

**CONSIDERATION OF AN ORDER OF RULEMAKING TO WITHDRAW RULE 5 CSR 30-640.200  
RELATING TO EARLY LEARNING FACILITIES FUNDING FORMULA  
FOR LEASE AGREEMENTS**

**STATUTORY AUTHORITY:**

Sections 161.092 AND 161.215, RSMo

Consent  
Item

Action  
Item

Report  
Item

**DEPARTMENT GOAL NO. 4:**

The Missouri Department of Elementary and Secondary Education will improve departmental efficiency and operational effectiveness.

**SUMMARY:**

The purpose of this rule is to establish a funding formula for early learning programs facility lease agreements when funding is requested from the Department of Elementary and Secondary Education and will be used for reimbursement of facility lease costs incurred. A notice of proposed rulemaking containing the text of the proposed rule was published in the *Missouri Register* on March 2, 2015 (40 MoReg 228-230).

The Board received numerous comments regarding the proposed rule. Most of the comments opposed the rule or made recommended changes to the proposed rule. Due to the significance of the recommended changes, this discussion will focus on withdrawing the rule and proposing a new rule incorporating some of the changes. The new proposal will be submitted for public comment later this year.

**PRESENTER(S):**

Ron Lankford, Deputy Commissioner, and Shelley Woods, Coordinator, Special Education Finance, Division of Financial and Administrative Services, will assist in the presentation and discussion of this agenda item.

**RECOMMENDATION:**

Based on input received during the comment period, the Department recommends that the State Board of Education authorize publication of an order of rulemaking in the *Missouri Register* to withdraw Rule 5 CSR 30-640.200 relating to Early Learning Facilities Funding Formula for Lease Agreements and that the State Board finds this withdrawal necessary to carry out the purposes of Sections 161.092 and 161.215.

**Title 5 – DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION**  
**Division 30 – Division of Financial and Administrative Services**  
**Chapter 640 – School Buildings**

**ORDER OF RULEMAKING**

By the authority vested in the State Board of Education (board) under sections 161.092 and 161.215, RSMo Supp. 2104, the board withdraws a rule as follows:

**5 CSR 30-640.200** Early Learning Facilities Funding Formula for Lease Agreements **is withdrawn.**

A notice of proposed rulemaking containing the text of the proposed rule was published in the *Missouri Register* on March 2, 2015 (40 MoReg 228-230). This proposed rule is withdrawn.

**SUMMARY OF COMMENTS:** The Board received numerous comments regarding the proposed rule. Most of the comments opposed the rule or made recommended changes to the proposed rule. The Board agrees with some of the changes, but because they are significant has chosen to withdraw this rule and propose a new rule incorporating some of the changes and submitting the new proposal for public comment later this year.

**RESPONSE:** As a result, the Board is withdrawing this rulemaking.

## Woods, Shelley

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**From:** Nickell, Angie  
**Sent:** Monday, March 02, 2015 12:50 PM  
**To:** Lankford, Ronald; Barr, Stephen; Quetsch, Cynthia; Woods, Shelley  
**Subject:** FW: Leasing proposal district comment

Please see the comment below by Ms. ONeal.

Angie Nickell | Director | Special Education Finance  
 Division of Financial and Administrative Services  
 P: 573-751-4385 | F: 573-526-6898 | dese.mo.gov

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**From:** Dierking, Michael **On Behalf Of** DESE Funds Management  
**Sent:** Friday, February 27, 2015 12:47 PM  
**To:** Nickell, Angie  
**Subject:** FW: Leasing proposal

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**From:** Patricia ONeal [<mailto:ponealepco@yahoo.com>]  
**Sent:** Friday, February 27, 2015 9:58 AM  
**To:** DESE Funds Management  
**Subject:** Leasing proposal

I would like to express my concerns on changing the reimbursement of ECSE lease proposal. In small communities, the availability of facilities and the costs associated with that facility tie administrator hands. Due to increased numbers of early childhood students and the severity of their disabilities, facilities have to be added. The goal is a facility that will meet the needs of students including handicapped restrooms for our wheelchair kiddos, appropriate changing areas for the kiddos who due to medical or social issues are still in diapers, and a room large enough to be used for motor activities including educational OT and PT. Sometimes in a small community, that type of facility is far and few between, limiting our choices.

I think the vast majority of districts are in the mode to provide the best educational setting for the least amount of money. I hope the decision on what the facility need is of the district would be left to the administration or stakeholders living in that community. They are in a position to know what amount is required to secure a facility that will provide the best education for these handicapped students.

**Woods, Shelley**

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**From:** Dierking, Michael on behalf of DESE Funds Management  
**Sent:** Thursday, March 26, 2015 8:06 AM  
**To:** Woods, Shelley; Nickell, Angie  
**Subject:** FW: ECSE Comments

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**From:** Sherry Heavin [<mailto:sheavin@pcr3.k12.mo.us>]  
**Sent:** Tuesday, March 24, 2015 4:53 PM  
**To:** DESE Funds Management  
**Subject:** ECSE Comments

Greetings,

I am a member of the COOP Board in Houston, Missouri. I would like to address this comment to a concern for funding that has been brought to my attention. As a COOP, they serve a great deal of students within a huge radius. Mrs. Collins runs a magnificent program that allows my neediest students to receive help early on here at Phelps County R-III. We are in the northern most point from the COOP, but they make the trip to work with our students the same as they do for the local students. If they didn't come to us, my families would not drive to Houston for those much needed services. **The funding should be based on numbers of students served NOT on numbers of students served in a building.** We formed the COOP so that we could have quality services. Also, it helps us get to know what type of special needs we can prepare for in the future and it helps us better serve our communities.

I urge DESE to reconsider this cut. Our COOP is about serving districts...serving children...and helping our neediest students.

Sherry Ann Heavin  
Superintendent

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**Woods, Shelley**

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**From:** Dierking, Michael on behalf of DESE Funds Management  
**Sent:** Thursday, March 26, 2015 8:07 AM  
**To:** Woods, Shelley; Nickell, Angie  
**Subject:** FW: Proposed Rules ECSE Lease  
**Attachments:** MO-CASE Comments ECSE Lease Proposed Rule.pdf

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**From:** Diane Golden [<mailto:diane.mocase@gmail.com>]  
**Sent:** Tuesday, March 24, 2015 6:24 PM  
**To:** DESE Funds Management  
**Subject:** Proposed Rules ECSE Lease

Attached please find MO-CASE comments on the proposed ECSE lease rule. We appreciate your consideration of our concerns and comments.

**Diane Cordry Golden, Ph.D. | Policy Coordinator | Missouri Council of Administrators of Special Education**  
*email:* [diane.mocase@gmail.com](mailto:diane.mocase@gmail.com) | *phone:* 816-616-7668 | *web:* <http://www.mo-case.org/>



## MISSOURI COUNCIL OF ADMINISTRATORS OF SPECIAL EDUCATION

3550 Amazonas Drive, Jefferson City, MO 65019

[www.mo-case.org](http://www.mo-case.org)

573.644.7804

### **Comments on Proposed Rules 5 CSR 30-640.200 (ECSE Leased Facilities)**

On behalf of our almost 1000 members, the Missouri Council of Administrators of Special Education (MO-CASE) respectfully submits the following comments on proposed rule 5 CSR 30-640.200 which changes the calculations for reimbursement for ECSE Leased Facilities.

**Recommendation: Establish a phase-in period for any new lease calculation to provide at least 12 months before the effective date and allow use of the 100% rate for a phase in period before moving to the 80% rate.**

We understand the challenging situation DESE faces in reimbursing 100% of ECSE costs while maintaining fiscal accountability absent extensive program personnel to provide direct oversight of ECSE services. The proposed rules appear to be an attempt to establish a consistent calculation formula for ECSE lease reimbursement to create equitable payments across the state. Because of the significance of this change, we strongly urge DESE to establish a reasonable period before the effective date. Districts cannot quickly or easily renegotiate lease agreements and any new rule should not be effective until at least a full year after the final rule is published.

We also urge DESE to allow reimbursement at 100% of the OA rates for a transition period before moving to the 80% rate. Districts are limited to leasing available properties within their school boundaries which does not always include all properties available in the county as is assumed by the OA rates. In addition, since the ECSE facility serves the entire district feasible buildings may be restricted to a central location within the district boundaries to support reasonable transportation time and costs. All of these factors are restrictions not taken into account by the OA rates.

**Recommendation: Publish a revised fiscal note and extend the comment period to allow new districts impacted sufficient time to provide cogent input.**

The original fiscal calculations in the published proposed rule were incorrect. The revised calculations impact five districts instead of two and some districts were not made aware of how the rule impacted their district until a couple of weeks before the comment due date. That is not enough time for these additional districts to evaluate the impact and provide comments. We strongly recommend the revised fiscal note be published and the comment period extended after the corrected publication date.

**Recommendation: Add some kind of "unique circumstances" clause to provide DESE with flexibility to make exceptions for unforeseen situations.**

Any arbitrary rule like this should have some sort of variance that can be granted based on unforeseen situations or circumstances outside the control of a district. For example, a tornado destroying facilities in a district could certainly lead to a critical need for a lease that might not comply with the OA square footage rate. An exception clause would give DESE the ability to address unique situations and circumstances that are beyond the control of the district.

MO-CASE appreciates the opportunity to provide these comments and we thank you for your consideration of our recommendations.

