

STATE OF MICHIGAN  
IN THE SUPREME COURT

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In re REQUEST FOR ADVISORY OPINION  
REGARDING CONSTITUTIONALITY OF  
2016 PA 249

Supreme Court  
Case No. 154085

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**BRIEF AMICI CURIAE IN OPPOSITION TO THE CONSTITUTIONALITY  
OF SECTION 152b OF 2016 PA 249**

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### **JURISDICTIONAL STATEMENT**

The Legislature passed 2016 PA 249 (“PA 249”) on June 8, 2016. PA 249 was signed into law by Governor Snyder on June 27, 2016. Governor Snyder asked this Court to issue an advisory opinion on July 13, 2016, pursuant to the Court’s discretionary authority to issue such an opinion in MCR 7.303(B)(3) and MCR 7.308(B) on the question of the constitutionality of Section 152b of PA 249. On July 20, 2016, this Court issued an Order inviting other persons or interested groups to move the Court for permission to file briefs *amicus curiae* on: (1) whether the Court should exercise its discretion to grant the Governor’s request to issue an advisory opinion in this matter; and (2) whether the appropriation to nonpublic schools authorized by Section 152b of 2016 PA 249 would violate Const. 1963, art 8, § 2.

**STATEMENT OF QUESTIONS INVOLVED**

- I. WHETHER THE COURT SHOULD EXERCISE ITS DISCRETION TO GRANT THE GOVERNOR’S REQUEST TO ISSUE AN ADVISORY OPINION IN THIS MATTER?**

Amici Curiae take no position.

- II. WHETHER THE APPROPRIATION TO NONPUBLIC SCHOOLS AUTHORIZED BY SECTION 152b OF 2016 PA 249 WOULD VIOLATE CONST 1963, ART 8, § 2?**

Amici Curiae answer “Yes.”

## SUMMARY OF THE ARGUMENT

On November 25, 2014, the Michigan Department of Education, in compliance with its obligation from 2014 PA 252, produced the Nonpublic Mandate Report listing a series of statutes and regulations of which the State of Michigan imposes duties upon nonpublic schools. Governor Rick Snyder signed 2016 PA 249 into law on June 27, 2016. PA 249 included Section 152b which appropriated \$2,500,000.00 of public funds towards reimbursing nonpublic schools for the actual costs of compliance with the statutes and regulations in the Nonpublic Mandate Report.

*Amici Curiae* state that Article VIII, § 2, ¶ 2, of the Michigan Constitution of 1963 prohibits the appropriation in Section 152b. Paragraph 2 prohibits public funding for nonpublic schools, prohibits public funds from being used, directly or indirectly, to support either the attendance of students at nonpublic schools or the employment of persons at nonpublic schools. The funding in Section 152b will, directly or indirectly, support the attendance of students or the employment of persons at nonpublic schools. Furthermore, the statutes and regulations identified in the Department of Education's Nonpublic Mandate Report are generally borne by every business or every school in the State of Michigan. Therefore, the expenses reimbursed by Section 152b are necessary elements of any school's existence.

*Amici Curiae* request the Court hold that the appropriation of \$2,500,000.00 in Section 152b of 2016 PA 249 is unconstitutional for violating Article VIII, § 2, of the Michigan Constitution of 1963.

## STANDARD OF REVIEW

This Court has stated in prior cases that the “Michigan Constitution . . . restricts advisory opinions to

- important questions of ‘law,’
- concerning the ‘constitutionality’ of legislation,
- ‘upon solemn occasions’ when requested by either house of the Legislature or the Governor,
- after the legislation has been enacted into law but before the effective date.”

*In re Request for Advisory Opinion, Enrolled House Bill No. 5250 (Being 1975 PA 227)*, 395 Mich 148, 149, 235 NW2d 321 (1975) (quoting *Advisory Opinion re Constitutionality of 1972 PA 294*, 389 Mich 441, 482-83, 208 NW2d 469, 483 (1973) (Levin, J., concurring)). “As suggested by the ‘important question of law’ requirement, the request for an advisory opinion must ‘particularize any claims of unconstitutionality.’” *Id.* (quoting *Advisory Opinion re Constitutionality of 1972 PA 294*, supra, 389 Mich 441, 484, 208 NW2d 469). “A request stated too broadly cannot be considered.” *Id.* (citing *Advisory Opinion re Constitutionality of 1974 PA 272*, 393 Mich 916 (1975)).

“Statutes are presumed to be constitutional, and courts have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent.” *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich 295, 307; 806 NW2d 683 (2011) (quoting *Taylor v Gate Pharm*, 468 Mich 1, 6, 658 NW2d 127 (2003)). “We [the Court] exercise the power to declare a law unconstitutional with extreme caution, and we never exercise it where serious doubt exists with regard to the conflict.” *Id.* at 307-08 (quoting *Phillips v Mirac, Inc.*, 470 Mich 415, 422, 685 NW2d 174 (2004)). “[T]he burden of proving that a statute is unconstitutional rests with the party challenging it . . .” *Id.* at 308 (quoting *In re Request for*

*Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1, 11; 740 NW2d 444 (2007)). “[W]hen considering a claim that a statute is unconstitutional, the Court does not inquire into the wisdom of the legislation.” *Id.* (quoting *Taylor*, 468 Mich at 6, 658 NW2d 127).

## I. STATEMENT OF FACTS

The central element of Section 152b is the Nonpublic Mandate Report published by the Michigan Department of Education on November 25, 2014. (Attached as Exhibit 1). This report forms the basis for outlining what costs are made reimbursable as a part of Section 152b. Therefore, it is important and relevant to the Court’s analysis to review the history of the Nonpublic Mandate Report, as well as the direct legislative history, what little there is, of Section 152b of PA 249.

### A. HISTORY OF THE NONPUBLIC MANDATE REPORT

The Nonpublic Mandate Report originated during the Legislature’s budget deliberations for the 2014-2015 fiscal year. This provision first appeared in the Senate’s budget for the Michigan Department of Education (“the Department”), Senate Bill 765. During a meeting of the Senate Appropriations Committee on April 22, 2014, former Senator Howard Walker offered an amendment to the bill to require the Department to compile a report that would identify mandates for public and nonpublic schools.<sup>1</sup> The amendment was approved by the Appropriations Committee and was included in Senate Bill 765.<sup>2</sup> The Appropriations Committee voted to report the bill with recommendation to the full Senate.<sup>3</sup> The Senate passed

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<sup>1</sup> "Senate Appropriations Committee Meeting Audio File, April 22, 2014." Michigan Senate Committee Audio Files, See: Appropriations-04-22-2014\_0203PM\_56\_65.mp3. April 22, 2014. Accessed August 15, 2016. <http://www.senate.michigan.gov/committeeaudio/2013-2014.aspx>.

<sup>2</sup> "Substitute for Senate Bill 765." Michigan Legislature. April 29, 2014. Accessed August 15, 2016. <http://www.legislature.mi.gov/documents/2013-2014/billengrossed/Senate/pdf/2014-SEBS-0765.pdf>.

<sup>3</sup> "Michigan Senate Appropriations Committee Meeting Minutes, April 22, 2014." Michigan Legislature. April 22, 2014. Accessed August 15, 2016. <http://legislature.mi.gov/documents/2013-2014/CommitteeDocuments/Senate/Appropriations/Meeting Minutes/2014-SCM-APPROPS-04-22-1.PDF>.

the bill on May 8, 2014, with twenty-eight (28) members supporting and ten (10) members opposing.<sup>4</sup>

The House of Representatives passed its own omnibus bill, House Bill 5313, without including the mandate report requirement.<sup>5</sup> Conference Committees, made up of three (3) senators and three (3) representatives, were formed to resolve the items of difference between the Senate and House plans.<sup>6</sup> A Conference Committee was held on Senate Bill 765 on June 10, 2014. The Committee included the mandate report requirement provision and reported Senate Bill 765 back to the Senate.<sup>7</sup> A Conference Committee was also held on the consideration of House Bill 5313, which was amended to include the mandate report requirement.<sup>8</sup>

Once Senate Bill 765 was returned to the Senate, it was not further acted on by the Legislature. It was referred to the Appropriations Committee where it essentially died.<sup>9</sup> Following established practice, the Senate bill was abandoned, and instead, House Bill 5313 moved forward containing the relevant provisions of the Senate bill.<sup>10</sup> When the Conference Report on House Bill 5313 was received by the Senate, the Senate Journal noted that the

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<sup>4</sup> "Senate Bill 765 History." Michigan Legislature. May 8, 2014. Accessed August 15, 2016. [http://www.legislature.mi.gov/\(S\(z54yvi3afuqy3mb1sk4dmaxu\)\)/mileg.aspx?page=getObject&objectName=2014-SB-0765](http://www.legislature.mi.gov/(S(z54yvi3afuqy3mb1sk4dmaxu))/mileg.aspx?page=getObject&objectName=2014-SB-0765).

<sup>5</sup> "Substitute for House Bill 5313." Michigan Legislature. May 6, 2014. Accessed August 15, 2016. <http://www.legislature.mi.gov/documents/2013-2014/billengrossed/House/pdf/2014-HEBH-5313.pdf>.

<sup>6</sup> "History of House Bill 5313." Michigan Legislature. May 20, 2014. Accessed August 15, 2016. [http://www.legislature.mi.gov/\(S\(ykvlakr1qdqx1qqujmfvhkgy\)\)/mileg.aspx?page=getObject&objectName=2014-HB-5313](http://www.legislature.mi.gov/(S(ykvlakr1qdqx1qqujmfvhkgy))/mileg.aspx?page=getObject&objectName=2014-HB-5313).

<sup>7</sup> "Department of Education Conference Committee, Senate Bill 765, June 10, 2014." Michigan Senate Committee Audio Files, See: DofED-06-10-2014\_0805AM\_19\_88.mp3. June 10, 2014. Accessed August 15, 2016. <http://www.senate.michigan.gov/committeeaudio/2013-2014.aspx>.

<sup>8</sup> "Michigan Senate Journal, No. 57, June 12, 2014." Michigan Legislature. June 12, 2014. Accessed August 15, 2016. [http://www.legislature.mi.gov/\(S\(ykvlakr1qdqx1qqujmfvhkgy\)\)/documents/2013-2014/Journal/Senate/pdf/2014-SJ-06-12-057.pdf](http://www.legislature.mi.gov/(S(ykvlakr1qdqx1qqujmfvhkgy))/documents/2013-2014/Journal/Senate/pdf/2014-SJ-06-12-057.pdf).

<sup>9</sup> "History of Senate Bill 765." Michigan Legislature. June 12, 2014. Accessed August 15, 2016. [http://www.legislature.mi.gov/\(S\(ykvlakr1qdqx1qqujmfvhkgy\)\)/mileg.aspx?page=getObject&objectName=2014-SB-0765](http://www.legislature.mi.gov/(S(ykvlakr1qdqx1qqujmfvhkgy))/mileg.aspx?page=getObject&objectName=2014-SB-0765).

