or authorized binding collective bargaining agreements for public employees.” *Id.* at 363.

2. **In the present case, Respondent followed appropriate procedure.**

In the present case, Respondent followed the statutory “meet and confer” procedure. Respondent met with the representatives, discussed their concerns and grievances and adopted them into written form. *See* Appellants’ Br. at 2. However, Respondent retained the authority to subsequently revoke this agreement. *See* Section 105.520, R.S.Mo. *See also Sumpter*, 645 S.W.2d at 363. It was neither obligated, nor did it have the power, to bind itself and its successors’ hands indefinitely regarding these memoranda of understanding. *Id.* As all parties recognized, the memoranda of understanding were never binding contracts under Missouri law, therefore, Respondent’s governing Board of elected officers was free to reject the memoranda.

**B. *Sumpter* is an accurate and appropriate statement of the law and should not be overruled.**

Appellants contend that the Court’s holding in *Sumpter* relies on an “untenable construction of the legislative intent of Section 105.520,” followed unnecessary dicta from *Clouse* and misapplied *Clouse* “in a manner that conflicts with other principles of Missouri law.” *See* Appellants’ Br. at 22-24. However, Appellants ignore the fact that *Sumpter* is one case in a long line of cases with a holding that was consistent with the Missouri Constitution and *Clouse*. *Sumpter* and the Missouri Supreme Court’s long-standing interpretation of the Missouri Public Sector Labor Law have been upheld numerous times, especially in recent years, in jurisdictions across the state. *See Independence Nat’l Education Ass’n v. Independence Sch. Dist.*, 162 S.W.3d 18, 21 (Mo. Ct. App. W.D. 2005); *Thruston*

*v. Jefferson City Sch. Dist.*, 95 S.W.3d 131, 134 (Mo. Ct. App. W.D. 2003); *Int'l Bhd. of Elec. Workers, Local Union 53 v. City of Independence Power and Light Dep't*, 129 S.W.3d 384, 386 (Mo. Ct. App. W.D. 2003); *Kinder v. Holden*, 92 S.W.3d 793, 797 (Mo. Ct. App. W.D. 2002); *Phipps v. Sch. Dist. of Kansas City*, 645 S.W.2d 91, 106 (Mo. Ct. App. W.D. 1982); *Schaeffer v. Bd. of Ed. of City of St. Louis*, 869 S.W.2d 163, 168 (Mo. Ct. App. E.D. 1993); *Strunk v. Hahn*, 797 S.W.2d 536, 539 (Mo. Ct. App. S.D. 1990).

Appellants contend that the Court's holding in *Sumpter* relies on an "untenable construction of the legislative intent of Section 105.520." See Appellants' Br. at 24. Appellants further argue that Section 105.520 must have created some additional rights beyond the rights recognized in *Clouse*. See Appellants' Br. at 24. In support of this, Appellants argue that *Clouse* recognized that public employees have a constitutionally protected right to present their views on working conditions to their public employer and this is no different from what Section 105.520 recognizes. See Appellants' Br. at 25. The fact that a potential result of the procedures in Section 105.520, as accurately interpreted by *Sumpter*, is that legislative bodies may immediately rescind an agreement is not grounds to universally condemn § 105.520 as "untenable" or "pointless." See *State v. Bressie*, 262 S.W. 1015, 1016 (Mo. 1915) (citing 36 Cyc. 1054, stating that "[i]t is competent for the Legislature, at the same session to alter, modify or repeal a law by a subsequent act at the same session."").



1. ***Sumpter* correctly recognizes that the Missouri Public Sector Labor Law merely streamlined the process by which employees exercise their First Amendment rights to voice their employment grievances and proposals regarding terms or conditions of employment.**

*Clouse* recognizes that all citizens, including public employees, enjoy the right granted by the First Amendment as well as the Missouri Constitution to organize and express their views to their employer. *Clouse* at 542 (citing U.S. Const. amend. I; Mo. Const., art. I, §§ 8-9). Section 105.520 creates a formal process for the exercise of this right. *See* Section 105.520, R.S.Mo. It creates no additional substantive rights. *Id.* Rather, it merely streamlines the process by which certain public employees exercise this right. *Id.* Therefore, Section 105.520 is not meaningless, as Appellants suggest.