**Woods, Shelley**

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**From:** Dierking, Michael on behalf of DESE Funds Management  
**Sent:** Monday, March 30, 2015 9:56 AM  
**To:** Nickell, Angie; Woods, Shelley  
**Subject:** FW: Comment on ECSE Lease Proposed Rule

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**From:** Dave Wilson [<mailto:DaWilson@cpsk12.org>]  
**Sent:** Monday, March 30, 2015 9:02 AM  
**To:** DESE Funds Management  
**Cc:** Lou Ann Tanner-Jones; Amy Wilson; Matthew Arms; Linda Quinley; Dana Clippard; Peter Stiepleman  
**Subject:** Comment on ECSE Lease Proposed Rule

To DESE Special Education Finance:

This email is Columbia Public Schools' (CPS) official response to DESE's proposed ECSE lease rule change. Given that 100% of funding for ECSE programming is the responsibility of the state due to the Hancock Amendment, it is inappropriate for the state to propose a rule that would transfer any reasonable amount of facility cost to local school districts. CPS supports the idea of a reasonable lease reimbursement formula so that costs are not exaggerated; however, this proposed rule fails to account for true leasing costs in larger cities. Under this rule, CPS will have to absorb over \$52,000 (roughly 50%) of the annual lease cost. It is not possible in Columbia to find adequate classroom and staff space for the cost of the lease reimbursement.

The state should remember that local school districts such as CPS are already funding significant portions of the ECSE program without billing the state for these facilities. CPS is currently leasing to own one building used exclusively for ECSE programming, with some state reimbursement. It also uses a significant portion of another building for the purposes of evaluation and housing ECSE staff who serve all ECSE students. CPS is required to serve students in the Least Restrictive Environment, which means they must be served with non-disabled students when possible. Many ECSE students are served in existing preschool programs and none of their associated staff are accounted for in the formula the state is proposing. CPS is currently challenged with keeping up with the growth in Columbia. CPS is one of the top three fastest growing districts in the state. These ECSE programs utilize valuable classroom and ancillary space that could be used for our growing population and CPS is in the process of building a new early childhood facility to assist with this growth. Much of the ECSE space used by CPS is free of charge to the state.

The formula's square footage assumption is inadequate. Between three buildings/spaces used solely for ECSE, CPS uses a total square footage of 16,290 to serve over 180 students, an average of 90 square feet per student. By the end of the school year, when the ECSE count is at its highest, CPS struggles with adequate facility space for our neediest ECSE students.

CPS is proposing an adjustment to the formula that would account for 100% of students enrolled in ECSE, not just those utilizing the leased facilities AND a larger square footage allowance. This formula would account for the myriad of staff required to identify and serve students utilizing the leased facilities, leased to own facilities, and the remainder of the students for whom CPS is providing space to the state for free. Under this adjusted rule, CPS's maximum reimbursement rate for all leased facilities would be \$172,087.20 (186 students \* 90 \* 10.28).

In addition, CPS agrees with MO-CASE's position that any rule change should not go into effect until the 2016-17 school year to allow districts adequate time to renegotiate leases or move to different facilities.

Respectfully,

Columbia Public Schools

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Dr. David Wilson  
Assistant Director of Special Services  
[dawilson@cpsk12.org](mailto:dawilson@cpsk12.org)  
573-214-3463

**Woods, Shelley**

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**From:** Dierking, Michael on behalf of DESE Funds Management  
**Sent:** Monday, March 30, 2015 1:17 PM  
**To:** Nickell, Angie; Woods, Shelley  
**Subject:** FW: Proposed ECSE Rule  
**Attachments:** ECSE Funding.pdf

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**From:** Scott Dill [<mailto:supt@houston.k12.mo.us>]  
**Sent:** Monday, March 30, 2015 10:51 AM  
**To:** DESE Funds Management  
**Subject:** Proposed ECSE Rule

Good Morning-

I have a document containing my comments on the proposed rule change for ESCE leases.

Thank you for your consideration.

Please let me know if I can clarify any of my comments.

Respectfully submitted,  
-sd

Scott Dill  
Superintendent  
Houston R-I School District  
[supt@houston.k12.mo.us](mailto:supt@houston.k12.mo.us)

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## HOME OF THE TIGERS

**Mr. Scott Dill**  
*Superintendent*  
417-967-3024, Ext. 450  
417-967-4887, Fax

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**Amy Dill**  
*Elementary Principal*  
417-967-3024, Ext. 460

**Terry Mayfield**  
*Middle School Principal*  
417-967-3024, Ext. 455

**Charlie Malam**  
*High School Principal*  
417-967-3024, Ext. 451

**Lillian Collins**  
*Director, Exceptional Child  
Cooperative*  
417-967-3196

# Houston R-I School District

423 West Pine Street – Houston, Missouri 65483

**An A+ Designated School  
Accredited with Distinction**

Monday, March 30, 2015

To whom it may concern,

I am writing in response to the proposed rule change to 5 CSR 30-640.200 Early Learning Facilities Funding Formula for Lease Agreements.

The Houston R-1 School District serves as the fiscal agent for the Exceptional Child Cooperative, serving the needs of thirteen school districts. The districts served by the cooperative are physically located in geographically disparate locations, limiting the ability of the cooperative to physically host students onsite.

The facilities leased by the cooperative, while not utilized to host students on a daily basis are nonetheless essential to student learning outcomes. The cooperative employs individuals who play a vital role in the educational efforts of students. Currently, the Exceptional Child Cooperative services 135 unduplicated ECSE students in five counties.

It is through the combined financial strength of the cooperating school districts that the Exceptional Child Cooperative is able to secure, and retain, the services of highly qualified individuals to meet the distinct needs of students. The proposed rule, will limit our ability to accomplish this task.

Losing ECSE funds for the purpose of lease agreements will have a detrimental effect on the ability of the employees at the Exceptional Child Cooperative to accomplish the primary task for which they have been employed.

I request, respectfully, that the proposed rule is withdrawn.

Scott P. Dill Ed.S.  
Superintendent of Schools  
Houston R-1 School District

**Woods, Shelley**

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**From:** Dierking, Michael on behalf of DESE Funds Management  
**Sent:** Monday, March 30, 2015 1:17 PM  
**To:** Nickell, Angie; Woods, Shelley  
**Subject:** FW: Comment on ECSE Lease Proposal Change 5 CSR 30-640.200

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**From:** Patricia Oneal [<mailto:ponealepco@yahoo.com>]  
**Sent:** Monday, March 30, 2015 1:11 PM  
**To:** DESE Funds Management  
**Cc:** Fair Play R-II - Renee Sagaser; Eric.Kurre; Mark Beem; Shannon.Snow; Halfway R-III - Tim Boatwright; Pat O'Neal  
**Subject:** Comment on ECSE Lease Proposal Change 5 CSR 30-640.200

We are a cooperative that serves 14 different school districts. We provide all ECSE services to those districts. Our goal was to provide services to our ECSE students as much as possible in their LRE and avoid extensive bus rides and additional costs of transportation that would have to be reimbursed to those districts. We serve approximately half of all of the students that we serve at the center base, but all teachers, staff, materials, OT, PT, nurse, Adaptive PE, IEP meetings, evaluations, etc. are done at our ECSE facility. Due to increased enrollment of all special education students of the 14 districts, we are moving to a different facility next door.

If the proposed formula is implemented, and our new lease is not fully funded, it would be a considerable additional cost to DESE as there would be an increase of transportation costs from 14 districts, addition of teachers, addition of paras, addition of another nurse, as we are currently sharing her with the other sped students that are center based.

I truly believe that funding our lease will save DESE thousands of dollars in additional costs that will be linked to the above listed items that would have to be reimbursed if our ECSE lease is not 100 percent reimbursed.

Thank you very much for this consideration.

Pat O'Neal  
 Exceptional Pupil Cooperative  
 Serving Fair Play R-II, Hickory County R-I, Dallas County R-1, Marion C Early R-V, Halfway R-III, Climax Springs R-IV, Macks Creek R-V, Hermitage R-IV, Wheatland R-II, Weaubleau R-III, Stockton R-I, Walnut Grove R-V, Humansville R-IV, Pleasant Hope R-VI.

**Woods, Shelley**

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**From:** Woods, Shelley  
**Sent:** Tuesday, March 31, 2015 9:01 AM  
**To:** DESE Funds Management  
**Cc:** Woods, Shelley  
**Subject:** Comments for 5 CSR 30-640.200  
**Attachments:** Updated Lease Information for Fiscal Note Mar 2015.pdf

**Requirement (1)(A) needs to be changed to clarify which eligible pupils can be counted.**

**Requirement (3)(A) needs to be changed to accommodate federal and state program requirements for space.**

**Requirement (3)(B)(1) needs to define who can be included as an eligible pupil for ECSE.**

**Requirement (3)(B) needs to have a definition added for eligible pupils for the ESEA preschool program.**

**Requirement (5) needs to be changed to include ESEA Preschool Programs.**

**The public and private cost estimates need to be updated to the amounts in the attached chart.**

*Shelley Woods*

Coordinator | Special Education Finance  
Division of Financial and Administrative Services  
Phone 573.751.3561 | Fax 573.526.6898  
shelley.woods@dese.mo.gov | www.dese.mo.gov

