

**STATE OF MICHIGAN
IN THE COURT OF APPEALS**

COUNCIL OF ORGANIZATIONS AND OTHERS FOR EDUCATION ABOUT PAROCHIAID (CAP); AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN (ACLU); MICHIGAN PARENTS FOR SCHOOLS; 482FORWARD; MICHIGAN ASSOCIATION OF SCHOOL BOARDS; MICHIGAN ASSOCIATION OF SCHOOL ADMINISTRATORS; MICHIGAN ASSOCIATION OF INTERMEDIATE SCHOOL ADMINISTRATORS; MICHIGAN SCHOOL BUSINESS OFFICIALS; MICHIGAN ASSOCIATIONS OF SECONDARY SCHOOL PRINCIPALS; MIDDLE CITIES EDUCATION ASSOCIATION; MICHIGAN ELEMENTARY AND MIDDLE SCHOOL PRINCIPALS ASSOCIATIONS; KALAMAZOO PUBLIC SCHOOLS; and KALAMAZOO PUBLIC SCHOOLS BOARD OF EDUCATION,

Plaintiffs-Appellees,

v.

STATE OF MICHIGAN; RICK SNYDER, Governor, in his official capacity; MICHIGAN DEPARTMENT OF EDUCATION; and SHEILA ALLES, Interim State Superintendent of Public Instruction, in her official capacity,

Defendants-Appellants.

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BRIEF FOR AMICUS CURIAE
EDUCATION LAW CENTER

Court of Appeals No. 343801

Court of Claims No. 17-000068-MB

BRIEF FOR AMICUS CURIAE
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INTEREST OF AMICUS CURIAE

Education Law Center (“ELC”) is a nonprofit organization that advocates on behalf of public school children for equal and adequate educational opportunity under state and federal laws through policy initiatives, research, public education, and legal action.

In states across the nation, ELC advances children’s opportunities to learn and succeed in school, assisting advocates and attorneys working to promote such opportunities. ELC provides research and analyses related to education cost and fair school funding, high quality preschool, and other proven education programs; assists parent and community organizations, school districts, and state policymakers in gaining the expertise needed to improve outcomes for disadvantaged children; and supports litigation and other efforts to bridge resource gaps, especially in the nation’s high-need and high-poverty public schools. Based on ELC’s extensive experience litigating constitutional challenges to inadequate funding in New Jersey and advocating for equal educational opportunity across the country, ELC has participated as *amicus curiae* or as counsel in state education rights and opportunity cases in California, Colorado, Connecticut, Delaware, Florida, Indiana, Minnesota, Nevada, New Jersey, New York, Pennsylvania, South Carolina, and Texas.

SUMMARY OF ARGUMENT

ELC respectfully submits this brief in support of Plaintiffs to provide the Court with a critical perspective on the condition of public education finance in Michigan and on the history of Michigan’s constitutional provision restricting public funds to the exclusive use of supporting public schools. The Court below correctly concluded that Section 152b of 2016 PA 249 (“Section 152b”), which would allocate funds from the State’s education budget to reimburse *nonpublic* schools for a wide range of expenses related to the operation of those schools and the education of their students, was unconstitutional under Article 8, § 2 of the Michigan Constitution.

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Council of Orgs & Others for Ed About Parochiaid v Michigan, unpublished opinion and order of the Court of Claims, entered April 26, 2018 (Docket No. 17-000068-MZ) (CAP). As explained below, this unconstitutional statute would also divert limited taxpayer dollars from Michigan’s deeply underfunded public school system.

First, the context of the 1970 passage of Article 8, § 2 of the Michigan Constitution—the “no-funding” provision prohibiting the use of public funds for private schools—reflects the will of Michigan voters to protect and improve their underfunded public education system. When the no-funding provision was passed, Michigan’s fiscal deficit had led to the underfunding of public education and growing disparities in education outcomes and performance among students. The no-funding provision was a firm and unequivocal statement by the Michigan electorate that they wanted their public schools to improve by ensuring taxpayer monies would not be diverted to nonpublic schools.

