



OCTOBER 2019

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ESSAY

MNEA'S INITIATIVE PETITIONS: OUT WITH SCHOOL CHOICE AND IN WITH LAWSUITS

By Susan Pendergrass

And so the election season begins. But it's not just the season to elect representatives who will go to Jefferson City and craft the laws of this state. It's also the season for interest groups to take advantage of a pathway around that process and get what they want by asking voters to add more amendments to the 160 or so that are already in our state constitution.

The largest teacher's union in Missouri—the Missouri National Education Association (MNEA)—is certainly aware of advantages of this approach. In September, it filed six initiative petitions that would significantly increase state funding for public education, eliminate the need for taxpayer approval of those increases (and the state income tax increases that will be needed to pay for them), expand free public schools to two additional years of age, make any and all forms of school choice illegal, and subject state funding for education to unlimited lawsuits.

Why might the MNEA be doing this? First, the petitions free education funding from the budget limitations that must be respected for all other forms of spending. This will quell fears that Medicaid expansion—also likely to be on the ballot—will divert money from public education. Under normal circumstances the budget can only be increased by a limited amount unless taxpayers approve a larger increase. Exempt the education budget from this limit and it's free to grow without taxpayer approval. Make no mistake—these initiatives would all require large increases in state income tax rates.

Second, the U.S. Supreme Court is hearing a case next month on a Montana student's right to use a publicly funded scholarship at a religious private school. The public education establishment it is no doubt aware that a ruling in favor of the student will likely make it possible for parents to use their children's education dollars at the school of their choice, even if it's religious. Because all six of the initiatives would make private school choice unconstitutional, if one of the proposals passes, the Missouri Constitution and the U.S. Constitution will be at odds.

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The six initiative petitions—step one in getting something on the ballot—basically take the group of proposals and mix them up in different forms. Presumably, the MNEA will settle on one for collection of the needed 100,000 signatures. And undoubtedly it will tout the proposal as necessary in order to “protect the children.” You can safely bet the MNEA won’t mention the removal of protections for parents and taxpayers.

The initiative petitions are formally known as “2020-117,” “2020-118,” “2020-119,” “2020-120,” “2020-121,” and “2020-122.” We’ve broken down what’s in each of them below. During the open comment period, we submitted the following analysis to the Secretary of State.

A. The Initiative Petitions Change the Definition of Public Education in Order to Expand Legal Challenges and Abolish Charter Schools

Initiative Petitions 2020-117, 2020-118, 2020-121, and 2020-122 Section 1(a)

These petitions contain the following language:

Section 1(a)

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] equality of educational opportunity, as described in this section, is a fundamental right. The general assembly shall ensure the equality of educational opportunity for all persons in this state through the establishment and maintenance of a uniformly regulated, thorough, appropriate, and adequate system of 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. The general assembly shall have an affirmative duty to adequately and equitably fund the free public schools established by this article.

This provision will expand the definition of public education, expand Missouri’s obligation with respect to satisfying that definition, and subject the state to legal

challenges that do not exist under current law.

Specifically, replacing a system of “free public schools” with “the equality of educational opportunity for all persons . . . through a uniformly regulated, thorough, appropriate, and adequate system” greatly expands the definition and funding of public education in Missouri. As a practical matter, such language is an open invitation for lawsuits against the state.

In 2009, the Missouri Supreme Court found (*CEE v. Missouri*) that there is no duty for the state to provide an adequate level of spending beyond the 25 percent of total budgetary spending requirement. The language in these petitions effectively vacates that finding and will likely trigger multiple lawsuits concerning the “adequacy” and “equity” of education funding.

Adequacy lawsuits can be very costly. A March 2006 adequacy case filed in New York City resulted in a ruling by a panel of judges that the city of New York must spend an additional \$4.7 to \$5.63 billion per year in operating aid in addition to \$9.2 billion in capital spending.¹ In *McCleary v. Washington*, the Washington State Supreme Court ruled in 2014 that the state was not “fully funding” public education and held the state in contempt of court, with a fine of \$100,000 per day until the problem was fixed.² This penalty was imposed until June 7, 2018. In order to finally get a favorable ruling from its state supreme court, the Kansas legislature has increased spending on public education by \$4 billion, with additional promised increases through the 2022–23 school year.³ In all, adequacy suits have been filed in at least 36 states, with fewer than 10 rulings in favor of the state.

In *CEE v. Missouri* in 2009, two estimates of the amount of inadequacy in Missouri funding were produced. **In 2019 dollars, the lower of the two estimates would come to \$626 million and the higher of the two estimates would be \$1.3 billion.** These amounts would represent an increase in state funding for public education of between 10 and 20 percent. However, it should be noted that, as these cases are typically decided by panels of judges, the additional spending that may be mandated is essentially unbounded.