<sup>10</sup> *Id.*

Conference Committee recommended receding from the Senate Bill and instead, the Conference Committee recommended that both chambers agree to the Conference Report on House Bill 5313.<sup>11</sup>

The Conference Report on House Bill 5313 passed the Senate and House on June 12, 2014, and was signed into law by Governor Snyder on June 30, 2014.<sup>12</sup> The provision containing the mandate report reads as follows:

Sec. 236. From the funds appropriated in part 1, the department shall compile a report that identifies the mandates required of nonpublic schools. In compiling the report, the department may consult with relevant statewide education associations in Michigan. The report compiled by the department shall indicate the type of mandate, including, but not limited to, student health, student or building safety, accountability, and educational requirements, and shall indicate whether a school has to report on the specified mandates. The report required under this section shall be completed by April 1, 2015 and transmitted to the state budget director, the house and senate appropriations subcommittees responsible for the department of education, and the senate and house fiscal agencies not later than April 15, 2015.<sup>13</sup>

The report was released by the Department on November 25, 2014. It contains a list of forty-four (44) mandates that are imposed on nonpublic schools. The report notes that while some of the mandates are specific to school operations, some are health and safety measures that are required of other institutions as well.<sup>14</sup>

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<sup>11</sup> "Michigan Senate Journal, No. 57, June 12, 2014." Michigan Legislature. June 12, 2014. Accessed August 15, 2016. [http://www.legislature.mi.gov/\(S\(ykvlakr1gdqx1qqujmfvhkgy\)\)/documents/2013-2014/Journal/Senate/pdf/2014-SJ-06-12-057.pdf](http://www.legislature.mi.gov/(S(ykvlakr1gdqx1qqujmfvhkgy))/documents/2013-2014/Journal/Senate/pdf/2014-SJ-06-12-057.pdf).

<sup>12</sup> "House Bill 5313 History." Michigan Legislature. June 30, 2014. Accessed August 15, 2016. [http://www.legislature.mi.gov/\(S\(jc0xkyzisqnm3eiro054wgzy\)\)/mileg.aspx?page=getObject&objectName=2014-HB-5313](http://www.legislature.mi.gov/(S(jc0xkyzisqnm3eiro054wgzy))/mileg.aspx?page=getObject&objectName=2014-HB-5313).

<sup>13</sup> "Public Act 252 of 2014." Michigan Legislature. June 30, 2014. Accessed August 15, 2016. <http://www.legislature.mi.gov/documents/2013-2014/publicact/pdf/2014-PA-0252.pdf>.

<sup>14</sup> "Nonpublic Mandate Report." MLive Media Group. November 25, 2014. Accessed August 15, 2016. [http://media.mlive.com/news\\_impact/other/MDE\\_Mandate\\_Report\\_2014-Revised.pdf](http://media.mlive.com/news_impact/other/MDE_Mandate_Report_2014-Revised.pdf).

**B. THE CONTENT OF THE EXISTING NONPUBLIC MANDATE REPORT  
PUBLISHED ON NOVEMBER 25, 2014**

Section 236 of 2014 PA 252 required the Michigan Department of Education to “...compile a report that identifies the mandates required of nonpublic schools.” The statute did not define “mandates” nor explain whether there was a difference between those matters that were ministerial and those which required an actual expenditure of resources.

The department’s report identified forty-four (44) different matters, both statutory and regulatory, which the Department considered “mandates” to nonpublic schools. However, the report did not differentiate between those matters which applied to every or almost every employer in the State of Michigan; those which applied to all schools, public or nonpublic and those which were unique to nonpublic schools. Further the report did not explain whether a specific mandate would require the expenditure of funds or whether it was a restriction on who could be hired and who could teach.

A review of the forty-four (44) items shows that thirteen (13) are applicable to any entity doing business in the state or any person with responsibilities to children. The Department included MCL 408.411 in its list; this is the State’s minimum wage law. Similarly the Department included MCL 423.501, the “Bullard-Plawicki” statute which applies to every employer in the State. These “mandates” are obligations imposed on every entity of any type which employs anyone.

Some twelve (12) items are applicable to every school of every type. These include the necessity for fire drills, MCL 29.19 and the inspection of school busses, MCL 257.715a. Three (3) items relate to who is permitted to teach and what license or certification they must have. These include MCL 380.1531 requiring certifications for teachers and counselors.

Seven (7) items relate to obligations created by statute but none of the obligations is imposed on a school. MCL 380.1177 requires parents to provide evidence of certain immunizations; MCL 380.1561 requires attendance at school. These requirements are imposed on parents or teachers but not on the school or school district.

Two (2) items relate to curriculum requiring education in English, MCL 380.1151, and requiring education relating to the constitutions of the United States and that of the State of Michigan; MCL 380.1166.

Section 152b of 2016 PA 249 is specific to this report. The only matters relevant to the statute are these forty-four (44) items. Yet there is no evidence that any public or nonpublic school actually expends resources to comply with these obligations or if they do, what those costs might entail. And few of these obligations are unique to public and nonpublic schools in particular.

**C. FACTS LEADING UP TO THE PASSAGE OF 2016 PA 249 AND THE APPROPRIATION OF \$2,500,000.00 TO NONPUBLIC SCHOOLS**

On February 16, 2016, Senator Goeff Hansen introduced Senate Bill 796, the School Aid budget bill for the 2016-2017 fiscal year, which will begin on October 1, 2016.<sup>15</sup> The School Aid budget funds the operations of local public schools.<sup>16</sup> Following the typical practice for appropriations bills, Senate Bill 796 contained blank spaces for the amount of total appropriations for the upcoming fiscal year.<sup>17</sup> These numbers would be determined later on in the legislative process after deliberations, and the bill would be amended accordingly.

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<sup>15</sup> "Michigan Senate Journal." Michigan Legislature. February 16, 2016. Accessed August 8, 2016. [http://www.legislature.mi.gov/\(S\(yfuohg1hafiitm5naqqxmvg\)\)/documents/2015-2016/Journal/Senate/pdf/2016-SJ-02-16-015.pdf](http://www.legislature.mi.gov/(S(yfuohg1hafiitm5naqqxmvg))/documents/2015-2016/Journal/Senate/pdf/2016-SJ-02-16-015.pdf).

<sup>16</sup> "School Aid/K-12 General Overview." Senate Fiscal Agency. November 2014. Accessed August 8, 2016. [http://www.senate.michigan.gov/sfa/Departments/Overview/OVk12\\_web.pdf](http://www.senate.michigan.gov/sfa/Departments/Overview/OVk12_web.pdf).

<sup>17</sup> "Senate Bill 796, As Introduced." Michigan Legislature. February 16, 2016. Accessed August 8, 2016. <http://www.legislature.mi.gov/documents/2015-2016/billintroduced/Senate/pdf/2016-SIB-0796.pdf>.

In the following months, multiple public hearings were held by a Senate subcommittee focused on School Aid issues. During this process, legislators and stakeholders discussed funding needs and crafted what would eventually become the final version of the School Aid budget.<sup>18</sup> Legislators heard testimony from relevant state departments, local governments, and interested parties. The bill grew in substantive content and now contained firm dollar amounts to be appropriated for public schools and for other purposes related to education needs. After the subcommittee's work was complete, the School Aid budget contained in Senate Bill 796 advanced to the larger Senate Appropriations Committee, which would consider the bill and make desired changes.

The Senate Appropriations Committee considered Senate Bill 796 at a meeting on April 14, 2016.<sup>19</sup> Approximately sixteen (16) minutes into the meeting, the chairman, Senator Dave Hildenbrand, introduced an amendment to add \$5,000,000 to the School Aid budget for the purpose of reimbursing nonpublic schools for costs associated with state-mandated requirements.<sup>20</sup> This was the first time in the budget deliberations process that this issue was discussed during committee testimony. The following exchange ensued between Senator Hildenbrand and two other members of the committee:

Senator Hildenbrand: "We will start with amendment number one. It will add \$5 million to the School Aid budget to reimburse nonpublic schools for costs associated with state-mandated requirements. It will be up to \$50 per pupil at nonpublic schools to reimburse them for their costs. So with that, I move the amendment, supported by Senator Hansen. Mr. Clerk, will you please call the roll."

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<sup>18</sup> Senate Fiscal Agency. Appropriations Process. Lansing, MI: Senate Fiscal Agency, 2014. December 2014. Accessed August 8, 2016. <http://www.senate.michigan.gov/sfa/BudgetProcess/AppropsHandbook.pdf>.

<sup>19</sup> "Senate Appropriations Committee Meeting Minutes, April 14, 2016." Michigan Legislature. April 14, 2016. Accessed August 8, 2016. <http://www.senate.michigan.gov/committees/files/2016-scm-approps-04-14-1.pdf>.

<sup>20</sup> "Senate Appropriations Committee Meeting Audio File, April 14, 2016." Michigan Senate Committee Audio Files, See: Appropriations-04-14-2016\_0215PM\_52\_08.mp3. April 14, 2016. Accessed August 8, 2016. <http://www.senate.michigan.gov/committeeaudio/2015-2016.aspx>.

*Senator Hoon-Yung Hopgood interjected with a question before a vote was taken.*

Senator Hopgood: "Just a quick question. This is to reimburse nonpublic schools for costs the state mandates; was there any review or consideration of mandates that are placed on all schools?"

Senator Hildenbrand: "They get state funding for their mandated costs; it's part of their budgets. Nonpublic schools don't get any state funding, but are still required to do some of the same mandatory expenditures."

Senator Hopgood: "Does this money cover all of what is estimated to be the costs borne by nonpublic [schools]?"

Senator Hildenbrand: "I don't think that it does. It only covers partial; up to \$50 per student. I think they do have more than that, but this will cover partial."

Senator Hopgood: "Can you just indulge me, do we have a sense of how much it is for the nonpublic [schools]?"

Senator Hildenbrand: "There is actually a report that was done, I believe by the Department of Education, I don't have the report with me, but I'd encourage you to take a look at it. It was done a year, year and a half ago, and it outlines some of the non-mandated costs associated. I did have some examples...background checks, safety drills, immunization verifications, and things like that that the state requires."

Senator Hopgood: "It wasn't a question of whether or not there were mandates or there were costs that were borne; I'm just trying to get a gauge on what it is, because this is an amendment that we are just seeing."

Senator Hildenbrand: "Okay, no problem. I move the amendment, supported by Senator Hansen. Mr. Clerk, please call the roll."

*Senator Coleman Young II interjected with a question before a vote was taken.*

Senator Young: "I'm sorry, Mr. Chairman, why are we doing this? We're taking \$5 million and we're giving this to nonpublic schools for what? For a mandate that they had to follow?"

Senator Hildenbrand: "The state mandates them to do certain things."

Senator Young: "Like what? Like reporting requirements?"