### Updated Fiscal Impact to Proposed Rule 5 CSR 30-640.200

Code	District	Cost Department Currently Obligated to Pay for FY15 Leases	Estimated Cost to Department under New Proposed Formula	Estimated Cost to Public (Local School Districts) and/or Private Entities under New Proposed Formula
006-104	LAMAR R-I	\$ 8,200.00	\$ 8,200.00	\$ -
006-104	LAMAR R-I	\$ 3,000.00	\$ 3,000.00	\$ -
010-093	COLUMBIA 93	\$ 106,200.00	\$ 53,661.60	\$ 52,538.40
016-090	JACKSON R-II	\$ 33,797.10	\$ 33,797.10	\$ -
022-089	NIXA	\$ 875,000.00	\$ 62,083.20	\$ 812,916.80
025-001	CAMERON R-I	\$ 11,768.90	\$ 11,768.90	\$ -
033-090	SALEM R-80	\$ 11,700.00	\$ 11,700.00	\$ -
039-141	SPRINGFIELD R-XII	\$ 687,729.00	\$ 148,919.40	\$ 538,809.60
039-141	SPRINGFIELD R-XII	\$ 127,419.00	\$ 26,712.00	\$ 100,707.00
049-142	CARTHAGE R-IX	\$ 12,000.00	\$ 12,000.00	\$ -
050-014	DESOTO 73	\$ 48,841.52	\$ 48,841.52	\$ -
055-108	MT. VERNON R-V	\$ 9,694.00	\$ 9,694.00	\$ -
083-001	NORTH PLATTE CO. R-I	\$ 7,500.00	\$ 7,500.00	\$ -
084-001	BOLIVAR R-I	\$ 20,400.00	\$ 18,217.20	\$ 2,182.80
084-002	FAIR PLAY R-II	\$ 7,000.00	\$ 7,000.00	\$ -
084-002	FAIR PLAY R-II	\$ 19,980.00	\$ 19,980.00	\$ -
096-119	SPECIAL SCHOOL DISTRICT	\$ 57,868.00	\$ -	\$ 57,868.00
096-119	SPECIAL SCHOOL DISTRICT	\$ 7,200.00	\$ -	\$ 7,200.00
104-045	BLUE EYE R-V	\$ 14,505.00	\$ 7,732.80	\$ 6,772.20
104-045	BLUE EYE R-V	\$ 11,898.00	\$ 3,866.40	\$ 8,031.60
107-152	HOUSTON R-I	\$ 28,200.00	\$ 1,944.00	\$ 26,256.00
108-142	NEVADA R-V	\$ 13,507.74	\$ 13,507.74	\$ -
TOTAL		\$ 2,123,408.26	\$ 510,125.86	\$ 1,613,282.40

**Woods, Shelley**

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**From:** Dierking, Michael on behalf of DESE Funds Management  
**Sent:** Tuesday, March 31, 2015 11:22 AM  
**To:** Nickell, Angie; Woods, Shelley  
**Subject:** FW: Public comment on proposed rule 5 CSR 30-640.200  
**Attachments:** DESE ECSE EB public comment.pdf

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**From:** Steve Helms [<mailto:Steve.Helms@house.mo.gov>]  
**Sent:** Tuesday, March 31, 2015 10:34 AM  
**To:** DESE Funds Management  
**Cc:** Burlison, Eric  
**Subject:** Public comment on proposed rule 5 CSR 30-640.200

To Whom It May Concern

The attached letter is for public comment from Rep. Eric Burlison.

Please let me know if you have any questions.

Thank you,

Steve Helms  
Legislative Assistant to Rep. Eric Burlison

For more information on Rep. Burlison and upcoming legislation, please visit his constituent website at:  
[www.EricBurlison.Net](http://www.EricBurlison.Net).

**CAPITOL OFFICE**

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Missouri House of Representatives  
**Eric Burlison**  
 State Representative, District 133

March 31, 2015

Commissioner Margie Vandeven  
 Department of Elementary and Secondary Education  
 Post Office Box 480  
 Jefferson City, MO 65102-0480

Dear Commissioner Vandeven,

Educating children is a top priority for all of us. Unfortunately, it seems that we are still moving in a direction that could harm the most disadvantaged among us.

Both Nixa and Springfield school districts, as well as others around the state, have entered into lease agreements with small businesses to provide for the educational needs of their special needs students. They did so with the knowledge and at the very least, passive agreement of the Department of Elementary and Secondary Education.

Shortly after the ink was dry, DESE decided to change their policy on the Early Learning Facilities Funding Formula for these lease agreements. These changes would amount to an arbitrary and capricious act that would cause an undue burden on these school districts and small business owners.

I'm asking for your help in pulling back from this potential conflict, which we see ending in costly litigation and harming all parties. Together, we can find a way to resolve this issue, honor agreements that have already been made, and change the ECSE Program that will allow for a tranquil transition.

Thank you so much for your consideration and help.

Sincerely,

A handwritten signature in blue ink that reads "Eric Burlison". The signature is written in a cursive, flowing style.

Eric Burlison  
 State Representative

**Woods, Shelley**

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**From:** Dierking, Michael on behalf of DESE Funds Management  
**Sent:** Tuesday, March 31, 2015 12:12 PM  
**To:** Woods, Shelley; Nickell, Angie  
**Subject:** FW: DESE Rules Public Comment  
**Attachments:** Kraus DESE comments.pdf

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**From:** Chris Sutherland [<mailto:chris.sutherland@senate.mo.gov>]  
**Sent:** Tuesday, March 31, 2015 12:05 PM  
**To:** DESE Funds Management  
**Subject:** DESE Rules Public Comment

Attached are Senator Will Kraus' comments on the Early Learning and Facilities Funding Formula for Lease Agreements rule change.

Sincerely,

Andrea Westhoff  
Legislative Aide  
Office of Senator Will Kraus, 8th District  
573-751-1464 (o)

Thank you for contacting us at the 8<sup>th</sup> District State Senate offices. Please feel free to follow us at our social media outlets. Click on the link to find us on [Facebook](#) or on [Twitter](#). You can also easily track legislation Senator Kraus has filed and find his public media releases at his Senate [home page](#).

To sign up for Senator Kraus' weekly email newsletter click [here](#).

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 LEE'S SUMMIT  
 LONE JACK  
 OAK GROVE

March 31, 2015

Commissioner Margie Vandeven  
 Department of Elementary and Secondary Education  
 Post Office Box 480  
 Jefferson City, MO 65102-0480

Dear Commissioner Vandeven,

I am writing in response to the proposed rule change to the Early Learning and Facilities Funding Formula for Lease Agreements. It is my hope that facilities for special education can remain fully funded throughout the state, especially facilities that districts are already committed to under current DESE rules.

I appreciate DESE's willingness to work with these public school districts. The proposed change affects districts around the state that have already committed to lease specific facilities for special education under the current funding formula. Districts entered into these leases in a good faith effort to provide the best possible educational experience for all students.

I fully understand the department's need to improve operating rules and that it is critical to use every education dollar wisely. However, I do ask that an eight year grace period be given to districts' current lease agreements entered into under current rules and funding so that the school districts do not experience an undue financial burden.

This is a standard period that most lease/purchase agreements are made under and would allow a better assessment of future building needs and programs to be made in these school districts.

Thank you for your consideration as we work together on a solution to this issue.

Sincerely,

A handwritten signature in blue ink that reads "Will Kraus".

Will Kraus

**Woods, Shelley**

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**From:** Dierking, Michael on behalf of DESE Funds Management  
**Sent:** Tuesday, March 31, 2015 1:17 PM  
**To:** Nickell, Angie; Woods, Shelley  
**Subject:** FW: The School District of Springfield, R-12 Comment on Proposed Rule 5 CSR 30-640.200

-----Original Message-----

From: Embree, Carol L. [<mailto:clembree@spsmail.org>]  
 Sent: Tuesday, March 31, 2015 1:11 PM  
 To: DESE Funds Management  
 Cc: Krause, Amy; Herrell, Justin  
 Subject: The School District of Springfield, R-12 Comment on Proposed Rule 5 CSR 30-640.200

Comment on Proposed Rule 5 CSR 30-640.200 Early Learning Facilities Funding Formula for Lease Agreements Via E-mail ([spedfunding@deese.mo.gov](mailto:spedfunding@deese.mo.gov))

The School District of Springfield, R-12 (District) lease reimbursements were approved by the Department of Elementary and Secondary Education (DESE) Division of Special Education on February 25, 2010 and December 18, 2012. Fiscal reimbursement for the leases began in Fiscal Years 2012 and 2015, respectively. The ECSE program currently serves approximately 586 children, which includes 82 non-disabled, integrated peers ages three, four and five. The program has grown since moving into the leased facilities serving over 800 families per year.

The proposed rule creates a new lease reimbursement formula that did not exist when the District made the decision to enter into the current lease agreements, and significantly and negatively affects funding. The District reasonably relied on approval by DESE, and the reimbursement formula calculated by DESE when determining to enter into the existing lease agreements.

As noted in the Updated Fiscal Impact to Proposed Rule 5 CSR 30-640.200 provided by the DESE, the impact of the proposed rule to the School District of Springfield, R-12, will result in the following change:

Springfield R-12  
 Lease Agreements

Current Amount Funded by DESE Per Year (A)

Proposed Amount Funded by DESE Per Year (B)

Estimated New Cost to the District Per Year (C)

Springfield Lease 1

687,729.00

148,919.40

538,809.60

Springfield Lease 2

127,419.00

26,712.00

100,707.00

\$815,148.00

\$175,631.40

\$639,516.60

A reduced funding level of \$175,631.40 (B) for the two leases will cause the District to identify alternative funding options for the \$639,516.60 (C) increase each year.

The School District of Springfield, R-12 appreciates the work of Dr. Ron Lankford, Deputy Commissioner of Education, and staff in identifying solutions to the current process and appreciates the opportunity to provide comments. The School District of Springfield, R-12 understands the need to improve the rules and respectfully requests that consideration be given to allow districts ample time to identify alternative solutions including negotiating an acceptable lease purchase or other option.

The School District of Springfield, R-12 respectfully requests that the Department of Elementary and Secondary Education allow an eight-year grace period to existing approved lease agreements and funding calculations.

Respectfully submitted,

Carol Embree, SFO  
 Chief Financial & Operations Officer  
 School District of Springfield, R-12  
 Kraft Administration Center  
 1359 E. St. Louis Street  
 Springfield, MO 65802  
 Cell: 417-569-4302

**Woods, Shelley**

---

**From:** djones@bulldogjr.blueeye.k12.mo.us  
**Sent:** Tuesday, March 31, 2015 7:44 AM  
**To:** Woods, Shelley  
**Subject:** ECSE Lease Public Comment  
**Attachments:** March 31ECSELEASE.docx

Please find attached comments and concerns for public record regarding the proposed changes for the ECSE payment on lease agreements.