Additionally, Appellants claim that *Sumpter's* holding is incorrect in that the Missouri Public Sector Labor Law obligates public employers to bargain with union representatives. *See* Appellants' Br. at 24. Appellants' argument is simply an incorrect statement of the law. Missouri's Public Sector Labor Law provides that public employers are to "meet, confer and discuss" terms and conditions of public employment with employee representatives. Section 105.520, R.S.Mo. This provision does not authorize "bargaining," the purpose of which is to reach a binding contract. *Sumpter's* holding is clearly in line with this principle and

constitutes an accurate interpretation of the Missouri Public Sector Labor Law. *See Strunk*, 797 S.W.2d at 539.

**2. Appellants' citation to cases from other jurisdictions is not persuasive.**

Appellants' reference to cases decided in other jurisdictions is neither helpful nor authoritative. *See* Appellant's Br. at 26 (citing *Hetland v. Bd. of Educ.*, 207 N.W.2d 731, 733-34 (Minn. 1973); *Glendale City Employees' Ass'n v. Glendale*, 540 P.2d 609, 614 (Cal. 1975)). These cases were decided within the parameters of their respective states' laws, which are not identical to Missouri's Public Sector Labor Law.

The case of *Hetland v. Bd. of Educ.*, 207 N.W.2d 731, 733-34 (Minn. 1973) was decided under Minnesota law which, unlike Missouri, allows collective bargaining by public employees. *See State v. Berthiaume*, 259 N.W.2d 904, 906 (Minn. 1977) (holding that Minn. St. 179.61-179.77 "authorizes the (public sector employees') union to enter into collective bargaining agreements with public employers, including the state, concerning the terms and conditions of employment."). This is directly contrary to the interpretation Missouri courts have given to Missouri's Public Sector Labor Law. *See Sumpter*, 645 S.W.2d at 363. Further, Minnesota's Public Employment Labor Relations Act is not identical to Missouri's Public Sector Labor Law, with Minnesota's law containing nearly seven times the amount of provisions in it as Missouri's law. *Compare* M.S.A. §§ 179A.01-179A.40 *with* Sections 105.500-105.530, R.S.Mo. Clearly, Minnesota's

public sector labor law is not identical to Missouri's and therefore necessitates a different interpretation.

The case of *Glendale City Employees' Ass'n v. Glendale*, 540 P.2d 609 (Cal. 1975) was decided under California which contains a fundamental difference from Missouri's law regarding public sector collective bargaining. Under California's labor law, a local government entity is permitted to enter into binding collective bargaining contracts "with authorized employee organizations." See *Sonoma County Org. of Pub. Employees v. County of Sonoma*, 591 P.2d 1, 4 (Cal. 1979). This statement of the law makes it clear that California law is quite different from Missouri's law which forbids local government entities from entering into binding agreements regarding the terms and conditions of employment. See *Clouse*, 206 S.W.2d at 542, 545; *State ex. rel Missey*, 44 S.W.2d at 41; *Sumpter*, 645 S.W.2d at 363.

**C. Appellants' arguments regarding the Teacher Tenure Act and *Dial v. Lathrop R-II Sch. Dist.*, 871 S.W.2d 444 (Mo. 1994) ignore *Clouse's* distinction between individual employment contracts and legislation regarding the terms and conditions of employment.**

**1. Appellants' discussion of the Teacher Tenure Act also does not support the contention that *Sumpter* should be overruled.**

Appellants argue that *Sumpter's* holding that legislative bodies may repudiate agreements is inconsistent with enforcement of other legislatively approved agreements, citing and discussing the Teacher Tenure Act. See Appellants' Br. at 26. Appellants' discussion of the Teacher Tenure Act is not on point and provides no justification for this Court to overrule *Sumpter*.

The Teacher Tenure Act was enacted by the General Assembly and does not constitute a binding contract on public employers, nor does it authorize collective bargaining. Rather, the Teacher Tenure Act is consistent with the holdings of *Clouse* and *Sumpter*. See Section 168.110 R.S.Mo., 2000, *et al.*

The Teacher Tenure Act is a product of Missouri's policy that the terms and conditions of public employment should be set legislatively. See Sections 168.110, 168.112, 168.114, 168.118, R.S.Mo, 2000. The Teacher Tenure Act mandates that all teachers must be paid according to a salary schedule established legislatively by the school district. Section 168.110 R.S.Mo.; *see also Sherwood Nat'l Educ. Ass'n v. Sherwood-Cass R-VIII Sch. Dist.*, 168 S.W.3d 456, 460 (Mo. Ct. App. W.D. 2005). Further, the Teacher Tenure Act contains provisions requiring that when school boards modify indefinite contracts of teachers, they do so in accordance with the legislatively established salary schedule that applies to all teachers in the district. Section 168.110(2), R.S.Mo.; *see also Sherwood*, 168 S.W.3d at 459.