- Senator Hildenbrand: “Exactly. Fire drills, reporting requirements, immunization verification, things like that that the state requires and they don’t pay for, and the state does pay public schools for those, to do those services, so this is going to help them offset some of that cost. It won’t cover it all, but it will help them cover some of their expenditures.”
- Senator Young: “I just don’t understand...why are we paying them back for these? Why are we giving public money to that?”
- Senator Hildenbrand: “Because we are requiring them, as a government, to do these things, and not covering the costs.”
- Senator Young: “But it’s safety stuff, you understand? I can understand if we were mandating them to provide some major education service, but from my understanding, correct me if I’m wrong, it’s basic stuff they should be doing already. Why are we paying them back for that? That’s just for safety and well-being.”
- Senator Hildenbrand: “I appreciate where you’re coming from, Senator Young. I think we have a difference of opinion on this, so, Mr. Clerk, will you please take the roll on the amendment?”

That exchange, less than four (4) minutes long, was the only public discussion on the appropriation. There was no testimony from the education community or other stakeholders regarding this addition to the budget. The amendment was adopted with twelve (12) members supporting, two (2) members opposing, and three (3) members abstaining from voting. After other amendments to the bill were adopted, the committee voted to report the bill favorably to the full Senate for consideration.<sup>21</sup>

The Senate took up the bill on May 4, 2016. Senator Morris Hood III sponsored an amendment to remove the funding for the nonpublic schools mandate reimbursement.<sup>22</sup> The amendment failed, with twelve (12) members supporting and twenty-four (24) members

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<sup>21</sup> Senate Appropriations Committee Meeting Minutes, April 14, 2016, at 4.

<sup>22</sup> "Michigan Senate Journal." Michigan Legislature. May 4, 2016. Roll Call No. 239. Accessed August 8, 2016.

opposing. The Senate passed the bill on May 5, 2016, with twenty-six (26) members supporting and ten (10) members opposing.<sup>23</sup>

While the Senate was occupied with Senate Bill 796, the House of Representatives passed an education omnibus bill which also included funding for the nonpublic school mandate reimbursement.<sup>24</sup> After both chambers passed their versions of the budget, custom practice was followed by which each chamber rejected the other chamber's respective bills, and the bills were referred to a Conference Committee.<sup>25</sup> Three (3) legislators from each chamber were named conferees to the committee. The conferees were tasked with resolving items of difference between the House and Senate versions of the budget bills.

On May 31, 2016, a Conference Committee meeting was held on Senate Bill 796. One of the items of difference between the Senate and House budgets was the amount of money appropriated for the nonpublic school mandate reimbursement. The Senate had appropriated \$5,000,000, and the House had appropriated \$1,000,000. A majority of the conferees settled on a compromise of \$2,500,000.<sup>26</sup> Representative Sarah Roberts sponsored an amendment to remove the funding. The amendment was a multi-part amendment that made cuts to several programs in the conference report. Representative Roberts offered the following explanation for the portion of the amendment that would have removed the reimbursement funding:<sup>27</sup>

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<sup>23</sup> "Michigan Senate Journal." Michigan Legislature. May 5, 2016. Roll Call No. 250. Accessed August 8, 2016.

<sup>24</sup> "Substitute for House Bill 5291." Michigan Legislature. April 14, 2016. Accessed August 8, 2016. [http://www.legislature.mi.gov/\(S\(aot5m2bfqvazaehvvuhaulpdd\)\)/documents/2015-2016/billcurrentversion/House/PDF/2016-HCVBH-5291-10654.PDF](http://www.legislature.mi.gov/(S(aot5m2bfqvazaehvvuhaulpdd))/documents/2015-2016/billcurrentversion/House/PDF/2016-HCVBH-5291-10654.PDF).

<sup>25</sup> Appropriations Process at 7.

<sup>26</sup> "Senate Fiscal Agency Bill Analysis, Senate Bill 796 Conference Report." Michigan Legislature. May 31, 2016. Accessed August 8, 2016. <http://www.legislature.mi.gov/documents/2015-2016/billanalysis/Senate/pdf/2015-SFA-0796-R.pdf>.

<sup>27</sup> "Senate Conference Committee on Senate Bill 796 Meeting Audio File, May 31, 2016." Michigan Senate Committee Audio Files, See: K12-05-31-2016\_1258PM\_18\_12.mp3. May 31, 2016. Accessed August 8, 2016. <http://www.senate.michigan.gov/committeeaudio/2015-2016.aspx>

- Representative Roberts: “The last part is cutting the two and a half million to reimburse nonpublic schools because they are mandated by state law to do certain things that public schools have to do, like perform criminal background checks on teachers and other school personnel. We have a lot of state mandates, a lot of mandates that businesses have to follow, and I think when we start to reimburse nonpublic schools this becomes a real slippery slope, and we could be opening up the door for all kinds of businesses and organizations and entities that have to meet state requirements coming back and saying, ‘Well, we want to get reimbursed for that.’ So, with that, I move my amendment, and I ask for support.”
- Senator Hansen: “Okay. It’s moved by Representative Roberts, supported by Senator Hopgood. A lot of things in one small amendment. I appreciate your passion.”
- Representative Roberts: “I just wanted to make it compact and concise.”
- Senator Hansen: “Well, I appreciate that we didn’t have 15 amendments, but I would have to say that we’ve done a lot of work on this budget and I’d hate to change everything around with this one amendment. So I would ask for a ‘no’ vote. Please call the roll.”

The amendment failed, with two (2) members supporting and four (4) members opposing. There was no further discussion on the issue. Less than seven (7) minutes after Representative Roberts’ amendment failed, the Conference Committee moved the bill forward with the \$2,500,000 appropriation in place.<sup>28</sup>

After the Conference Committee process, individual budgets are consolidated into two (2) omnibus budgets: an education omnibus bill containing appropriations for School Aid, Higher Education, and Community Colleges, and a general omnibus bill containing

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<sup>28</sup> *Id.*

appropriations for other state departments. The School Aid budget bill was rolled into Senate Bill 801, the education omnibus bill.<sup>29</sup>

On June 8, 2016, the Senate voted on final passage of Senate Bill 801. It passed with twenty (20) members supporting and seventeen (17) members opposing.<sup>30</sup> Governor Snyder signed the budget into law as Public Act 249 on June 27, 2016.<sup>31</sup> Questions about the constitutionality of the nonpublic schools mandate reimbursement funding led the Governor to request the Michigan Supreme Court issue an advisory opinion on the matter.<sup>32</sup>

The appropriation at issue is contained in Section 152b of Public Act 249 of 2016.

It reads, in part:

- (1) From the general fund money appropriated under Section 11, there is allocated an amount not to exceed \$2,500,000.00 for 2016-2017 to reimburse costs incurred by nonpublic schools as identified in the nonpublic school mandate report published by the department on November 25, 2014.

The appropriation adds that these funds are “considered to be incidental to the operation of a nonpublic school, are noninstructional in character, and are intended for the public purpose of ensuring the health, safety, and welfare of the children in nonpublic schools...” This instruction is clearly an attempt to immunize the appropriation from constitutional scrutiny by earmarking these funds for “incidental” expenses related to health and safety needs.

<sup>29</sup> "Michigan Senate Journal." Michigan Legislature. June 8, 2016. Accessed August 8, 2016. [http://www.legislature.mi.gov/\(S\(qndexhpx1jknezb2q3nw0d22\)\)/documents/2015-2016/Journal/Senate/pdf/2016-SJ-06-08-057.pdf](http://www.legislature.mi.gov/(S(qndexhpx1jknezb2q3nw0d22))/documents/2015-2016/Journal/Senate/pdf/2016-SJ-06-08-057.pdf)

<sup>30</sup> *Id.* at Roll Call 415.

<sup>31</sup> "History of Senate Bill 801." Michigan Legislature. August 3, 2016. Accessed August 8, 2016. [http://www.legislature.mi.gov/\(S\(qndexhpx1jknezb2q3nw0d22\)\)/mileg.aspx?page=getObject&objectName=2016-SB-0801](http://www.legislature.mi.gov/(S(qndexhpx1jknezb2q3nw0d22))/mileg.aspx?page=getObject&objectName=2016-SB-0801).

<sup>32</sup> "Governor's Request for Advisory Opinion." [http://www.michigan.gov/documents/snyder/letter\\_to\\_Bob\\_Young\\_529291\\_7.pdf](http://www.michigan.gov/documents/snyder/letter_to_Bob_Young_529291_7.pdf).

## II. ARGUMENT

A request for an advisory opinion should be considered under the standards enunciated by Justice Levin in *1972 PA 294*, but should also consider practical issues posed by the application of the legislation in question. *Amici Curiae* take no position on whether the Court should issue an advisory opinion in this matter.

If the Court should find it appropriate to issue an advisory opinion at this time, the Court should rule that, after review, the appropriation of funds to nonpublic schools in Section 152b must fail constitutional muster based upon the plain language of Const 1963, art 8, § 2 (“Article 8, Section 2”). This brief *Amici Curiae* advances a number of arguments against the constitutionality of Section 152b in light of Article 8, Section 2. First, the plain language of Article 8, Section 2, prohibits the appropriation of funds to nonpublic schools for the purposes provided for in Section 152b based upon a textual analysis of the constitutional section. If construed based upon the previously understood categories of expenses, then the Section 152b appropriation falls into a category of funding prohibited by Article 8, Section 2. The Nonpublic Mandate Report states that certain expenses are in fact “educational requirements” of nonpublic schools under Article 8, Section 2, and these educational requirements deserve separate analysis if the Court does not strike down Section 152b writ large.

### A. REVIEW OF CONSTITUTIONAL HISTORY AND CASE LAW ON ARTICLE 8, SECTION 2

Const 1963, Article 8, § 2, reads in part:

Nonpublic schools, prohibited aid

No public monies or property shall be appropriated or paid or any public credit utilized, by the legislature or any other political subdivision or agency of the state directly or indirectly to aid or maintain any private, denominational or other nonpublic, pre-elementary, elementary, or secondary school. No payment, credit, tax benefit, exemption or deductions, tuition voucher, subsidy, grant or loan of

public monies or property shall be provided, directly or indirectly, to support the attendance of any student or the employment of any person at any such nonpublic school or at any location or institution where instruction is offered in whole or in part to such nonpublic school students. The legislature may provide for the transportation of students to and from any school.