March 31, 2015

Shelley Woods, Director

Department of Elementary and Secondary Education

Special Education Finance

PO Box 480

Jefferson City, MO 65101

Dear Shelley,

This is in response to concerns regarding the proposed rule change for payment of ECSE leased facilities, 5 CSR 30-640.200. The Tri-Lakes Cooperative is a 15 member district serving over 145 ECSE students. We have two facilities that will sustain an impact from the proposed rule change. As a Cooperative we serve as many as four districts in one center-based location. For this reason the Cooperative board has chosen to lease facilities in order to provide the best quality of services for ECSE students. Not only can we accommodate students with the most severe disabilities in these two facilities, but these leased sites have provided a highly effective service location for students to receive related therapy from professional staff. Superintendents, board of education members, and parents, for many years have valued the services that have been provided through these center-based programs and the service delivery that has been provided students. We have maintained the same lease agreements for well over 10 years.

The position that MO CASE has provided seems to be reasonable in calling for a phase in period for a new lease calculation period of at least 12 months to allow use of a 100% rate before moving to an 80% calculation. This would allow districts a chance to renegotiate and plan. Allowing districts a 12 month time for planning would provide an opportunity for managing the ECSE lease options that might be available to districts as well as exploring options available to meet the needs of students.

Sincerely,

Deann Jones, Director

Tri-Lakes Cooperative

**Woods, Shelley**

---

**From:** Angela Turner <aturner@houston.k12.mo.us>  
**Sent:** Wednesday, April 01, 2015 11:25 AM  
**To:** Woods, Shelley  
**Subject:** proposed rule change to 5 CSR 30-640.200 Early Learning Facilities Funding Formula for Lease Agreements.

To whom it may concern,

I am writing in response to the proposed rule change to 5 CSR 30-640.200 Early Learning Facilities Funding Formula for Lease Agreements.

I work as a Teacher for children who are Deaf or Hard of hearing for the Exceptional Child Cooperative, serving the needs of thirteen school districts. The districts served by the cooperative are physically located in geographically disparate locations, limiting the ability of the cooperative to physically host students onsite.

The facilities leased by the cooperative, while not utilized to host students on a daily basis are nonetheless essential to student learning outcomes. The cooperative employs other individuals who also play a vital role in the educational efforts of students. Currently, the Exceptional Child Cooperative services 135 unduplicated ECSE students in five counties. Some of these children either currently or in the past are deaf or hearing impaired, therefore has received special services that would be very difficult to obtain without this cooperative.

It is through the combined financial strength of the cooperating school districts that the Exceptional Child Cooperative is able to secure, and retain, the services of highly qualified individuals to meet the distinct needs of students. The proposed rule, will limit our ability to accomplish this task.

Losing ECSE funds for the purpose of lease agreements will have a detrimental effect on my ability as an employee at the Exceptional Child Cooperative to accomplish the primary task for which I have been employed.

I request, respectfully, that the proposed rule is withdrawn.

Angela Turner, M.S. Deaf Education  
Teacher for the Deaf/Hearing Impaired  
Exceptional Child Cooperative: Houston R-1 School District

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**Woods, Shelley**

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**From:** Dierking, Michael on behalf of DESE Funds Management  
**Sent:** Wednesday, April 01, 2015 12:03 PM  
**To:** Woods, Shelley; Nickell, Angie  
**Subject:** FW: public comment on proposed rule regarding EC lease payments  
**Attachments:** DESE Letter on lease agreements from House Reps.pdf; AVG Certification.txt; "AVG certification".txt

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**From:** Karen McKnight [<mailto:karenmcknight@nixaschools.net>]  
**Sent:** Wednesday, April 01, 2015 8:16 AM  
**To:** DESE Funds Management  
**Cc:** Stephen.Kleinsmith; Brenda Rantz; [Virginia.Fry@huschblackwell.com](mailto:Virginia.Fry@huschblackwell.com)  
**Subject:** public comment on proposed rule regarding EC lease payments

To whom it may concern:

Please include the attached document as public comment on the proposed rule regarding ECSE lease payments. The attorney for Nixa Public Schools, Husch and Blackwell, should also be sending a public comment today on behalf of our district. Please confirm receipt of this public comment as well as the additional public comment once received from Husch and Blackwell. We appreciate the opportunity to provide comment and hope that you will fully consider our concerns.

Respectfully submitted,

*Karen McKnight*

Executive Director of Special Services  
Nixa Public Schools  
417-449-3270

**Capitol Building**  
201 West Capitol Avenue  
Jefferson City, MO 65101-6806  
(573) 751-4043 house.mo.gov



**Representatives**  
Scott Fitzpatrick  
Tom Flanigan  
Lyndall Fraker  
Elijah Haahr  
Lincoln Hough  
Charlie Norr  
Don Phillips  
Jared Taylor

**Representatives**  
Sonya Anderson  
Kevin Austin  
Eric Burlison

Missouri House of Representatives

February 18, 2015

Commissioner Margie Vandeven  
Department of Elementary and Secondary Education  
Post Office Box 480  
Jefferson City, MO 65102-0480

Dear Commissioner Vandeven,

We the undersigned appreciate your help and willingness to work with Springfield and Nixa public schools. We especially appreciate the amount of thoughtful attention that Ron Lankford has dedicated to working toward a solution that is respectful to Missouri taxpayers, while accomplishing the goal of public education.

Educating children is a top priority of ours and we know that it is yours as well. Especially, helping those who start out with a learning disadvantage.

We are proud of the work that our educators in Springfield and Nixa have done to provide a quality education and learning environment for those with special needs.

Which brings us to the issue at hand – Springfield and Nixa, in a desire to provide the best education possible and utilize available resources, committed themselves to leased space allowed by current DESE rules.

We fully understand the need to improve the rules and that it is critical for you to use every education dollar wisely, however we only ask that an eight year grace period be given to current lease agreements.

This is a standard period that most lease/purchase agreements are made under and would allow a better, more judicious assessment of future building needs and programs to be made in these school districts.

Thank you for your consideration as we work together on a solution to this issue.

Sincerely,

A row of five handwritten signatures in blue ink, corresponding to the names listed below.

Sonya Anderson      Kevin Austin      Eric Burlison      Scott Fitzpatrick      Tom Flanigan

A row of six handwritten signatures in blue ink, corresponding to the names listed below.

Lyndall Fraker      Elijah Haahr      Lincoln Hough      Charlie Norr      Don Phillips      Jared Taylor

A handwritten signature in blue ink, with the name "Lynn Morris" printed below it.

Lynn Morris

**Woods, Shelley**

---

**From:** Dierking, Michael on behalf of DESE Funds Management  
**Sent:** Wednesday, April 01, 2015 12:03 PM  
**To:** Woods, Shelley; Nickell, Angie  
**Subject:** FW: Submission of Comments on Proposed Rule 5 CSR 30-640.200 Early Learning Facilities Funding Formula for Lease Agreements  
**Attachments:** 1-1(2015-04-01 10-32-14).PDF

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**From:** Templeton, Carla [<mailto:Carla.Templeton@huschblackwell.com>] **On Behalf Of** Pearson, Lowell  
**Sent:** Wednesday, April 01, 2015 10:46 AM  
**To:** DESE Funds Management  
**Subject:** Submission of Comments on Proposed Rule 5 CSR 30-640.200 Early Learning Facilities Funding Formula for Lease Agreements

**Carla Templeton**  
**Legal Administrative Assistant**

**HUSCH BLACKWELL LLP**  
235 East High Street, P.O. Box 1251  
Jefferson City, MO 65101-3206  
Direct: 573.761.1132  
Fax: 573.634.7854  
[Carla.Templeton@huschblackwell.com](mailto:Carla.Templeton@huschblackwell.com)  
[huschblackwell.com](http://huschblackwell.com)

# HUSCH BLACKWELL

Lowell Pearson  
Partner

235 East High Street, P.O. Box 1251  
Jefferson City, MO 65102-1251  
Direct: 573.761.1115  
Fax: 573.634.7854  
lowell.pearson@huschblackwell.com

April 1, 2015

**VIA E-MAIL (SPEDFUNDING@DESE.MO.GOV)**

Department of Elementary and Secondary  
Education  
ATTN: Special Education Finance  
Division of Financial and Administrative  
Services  
P.O. Box 480  
Jefferson City, Missouri 65102-0480

Re: Comments on Proposed Rule 5 CSR 30-640.200 Early Learning Facilities  
Funding Formula for Lease Agreements (hereinafter "Proposed Rule")

To Whom It May Concern:

I am writing this comment on behalf of the Nixa Public Schools (hereinafter "Nixa"). Nixa currently leases a building from a private developer to house their Early Childhood Special Education (hereinafter "ECSE") Program. The ECSE Program currently serves approximately one hundred twenty-four (124) children in special education and non-disabled integrated peers ages three, four and five and has grown since the Program was able to move into the leased facility. The Proposed Rule directly and drastically affects the funding of the lease for the building where the ECSE Program is located.

**I. Background**

Nixa determined in 2013 that it needed to expand its ECSE Program to meet the growth that it was experiencing in the elementary grades, in addition to the waiting list at the Pre-K level. The district also had a desire to include non-disabled integrated peers within their current ECSE structure. The district did not have available space to relocate the Program from the space it had outgrown to other district buildings. Nixa has had a consistently aggressive master planning construction schedule in order to keep up with the growth that the community has experienced over the last ten to fifteen years. As a result, Nixa did not have available bonding capacity to construct a new facility. Out of space and unable to build a building to house the program left one other available option – leasing space for the program. Nixa researched available, local space, but could not find space suitable to house the ECSE Program.

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About this time, Nixa was approached by a local developer who had already designed a fully furnished turn-key facility that included all furniture, furnishings, SmartBoards, and a phone and intercom system. Nixa checked out the developer's references and learned that he had already built similar facilities for another school district.