The Teacher Tenure Act does not permit schools to negotiate individual teacher contracts, which serves as further evidence that the terms and conditions of

public employment must be established through legislation. *Sherwood*, 168 S.W.3d at 460. In *Villel v. Reorg. Sch. Dist. No. 1*, 689 S.W.2d 72, 75 (Mo. Ct. App. W.D. 1985), the court held that a school’s salary schedule is applicable to “all teachers” and a school’s refusal to pay the plaintiff teacher in accordance with its salary schedule constituted a demotion of that teacher in violation of the specific contract modification and termination provisions in the statute. *Sherwood*, 168 S.W.3d at 460 (quoting *Villel*, 689 S.W.2d at 78). The school was required to reimburse the teacher for the years his pay was not consistent with the salary schedule. *Id.*

A similar case, also mentioned in *Sherwood*, is *Long v. Sch. Dist. of University City*, 777 S.W.2d 944, 945-947 (Mo. Ct. App. E.D. 1989) where the court held that a school district’s refusal to adhere to the salary schedule for an individual teacher and its failure to follow the specific procedural requirements in modifying the teacher’s contract constituted a violation of the Teacher Tenure Act. *Sherwood*, 168 S.W.3d at 460 (citing *Long*, 777 S.W.2d at 947-48). As set forth in this case, school districts do not have the authority to negotiate individual contracts with teachers and the authority to set the terms and conditions of teacher employment rests solely with each district’s school board. *Id.* at 459.

**2. Appellants’ discussion of *Dial v. Lathrop R-II Sch. Dist.* also does not compel this Court to overrule *Clouse*.**

The case of *Dial v. Lathrop R-II Sch. Dist.*, 871 S.W.2d 444 (Mo. 1994) cited by Appellants deals with an employment contract with one teacher. Missouri

law has always recognized a clear distinction between contracting with individual employees for employment and contracting with a union. In *Clouse*, the Court noted this important distinction. *See Clouse*, 206 S.W.2d at 541-544 (holding that the trial court correctly understood that the contracts at issue had been reached with individual employees and not by collective bargaining and further holding that the purpose of collective bargaining is not for making individual contracts of employment).

In *Dial*, the Board of Education remained free to alter a teacher's contract under certain circumstances. 871 S.W.2d at 450. Rather, the Board was required to go through the proper, statutorily established channels of authority to alter the contract and not act arbitrarily. *Id.* (holding that because Appellant Dial was a permanent teacher, the district could alter the terms of her contract in only one of two ways, according to Section 168.110 R.S.Mo. This decision is consistent with the holding in *Sumpter*, which held terms and conditions of employment are to be set by the governing legislative body and that any changes to the "meet and confer" provisions in Missouri's Public Sector Labor Law ought to be made by the Missouri legislature. *Sumpter*, 645 S.W.2d at 361 (citing *Clouse*, 206 S.W.2d 539 and Section 105.520 R.S.Mo.).

Appellants' discussion of additional cases in which the government entered into contracts with individuals is not persuasive. *See* Appellants' Br. at 28. Each case cited by Appellant addresses a contract reached with a private individual or corporation, not a collective bargaining unit, again ignoring the important

distinction between individual contracts and collective bargaining contracts. *See Veling v. City of Kansas City*, 901 S.W.2d 119, 121 (Mo. Ct. App. W.D. 1995) (personal services contract with an individual); *Bartlett v. Bi-State Dev. Agency*, 827 S.W.2d 267 (Mo. Ct. App. E.D. 1992) (contract with transportation corporation); *St. Louis Terminals v. City of St. Louis*, 535 S.W.2d 593 (Mo. Ct. App. 1976) (contract with private corporation to operate a dock). None of these cases involve a collective bargaining agreement with a union or other collective bargaining unit, nor do they address the issue of a legislative body contracting with an unelected third party to set the terms and conditions of employment. As stated previously and as outlined by Missouri's long line of jurisprudence regarding its ban on collective bargaining contracts, collective bargaining is a unique issue that is repugnant to Missouri's system of government and public policy. Contracts with individuals and corporations are an entirely different matter that is irrelevant to the discussion of collective bargaining contracts.