This second paragraph of Section 2 was added by Proposal C, a constitutional initiative amendment prepared by a citizens' group known as the Council Against Parochialism. Prior to the ratification of the amendment, Gov. William G. Milliken in 1970 PA 100 proposed appropriating \$22 million in direct aid to pay for the salaries of lay-teachers providing instruction on nonreligious subjects in nonpublic schools. Robert H. Longstaff, (Michigan Commentary Oct. 1, 1993) *Public Money for Private Education: The Ghost of 1970*. In response, the Council Against Parochialism drafted Proposal C and successfully got the proposal put on the election ballot in 1970. The amendment was ratified by popular vote on November 3, 1970, and became effective as of December 19, 1970. In response to a request from Representative Marvin R. Stempien concerning the possible impact of Proposal C, then-Michigan Attorney General Frank J. Kelley, issued Opinion of the Attorney General No. 4715 on November 3, 1970, stating the possible impact on a number of categories of aid to nonpublic schools. The Michigan Supreme Court reviewed Attorney General Kelley's Opinion in great detail in *In re Proposal C*, 384 Mich 390; 185 NW2d 9 (1971).<sup>33</sup>

Likely the most relevant part of the Court's opinion in *In re Proposal C* to the present matter was the overview of "auxiliary services." See *Id.* at 417-21. In the discussion, the Court held that such auxiliary services provided on equal basis to students attending both public and nonpublic schools did not violate the recently passed Proposal C. See *Id.* As the Court understood at the time, the State Board of Education could provide for funding for

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<sup>33</sup> The case cited herein as *In re Proposal C* is sometimes referred to in other sources by the name *School District of Traverse City v Kelley* or simply *School District of Traverse City*.

services such as “health and nursing services and examinations; street crossing guard services; national defense education act testing services; speech correction services; visiting teacher services for delinquent and disturbed children . . .” *Id.* at 417-18 (quoting MCL 340.622<sup>34</sup> (repealed by 1976 PA 451, § 1851)). As a result, the category of “auxiliary services” as discussed by *In re Proposal C*, is limited to “special educational services designed to remedy physical and mental deficiencies of school children and provide for their physical health and safety” as defined by the Auxiliary Services Act.” *Id.* at 418-120. The Court specifically commented on the limitations of its holding on auxiliary services:

The clause in the Act . . . does not give the legislature a blank check to make any services a health and safety measure outside the reach of Proposal C simply by calling it an auxiliary service.

We do not read the prohibition against public expenditures to support the employment of persons at nonpublic schools to include policemen, firemen, nurses, counsellors and other persons engaged in governmental, health, and general welfare activities.

*Id.* at 420.

In 1975, the Court next reviewed the constitutionality of a statute under the language in Proposal C. In *In re Advisory Opinion re Constitutionality of 1974 PA 242*, the Court examined the constitutionality of an appropriation of funds to students for textbooks and supplies, which in effect subsidized educational materials for students attending both public and nonpublic schools. See *In re Advisory Opinion re Constitutionality of 1974 PA 242*, 394 Mich 41; 228 NW2d 772 (1975). In writing for the majority in *1974 PA 242*, Justice Swainson drew the distinction between “commodities ‘incidental’ to a school’s maintenance and support” and “essential aids that constitute a ‘primary’ feature of the educational process” *Id.* at 49.

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<sup>34</sup> The version of MCL 340.622 reviewed in *In re Proposal C* was repealed by 1976 PA 451, § 1851. The statute was revived with substantially the same language in 2008 and is now codified at MCL 380.1296.

Justice Swainson endorsed two parallel but similar tests for helping distinguish between “incidental commodities” and “primary features”; these were known as the “necessary elements of any school’s activity” test and the “integral fundamental part of the elementary and secondary education” test.<sup>35</sup> *Id.* Applying these tests, Proposal C would bar public funds from being used for “primary and essential elements of a private school’s existence.” *Id.*

The final time that the Supreme Court reviewed the substance of Article 8, Section 2, it held that shared-time instruction for students attending nonpublic school was constitutionally permissible so long as students attended public school classes on public school grounds. See *Snyder v Charlotte Pub Sch Dist, Eaton County*, 421 Mich 517, 553; 365 NW2d 151 (1984). This case generally held up the idea that students in nonpublic schools could take advantage of public-school elective courses, like band class, under the condition this instruction was provided on property owned by public schools.

Since the Court decided *Snyder* in 1984, it has not since decided any cases dealing specifically with Paragraph 2 of Article 8, Section 2. With the lack of particularized precedent, the Court must undertake a greater analysis of the situation if it intends to issue an advisory opinion in this matter.

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<sup>35</sup> These two (2) tests originated with the Michigan Supreme Court in a case decided in July, 1970, prior to the enactment of Proposal C. *Bond v Pub Schs of Ann Arbor Sch Dist*, 383 Mich 693, 701-02; 178 NW2d 484 (1970). The Court in *Bond* held that school districts could not charge fees for text books and supplies under the other language of Const 1963, art 8, § 2, that was in place prior to Proposal C. *Id.* While the Court mentioned both tests, it did not endorse one over the other.

**B. BASED UPON THE SCANT LEGISLATIVE HISTORY OF SECTION 152b of 2016 PA 249, THE LEGISLATURE IS NOT ENTITLED TO UTMOST DEFERENCE**

**1. The Proper Method of Interpreting Proposal C is to Look to the Understanding of the Voters Who Ratified the Amendment**

Generally speaking, the Supreme Court is required to give deference to the Legislature in passing laws and appropriating public funds. The Supreme Court has made clear that it will not question the “wisdom” of legislation, but it must undertake a review if and when a legitimate constitutional challenge to a statute exists. In conducting a constitutional review, appellate courts in Michigan must give deference to the legislative branch and only construe a statute as unconstitutional if that unconstitutionality is clearly apparent. *Gillette Commercial Operations North America et al v Dep’t of Treasury*, 312 Mich App 394, 407; 878 NW2d 891 (2015). “The burden of proving a statute is unconstitutional rests with the party challenging it . . . .” *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich 295, 308; 806 NW2d 683 (2011) (quoting *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1, 11; 740 NW2d 444 (2007)).

The primary principal of constitutional interpretation is that of “common understanding,” or better understood as “the sense of the words used that would have been most obvious to those who voted to adopt the constitution.” *Id.* at 309 (quoting *Straus v Governor*, 459 Mich 526, 533; 592 NW2d 53 (1999)). In determining what to consider when attempting to interpret the “common understanding,” the “proper objective” is “to determine the intent of the ratifiers in adopting the provision . . . .” *Id.* at 310 (quoting *Studier v Mich Pub Sch Employees’ Retirement Bd*, 472 Mich 642, 655-657; 698 NW2d 350 (2005)).

Proposal C was ratified by popular vote on an election ballot, not by state officials. The best method to understand the meaning of Proposal C is to determine what the voters

understood they were affirming by voting on Proposal C. In official sources for the State of Michigan, the “subject” of Proposal C was to “Prohibit public aid to nonpublic schools and students.”<sup>36</sup> In that sense, the voters understood they were broadly attempting to prohibit public funds from going towards nonpublic schools.

## **2. The Lack of Legislative Fact-Finding Prior to the Appropriation of \$2,500,000.00 to Fund Nonpublic Schools**

Prior to the committee meeting on April 14, 2016, there had been no discussion of appropriating funds in the School Aid budget to nonpublic schools. When the amendment came up to add these appropriations for nonpublic schools, the discussion of the matter lasted all of four (4) minutes. The committee neither asked for nor took any testimony from experts on the subject for the need for funds to be appropriated for these purposes, or the possible constitutional implication of this funding for nonpublic schools.

Likewise, the House of Representatives did not attempt any fact-finding on the subject but also voted to appropriate funding in an omnibus education bill. When multiple proposed amendments attempted to remove the provision for funding to nonpublic schools, they were all rejected without further information on the subject.

The prior bill that required the Department of Education to compile the Nonpublic Mandate Report did not mention that the future purpose of the bill was going to appropriate funding for nonpublic schools at some point in the future. Instead, Section 236 of Public Act 252 of 2014, merely required the Department of Education to make a list of mandates falling on nonpublic schools. The Report does not represent which of these mandates are unique to schools, which mandates are borne by all Michigan employers, or the financial impact of these

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<sup>36</sup> Initiatives and Referendums Under the Constitution of the State of Michigan of 1963, [http://www.michigan.gov/documents/sos/Const\\_Amend\\_189834\\_7.pdf](http://www.michigan.gov/documents/sos/Const_Amend_189834_7.pdf).

mandates on nonpublic schools. Despite lacking these details, the Legislature deemed the Report a sufficient basis for appropriating money without further inquiry.

This Court's practice is to interfere with the Legislature's function as little as possible. However, the Court cannot ignore that the Legislature passed this funding provision for nonpublic schools with little regard to its constitutionality or necessity. In the sliding scale of deference afforded by this Court to the Legislature, the scant legislative history behind Section 152b must count against the constitutionality of the legislation.

**C. THE LANGUAGE OF SECTION 152b OF 2016 PA 249 IS UNCONSTITUTIONAL ON ITS FACE BECAUSE IT VIOLATES ARTICLE 8, SECTION 2 OF THE MICHIGAN CONSTITUTION**

**1. Section 152b Violates the Michigan Constitution from a Textual Analysis Perspective**

Section 152b of PA 249 is first and foremost unconstitutional on its face. Subsection 1 of Section 152b states: "From the general fund money appropriated under section 11, there is allocated an amount not to exceed \$2,500,000.00 for 2016-2017 to reimburse costs incurred by nonpublic schools as identified in the nonpublic school mandate report published by the department on November 25, 2014 and under subsection (2)." 2016 PA 249, § 152b(1). This language appropriating funds stands in direct contradiction to the plain language of the Michigan Constitution, which states, in part: "No public monies or property shall be appropriated or paid . . . by the legislature . . . directly or indirectly to aid or maintain any private, denominational or other nonpublic, pre-elementary, elementary, or secondary school." Const 1963, art 8, § 2.

The first rule that a Court should follow in ascertaining the meaning of words in a constitution is to give effect to the plain meaning of such words as understood by the people who adopted it. *Bond v Public Schools of Ann Arbor School Dist*, 383 Mich 693, 699; 178 NW2d

484 (1970) (listing cases). The court is bound to interpret the words of the Michigan Constitution in a manner that gives sufficient effect to the “law the people have made.” *Sharp v City of Lansing*, 464 Mich 792, 886; 629 NW2d 873 (2001) (Kelly, J., dissenting) (quoting *People v Reichenbach*, 459 Mich 109, 119; 587 NW2d 1 (1998)). The meaning of language in the Michigan Constitution is subject to the “common understanding” of the language from the viewpoint of the individuals who adopted the constitutional language. Since this matter was approved by the voters in 1970, this Court should consider the understanding that the voters had in ratifying the amendment. According to summary documents published by the State of Michigan, the overview of Proposal C’s amendment to Article 8, Section 2 was meant to “[p]rohibit public aid to nonpublic schools and students.” In that sense, Section 152b of PA 249 stands in contradiction to the voters’ understanding of Article 8, Section 2.