The developer proposed to buy vacant land owned by the district and build a facility that would be adjacent to the district's Pre-School Program. This option allowed Nixa to keep the Pre-School Program and the ECSE Program on the same campus. This option was particularly desirable because the two programs share a principal/director as well as other resources.

The proposed building site was on land already owned by the district. The district was willing to sell the land to the developer, but there were zoning issues that would arise if there was a transfer of ownership. The City of Nixa was consulted to see if there was a way to speed up the zoning issues. The City advised that it was unable to speed up the zoning process. This meant that the zoning process would lengthen the time before construction could begin and the facility could not be completed in time to begin the 2014-15 school year.

When it became apparent that the land could not be sold to the developer and keep the project on track, the developer offered to go ahead and build the facility if the district would enter into a ground lease on the land owned by the district. The district saw this as its only option to timely meet the needs of the ECSE Program. Nixa entered into a ground lease with the developer so that the facility could be constructed and completed in the desired timeframe.

In June 2013, Nixa advised The Missouri Department of Elementary and Secondary Education (hereinafter "DESE") that it was investigating its options for an ECSE facility. DESE advised that in order for Nixa to be reimbursed for a lease, Nixa must submit a copy of the lease agreement and a completed Lease Approval Form. Nixa was further told that "Districts leasing facilities are not required to submit the ECSE Capital Cost Purchase Agreement to the Division, only the Lease Approval Form. **Again, the reimbursement formula will not be applied for facility leases.** All facility leases must contain the square footage and total lease cost. Please note districts may not charge lease costs to the ECSE program for their own buildings." E-mail from Angie Nickell, Director, Special Education Finance, Division of Financial and Administrative Services, to Sandra Gold, Special Education Interim Director, Nixa Public Schools (June 19, 2013, 14:09 CST) (emphasis added).

In August 2013, Nixa submitted an ECSE Lease Approval Form to the SPED Finance Office and asked when it would receive official approval of the lease reimbursement so that it could proceed with preparations to open a facility in the fall of 2014. Nixa was advised by a DESE representative: "I spoke with Angie Nickell about your ECSE Lease Approval. She said we don't actually approve them, we just need a copy of your lease information and will contact you if anything is missing. So you don't have to wait on us to approve them to continue with your process." E-mail from Cathy Mendez Roca, Special Education Finance, Missouri

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Department of Elementary and Secondary Education, to Karen McKnight, Assistant Director of Special Services, Nixa Public Schools (Aug. 6, 2013, 10:38 CST).

After the ECSE Lease Approval Form was submitted, Nixa responded to questions from DESE who requested that a justification for the lease agreement be submitted. A justification was submitted by Nixa on August 19, 2013. On August 21, 2103, DESE advised Nixa that "... The Department does not approve rental leases for the ECSE program. The district submits the lease with the required cover sheet and we input into the system for payment. While we may ask for further justification as to why the district chose one option over another for audit purposes, we leave the decision for providing services at the local level and let the district choose the best option for them. So, the Department will pay the ECSE lease amount as long as funds are appropriated for this program, or unless there is a legislative change that prohibits us from doing so. I don't foresee either of these being an issue in the next few years." E-mail from Shelley Woods, Coordinator, Special Education Finance, Division of Financial and Administrative Services, to Sandra Gold, Special Education Interim Director, Nixa Public Schools (Aug. 21, 2013, 09:03 CST).

DESE did question the 20 year lease term that had been negotiated between Nixa and the developer for the facility. "On a side note, the 20 year lease term was concerning to us as we have no idea where this program will be in 20 years. I would recommend trying to get the lease amount to 5 years as indicated in your justification." E-mail from Shelley Woods, Coordinator, Special Education Finance, Division of Financial and Administrative Services, to Sandra Gold, Special Education Interim Director, Nixa Public Schools (Aug. 21, 2013, 09:03 CST). As a result of DESE's comments, Nixa renegotiated with the developer, and the lease term for the facility was reduced from 20 years to 5 years.

Nixa was advised that DESE had received enough information to justify Nixa's decision. E-mail from Cathy Mendez Roca, Special Education Finance, Missouri Department of Elementary and Secondary Education, to Karen McKnight, Assistant Director of Special Services, Nixa Public Schools (Aug. 21, 2013, 09:51 CST). DESE also said that: "Yes, the district may proceed with plans for preparing to move the ECSE program into the leased building by August, 2014. We will enter the lease amount of \$875,000 onto the lease page of the Sept 2015 ECSE ER." E-mail from Angie Nickell Director, Special Education Finance, Division of Financial and Administrative Services, to Sandra Gold, Special Education Interim Director, Nixa Public Schools (Sept. 6, 2013, 09:56 CST).

In reliance on DESE's permission to proceed, Nixa finalized negotiations with the developer for the lease on the facility and the developer proceeded to break ground on the project on November 20, 2013. Despite some weather delays, a building was constructed by the developer and Nixa was able to move the ECSE Program to the leased facility at the beginning of the 2014-2015 school year. Less than six months after the ECSE Program was moved into the leased building, Nixa learned that DESE intended to submit the Proposed Rule. The

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superintendent of Nixa initiated the conversation with DESE to inquire about the Proposed Rule because DESE had not communicated the information to the district.

The Proposed Rule creates a new lease reimbursement formula that did not exist when Nixa entered into the lease agreement with the developer. The Proposed Rule drastically reduces the lease reimbursement to Nixa. Nixa submits this comment because the district reasonably relied on DESE's representation that there was no reimbursement formula that would be applied for a facility lease with a third party and because there are multiple problems with the Proposed Rule.

## **II. The Proposed Rule Violates the Contract Clauses of the United States Constitution and the Missouri Constitution.**

The Contract Clause of the United States Constitution states that, "No State shall...pass any...Law impairing the Obligations of Contracts." U.S. Const. art. I, § 10, cl. 1. This applies to both public contracts, where one of the parties to the contract is the state, and private contracts. Further, Article 1, Section 13 of the Missouri Constitution directs that, "no...law impairing the obligation of contracts...can be enacted." While these Contract Clauses apply directly to state law, they also apply to administrative agencies' rules. The General Assembly cannot pass a statute that impairs contracts. DESE receives all of its power from the General Assembly. Because DESE's power comes from the General Assembly, DESE cannot do anything that the General Assembly could not do. The General Assembly could not pass the Proposed Rule as a state law because it would substantially impair existing contracts. Thus, DESE cannot implement the Proposed Rule because it cannot exceed the scope of power granted to it by the General Assembly.

The United States Supreme Court formulated a test to determine violation of the Contract Clause. The test examines: 1. Whether the state law has operated as a substantial impairment on pre-existing contractual relationships; 2. Whether the state has a significant and legitimate public purpose behind the regulation; and 3. Whether the adjustment of the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the adoption. *Energy Reserves Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983). Application of the three prong test to the Proposed Rule shows that adoption of the Proposed Rule would violate the Contract Clause and be unconstitutional.

### **A. Impairment on pre-existing contractual relationship**

The Proposed Rule substantially impairs the pre-existing lease contract between Nixa and the developer of the building. The lease agreement is for five (5) years with an annual lease payment of \$875,000.00. The Proposed Rule would reimburse Nixa only \$69,556.00. This leaves a shortfall in the annual lease payment of over \$800,000. The Small Business Impact Statement ("SBIS"), the Public Cost and the Private Cost comments to the Proposed Rule all

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admit that DESE has given no consideration to the impact the Proposed Rule would have on existing lease relationships. The SBIS states that “The formula was determined by examining the costs of current leases. Small businesses may be lessors to school districts. Tax dollars are used to pay the leases. The purpose of the regulation is to inform districts how much they will be reimbursed. Small businesses will know the maximum amount of a lease payment that the district will pay using state funds.” Small Business Impact Statement, Rule No. 5 CSR 30-640.200 (Dec. 30, 2014). **There is no discussion as to the impact the Proposed Rule would have on existing leases.** In fact, the SBIS indicates that it is unknown if school districts lease from small businesses, so no small businesses were consulted with respect to the Proposed Rule. (This despite the fact that DESE requires copies of all leases be submitted with the Early Childhood Special Education Lease Form.)

Public Cost: “...It is unknown what the costs will be in future years as leases are renegotiated. If the new lease is consistent with the formula there will be no cost to local school districts for the leases.” Private Cost: “The private costs are unknown.” DESE has admitted that the Proposed Rule completely fails to consider the impact that it would have on existing contractual relationships between the school districts and lessors. The failure to consider the impact does not negate the substantial impact the Proposed Rule has on existing contractual relationships.

### **B. No legitimate public purpose**

DESE’s stated purpose behind the Proposed Rule is to “improve departmental efficiency and operational effectiveness.” Early Learning Facilities Funding Formula for Lease Agreements, 5 CSR 30-640.200 (Proposed March 2, 2015). This is not the “significant and legitimate public purpose” that the Supreme Court envisioned for allowing the impairment of a contract. Rather, the Supreme Court saw the “remedying of a broad and general social or economic problem” as the goal. *Energy Reserves Grp.*, 459 U.S. at 411. DESE has admitted that the Proposed Rule is designed to improve their internal working which does not rise to the level required to pass constitutional scrutiny.

### **C. Lack of reasonable conditions**

Finally, the adjustment of rights of the contracting parties has to be based upon reasonable conditions and be of a character appropriate to the public purpose. *Id.* The public purpose stated here is to “improve departmental efficiency and operational effectiveness.” As discussed above, this purpose is an internal purpose and does not justify interfering with the rights of two parties who already have entered into an arm’s length negotiated contract. DESE has failed to offer any reasonable conditions that would accommodate the contractual rights of those impacted by the Proposed Rule. DESE could easily remedy this lack of reasonable conditions by drafting a rule that does not apply retrospectively to current leases.