Initiative Petitions 2020-119 and 2020-120, Section 1(a)

These petitions contain the following language:

Section 1(a)

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] equality of educational opportunity, as described in this section, is a fundamental right. The general assembly shall ensure the equality of educational opportunity for all persons in this state through the establishment and maintenance of a uniformly regulated, thorough, appropriate, and adequate system of free public schools governed by publicly elected school boards for the gratuitous instruction of all persons in this state within ages not in excess of twenty-one years as prescribed by law. The general assembly shall have an affirmative duty to adequately and equitably fund the free public schools established by this article.

The language of this section, like the language in Initiative Petitions 2020-117 and 2020-118, will expand the definition of public education, expand Missouri's obligation with respect to satisfying that definition, and subject the state to legal challenges that do not exist under current law. However, this language goes one step further. It outlaws the current governance structure of charter schools

The requirement that public schools be governed by “publicly elected school boards” would force all current charter school students to return to the Kansas City Public School District and St. Louis Public School District. There are currently 71 charter schools in Missouri. These schools are public schools and pursuant to existing law have independent volunteer boards rather than publicly elected boards. These schools serve nearly 12,000 students in Kansas City and over 11,000 students in St. Louis. Many of these schools have waiting lists.

These initiatives, if passed, would abolish some of the highest performing “public” schools in their districts. A high-quality research study conducted by the Stanford

Center for Research on Education Outcomes (CREDO) found that Kansas City charter school students outperformed their matched traditional-school peers in English/language arts in 2014–15 through 2016–17 and in math in 2015–16.⁴ In 2017, there were 14 charter schools in Kansas City and 8 in St. Louis that had the highest Annual Performance Report ratings in each city.⁵

It should be noted that if passed, these initiatives would require Kansas City and the City of St. Louis school districts to absorb approximately 23,000 students (those currently attending charters) in one school year. That would require fully staffing and funding dozens of additional schools within those systems. However, the current performance of—and parent demand for—charter schools would likely trigger additional lawsuits.

B. The Initiative Petitions Mandate Universal Pre-K, Which Has No Proven Benefits Other Than Increasing the Costs of Education

Initiative Petitions 2020-118, 2020-120, 2020-122 contain the following language:

Section 1(c)

Any voluntary early childhood education program established by a publicly elected school board for persons between the ages of three and five years shall be funded as part of the public schools established by this article.

This section expands Missouri's free public education obligation to two additional years of age. A reasonable person would wonder why such an expansion is contemplated when research shows that such programs do not produce academic gains.⁶ We do know such a service will be very expensive.

There are currently approximately 204,000 Missouri children between the ages of 3 and 5 who are not enrolled in kindergarten. Of that number, 45 percent (92,000) already attend preschool. Just 2,650 attend free preschool offered through school districts, another 11,379 attend preschool at a Head Start Center, and 10,257 attend state preschools for children with special needs.⁷

If free preschool were to be made universally available, at the current average per-student cost of \$3,677, the total program cost could be as high as **\$750 million** (assuming 100 percent participation). Even if the 68,000 children currently attending preschool at their parents' expense decided not to join the program, the cost would still be approximately **\$412 million**. It is likely that the true cost would fall somewhere in between. In 2017, Missouri spent \$9.7 million on state-provided preschool, meaning that the budget would increase by at least \$400 million under this proposal.

The evidence to support the benefits of state-provided universal preschool is weak.⁸ According to a study by the Brookings Institution, most of the academic gains from universal preschool are short-lived.⁹ And in a study of Tennessee's program, non-participants outperformed participants.¹⁰

C. The Initiative Petitions Abolishes the Requirement of Voter Approval for Tax Increases Under the Hancock Amendment for Public Education Funding

Initiative Petitions 2020-117, 2020-118, 2020-119 and 2020-120 contain the following language:

Section 3 (b)

In event the public school fund provided and set apart by law for the support of free public schools, shall be insufficient to sustain free public schools that satisfy all requirements of this article, [at least eight months in every year in each school district of the state], the general assembly shall [may] provide for such deficiency. Notwithstanding any other provision of law to the contrary, new or increased taxes or fees enacted by the general assembly for the purpose of funding free public schools as established in this article, are not subject to the provisions of article X of this constitution. [; but in] no case shall there be set apart less than twenty-five percent of the state revenue, exclusive of interest and sinking fund, to be applied annually to the support of the free public schools. For the purpose of calculating state income tax rates, state net general revenue shall not include funds used solely to meet the requirements of providing free public schools. The provisions of

this section and section 1(a) may be enforced by a private cause of action brought by or on behalf of any taxpayer, student of a public school, or school district within this state against the general assembly in a circuit court of proper venue and, if the suit is sustained, the plaintiff or plaintiffs shall receive from the state any costs, including attorney's fees incurred by the plaintiff or plaintiffs in maintaining such suit.