The second rule of construction is to give controlling weight to the specific provisions when it conflicts with a broader provision. See *Advisory Opinion on Constitutionality of 1978 PA 426*, 403 Mich 631, 639-40; 272 NW2d 495 (1978). “The general provision is therefore left controlling in all cases where the specific provision does not apply.” *Id.* at 640 (citing *McDonald v Schnipke*, 380 Mich 14, 20; 155 NW2d 169 (1968) and *Hart v Wayne County*, 396 Mich 259, 273; 240 NW2d 697 (1976)). Leaving aside the question of the voters’ intent in ratifying Proposal C, in the second paragraph of Article 8, Section 2 of the Michigan Constitution there are two (2) “general” rules and one (1) “specific” rule. The general rules provide: (1) that no funds or appropriation from the legislature or any political subdivision or agency shall aid or maintain a nonpublic school; and (2) that no payment shall go to directly or indirectly benefit the attendance of a student or the employment of any person at such a nonpublic school. Const 1963, art 8, § 2. The only specific rule allows for transportation of students to and from any school, implying there is no restriction on the State or any school

district using public funds to transport students to and from nonpublic schools. *Id.* Based upon this second rule of constitutional construction, payments to nonpublic schools are still prohibited on the face on the Michigan Constitution because such appropriations do not fall into the transportation exception, the only exception articulated. In the absence of falling into the specific exception which the Legislature obviously knows how to create, the general rule is left to control, and in this case the general rule prohibits public funding for nonpublic schools.

The third rule of construction set forth by the Supreme Court states: “In construing constitutional provisions where the meaning may be questioned, the Court should have regard to the circumstances leading to their adoption and the purpose sought to be accomplished.” *Advisory Opinion on Constitutionality of 1978 PA 426*, supra, 403 Mich at 640 (quoting *Kearney v Board of State Auditors*, 189 Mich 666, 673; 155 NW 510, 512 (1915)). As a result, if the Court is not satisfied in using the first and second rules to come to a full understanding of Article 8, Section 2, under the facts presented in this matter, the Court can also examine the meaning behind the advocacy of the Council Against Parochialism and understand that the amendment was meant to limit the legislature and the governor from directly contributing towards the operation of nonpublic schools. Under this historical viewpoint, Section 152b again fails constitutional muster.

Regardless of how the Supreme Court finds it needs to interpret the constitutionality of Section 152b, each successive rule of construction leaves the Court in a position to strike down Section 152b as unconstitutional.

## 2. Section 152b Violates the Establishment Clause because It Will Provide Direct Financial Support to Religious Schools

The First Amendment to the Constitution of the United States provides that “Congress shall make no law respecting an establishment of religion . . .” US Const am 1. Likewise, the Michigan Constitution goes into greater detail when it states: “No money shall be appropriated or drawn from the treasury for the benefit of any religious sect or society, theological or religious seminary; nor shall property belonging to the state be appropriated for any such purpose.” Const of 1963, art 1, § 4. Because the category of nonpublic schools includes religious schools, any funds being appropriated to the broader category of nonpublic schools would include an appropriation of funds to religious schools, absent some specific exclusion. Since Section 152b contains no exclusion, Section 152b appropriates funds to religious schools. A simple reading of the third sentence of Article 1, Section 4, of the Michigan Constitution leaves no doubt that the Michigan Constitution is meant to prohibit public funds from supporting religious sects, including religious schools.

In *Lemon v Kurtzman*, the United States Supreme Court struck down statutes in Pennsylvania and Rhode Island when those states appropriated funds to support the salaries of teachers in religious schools and designated money for such things as textbooks. *Lemon v Kurtzman*, 403 US 602 (1971). Out of the *Lemon* case, the Supreme Court developed what became known as the “*Lemon* test,” which requires that all legislation: (1) must have a secular purpose; (2) must not have a principal effect of advancing or inhibiting religious practice; and (3) must not result in “excessive government entanglement” with religious affairs. *Id.* at 612-13. Legislation must pass all three tests or it violates the Establishment Clause of the United States Constitution. The Michigan Constitution is even more restrictive in that it specifically prohibits public funds from going to benefit any religious sect or society. Const of 1963, art 1, § 4. In the

context of Article 8, Section 2 issues, the furthest this Court has discussed the Establishment Clause was simply to say that when public school employees teach nonpublic school students on public school grounds, it does not create an Establishment Clause violation. *Snyder*, supra, 421 Mich at 541.

In the *Lemon* case, Chief Justice Burger, in his opinion for the Supreme Court's majority, drew a distinction under the Establishment Clause between payments made to schools and tax exemptions for places of religious worship. See *Lemon*, supra, 403 US at 624. In commenting upon this distinction, the Chief Justice opined that the argument that allowing payments to religious schools would progress to the inevitable state churches and state religion was more persuasive than when applied to a challenge over tax exemptions for churches. *Id.* ("The progression argument, however, is more persuasive here. We have no long history of state aid to church-related educational institutions comparable to 200 years of tax exemptions for churches.") Even though this Court has not engaged in extensive Establishment Clause review of issues surrounding Article 8, Section 2, of the Michigan Constitution, the resulting entanglement between church and state presented by Section 152b is a concern this Court must consider. As Chief Justice Burger implied, such small intrusion into the separation of church and state may progress into larger concerns if left unchecked. With the appropriation in Section 152b, the Legislature's reasoning is that it is merely covering the cost of certain regulatory requirements placed upon nonpublic schools—and by extension religious schools—normal and essential to their operations. What is now a \$2,500,000 appropriation represents only a small sliver of the State's education budget, but it requires no stretch of the imagination that the Legislature may search for other methods to funnel even more money to nonpublic and religious schools if Section 152b sustains a constitutional challenge. This is the exact sort of progressive harm that Chief Justice Burger warned against in *Lemon*.

Due to the entanglement between church and state presented by the appropriation of \$2,500,000.00, the Supreme Court should hold Section 152b unconstitutional pursuant to the Establishment Clause of the First Amendment to the United States Constitution and Article 1, Section 4 of the Michigan Constitution of 1963.

**3. Section 152b Is Indirect Financial Support for the Attendance of Students at Nonpublic Schools**

The second sentence of the second paragraph of Article 8, Section 2, of the Michigan Constitution states, in part: “No payment, credit, tax benefit, exemption or deductions, tuition voucher, subsidy, grant or loan of public monies or property shall be provided, directly or indirectly, to support the attendance of any student . . . at any such nonpublic school . . . .” Const 1963, art 8, § 2. Money, as opposed to other forms of property, is fungible. See, e.g., *People v Konesko*, 2005 WL 1632532, at \*2 (Mich App 2005) (citing 3 LaFave, *Substantive Criminal Law* (2d ed, 2003), § 19.5(d)); *People v \$176,598.00 US Currency*, 242 Mich App 342, 347 n. 4; 618 NW2d 922 (2000); *Michigan Soft Drink Ass’n v Dep’t of Treasury*, 206 Mich App 392, 405; 522 NW2d 643, 649 (1994) (citing *United States v Sperry Corp*, 493 US 52, 62 n 9 (1989)). While Section 152b’s stated purpose is to specifically reimburse costs incurred due to state-mandates, the Court must examine not only the enunciated purpose of the appropriation of funds, but also the impact of the appropriation. By looking at the reasonable impact of these funds, this Court can only conclude that by appropriating funds to pay for certain necessary expenditures, the Legislature is freeing up other money to support the educational aspect of nonpublic schools. Thus, Section 152b is indirect support of students’ attendance at nonpublic schools.

Assuming, arguendo, that nonpublic schools are financially supported by a combination of charging tuition from students and accepting private donations, and donations

are unaffected by this policy, the net effect of the State's reimbursement of overhead expenses would necessarily support the attendance of students or the employment of staff as a result, even if the specific reimbursements are said to cover non-educational expenses. However, the claimed nature of the expenses the Legislature intended to cover under Section 152b is not dispositive because Article 8, Section 2, includes a prohibition against either "directly or indirectly" supporting the attendance of a student. Const 1963, art 8, § 2. As long as these costs would have had to have been paid by the nonpublic schools regardless, the State absorbing these costs relieves some of the financial burden, thus having the net effect of lowering the cost of tuition to students or increasing funding for educational activities. Section 152b is unconstitutional under Article 8, Section 2, because it is an indirect subsidy to support the attendance of students at nonpublic schools.

**4. Section 152b Is Direct Financial Support for the Employment of Persons at Nonpublic Schools**

The second sentence of paragraph 2 of Article 8, Section 2, not only prohibits State support for students' attendance at nonpublic schools but also prohibits the State from subsidizing the employment of "any person" at nonpublic schools. Const 1963, art 8, § 2. In *In re Proposal C*, the Supreme Court did not interpret this language in the strictest sense and carved out an exception for "policemen, firemen, nurses, counsellors and other persons engaged in governmental, health and general welfare activities." *In re Proposal C, supra*, 384 Mich at 420. However, in these cases, the Supreme Court has not held that funds may be used for the employment of private individuals who otherwise do work solely or primarily on behalf of the nonpublic school.

Pursuant to Section 152b, the Department of Education is supposed to publish a form for nonpublic schools to fill out in order to request reimbursement for "actual costs"

incurred in fulfilling their obligations under the requirements published in the Nonpublic Mandate Report. 2016 PA 249, § 152b(1), (2), & (4). Section 152b makes reference to “actual cost[s]” but does not further define what the Superintendent of Education may or may not consider an actual cost of compliance with the requirements listed in the Nonpublic Mandate Report. *Id.* § 152b(4). Black’s Law Dictionary defines the term “actual cost” as:

The actual price paid for goods by a party, in the case of a *bona fide* purchase, which may not necessarily be the market value of the goods. It is a general or descriptive term which may have varying meanings according to the circumstances in which it is used. It imports the exact sum expended or loss sustained rather than the average or proportional part of the cost. Its meaning may be restricted to materials, labor, and overhead or extended to other items.

Black’s Law Dictionary 33 (5<sup>th</sup> ed. 1983). Since the dictionary definition provides little further clarification, the interpretation of the term “actual costs” remains largely up to the discretion of the Superintendent and the Department of Education. As a result, “actual costs” may in the end include reimbursement for time expended by private employees at nonpublic schools.

First, the lack of specifics as to which types of expenses may be reimbursable under Section 152b is sufficient reason to find the provision unconstitutional. Although extreme, it is a possible interpretation that the Superintendent may decide to reimburse expenses directly related to nonpublic school employees’ salaries or wages to the extent the employee spent time working on preparing or submitting the deliverables set out in the Nonpublic Mandate Report. The Supreme Court has previously read into Article 8, Section 2, a narrow exception for public money going towards the employment of persons at nonpublic schools, and Section 152b opens up the prospect of public funds being used to pay for or reimburse the cost of private employees at nonpublic schools. Obviously, an administrator at a nonpublic school does not fit into the categories set out in *In re Proposal C*, such as a policeman, firefighter, or nurse. *In re Proposal C* does not establish that a school administrator

can be an exception to the plain language of Article 8, Section 2's prohibition against paying for wages or salaries of persons at nonpublic schools. Because this funding is clearly not permitted by the Michigan Constitution, the appropriation of funds in Section 152b is unconstitutional because it is direct support for the employment of persons at nonpublic schools.

**D. THE FUNDING PROVIDED FOR IN SECTION 152b IS UNCONSTITUTIONAL BECAUSE IT IS APPROPRIATED TO PAY FOR PARTS OF THE "NECESSARY ELEMENTS" OF ANY SCHOOL'S ACTIVITY**

Michigan Supreme Court Justice Swainson laid out the "necessary elements of any school's activity" test to distinguish which expenses could be provided to nonpublic schools and which could not under Article 8, Section 2 of the Michigan Constitution of 1963. This Section will discuss how that test applies to Section 152b.