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### **D. Violation of the Contract Clause of the Missouri Constitution**

Article 1, Section 13 of the Missouri Constitution directs that, “no...law impairing the obligation of contracts, or retrospective in its operation...can be enacted.” The two phrases “impairing the obligation of contracts” and “retrospective in its operation” work together. *Hoyne v. Prudential Sav. & Loan Ass'n*, 711 S.W.2d 899, 902 (Mo. Ct. App. 1986). Because a law cannot be “retrospective in its operation,” it cannot change the duties imposed by contract. *Id.* The Missouri Supreme Court has interpreted this prohibition against laws that operate retrospectively to be applicable if “the law in question impairs some vested right or affects past transactions to the substantial prejudice of the parties.” *Dial v. Lathrop R-II Sch. Dist.*, 871 S.W.2d 444, 447 (Mo. 1994). A vested right is one that has “become a legal or equitable title to the present or future enjoyment of property or a demand, or a legal exemption from a demand, of another.” *Id.*

The Proposed Rule impairs the obligations of the lease contract for both Nixa and the lessor. The Proposed Rule requires the duties under the contract to be changed—Nixa has to either renegotiate the lease or pay the difference itself between the amount funded and the lease amount. As stated above, the shortfall in the annual lease payment would be over \$800,000 according to the Proposed Rule. This would be a “substantial prejudice” to the parties. Because the Proposed Rule impairs the obligations of the lease contract, affecting past transactions to the substantial prejudice of the parties, the Proposed Rule is unconstitutional under the Missouri Constitution.

### **III. The Proposed Rule’s Fiscal Note is Not Accurate.**

#### **A. Public Cost Fiscal Note**

Sections 536.200 RSMo and 536.205 RSMo require state agencies to file fiscal notes with a proposed rule. “These requirements are not trivial. They are necessary to ensure that any agency proposing a rule adequately considers the private and public entities it will affect. At the very least, the fiscal note ‘force[s] the agency to think about the economic consequences of its rulemaking’”. *Missouri Hospital Association v. Air Conservation Commission*, 874 S.W.2d 380, 390 (Mo. App 1994) (quoting 20 *Alfred S. Neeley and Daniel W. Shinn*, Missouri Practice Administrative Practice and Procedure §6.51 (1986).

Section 536.200.1 RSMo establishes the requirements for the public cost fiscal note:

536.200.1. Any state agency filing a notice of proposed rulemaking, as required by section 536.021, wherein the adoption, amendment, or rescission of the rule would require or result in an expenditure of public funds by or a reduction of public revenues for that agency or any other state agency of the state government or any political subdivision thereof including counties,

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cities, towns, and villages, and school, road, drainage, sewer, water, levee, or any other special purpose district which is estimated to cost more than five hundred dollars in the aggregate to any such agency or political subdivision, shall at the time of filing the notice with the secretary of state file a fiscal note estimating the cost to each affected agency or to each class of the various political subdivisions to be affected. The fiscal note shall contain a detailed estimated cost of compliance and shall be supported with an affidavit by the director of the department to which the agency belongs that in the director's opinion the estimate is reasonably accurate. If no fiscal note is filed, the director of the department to which the agency belongs shall file an affidavit which states that the proposed change will cost less than five hundred dollars in the aggregate to all such agencies and political subdivisions.

The Proposed Rule states that “This proposed rule may cost local school districts one million thirty-nine thousand one hundred thirty dollars (\$1,039,130).” However, this is not accurate because not all of the districts that leased facilities were included with the Proposed Rule, and some districts that were included should not have been. For example, Columbia 93, Mt. Vernon R-V, and the Special School District were omitted from the fiscal note, even though they currently lease property for early learning facilities. The purpose of the fiscal note is to give notice to those possibly affected by the Proposed Rule. However, many districts that are possibly affected were omitted. Several districts that according to the fiscal note would not be affected by the Proposed Rule actually will be affected. Additionally, the fiscal notes do not correctly reflect the number of children enrolled in the ECSE programs. The Public Cost of the Proposed Rule is therefore inaccurate.

After the Proposed Rule was published, DESE released an updated Fiscal Impact to the Proposed Rule. This update did not differentiate between Public Cost and Private Cost. The update increased the Public Costs by nearly \$600,000. It changed not only the districts that would be affected, but also the amounts by which each district would be affected. There is no statutory authority for submitting a revised fiscal note. Section 536.215 RSMo allows for an update when the rule is altered to create a change in cost, however, the Proposed Rule stayed the same: The Updated Fiscal Impact is a tacit admission that the information published with the Proposed Rule in the Missouri Register is incorrect.

### **B. Private Cost Fiscal Note**

Section 536.205.1 RSMo establishes the requirements for the private cost fiscal note:

536.205.1. Any state agency filing a notice of proposed rulemaking, as required by section 536.021, whereby the adoption, amendment, or rescission of the rule would require an expenditure of money by or a reduction in income

## HUSCH BLACKWELL

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for any person, firm, corporation, association, partnership, proprietorship or business entity of any kind or character which is estimated to cost more than five hundred dollars in the aggregate, shall at the time of filing the notice with the secretary of state file a fiscal note containing the following information and estimates of cost:

- (1) An estimate of the number of persons, firms, corporations, associations, partnerships, proprietorships or business entities of any kind or character by class which would likely be affected by the adoption of the proposed rule, amendment or rescission of a rule;
- (2) A classification by types of the business entities in such manner as to give reasonable notice of the number and kind of businesses which would likely be affected;
- (3) An estimate in the aggregate as to the cost of compliance with the rule, amendment or rescission of a rule by the affected persons, firms, corporations, associations, partnerships, proprietorships or business entities of any kind or character.

The private cost fiscal note filed with the Proposed Rule is based on assumptions that are both erroneous and incomplete. The Proposed Rule fails to include any of the information required by 536.205.1 RSMo. There are no estimates as to the number of persons affected or classifications by types of businesses likely to be affected. Further, the Proposed Rule states that “the private costs are unknown.” While in the Small Business Impact Statement DESE states that “[b]usinesses who lease property to school districts for early learning programs” will be affected by the Proposed Rule, it also states that “[i]t is unknown if school districts lease from small businesses so no small businesses were consulted.” Small Business Impact Statement, Rule No. 5 CSR 30-640.200 (Dec. 30, 2014). DESE goes on to say that the “formula was determined by examining the costs of the current leases,” rather than looking at the leases themselves. *Id.* Each school district is required to submit the lease to DESE to receive reimbursement, so DESE has all of the leases available to review. However, DESE did not use any of this information to create the formula or to determine the true impact of the Proposed Rule.

The Missouri Court of Appeals has previously concluded that adopted rules with incorrect fiscal notes were “void and of no force and effect.” *Missouri Hosp. Ass'n v. Air Conservation Comm'n*, 874 S.W.2d 380, 392 (Mo. Ct. App. 1994). The court said that there “was no estimate of the number of persons, firms, corporations, etc. by class which might be affected...nor was there a classification of the types of business entities that might be affected...” *Id.* The court concluded that because the agency “did not make a comprehensive and diligent effort to determine all private entities that would likely be affected and did not estimate the number of such entities by class in a manner giving them reasonable notice they would be affected, in adopting Rule 160 the Commission failed to meet its obligations under § 536.205.” *Id.* Similarly here, DESE has not made a “comprehensive and diligent effort” to

## HUSCH BLACKWELL

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determine those likely affected in a manner giving them “reasonable notice,” and therefore the Proposed Rule should not be adopted.

#### **IV. The Proposed Rule Violates the Hancock Amendment and *Rolla 31 School District v. State*.**

The Missouri Constitution directs that property taxes and other local taxes cannot be increased without voter approval. Mo. Const. art. X section 16. The state is prohibited from requiring any new or expanded activities by counties and other political subdivisions without full state financing. *Id.* Further, section 21 of the Missouri Constitution prohibits a reduction of the state financed proportion of the costs of any existing activity or service required of counties and other political subdivisions. Mo. Const. art. X section 21.

Missouri courts have previously addressed the issue of funding school districts for special education programs for three and four year old students. *Rolla 31 Sch. Dist. v. State*, 837 S.W.2d 1 (Mo. 1992). In *Rolla 31*, the Missouri General Assembly established that school districts had to create these special education programs, but wanted to require local districts to provide 10% of the funds. The court held that this was a violation of the Hancock Amendment because the legislature failed to provide a specific allocation to cover the full cost of the program; local districts would have to raise taxes to pay for the difference.

The Missouri Constitution requires the state to fund any state-mandated program. Pursuant to section 162.700 RSMo, early childhood special education services are mandatory and are paid through state and federal appropriated funds. The state cannot require the local district to pay for these services. The Proposed Rule specifically states that if the local district cannot renegotiate its lease, then the local district has to make up the difference between the lease amount and the amount funded under the Proposed Rule. However, this goes directly against the Missouri Supreme Court finding in *Rolla 31*. DESE is fully aware of this requirement. In the Early Childhood Special Education Expenditure Guide they advise that: “...In 1990, Missouri chose to extend its participation in the federal special education grant and provide FAPE [Free and Appropriate Public Education] to three, four, and five year old children with disabilities through the Early Childhood Special Education (ECSE) Program. This required mandating the program statewide. Pursuant to Section 162.700 RSMo; ECSE services are mandatory and program costs associated with these services are paid through state and federal appropriated funds. No local funds support this program due to a Missouri Supreme Court Decision.” Early Childhood Special Education (ECSE) Expenditure Guide, 5 (2014-15). “In 1992, the Missouri Supreme Court ruled that if Missouri mandated services for the three and four year old population, it must reimburse the costs for these services (*Rolla 31 School District v. State of Missouri*, 837 SW2d 1).” *Id.*

Despite DESE’s knowledge that local funding was not available, the Proposed Rule requires the local districts to make up the difference between the amount funded and the amount

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of the lease. The Proposed Rule states that it “may cost the local school districts ...\$1,039,130 in fiscal year 2015 if the current lease amount is not renegotiated...” However, under the Hancock Amendment and *Rolla 31*, the state must cover the entire funding of a state-mandated program such as ECSE. Therefore, the local districts cannot be required to contribute to any of the funding, and the Proposed Rule is unconstitutional.