With respect to public education, this section eliminates the constitutional mandate that voters approve tax increases subject to the Hancock Amendment. This section also creates a new legal right to sue the state for insufficient education funding.

This point deserves repeating. This section will exempt public school funding from the provisions of Article X of Missouri's Constitution; thereby removing taxpayer protections approved by the state's voters nearly forty years ago.

Article X addresses the power of Missouri's general assembly to tax its residents, but more importantly, provides limitations to that power.¹¹ In 1980, Missouri voters approved an amendment to the state's Constitution, adding Sections 16 through 24 to Article X, which is commonly referred to as the Hancock Amendment.¹² This amendment imposed limitations to the taxes Missouri's government can levy, and requires voter approval before those limits may be exceeded.

As discussed above, Sections 1(a) and 1(c) of these initiative petitions will require tax increases that exceed what would be allowed under the Hancock Amendment. Combining the estimated costs from Sections 1(a) and (c), it is reasonable to assume Missouri could be on the hook for somewhere around \$2 billion in increased education spending. Missouri's Constitution requires the yearly budget be balanced, so the cost of these proposals would have to be paid for immediately in the form of new taxation.¹³ Even if the administrative difficulties that would accompany such a major change in state tax policy are disregarded, Missouri's yearly tax collections of around \$10 billion would have to be increased by roughly 20 percent to cover such expense. In other words, the top Missouri tax bracket could increase from 5.9 percent to over 7 percent. It would then be the yearly

task of the General Assembly to determine the amount of funds needed and the method of taxation they use to obtain them. This proposal would remove Missouri's taxpayers' voices from not just one, but every future tax increase discussion as a result of the proposed change to education funding.

If passed, the Initiative Petitions also will impose significant financial burdens on Missouri households and have harmful effects on state economic growth. In 2017, the U.S. Census Bureau estimated that Missouri had nearly 2.4 million households.¹⁴ Financing a new state expenditure totaling more than \$2 billion could cost each household in the state, on average, nearly \$1,000. In terms of taxation, previous estimates from the Department of Revenue show that each 0.1 percent increase in the top individual income tax rates translates to an increase in revenue of around \$110 million.¹⁵ Based on Missouri's current income tax brackets, a 33 percent (5.4% to 7.2%) increase in the top individual income tax rate would be required to cover that same \$2 billion expense. The economic research is clear; rapidly increasing taxes reduces jobs, which, in turn, harms long-term economic growth.¹⁶

Moreover, Section 3 (b) provides that for the purpose of calculating state income tax rates, state net general revenue shall not include funds used solely to meet the requirements of providing free public schools. The impact of this language would be felt across Missouri's entire state government. Public education is already Missouri's single largest expenditure from the state's tax revenues. While Missouri's constitution only requires 25 percent of all general revenue be devoted toward education, the state's current budget allocates more than 35 percent, a difference of more than \$1 billion. If the cost of education were to increase but the entire public education system could be funded through new taxes, it stands to reason that other current programs or services could be funded indirectly by those same taxes because money is fungible.

All state taxes, unless specifically designated to be deposited elsewhere, are deposited into Missouri's General Revenue Fund. Once deposited into the fund, there are no stipulations for where the General Assembly may spend the money. Since this proposal

only deals with Article IX of the Constitution, there are no included safeguards for how increased expenditures outside of education could be appropriated to avoid the Hancock Amendment's restrictions. What does this mean?

If one program is exempt from the Hancock Amendment, effectively every other program is exempt as well. And if that is the case, there is no bound to the tax increases Missourians could face as a result of these Initiative Petitions.

Initiative Petitions 2020-121, and 2020-122 contain the following language:

Section 3 (b)

In event the public school fund provided and set apart by law for the support of free public schools, shall be insufficient to sustain free public schools that satisfy all requirements of this article, [at least eight months in every year in each school district of the state], the general assembly shall [may] provide for such deficiency. Notwithstanding any other provision of law to the contrary, new or increased taxes or fees enacted by the general assembly for the purpose of funding free public schools as established in this article, are not subject to the provisions of article X of this constitution. [; but in] In no case shall there be set apart less than twenty-five percent of the state revenue, exclusive of interest and sinking fund, to be applied annually to the support of the free public schools. The provisions of this section and section 1(a) may be enforced by a private cause of action brought by or on behalf of any taxpayer, student of a public school, or school district within this state against the general assembly in a circuit court of proper venue and, if the suit is sustained, the plaintiff or plaintiffs shall receive from the state any costs, including attorney's fees incurred by the plaintiff or plaintiffs in maintaining such suit.