As was mentioned in Section II.A, *supra*, the Legislature has specifically allowed the funding for auxiliary services for nonpublic students. The relevant statutory provision states, in its entirety:

The board of a school district that provides auxiliary services specified in this section to its resident pupils in the elementary and secondary grades shall provide the same auxiliary services on an equal basis to pupils in the elementary and secondary grades at nonpublic schools. The board may use state school aid to pay for the auxiliary services. The auxiliary services shall include health and nursing services and examinations; street crossing guards services; national defense education act testing services; teacher of speech and language services; school social work services; school psychological services; teacher consultant services for students with a disability and other ancillary services for students with a disability; remedial reading; and other services determined by the legislature. Auxiliary services shall be provided under rules promulgated by the superintendent of public instruction.

MCL 380.1296.

The question of what constitutes an auxiliary service has addressed by this Court. In *In re Proposal C*, 384 Mich 390; 185 NW2d 9 (1971), this Court examined an Attorney

General's Opinion construing the Michigan Constitution's prohibition to aid to nonpublic schools. As the Court explained, "[b]y statutory definition and practical application, auxiliary services are special educational services designed to remedy physical and mental deficiencies of school children and provide for their physical health and safety." *In re Proposal C*, 384 Mich at 418-419.

The Court went on to explain that the reason auxiliary services do not fall under the constitutional prohibition is because "they have only an incidental relation to the instruction of private school children." Therefore, the constitutional prohibitions "which are keyed into prohibiting the passage of public funds into private school hands for purposes of running the private school operations are not applicable to auxiliary services which only incidentally involve the operation of educating private school children. *Id.* at 419-420. Stated another way, funds which would be for purposes of running the private school operations are not auxiliary, and therefore fall under the constitutional prohibition.

After setting forth this background, the Court made two important statements regarding auxiliary funding:

- "In addition auxiliary services are similar to shared time instruction in that private schools exercise no control over them. They are performed by public employees..." *Id.* at 420 (emphasis added).
- "The clause in the [Auxiliary Services] Act which states that auxiliary services shall include 'such other services as may be determined by the legislature' does not give the legislature a blank check to make any service a health and safety measure outside the reach of [the constitutional prohibition] simply by calling it an auxiliary service." *Id.* (emphasis added).

These findings are extremely applicable in the instant situation for the reason that none of the services for which the Legislature appropriated nonpublic funds are "performed by public employees," as required to be considered auxiliary. Further, to the extent the Legislature deemed the services to be "health and safety measures," it was done for the

purpose of removing it from the constitutional prohibition. Finally, aid supporting auxiliary services is clearly set forth in MCL 380.1296, quoted above. The statute is meant to assist with street crossing guard services, for example. It is not meant to reimburse a nonpublic school employee for simply doing his or her job.

Section 152b states: “there is allocated an amount not to exceed \$2,500,000 for 2016-2017 to reimburse costs incurred by nonpublic schools as identified in the nonpublic school mandate report...” MCL 388.1752b(1). The Legislature also included language to specifically avoid the reach of the constitutional provision. The statute states, in relevant part:

(7) The funds appropriated under this section are for purposes related to education, are considered to be incidental to the operation of a nonpublic school, are noninstructional in character, and are intended for the public purpose of ensuring the health, safety, and welfare of the children in nonpublic schools and to reimburse nonpublic schools for costs described in this section.

(8) Funds allocated under this section are not intended to aid or maintain any nonpublic school, support the attendance of any student at a nonpublic school, employ any person at a nonpublic school, support the attendance of any student at any location where instruction is offered to a nonpublic school student, or support the employment of any person at any location where instruction is offered to a nonpublic school student.

MCL 388.1752b(7)-(8).

Although the Legislature stopped short of using the word “auxiliary” in the statute at issue, it is clear that this language is an example of exactly what this Court warned against in *In re Proposal C*. By alleging the aid is for “health, safety, and welfare” and not to “aid or maintain any nonpublic school,” the statute hits the key words to trigger an auxiliary service. The use of the words “incidental to the operation of a nonpublic school” is a direct attempt to circumvent the constitutional prohibition on aid. “Incidental” and “auxiliary” are essentially synonymous in this context, since the Legislature has explicitly attempted to place these “incidentals” within the realm of “health, safety, and welfare.”

Typically, “incidental” aid has been examined by this Court in the context of shared time instruction between public and nonpublic schools. This was the case in *In re Proposal C*, as well as in *Snyder v Charlotte Pub Sch Dist, Eaton Co*, 421 Mich 517; 365 NW2d 151, 158 (1984). Tellingly, in *Snyder*, the Court also referred to shared time instruction as “auxiliary”: “This does not mean that a public school district must offer shared time instruction or auxiliary services....” *Id*, at 532 (internal quotation and citation omitted). The Legislature’s use of “incidental” as opposed to “auxiliary” is meaningless.

As mentioned above, in *Bond v Pub Schs of Ann Arbor Sch Dist*, 383 Mich 693; 178 NW2d 484 (1970), this Court articulated two tests to determine whether something was “incidental” to a school system: “necessary elements of any school’s activity” or “integral fundamental part of the elementary and secondary education.” *Id*, at 702. Although potentially relevant, this was prior to the enactment of MCL 380.1296, which much more clearly sets forth what is to be considered an auxiliary service.

The Nonpublic Mandate Report, for which the Legislature has appropriated the reimbursements, has broken down the mandated reporting into six (6) categories: Accountability, Building Safety, Educational Requirements, School Operations, Student Health, and Student/Staff Safety. (Exhibit 1, p 3 - Nonpublic Mandate Report). The report lists statutes with which nonpublic schools are required to comply, places them into one or more of the categories, and states whether there is a “deliverable” requirement: “A deliverable represents if the mandate requires a report(s), the submission of a form(s), or other types of documents to be produced.” (Exhibit 1, p 3). As the last column of chart clearly shows, the vast majority of the mandates do not require a report, form, or other document production. (Exhibit 1, p 4). What this means, then, is that the appropriation is, at its core, for the purpose of paying a nonpublic school employee to comply with Michigan law. Nonpublic schools will

have to fill out a form to show compliance with some of the statutes, and will be paid “actual cost to comply.” MCL 388.1752b(4).

On its face, this cannot be considered auxiliary for the simple reason that it is aid paid directly to a nonpublic school. As this Court clearly stated in *In re Proposal C*, “auxiliary services are similar to shared time instruction in that private schools exercise no control over them. They are performed by public employees...” *In re Proposal C, supra*, 384 Mich, at 420 (emphasis added). There is no doubt that these services, if filling out a form can be considered a service, are not performed by public employees. Therefore, these are not auxiliary services, and are not exempt from the constitutional prohibition.

However, if further inquiry is necessary, each of the mandates on its own does not qualify for an exemption from the constitutional prohibition. As mentioned above, the Nonpublic Mandate Report has divided the mandates into categories (Exhibit 1, p 4), and they will be listed as such below. As it is unclear whether the Legislature intends the aid to be for all mandates listed, or just those with a “deliverable” requirement, each mandate will be addressed.

The aid appropriated to nonpublic schools at issue does not specify for what purpose the funds can be given. MCL 388.1752b sets forth, as quoted fully above the allocation of money “to reimburse costs incurred by nonpublic schools as identified in the nonpublic school mandate report....” Section 152b(1). The statute goes on to state that “a nonpublic school seeking reimbursement under subsection (1) of costs incurred ... shall submit the form....” Section 152b(3). The statute does not specify what costs may or may not be submitted for reimbursement, meaning that potentially any costs accrued under the mandates listed in the School Mandate Report (Exhibit 1) could be reimbursed.

## 1. Mandated Educational Requirements

The School Mandate Report lists twelve (12) statutes and rules setting forth educational requirements for nonpublic schools. These are the basic requirements that the state has set forth as necessary, fundamental elements of a school's activity. This Court addressed a similar issue in *In re Advisory Opinion re Constitutionality of 1974 PA 242*, 394 Mich 41; 228 NW2d 772 (1975). In that case, the question presented was whether textbooks and supplies are an integral part of a school's function, or whether they are "incidental" to the operation of a school. This Court found that they are "essential aids that constitute a 'primary' feature of the educational process and a 'primary' element required for any school to exist." *Id*, at 48.

In coming to this conclusion, the Court articulated two different tests, both of which led to the conclusion that textbooks and supplies are not "incidental": "Applying either the 'necessary elements of any school's activity' test or the 'integral fundamental part of the elementary and secondary education' test, it is clear that books and school supplies are an essential part of the system of free public and elementary and secondary schools." *Id*, at 49.

The same logic should be applied to the educational requirements mandated and listed in the School Mandate Report. These requirements are an integral fundamental part of what makes a school a school. They are not "special educational services," nor are they for students' health and safety. Aid for these requirements would, on its face, directly violate the constitutional prohibition: "No public monies or property shall be appropriated or paid ... to aid or maintain any private, denominational or other nonpublic, pre-elementary, elementary, or secondary school." Mich Const art 8, § 2.

**MCL 380.1151 – English as basic language of instruction**

MCL 380.1151 sets forth the requirement that English must be the basic language of instructions in Michigan schools and nonpublic schools, with exceptions. The relevant exception states “Religious instruction in a nonpublic school given in a foreign language in addition to the regular course of study.” MCL 380.1151(2)(a). Under Section 152(b), a nonpublic school could potentially request reimbursement for all costs, including teacher salary, textbooks, et cetera, associated with “religious instruction ... given in a foreign language” so long as it is in addition to the regular course of study.

As stated above, this Court has already found that textbooks are essential aids for the educational process and existence of a school. *In re Advisory Opinion, supra*, 394 Mich at 49. It goes without saying that teachers’ salaries, and the other costs of employing teachers and running a school, are integral to the existence of a school. In fact, the United States Supreme Court has addressed this very issue. In *Lemon v Kurtzman, supra*, the Court considered Pennsylvania and Rhode Island statutes which provided for reimbursement to nonpublic “church-related” schools for teachers' salaries, textbooks, and instructional materials under certain circumstances. *Id*, at 606. Unsurprisingly, the Court found that these statutes were unconstitutional, primarily focusing on the excessive entanglement between the government and a religious institution. *Id*, at 620-621.

The same issue would arise if nonpublic, religious institutions sought reimbursement pursuant to Section 152(b) for the mandates of MCL 380.1151. Reimbursement for the salaries, textbooks, and other accoutrements needed for religious instruction under MCL 380.1151(2)(a) would be identical to those addressed in *Lemon*, and would clearly violate the Establishment Clause. Reimbursement for the teaching of classes in English, as mandated by MCL 380.1151(1) would also be unconstitutional as this would fall

squarely under the finding of *In re Advisory Opinion*, as obviously “a primary feature of the educational process and a primary element required for any school to exist.” *In re Advisory Opinion, supra*, at 49.