### V. The Proposed Rule is Inconsistent with Public Policy.

For more than a year before moving the ECSE program in the leased facility, Nixa was in constant communication with DESE. Nixa requested information as to funding for an ECSE site and requested the procedures for getting approval for leases. Nixa was informed that reimbursement formulas did not apply to a lease and that DESE approval was not required for a lease. Nixa continued to keep DESE informed of the process, including sending DESE copies of the lease agreement. The only feedback Nixa received as to the lease was to shorten the term from twenty years to five years. DESE told Nixa that the “Department will pay the ECSE lease amount as long as funds are appropriated for this program, or unless there is a legislative change that prohibits” and they didn’t foresee either of these being an issue in the next few years. Finally, in September 2013, DESE told Nixa that “the district may proceed with plans for preparing to move the ECSE program into the leased building by August 2014.”

Throughout the whole process, Nixa has been totally transparent with DESE. Yet six months after the ECSE Program moved into the leased facility, DESE submitted the Proposed Rule that (1) created a reimbursement rule for leased premises; and (2) drastically reduced the way leases are reimbursed for the ECSE Program. The Proposed Rule completely ignores the lease commitment for which DESE provided guidance as to the term. DESE should not be allowed to create a reimbursement formula and change the reimbursement rates when it knew that it would impact Nixa and other districts.

### VI. Conclusion

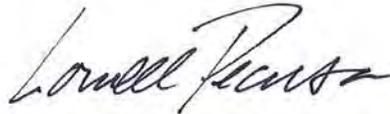
The consequences of the problems described in this letter are significant. As discussed above, the Proposed Rule fails to comply with sections 536.200.1, 536.205.1, and 162.700 RSMo, as well as the United States Constitution, the Missouri Constitution, and Missouri case law. The General Assembly’s Joint Committee on Administrative Rules has the authority to recommend that the full Assembly disapprove and annul any proposed rule that is in conflict with state law. *Sec. 536.028.5(2) RSMo*. In turn, the General Assembly can disapprove or annul the proposed rule. *Sec. 536.028.7 RSMo*.

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I appreciate the opportunity to make these comments on behalf of Nixa and respectfully suggest that the Proposed Rule be withdrawn or amended to address the issues identified herein.

Sincerely,

A handwritten signature in black ink, appearing to read "Lowell Pearson". The signature is written in a cursive style with a prominent initial "L".

Lowell Pearson

LDP:LCR

**Woods, Shelley**

---

**From:** Dierking, Michael on behalf of DESE Funds Management  
**Sent:** Thursday, April 02, 2015 8:06 AM  
**To:** Woods, Shelley; Nickell, Angie  
**Subject:** FW: Comment letter on Proposed Rule 5 CSR 30-640.200  
**Attachments:** 2015-04-01 DAM to DESE re Proposed Rule 5 CRS 30-640.200.pdf

---

**From:** Tom Smith [<mailto:tsmith@moedcounsel.com>]  
**Sent:** Wednesday, April 01, 2015 4:02 PM  
**To:** DESE Funds Management  
**Cc:** Duane Martin  
**Subject:** Comment letter on Proposed Rule 5 CSR 30-640.200

To Whom It May Concern,

Please find attached the comment letter from Missouri EdCounsel LLC, on behalf of the Exceptional Pupil Cooperative (EPCO), regarding Proposed Rule 5 CSR 30-640.200 – Early Learning Facilities Funding Formula for Lease Agreements. Please let me know if you have any trouble opening the attached letter.

Thanks,  
 Tom



Thomas Smith  
 Attorney  
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 Columbia, Missouri 65203  
 Office: (573) 777-9645  
 Mobile: (314) 359-0219  
 Fax: (573) 777-9648  
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April 1, 2015

**VIA ELECTRONIC MAIL ONLY**

Department of Elementary and Secondary Education  
ATTN: Special Education Finance, Division of Financial and Administrative Services  
P.O. Box 480, Jefferson City, MO 65102-0480  
[spedfunding@dese.mo.gov](mailto:spedfunding@dese.mo.gov)

Re: Comments on Proposed Rule 5 CSR 30-640.200 Early Learning Facilities  
Funding Formula for Lease Agreements

To Whom It May Concern:

Missouri EdCounsel is submitting this comment on behalf of the Exceptional Pupil Cooperative (hereinafter "EPCO"), an educational cooperative made up of 14 different public school districts in the State of Missouri.<sup>1</sup> EPCO provides all Early Childhood Special Education ("ECSE") services to those districts. It is the goal of EPCO to provide services to ECSE in the least restrictive environment ("LRE") as much as possible, and to avoid extensive bus rides and additional costs of transportation. In turn, this lowers the costs to member districts for ECSE services – a savings that is then passed on to the public. Under the Proposed Rule, the services provided disabled children will be dramatically reduced and the public costs of providing reduced services will be substantially increased. The Proposed Rule is counter to the welfare of the students with disabilities specifically and the public interest generally.

EPCO serves approximately half of its members' ECSE students at EPCO's central facility in Bolivar, Missouri. This central facility houses all of EPCO's teachers, staff, nurses and materials. It is also the location for services such as occupational therapy, physical therapy and adaptive physical education. Finally, the central facility also serves as the location for evaluations, Individualized Education Program meetings and other related meetings. The remaining half of the ECSE students are served by EPCO through the member districts' preschools, Head Start Programs, Day Cares, and homes.

Due to the increased enrollment of special education students in EPCO's 14 member districts, EPCO is in the process of moving its ECSE program into a different facility in time for

<sup>1</sup> These school districts include Fair Play R-II, Hickory County R-I, Dallas County R-1, Marion C Early R-V, Halfway R-III, Climax Springs R-IV, Macks Creek R-V, Hermitage R-IV, Wheatland R-II, Weaubleau R-III, Stockton R-I, Walnut Grove R-V, Humansville R-IV, and Pleasant Hope R-VI.

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the start of the 2015-2016 school year. This new facility will allow EPCO to continue to provide exceptional ECSE services to its members' students and allow for additional expected growth. The new facility will, however, not be owned by EPCO. Instead, EPCO is leasing the facility from a private developer. A lease has already been executed and the facility will be ready to house EPCO by the start of the next school year.

Due to EPCO's current plan to move its central facility to a new location under a new lease, and its goal of educating ECSE students in the LRE, the timing of Proposed Rule 5 CSR 30-640.200 (hereinafter "the Proposed Rule") will work a substantial hardship to EPCO in the use of public funds for disabled children. If the formula in the Proposed Rule is implemented, then EPCO's new lease will not be fully funded unless EPCO provides all of its ECSE services at the new central facility, thereby increasing the reimbursement amount under the new formula.

Were EPCO to provide all of its ECSE services at the new central facility, then there would be considerable additional costs for transporting ECSE students from their home districts to the new facility.<sup>2</sup> This would also require EPCO to increase the number of teachers and paraprofessionals, and add an additional nurse to the staff. The end result of this change in the way EPCO provides services is that the overall costs to the State would drastically increase. While the reimbursement amount for the lease will reduce, the overall public cost will increase due to reimbursements that will be required from other areas. The more concerning result, however, is that EPCO will no longer be able to educate ECSE students in the LRE, and instead will have to transport all ECSE students to the central facility in order to afford the lease payments for which DESE will no longer reimburse it for under the Proposed Rule.

The Proposed Rule creates a new reimbursement formula that was not in effect when EPCO entered into the new lease agreement with the private developer. EPCO and its member districts reasonably relied on DESE's approval and reimbursement formula when determining to enter into the new lease agreement. Accordingly, EPCO has serious concerns that the new formula will hinder EPCO's ability to provide the best possible ECSE services to its member districts' students in the LRE. Aside from this, however, there are also multiple reasons to question the legality of the Proposed Rule.

To begin with, the public and private cost fiscal notes are inaccurate. Section 536.200.1 RSMo establishes the requirements for the public cost fiscal note, and states, in part, that "[t]he fiscal note shall contain a **detailed estimated cost of compliance** and shall be supported with an affidavit by the director of the department to which the agency belongs that in the director's opinion the estimate is **reasonably accurate**." § 536.200.1, RSMo. (emphasis added). The purpose of the fiscal note is to provide notice to effected entities of the estimated financial impact a given rule might have on them. *See Mo. Hosp. Ass'n v. Air Conservation Com'n*, 874 S.W.2d 380, 390-391 (Mo. App. W.D. 1994). Accordingly, the fiscal note requirements are "clearly designed to require agencies to take reasonable steps to consider and identify all public and private entities significantly affected by any proposed rule, and to investigate, consider and comprehensively estimate the full range of costs involved." *Id.* at 391. If a state agency fails to follow the mandates of § 536.200.1, RSMo., then rules adopted in violation thereof are void and of no force or effect. *Mo. Hosp. Ass'n* at 392.

<sup>2</sup> For some students, this could be as far as 114 miles roundtrip, excluding the additional mileage to each ECSE student's home for door to door pick up.

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In this instance, the comments to the Proposed Rule published in the Missouri Register states that “This proposed rule may cost local school districts one million thirty-nine thousand one hundred thirty dollars and sixty cents (\$1,039,130.60) in fiscal year 2015...” However, this is not accurate. The Public Cost Fiscal Note contains a specific list of districts that will be affected by the Proposed Rule and an estimate of the cost impact to these districts. Yet, this list is incomplete in that it does not contain all of the districts that are currently leasing facilities, and some districts that were included should not have been.<sup>3</sup> Further, the fiscal notes do not correctly reflect the number of children enrolled in ECSE programs. The Public Cost of the Proposed Rule is therefore inaccurate because it is based on incorrect headcounts and an incorrect list of affected districts. As such, the mandates of § 536.200.1, RSMo., have not been followed and the Proposed Rule is void.