This is similar to the other version; with respect to public education, this section eliminates the constitutional mandate that voters approve tax increases subject to the Hancock Amendment. This section also creates a new legal right to sue the state for insufficient education funding.

D. The Initiative Petitions Eliminate the Ability of Low-Income Parents to Determine Their Children's Education Provider

Initiative Petitions 2020-117, 2020-118, 2020-119, 2020-120, 2020-121, and 2020-122 contain the following language:

Section 11

Appropriations made for the purpose of satisfying this article by the general assembly or any county, city, town, township, school district, or other municipal corporation shall only be to aid, support, or sustain the system of free public schools and in no event shall any appropriation be made, funds expended, or tax credits or other tax expenditures enacted after January 1, 2020 for the benefit of private schools. Nothing in this section shall prevent a contract for services between a public school and a private entity where necessary to meet the requirements of this article.

This section forecloses any attempt to allow parents, especially parents with low incomes, to have any say in their children's education provider.

This section of the petitions would make many school choice programs illegal, including tax-credit scholarships and education savings accounts, and would limit parent decision-making over their children's education.

There is significant demand from Missouri parents to be able to personalize their children's education. In a 2014 survey, 39 percent of Missouri parents indicated that, if money were not a factor, private schools would be their preferred school type. But during the same year only 9 percent of Missouri students were actually enrolled in private schools.¹⁷ Another 15 percent indicated that a charter school would be their first choice. Because these are restricted to just two cities—Kansas City and St. Louis—only three percent of parents are able to access that choice.

The initiative petitions, if passed, would limit opportunities for students most in need of options—disabled students, economically disadvantaged students, and bullied students. Many tax-credit scholarship

programs in other states are tailored specifically to students who come from families with low incomes (25 programs) and those with disabilities (19 programs). A scholarship program for Missouri children with autism—passed by the legislature as Bryce's Law—would not be able to offer publicly funded scholarships.

Many private school choice programs in other states are having long-term positive impacts on their participants, and Missouri students would be prevented from participating in similar programs. Florida's Tax Credit Scholarship Program provides students scholarships to attend private schools. According to recent research, 57 percent of students who participated in the Florida Tax Credit Scholarship Program starting in elementary or middle school enrolled in college, compared to 51 percent enrollment for students not in the program. Of students who entered the scholarship program in high school, 64 percent enrolled in college compared to 54 percent of students not in the program. Scholarship students were also 10 to 20 percent more likely to complete college and graduate with a bachelor's degree.¹⁸

The Initiative Petitions eliminate many potential options for parents to send their children to a safe school when that is a priority. Over a quarter, 27 percent, of Missourians cited safety as the most important characteristic in choosing a school.¹⁹ A study in Indiana, a state with multiple private school choice options, found that private schools experience fewer discipline incidents than traditional public schools.²⁰

Private school choice programs are cost effective for the state, even as they provide superior outcomes for participants. A 2018 study found that the 16 existing school voucher programs in other states saved, on average, \$3,400 tax dollars per scholarship recipient each year from the beginning of the programs to 2015.²¹

Missouri's economy would also miss out on the long-term economic benefits of school choice programs. Tennessee's Education Savings Accounts program currently enrolls about 2 percent of students. A 2018 study that forecasted the potential economic benefits to Tennessee under either conservative or robust rates of program participation found that the increase in high school diploma attainment could yield between \$2.9 and

\$4.5 billion in economic benefits to the state, including an increase in personal income from \$683 million to \$1 billion, and a reduction in the number of felons and misdemeanants, spurring \$685 million to \$1.1 billion in benefits.²²

Because the initiatives make public funding for private education illegal, several currently operating programs would become unconstitutional. The Missouri Course Access and Virtual School Program (“MOCAP”) has several private providers. In some instances, MOCAP private school providers are the only providers of certain classes. In addition, the Missouri Preschool Project currently aids multiple private schools that provide preschool services.²³

CONCLUSION

The initiative petitions would significantly limit educational opportunity for all Missouri students and will impose a significant cost on taxpayers without any commensurate gain in educational attainment for our students. One can only wonder at the true objective of these proposals.

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