**MCL 380.1166 – Constitution and governments mandatory courses**

MCL 380.1166 requires that all public and nonpublic schools give instruction on the Michigan and United States Constitutions, historical and current forms of government, and classes on civics, with certain exceptions. Like the requirements of MCL 380.1151, nonpublic schools could request reimbursement for the fundamental school costs of teachers’ salaries, textbooks, and other instructional materials for teaching these required classes. And as above, because this mandate is a “primary feature of the educational process and a primary element required for any school to exist,” public monies cannot constitutionally be paid.

**MCL 380.1233; R 390.1145 – Teaching or counseling as noncertificated teacher; special permits; emergency permits**

This statute and Michigan Administrative Regulation set forth the requirements for certificated teachers (MCL 380.1233) and the ability to obtain an emergency permit in certain circumstances (R 390.1145). Again, this type of requirement is fundamental to operating a school, and cannot be considered auxiliary or incidental. In 1986, this Court addressed these requirements as they pertain to religious schools in *Sheridan Rd Baptist Church v Dept of Ed*, 426 Mich 462; 396 NW2d 373 (1986). In determining that the certification requirement was appropriate for religious schools, the Court found that the State’s compelling interest in teacher certification is a “vital ingredient to a good education....” *Id*, at 480. The Court summed up the fundamental requirement of teacher certification:

Therefore, to the extent that certification of teachers furthers education, it can be considered a compelling state interest. Those certification requirements which involve gaining expertise in a particular substantive field, taking classes in a program of general or liberal education, student

teaching and taking a few basic courses in education, are clearly aimed at and closely related to the goal of producing competent teachers.

*Id.*, at 481-482.

Like teacher salaries, textbooks, and other necessary supplies, teacher certification is an integral to the existence of a school. *See also People v DeJonge*, 179 Mich App 225; 449 NW2d 899, (1989). Therefore, the constitutional prohibition of state aid applies.

#### **MCL 380.1531-1538 – Teacher certification and administrator certificates**

These sections of the Revised School Code set forth the requirements and details surrounding the certification and decertification of teachers and administrators. There are also certain reporting requirements, such as when a school district must notify the Superintendent of Public Education of a criminal conviction of a certificated teacher. MCL 380.1535(a)(9). MCL 380.1538 sets out the fee schedule for certifications, permits, authorizations, and other types of license. For all of the same reasons as stated regarding the mandates of MCL 380.1233 and R 390.1145, clearly state aid to reimburse for these certification and other fees, or anything related to them, would violate the constitutional prohibition. These mandates are necessary for the existence and maintenance of a school, and therefore cannot be supported, directly or indirectly, by public monies.

#### **MCL 380.1561 – Compulsory school attendance**

Section 1561 of the Revised School Code mandates attendance at a public school for children who are not exempted, including an exemption if the child “is attending regularly and is being taught in a state approved nonpublic school, which teaches subjects comparable to those taught in the public schools....” MCL 380.1561(3)(a). Although it is unclear what, if any, costs a nonpublic school could claim under this statute, any such costs would necessarily be attributable to a student’s attendance at a nonpublic school, and would

therefore go to the heart of what is necessary for the existence of a nonpublic school. Without the exemption that allows students to attend, a nonpublic school obviously would not exist. For public monies to be allocated as a result of student attendance at a nonpublic school would be directly for the maintenance of a nonpublic school, in violation of the Constitution.

Compulsory attendance in school is a compelling state interest. The same reasoning that this Court applied in *Sheridan Rd Baptist Church* should be applied here: The education of children is a compelling state interest and children's attendance is a "vital ingredient to a good education...." *Sheridan, supra*, at 480. In fact, in addressing compulsory attendance at school for children, the United States Supreme Court has found that states have a strong interest in ensuring education: "There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education. See, e.g., *Pierce v Society of Sisters*, 268 US 510, 534; 45 S Ct 571, 573; 69 L Ed. 1070 (1925)." *Wisconsin v Yoder*, 406 US 205, 213; 92 S Ct 1526; 32 L Ed 2d 15 (1972). Just as with the requirement for certification, attendance is integral to the very foundation of both public and nonpublic schools.

**MCL 388.514 – Postsecondary Enrollment options;  
MCL 388.519-520 – Postsecondary Enrollment Act information and counseling**

MCL 388.514 sets forth the enrollment requirements for postsecondary education, and also covers payment, noncompletion of courses, and appropriation. The statute specifies a couple of responsibilities for schools, including nonpublic schools, involving providing an eligibility letter for students (Section 4(1)) and providing and maintaining correspondence regarding an eligible student's participation in postsecondary enrollment. (Section 4(11)). MCL 388.519-520 cover the information and counseling services required of public and nonpublic schools for postsecondary education, and the applicable timelines. On

their faces, these statutes address the core of what this Court in *In re Advisory Opinion* referred to as “a primary feature of the educational process and a primary element required for any school to exist,”: education. *In re Advisory Opinion, supra*, 394 Mich at 49.

**MCL 388.1904 – Career and technical preparation program; enrollment; records;**  
**MCL 388.1909-1910 – Career and technical preparation information and counseling**

The sections regarding career and technical preparation and attendance, MCL 388.1904, 1909-1910, are substantially similar to those covering postsecondary education, discussed in the subsection above. For the identical reason, that the sole basis is the education of students, these mandates are a primary element of the existence of a school. Therefore, as above, they fall within the constitutional prohibition on state aid.

**R 340.293 – Notification to districts of auxiliary services needed**

This section of the Michigan Administrative Code covers notifications to and from nonpublic schools. As the Department of Education stated in the Nonpublic Mandate Report, this mandate is categorized as an “Educational Requirement.” (Exhibit 1, p 4). As conceded by the Department, these notifications required to or from a nonpublic school fall under the umbrella of education, and are therefore integral to the educational process. State aid for these notifications or any other affiliated costs would violate the constitutional prohibition.

**R 390.1146 – Mentor teachers for noncertificated instructors**

Michigan Administrative Code R 390.1146 states, in part, that noncertificated teachers may be employed for limited purposes, provided that a qualified mentor teacher is assigned. The basis of this rule is essentially the same as MCL 380.1233; R 390.1145, discussed above. Again, this type of requirement is fundamental to operating a school, and cannot be considered auxiliary or incidental. As this Court found in *Sheridan Rd Baptist*

*Church, supra*, 426 Mich at 480, the State’s compelling interest in teacher certification is a “vital ingredient to a good education....” *Id*, at 480. Like teacher salaries, textbooks, and other necessary supplies, teacher certification is an integral to the existence of a school. See also *People v DeJonge*, 179 Mich App 225; 449 NW2d 899, (1989). Therefore, the constitutional prohibition applies.

### **R 390.1147 – Certification of school counselors**

In the Nonpublic Mandate Report, the Department of Education listed R 390.1147 as “Certification of School Counselors.” (Exhibit 1). In reality, R 390.1147 covers Expert in Residence permits, and Certification of School Counselors is covered by R 390.1301-1308. However, regardless of which of these sections the Department intended to include in its Nonpublic Mandate Report, the application of the constitutional prohibition will be the same. As with the teacher certification requirements, as well as the noncertified instructor requirements, such mandates are at the core of what is required for a school to exist, and therefore any state aid for these purposes is prohibited.

## **2. Mandated School Operations**

In addition to Educational Requirements, the Nonpublic School Mandate Reports lists several School Operations mandates. For many of the same reasons listed for the Educational Requirements above, School Operations requirements cannot be considered auxiliary or incidental to the operation of a school. By their very categorization, it goes without saying that requirements for school operations are necessary for the existence and maintenance of a school.

**MCL 29.5p – Hazardous Chemicals – Employee Right to Know** (Also as Student/Staff Safety)

MCL 29.5p mandates that all employers under the Michigan occupational safety and health act (defined as “all places of employment in the state, except in domestic employment and in mines as defined” by the statute, MCL 408.1002) provide information to the fire chief under certain circumstances. This statute obviously applies to both public and private employers in the state of Michigan. The Department of Education recognized this mandate as pertaining to “school operations.” And although an argument can be made this also pertains to student and staff safety, it falls under the constitutional mandate as it is primarily school operations. The constitutional provision prohibiting state aid for school operations, which clearly fits the *In re Advisory Opinion* description of “a primary element required for any school to exist,” (394 Mich at 49), overrides any potential exemption created by case law regarding health and safety issues. Any reimbursement sought pursuant to the mandates of MCL 29.5p would constitute unconstitutional aid to a nonpublic school.

**MCL 289.1101-8111 – Food Law** (Also as Student/Staff Safety)

This statute, which dictates the requirements regarding the selling of food, is not specifically directed to schools, but to the “manufacture, production, processing, packing, exposure, offer, possession, and holding of any food for sale; and the sale, dispensing and giving of food, serving, and the supplying of food in the conduct of any food establishment.” MCL 289.1103.

Like the provision regarding hazardous chemicals above, the Department of Education has conceded that this is an issue of school operations, although it could conceivably contain elements of student and staff safety as well. However, like above, the school

operations elements are required for the existence of a school, and the applicable constitutional prohibition outweighs any case law that might suggest any exemption regarding state aid.

**MCL 388.551-557 – Private, Denominational & Parochial Schools Act**

The Private, Denominational, and Parochial Schools Act, MCL 388.551, *et seq*, sets forth the definitions, supervision, teachers, qualifications, examinations, compulsory attendance, and other elements of such schools. The Act specifically states that the superintendent of public instruction shall supervise these nonpublic schools, and the salaries and expenses involved with this public supervision is funded by the state. MCL 388.551. Additionally, the Act states: “Nothing in this act contained shall be construed so as to permit any parochial, denominational, or private school to participate in the distribution of the primary school fund.” MCL 388.557.

By its very language, the Act ensures that the only public money to be spent is to cover the costs of the public supervision of the nonpublic schools. The schools themselves have no access to the state fund. Additionally, the Act covers purely educational requirements for the nonpublic school, including teacher certification, attendance, examinations, et cetera. For the same reasons, as stated above, that these mandates are integral to the educational process, they continue to fall into that category when codified in this Section. Therefore, state funding for such mandates would be inappropriate.

**MCL 408.411-424 – Workforce Opportunity Wage Act (minimum wage)**

Like the Hazardous Chemicals statute discussed above, the Workforce Opportunity Wage Act, MCL 408.411, *et seq*, applies to all employers who employ “2 or more employees at any 1 time within a calendar year.” MCL 408.412. This statute, which covers the wages required to be paid to the employees of a nonpublic school, is obviously within the realm of what is required “for any school to exist.” There is nothing in the statute, nor any

surrounding case law, to indicate that the mandates of the Wage Act would qualify a nonpublic school for any exception or exemption to the constitutional prohibition on state aid.

**MCL 409.104-106 – Youth Employment Standards Act; work permits in student files**

The Youth Employment Standards Act covers the employment of minors. It does potentially require a nonpublic school to issue a work permit for students under certain circumstances, but little else. There is nothing in the statute to indicate any costs that would arise over which to seek reimbursement; nor in fact any reason why these mandates would fall into any of the exceptions to the constitutional prohibition on state aid. Appropriations for work permit compliance would be unconstitutional.