### CONCLUSION

For the abovementioned reasons, this Court should affirm the decision of the trial court and reaffirm its decisions in *Clouse* and *Sumpter*.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH RULE 84.06**

The undersigned certifies that:

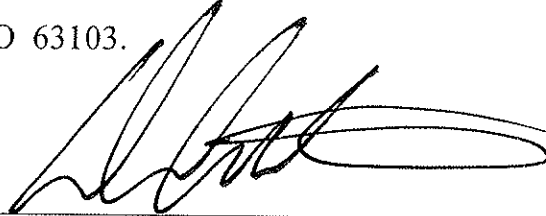
- (1) this brief contains the information required by rule 55.03;
- (2) this brief complies with the limitations contained in Rule 84.06(b);
- (3) there are 7,424 words in this brief;
- (4) the floppy disk containing a copy of this brief filed contemporaneously herewith has been scanned for viruses and is virus-free.

  
Duane A. Martin



CERTIFICATE OF SERVICE

I hereby certify that on this 28<sup>TH</sup> day of November, 2006, two copies of the foregoing were sent by overnight mail to each of the following attorneys for Appellants: Sally Barker, Schuchat, Cook & Werner, 1221 Locust Street, Second Floor, St. Louis, MO 63103.

A handwritten signature in black ink, appearing to read 'Duane A. Martin', written over a horizontal line.

Duane A. Martin

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**Section 161.092, R.S.Mo. 2000**

The state board of education shall:

- (1) Adopt rules governing its own proceedings and formulate policies for the guidance of the commissioner of education and the department of elementary and secondary education;
- (2) Carry out the educational policies of the state relating to public schools that are provided by law and supervise instruction in the public schools;
- (3) Direct the investment of all moneys received by the state to be applied to the capital of any permanent fund established for the support of public education within the jurisdiction of the department of elementary and secondary education and see that the funds are applied to the branches of educational interest of the state that by grant, gift, devise or law they were originally intended, and if necessary institute suit for and collect the funds and return them to their legitimate channels;
- (4) Cause to be assembled information which will reflect continuously the condition and management of the public schools of the state;
- (5) Require of county clerks or treasurers, boards of education or other school officers, recorders and treasurers of cities, towns and villages, copies of all records

required to be made by them and all other information in relation to the funds and condition of schools and the management thereof that is deemed necessary;

(6) Provide blanks suitable for use by officials in reporting the information required by the board;

(7) When conditions demand, cause the laws relating to schools to be published in a separate volume, with pertinent notes and comments, for the guidance of those charged with the execution of the laws;

(8) Grant, without fee except as provided in section 168.021, RSMo, certificates of qualification and licenses to teach in any of the public schools of the state, establish requirements therefor, formulate regulations governing the issuance thereof, and cause the certificates to be revoked for the reasons and in the manner provided in section 168.071, RSMo;

(9) Classify the public schools of the state, subject to limitations provided by law, establish requirements for the schools of each class, and formulate rules governing the inspection and accreditation of schools preparatory to classification, with such requirements taking effect not less than two years from the date of adoption of the proposed rule by the state board of education, provided that this condition shall not apply to any requirement for which a time line for adoption is mandated in either federal or state law;

(10) Make an annual report on or before the first Wednesday after the first day of January to the general assembly or, when it is not in session, to the governor for publication and transmission to the general assembly. The report shall be for the last preceding school year, and shall include:

(a) A statement of the number of public schools in the state, the number of pupils attending the schools, their sex, and the branches taught;

(b) A statement of the number of teachers employed, their sex, their professional training, and their average salary;

(c) A statement of the receipts and disbursements of public school funds of every description, their sources, and the purposes for which they were disbursed;

(d) Suggestions for the improvement of public schools; and

(e) Any other information relative to the educational interests of the state that the law requires or the board deems important;

(11) Make an annual report to the general assembly and the governor concerning coordination with other agencies and departments of government that support family literacy programs and other services which influence educational attainment of children of all ages;

(12) Require from the chief officer of each division of the department of elementary and secondary education, on or before the thirty-first day of August of each year, reports containing information the board deems important and desires for publication;

(13) Cause fifty copies of its annual report to be reserved for the use of each division of the state department of elementary and secondary education, and ten copies for preservation in the state library;

(14) Have other powers and duties prescribed by law.