Second, Michigan’s financial instability has persisted and its public schools remain chronically underfunded, with a widening of the disparities in education performance among students across the state. This underperformance is glaring for at-risk students, such as economically disadvantaged students, English Language Learners (“ELLs”), and students with disabilities. Section 152b’s use of public funds to reimburse nonpublic schools for educational and operational expenses will only exacerbate these disparities by siphoning funds available to support Michigan’s public schools even further below today’s severely inadequate levels. More troubling, Section 152b would fund nonpublic school activities in the very areas in which public schools now struggle to serve their students. The State’s public education funds should be allocated directly and exclusively to Michigan’s public school students, as required by Michigan’s Constitution.

ARGUMENT

Section 152b, earmarking millions of dollars of each year's public education budget to reimburse nonpublic schools for a wide range of expenses, would further decrease the already inadequate funds available to Michigan public schools.

As amended in 2017, Section 152b diverts \$2.5 million from Michigan's general fund for public schools for each of the 2016–2017 and 2017–2018 school years “to reimburse actual costs incurred by nonpublic schools in complying with a health, safety, or welfare requirement mandated by a law or administrative rule of this state.” MCL 388.1752b(1) (diverting money from “[f]rom the general fund money appropriated under section 11,” which is money appropriated to Michigan's public schools under the “State School Aid Act of 1979” (see MCL 388.1611)). Eligible categories of reimbursable expenses are listed on a form compiled by the Michigan Department of Education (the “Form”). Michigan Department of Education, Section *152b Reimbursement Form*, <https://www.michigan.gov/documents/mde/2018.Section.152b.Reimbursement.Form_610867_7.xlsx> (accessed July 16, 2018). The Form identifies 38 purported health, safety, or welfare requirements mandated under state law that apply to nonpublic schools, including those obligations that attach to all public schools and to many other Michigan workplaces and institutions. *Id.*

As the statute makes clear, the expenditures for which nonpublic schools may seek reimbursement encompass more than health, safety, or welfare. See MCL 388.1752b(7) (“The funds appropriated under [Section 152b] are for purposes related to education . . .”). The reimbursable expenses listed on the Form range from disclosure of information about hazardous chemicals in the workplace, to securing licenses for teachers, to the content of the curriculum taught at nonpublic schools. See, e.g., MCL 29.5p (employee's right to know about hazardous chemicals); MCL 380.1531 (issuing licenses and certificates for teachers); MCL 380.1561(3)(a)

(curriculum requirements). As the Court of Claims explained, “the funds are expressly linked to wages owed to nonpublic school employees.” *CAP*, unpub op at 10.¹ Moreover, “[t]he nonpublic school also has control over the type of activities—some of which touch on curriculum and specific courses to be taught—to which the funds can be applied” and “has complete control of the funds after they are dispersed.” *Id.* at 11. As the Court held below, Section 152b is unconstitutional because it conflicts with the plain language of Article 8, § 2 of the Michigan Constitution, which prohibits precisely what Section 152b would authorize: the diversion of public school funding to nonpublic schools. *Id.* at 10.

If Section 152b were permitted to go into effect, the statute would divert millions of dollars for the reimbursement of nonpublic school expenses on the Form in the current school year and subsequent school years. It would also open the door to increasing the amounts diverted from the public schools in future years. Michigan’s public school students deserve—and are entitled to—an adequately funded public education, a commitment the Michigan voters chose to protect and preserve in the no-funding amendment. Accordingly, this Court should affirm the judgment below.