**MCL 423.501-512 – Bullard-Plawecki Employee Right to Know Act (employee files)**

Bullard-Plawecki, the statute which mandates the requirements of maintaining employees' personnel files, dictates the actions of employers, like the Wage Act and Youth Employment Standards Act, above. And like the statutes above, there is nothing in Bullard-Plawecki to indicate any costs that would arise over which to seek reimbursement; nor in fact any reason why these mandates would fall into any of the exceptions to the constitutional prohibition on state aid. Appropriations for this too would be unconstitutional.

**MCL 722.112 – Child care organizations**

The Nonpublic Mandate Report cites MCL 722.112 as a mandate of nonpublic schools. (Exhibit 1). Since this section of the statute specifically covers the Agency responsible for promulgation of rules; ad hoc rules committee; subject matter of rules; fire prevention and safety; review of rules, it is assumed the Report actually intended to cite the entire Child Care Organizations Act, MCL 722.111, *et seq.* The Act's preamble states that it is "to provide for the

protection of children through the licensing and regulation of child care organizations” among other things.

It is unclear why the Department of Education has taken the position that this mandate is relevant as there is no indication that the statute would apply to nonpublic schools. However, even if it did, the situation is the same as the Wage and other Acts above: nothing indicates that any costs would arise that would be reimbursable, and no basis has been articulated on which to believe the constitutional prohibition on state aid would not apply.

**R 289.571.1-570.6 – Food establishment manager certification**

It is understood that this reference is to Regulation No 570 of the Department of Agriculture, Food and Dairy Division. These regulations set forth the accredited certification requirement for the manager of a food establishment. Like with the Food Law Act above, this Regulation is a school operation. As such, it neatly falls into the category of integral to the operation of a school, and does not qualify for any exception or exemption to the Constitutional prohibition.

**R 340.484 – Boarding school requirements** (“includes aspects of all categories”)

The Rule cited in the Nonpublic Mandate Report is the Educational Requirements of Boarding Schools, R 340.484. This Rule states the certifications and other educational requirements of boarding schools. This is no different than the school requirements listed above. In fact, it is unclear why the Department of Education has asserted that this is primarily a school operations issue. On its face, this is clearly a Rule regarding educational requirements.

As stated above, educational requirements are the basic requirements that the state has set forth as necessary, fundamental elements of a school’s activity. This Court in *In*

*re Advisory Opinion* found that they are “essential aids that constitute a ‘primary’ feature of the educational process and a ‘primary’ element required for any school to exist.” 394 Mich at 48.

Also as above, the same logic should be applied to these additional educational requirements. These requirements are an integral fundamental part of what makes a school a school. They are not “special educational services,” nor are they for students’ health and safety. Aid for these requirements would, on its face, directly violate the constitutional prohibition:

### **3. Mandated Accountability**

**MCL 380.1135 – Student records;**

**MCL 380.1137a – Release of student information to parent subject to PPO;**

**MCL 380.1578 – Attendance records**

MCL 380.1135, Enrolling students, identification requirements; failure to comply; reporting of inaccurate or suspicious affidavits; request for previous school records; disclosure of information; MCL 380.1137a, Records of minor pupils; parental access to information prohibited, and MCL 380.1578, Attendance report; nonpublic schools, all set forth requirements for the operation of a school. MCL 380.1135 simply states the requirement for maintaining records. MCL 380.1137a simply states when a school may not release records. It involves no affirmative action. And finally, MCL 380.1578 merely requires that a nonpublic school report to the superintendent of schools the children enrolled.

These mandates are nothing outside or in addition to what is required of each public school, and put no additional burdens on nonpublic schools. Like Bullard Plawecki and Compulsory Attendance above, these mandates are merely the basic elements of running a school. Like each of these statutes, rules, and regulations listed, “essential aids that constitute a ‘primary’ feature of the educational process and a ‘primary’ element required for any school

to exist.” *In re Advisory Opinion*, 394 Mich at 48. They are neither auxiliary nor incidental, and are therefore subject to the constitutional prohibition of state aid to nonpublic schools.

#### 4. Mandated Building Safety

The following two areas deal with compliance with construction codes for building and remodeling school buildings. These laws are related to the educational mission of public and nonpublic schools.

##### **MCL 388.851-855b – Construction of school buildings**

The preamble to this Act states it concerns:

regulating the construction, reconstruction, and remodeling of certain public or private school buildings or additions to such buildings...to promote the safety, welfare, and educational interests of the people of the State of Michigan.

1937 PA 306 (emphasis added).

Thus, the Legislature recognized the important educational relationship between this Act and the educational mission of the nonpublic school. The Court of Appeals recognized the purpose of the statute when it stated:

The rules and regulations at issue have, as their purposes, the prevention of fire and the promotion of the health, safety and educational interests of the state’s citizens. This is clearly a secular purpose. The legislature has determined that schools present a unique situation requiring higher standards of fire prevention and safety than buildings used for open meetings.

*Hough v North Star Baptist Church*, 109 Mich App 780, 783-84; 312 NW2d 158 (1981) (emphasis added).

Obviously, the Legislature found that higher standards needed to be applied to schools as they carry out an essential educational role in our society and state. Another panel of the Court of Appeals found that “all schools should meet reasonable safety requirements for

children entrusted to their care.” *State Fire Marshall v Lee*, 101 Mich App 829, 836; 300 NW2d 748 (1980).

The above illustrates the important educational mandates that are an integral part of an elementary and secondary education. Therefore, these mandates are not incidental or auxiliary and fall under the constitutional prohibition. To the extent that these laws serve a dual purpose to the health and safety of students, as well as the educational mission, the educational mission and purpose of these laws overrides the health and safety as the predominant purpose behind the statutes. The Court of Appeals stated above that the Legislature found schools have a unique higher standard that must be adhered to. The reason is simple: because schools have been entrusted to the care of the students while performing the educational mission and act *in loco parentis*.

#### **MCL 388.863 – Compliance with federal asbestos building regulation**

This section of the law states that educational facilities shall comply with the standards contained in the federal Toxic Substances Control Act, 15 USC § 2641-2656. A nonpublic school should not receive monetary reimbursement from the state because it has to comply with federal statutes. As any mandates required by the nonpublic school run to federal law as opposed to state law, these would fall under the constitutional prohibition for reimbursement.

#### **5. Mandated Student/Staff Safety**

The following statutes are categorized by the Department of Education under Student/Staff Safety. While several of these matters do pertain to the health and safety of the students, several seem to pertain to the core educational mission of a nonpublic school. Many of these statutes apply equally to a public school and nonpublic school. Thus, there is no

reason for specific reimbursement for nonpublic schools when public schools must also comply with the laws without specific reimbursement. These statutes would include:

MCL 29.19 – Fire/Tornado Drills/Lockdown/Shelter in Place.

MCL 324.8316 – Notice of pesticide application at school or daycare center

MCL 380.1274b – Products containing mercury; prohibit in schools

R 258.637 – Pesticide use

R 325.7001-70018 – Bloodborne Pathogens

MCL 380.1230-1230h – Required criminal background check by state police/FBI; unprofessional employment history check; Registered educational personnel

MCL 380.1539b – Notification of conviction of listed offense

MCL 722.115c – Childcare organization criminal history and criminal background checks

MCL 722.621-638 – Child Protection Law

In all of the above Acts, both public and nonpublic schools must comply. There are no bases for reimbursement to a nonpublic school for any requirements when public schools receive no specific reimbursement for following the same mandates.

Another category as defined by the Department under the Student/Staff Safety deals with school busses. MCL 257.715a; MCL 257.1807-1873; and R 257.955. While the constitution does state “the legislature may provide for the transportation of students to and from any school,” the statutes deal with the inspection of buses and the type of buses that can be utilized. There is nothing in the text of the constitution which gives the Legislature the right to provide for reimbursement other than the direct transportation of students. Further, these requirements are the same whether the school be public or nonpublic. As stated above, there is no basis for reimbursement when public schools are also not similarly directly reimbursed for such mandates. Additionally, as with the childcare statutes listed above, there is no reason to believe this provision applies to nonpublic schools.

The final statute under this category deals with public playground safety. MCL 408.681-687 is the Playground Equipment Safety Act. This Act seemingly does not apply to private schools as “public playground equipment” means equipment that is “owned and operated by a local unit of government, school district, or any other governmental entity.” MCL 408.682(b). Therefore, it appears that only public playground equipment is covered under the statute and thus a nonpublic school would not fall under these parameters.

#### **6. Mandated Student Health**

The next category developed by the Department of Education deals with Student Health.

##### **MCL 333.9155 – Concussion education.**

This section of the Public Health Code requires concussion education and the providing of educational materials concerning concussions. By the very definition of this statute, education of students is involved. Therefore, the constitutional prohibition would prohibit any reimbursement for direct education.

##### **MCL 333.9208 – Immunizations.**

This section of the Public Health Code requires a parent to have a child immunized before that child enters the seventh grade. There are no mandates here for a public school or a nonpublic school to comply with. Therefore, there is no cost to reimburse.

##### **MCL 333.17609 – Licensure of school speech pathologist.**

This section of the Public Health Code deals with requiring individuals who want to provide speech and language pathology services in a school must be licensed by the state. Again, any requirement mandated by the state falls upon an individual not upon a public school or a nonpublic school. There are no mandates that a nonpublic school has to adhere to or be reimbursed. Therefore, no reimbursement can be required.

**MCL 380.1177-1177a – Immunization statements and vision screening.**

MCL 380.1177 provides that parents must have their child tested or immunized against certain diseases as well as submit to a vision screening test. Obviously, these requirements are on the parent, not a school. MCL 380.1177(3) does provide that an administrator of each school must provide certain information concerning the immunization status and vision report for each child. However, this requirement is the same for a public school as well as a nonpublic school. There would be no reason to reimburse for a mandate that is consistent across schools and reimburse only the nonpublic school.

MCL 380.1177a provides that schools must provide information to parents concerning meningococcal meningitis and human papillomavirus. To require a district to provide educational materials to parents and students goes to the core of the educational mission of schools and therefore falls within the constitutional prohibition.

**MCL 380.1179 – Possession and use of inhaler and epinephrine auto-injector.**

This section of the School Code allows pupils to possess at school an inhaler or an epinephrine auto-injector. This provision of the Code does not impose any mandate on the nonpublic school, therefore, there is no mandate that needs to be reimbursed.

**III. CONCLUSION**

The *Amici* pray, for all of the reasons set forth above, that this Court grant the relief requested herein.

Respectfully submitted,

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In Pro Per Amicus Curiae

Dated: August 26, 2016      By: /s/ Senator David Knezek  
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Dated: August 26, 2016      By: /s/ Senator Rebekah Warren  
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Dated: August 26, 2016      By: /s/ Senator Curtis Hertel, Jr.  
Michigan State Senate District 23  
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