The Proposed Rule is also void due to the inadequacies of the Private Cost Fiscal Note of the Proposed Rule. Section 536.205.1 RSMo., establishes the requirements for the private cost fiscal note. It states, in part, that the private cost fiscal note must include:

- (1) An estimate of the number of persons, firms, corporations, associations, partnerships, proprietorships or business entities of any kind or character by class which would likely be affected by the adoption of the proposed rule, amendment or rescission of a rule;
- (2) A classification by types of the business entities in such manner as to give reasonable notice of the number and kind of businesses which would likely be affected;
- (3) An estimate in the aggregate as to the cost of compliance with the rule, amendment or rescission of a rule by the affected persons, firms, corporations, associations, partnerships, proprietorships or business entities of any kind or character.

§ 536.205.1 RSMo. The Proposed Rule’s Private Cost Fiscal Note only lists two private entities as being affected. However, this is simply not true. Any private entity leasing property to a school district for purposes of providing ECSE facilities would be affected by the Proposed Rule. DESE impliedly acknowledges this by stating that districts with lease payments that exceed the reimbursement amount under the new formula will have to renegotiate their leases. Any renegotiation will have a significant impact on all private entities acting as lessor in these situations. Additionally, this potential impact could go well beyond the stated amount of \$1,039,130.60 per year. Without an accurate account of the number of districts affected by the Proposed Rule, as discussed above, there cannot be an accurate estimation of the impact the Proposed Rule could have on private entities. Accordingly, the Private Cost Fiscal Note is inaccurate and in violation of § 536.205.1 RSMo., thereby making the Proposed Rule void as a matter of law.

In addition to the fiscal note issues discussed above, the Proposed Rule would also violate the Contracts Clause of the United States Constitution. The Contract Clause of the United States Constitution states that, “No State shall ... pass any ... Law impairing the Obligations of Contracts.” U.S. Const. art. I, § 10, cl. 1. This applies to both public contracts and private

<sup>3</sup> Notably, only one of the 14 member Districts of EPCO was included in this list. Given the fact that DESE has a complete list of all districts which have entered into a lease for ECSE facilities, these omissions are very concerning and causes one to wonder how many other district should have been included in this list and the impact to them assessed as well.

contracts. While the Contract Clause in the Constitution applies directly to state law, it also applies to administrative agencies' rules. The General Assembly cannot pass a statute that impairs contracts in violation of the Contracts Clause. Since DESE receives all of its power from the General Assembly, DESE cannot do anything that the General Assembly could not do. The General Assembly could not pass the Proposed Rule as a state law if it would substantially impair existing contracts in violation of the Contracts Clause. Thus, DESE cannot implement the Proposed Rule if it will exceed the scope of power granted to it by the General Assembly and violate the Contracts Clause.

The United States Supreme Court formulated a test to determine whether a violation of the Contracts Clause has occurred. The test examines the following:

- 1) Whether the state law has operated as a substantial impairment on preexisting contractual relationships;
- 2) Whether the state has a significant and legitimate public purpose behind the regulation; and,
- 3) Whether the adjustment of the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the adoption.

*Energy Reserves Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983). Application of the three prong test to the Proposed Rule shows that adoption of the Proposed Rule would violate the Contract Clause and be unconstitutional.

To begin with, the Proposed Rule substantially impairs the preexisting lease contract between EPCO and the private developer. The lease agreement is for 5 years with an annual lease payment of \$55,000. Under the current formula, EPCO's member districts would be reimbursed that full amount annually. The Proposed Rule, however, would reimburse EPCO only \$22,000 annually. This leaves EPCO and its members with a remaining \$33,000 due on the annual lease payment for which EPCO and its members will not be reimbursed. Yet, DESE does not even acknowledge this fact in the SBIS, Public Cost and Private Cost comments to the Proposed Rule, other than to say that districts will have to make up the difference and can renegotiate their leases. Aside from the fact that there will be few developers willing to renegotiate an already agreed upon lease amount, the failure to adequately consider the impact does not negate the substantial impact the Proposed Rule has on existing contractual relationships.

Furthermore, the Proposed Rule does not satisfy the second prong of the Contracts Clause test, in that there is no legitimate public purpose sufficient to justify the substantial impairment this will have on current contractual relationships. As the Supreme Court stated in *Energy Reserves*, "[i]f the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem ... The requirement of a legitimate public purpose guarantees that the State is exercising its police power, rather than providing a benefit to special interests. 459 U.S. at 411-12.

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DESE's stated purpose behind the Proposed Rule is to save the department money and to improve departmental efficiency and operational effectiveness.<sup>4</sup> This is not the "significant and legitimate public purpose" that the Supreme Court envisioned for allowing the impairment of a contract. Rather, the Supreme Court saw the "remedying of a broad and general social or economic problem" as the goal. *Energy Reserves*, at 411-12. Accordingly, it does not rise to the level required to pass constitutional scrutiny.

Finally, in order not to violate the Contracts Clause the adjustment of rights of the contracting parties has to be based upon reasonable conditions and be of a character appropriate to the public purpose. *Id.* at 412-13. The public purpose stated here is to "improve departmental efficiency and operational effectiveness." As discussed above, this purpose is an internal purpose and does not justify interfering with the rights of two parties who already have entered into an arm's length negotiated contract. Further, DESE has failed to offer any reasonable conditions that would accommodate the contractual rights of those impacted by the Proposed Rule. For instance, DESE could have allowed for a grace period before the new formula under the Proposed Rule would take effect, and ensured that the new formula would not apply retroactively to leases entered into before the effective date. As such, the Proposed Rule does not satisfy the third prong of the Contracts Clause test. Since the Proposed Rule does not satisfy any of the three prongs of the test, it violates the Contracts Clause and is unconstitutional.

In addition to violating the U.S. Constitution, the Proposed Rule also violates the Missouri Constitution. The Missouri Constitution directs that property taxes and other local taxes cannot be increased without voter approval, and that the state is prohibited from requiring any new or expanded activities by counties and other political subdivisions without full state financing. Mo. Const. art. X, section 16. Further, section 21 of the Missouri Constitution prohibits a reduction of the state financed proportion of the costs of any existing activity or service required of counties and other political subdivisions. Mo. Const. art. X section 21. These constitutional provisions are collectively known as the Hancock Amendment, and its provisions have been interpreted by Missouri Courts on numerous occasions.

The Missouri Supreme Court has addressed the Hancock Amendment in the context funding school districts for special education programs for three and four year old students. *Rolla 31 Sch. Dist. v. State*, 837 S.W.2d 1 (Mo. 1992). In *Rolla 31*, the Missouri General Assembly established that school districts had to create these special education programs, but wanted to require local districts to provide 10% of the funds. The court held that this was a violation of the Hancock Amendment because the legislature failed to provide a specific allocation to cover the full cost of the program; local districts would have to raise taxes to pay for the difference. *Id.* at 6-7.

The Missouri Constitution requires the state to fund any state-mandated program. Pursuant to §162.700, RSMo., early childhood special education services are mandatory and are paid through state and federal appropriated funds. The state cannot require the local district to pay for these services. The Proposed Rule specifically states that if the local district cannot renegotiate its lease, then the local district has to make up the difference between the lease

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<sup>4</sup> See "Consideration of a Notice of Proposed Rulemaking to Adopt Rule 5 CSR 30-640.200 Early Learning Facilities Funding Formula for Lease Agreements," State Board of Education Agenda Item, Department Goal No. 4, January 2015.

amount and the amount funded under the Proposed Rule. However, this goes directly against the holding in *Rolla 31*. DESE is fully aware of this requirement. In the Early Childhood Special Education Expenditure Guide they advise that:

In 1990, Missouri chose to extend its participation in the federal special education grant and provide FAPE to three, four, and five year old children with disabilities through the Early Childhood Special Education (ECSE) Program. This required mandating the program statewide. Pursuant to Section 162.700 RSMo; ECSE services are mandatory and program costs associated with these services are paid through state and federal appropriated funds. No local funds support this program due to a Missouri Supreme Court Decision ... In 1992, the Missouri Supreme Court ruled that if Missouri mandated services for the three and four year old population, it must reimburse the costs for these services (*Rolla 31 School District v. State of Missouri*, 837 SW2d 1).

DESE Early Childhood Special Education Expenditure Guide, p. 5. Despite DESE's knowledge that local funding was not available, the Proposed Rule requires the local districts to make up the difference between the amount funded and the amount of the lease. The Proposed Rule states that it "may cost the local school districts ... \$1,039,130 in fiscal year 2015 if the current lease amount is not renegotiated ..." However, under the Hancock Amendment and *Rolla 31*, the state must cover the entire funding of a state-mandated program such as ECSE. Therefore, the local districts cannot be required to contribute to any of the funding, and the Proposed Rule is unconstitutional.

The issues discussed above are significant, as is the effect that the Proposed Rule will have on school districts throughout the state. The Proposed Rule has inadequate and inaccurate fiscal notes, violates the Contracts Clause of the U.S. Constitution, violates the Hancock Amendment in the Missouri Constitution, and is directly prohibited by a Missouri Supreme Court decision. Accordingly, on behalf of EPCO, I strongly urge DESE to reconsider the Proposed Rule and either withdraw it completely, or amend it so that there is a later effective date and existing leases are exempted from the new reimbursement formula.

I appreciate the opportunity to provide these comments on behalf of EPCO

Sincerely,

A handwritten signature in blue ink that reads "Duane A. Martin" followed by "by TTS" in a smaller, less legible script.

Duane A. Martin

DAM/tcs