**Section 168.110, R.S.Mo. 2000**

The board of education of a school district may modify an indefinite contract annually on or before the fifteenth day of May in the following particulars:

- (1) Determination of the date of beginning and length of the next school year;
- (2) Fixing the amount of annual compensation for the following school year as provided by the salary schedule adopted by the board of education applicable to all teachers.

The modifications shall be effective at the beginning of the next school year. All teachers affected by the modification shall be furnished written copies of the modifications within thirty days after their adoption by the board of education.

**Section 168.112, R.S.Mo. 2000**

An indefinite contract between a permanent teacher and a board of education may be terminated or modified at any time by the mutual consent of the parties thereto. Any teacher who desires to terminate his contract at the end of a school term shall give written notice of his intention to do so and the reasons therefor not later than June first of the year in which the term ends.



**Section 168.114, R.S.Mo. 2000**

1. An indefinite contract with a permanent teacher shall not be terminated by the board of education of a school district except for one or more of the following causes:

(1) Physical or mental condition unfitting him to instruct or associate with children;

(2) Immoral conduct;

(3) Incompetency, inefficiency or insubordination in line of duty;

(4) Willful or persistent violation of, or failure to obey, the school laws of the state or the published regulations of the board of education of the school district employing him;

(5) Excessive or unreasonable absence from performance of duties; or

(6) Conviction of a felony or a crime involving moral turpitude.

2. In determining the professional competency of or efficiency of\* a permanent teacher, consideration should be given to regular and special evaluation reports prepared in accordance with the policy of the employing school district and to any written standards of performance which may have been adopted by the school board.

stenographer to be complete and correct. The transcript shall not be open to public inspection, unless the hearing on the termination of the contract was an open hearing or if an appeal from the decision of the board is taken by the teacher;

(6) All costs of the hearing shall be paid by the school board except the cost of counsel for the teacher;

(7) The decision of the board of education resulting in the demotion of a permanent teacher or the termination of an indefinite contract shall be by a majority vote of the members of the board of education and the decision shall be made within seven days after the transcript is furnished them. A written copy of the decision shall be furnished the teacher within three days thereafter.

**Section 168.118, R.S.Mo. 2000**

If a hearing is requested on the termination of an indefinite contract it shall be conducted by the board of education in accordance with the following provisions:

- (1) The hearing shall be public;
- (2) Both the teacher and the person filing charges may be represented by counsel who may cross-examine witnesses;
- (3) Testimony at hearings shall be on oath or affirmation administered by the president of the board of education, who for the purpose of hearings held under sections 168.102 to 168.130 shall have the authority to administer oaths;
- (4) The school board shall have the power to subpoena witnesses and documentary evidence as provided in section 536.077, RSMo, and shall do so on its own motion or at the request of the teacher against whom charges have been made. The school board shall hear testimony of all witnesses named by the teacher; however, the school board may limit the number of witnesses to be subpoenaed on behalf of the teacher to not more than ten;
- (5) The board of education shall employ a stenographer who shall make a full record of the proceedings of the hearings and who shall, within ten days after the conclusion thereof, furnish the board of education and the teacher, at no cost to the teacher, with a copy of the transcript of the record, which shall be certified by the

**Section 171.011, R.S.Mo. 2000**

The school board of each school district in the state may make all needful rules and regulations for the organization, grading and government in the school district.

The rules shall take effect when a copy of the rules, duly signed by order of the board, is deposited with the district clerk. The district clerk shall transmit forthwith a copy of the rules to the teachers employed in the schools. The rules may be amended or repealed in like manner.

20 U.S.C. § 6301 (2001)

The purpose of this subchapter is to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging state academic achievement standards and state academic assessments. This purpose can be accomplished by

- (1) ensuring that high-quality academic assessments, accountability systems, teacher preparation and training, curriculum, and instructional materials are aligned with challenging State academic standards so that students, teachers, parents, and administrators can measure progress against common expectations for student academic achievement;
- (2) meeting the educational needs of low-achieving children in our Nation's highest-poverty schools, limited English proficient children, migratory children, children with disabilities, Indian children, neglected or delinquent children, and young children in need of reading assistance;
- (3) Closing the achievement gap between high and low-performing children, especially the achievement gaps between minority and nonminority students, and between disadvantaged children and their more advantaged peers;
- (4) holding schools, local educational agencies, and States accountable for improving the academic achievement of all students, and identifying and turning around low-performing schools that have failed to provide a high-quality