I. VOTERS ENACTED ARTICLE 8 TO PROTECT THE PUBLIC SCHOOL SYSTEM

In the decades preceding the 1970 enactment of Article 8, § 2, the Michigan legislature had authorized various forms of indirect aid to nonpublic schools. See, e.g., 1948 CL 352.20 (permitting transportation for students of nonpublic schools); 1965 PA 343 (requiring that auxiliary services, such as health services and examinations, be provided on an equal basis to

¹ Indeed, nonpublic schools would be entitled to reimbursement of the “hourly wage for the employee or employees performing a task” associated with each of the mandated requirements. See MCL 388.1752b(9).

students of public and nonpublic schools). In the 1970 legislative session, proponents of nonpublic schools succeeded in having the Legislature enact a provision in the State School Aid Bill that allowed broad funding of nonpublic schools. See 1970 PA 100. The Michigan Supreme Court upheld its constitutionality in an October 1970 advisory opinion requested by the Legislature. *In re Legislature's Request for an Opinion on the Constitutionality of Chapter 2 of Amendatory Act No 100 of Pub Acts of 1970*, 384 Mich 82; 180 NW2d 265 (1970). As a result, public funds were disbursed to nonpublic schools. See *In re Certification of Questions Pertaining to Proposal C*, 384 Mich 390, 406 n2; 185 NW2d 9 (1971).

In response, citizens opposed to using public funds for nonpublic schooling began circulating the petition that would become Article 8, § 2. *Id.* This petition gathered sufficient support to be included on the next election ballot, but the Michigan Secretary of State refused to put the measure to a vote. See *Garman v Hare*, 26 Mich App 403; 182 NW2d 563 (1970), vacated sub nom *Carman v Hare*, 384 Mich 443 (1971). The Michigan Court of Appeals, however, ruled that the petition was valid, and that the question of nonpublic school funding was to be answered by the Michigan electorate. See *Garman*, 26 Mich App at 406.

The Michigan voters answered that question decisively when they voted to approve Article 8, § 2. Nor can there be any doubt of voters' intent. The debate surrounding Article 8, § 2 centered on the urgent need for robust and adequate public school funding. See, e.g., Cordray, *School Reform Panel Hears Parochiaid, Financing Pleas*, Ann Arbor News (July 17, 1969) <<http://oldnews.aadl.org/node/78060>> (accessed July 17, 2018) (“[T]he overriding issue—at least the one most important to the taxpayer—will be the one of financing educational reform.”). At the time, many public school district budgets were under stress from competing obligations to balance growing deficits, meet student need, and fulfill teacher contracts. See, e.g., Citizens

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Research Council of Mich, *Detroit School District Finances, Council Comments No 829* (March 19, 1970). An overreliance on local property taxes to fund public education heightened the need for increases in school aid from the State. See Dykes, *The Search for Community: Michigan Society and Education, 1945–1980s*, in Hathaway, ed, *Michigan Visions of Our Past* (East Lansing, Mich: Mich St Univ P, 1989), pp. 300–301 (discussing the Legislature’s reluctance to increase school aid to meet education needs statewide and the resulting rise in dropout rates).

Proponents of the petition were concerned that public aid for nonpublic schools would divert already limited and scarce state funds from public schools. As an article in the *Ann Arbor News* noted, “[t]he basic issue is that of direct aid to non-public schools. It is the fact that one-half the cost of teachers’ salaries which non-public schools receive in 1970–71 . . . will provide more state aid for non-public schools than for many public schools.” *Proposal C Goes Too Far? Ianni Says No*, *Ann Arbor News* (October 17, 1970) <<http://oldnews.aadl.org/node/76419>> (accessed July 17, 2018). These fears were exacerbated by the Legislature’s delay in distributing the annual appropriations for public schools in 1970. See *Delays in State Aid Bring Out Blind Spots*, *Ann Arbor News* (May 23, 1970) <<http://oldnews.aadl.org/node/78090>> (accessed July 17, 2018). At the same time that public school districts were in desperate need of appropriations, the Legislature was proposing to allocate millions of dollars to private schools.

In approving the no-funding provision, Michigan citizens expressed their will in clear terms: they wanted to ensure public schools were funded at levels adequate to serve their students by preventing the continuing diversion of taxpayer dollars to nonpublic schools. The Michigan electorate confirmed that intent when it rejected (with more than 69% of the vote against) an initiatory petition that would have amended the Constitution to permit the State to indirectly support nonpublic school students. State of Michigan, Terri Lynn Land, Secretary of State,

Initiatives and Referendums Under the Constitution of the State of Michigan of 1963, <https://www.michigan.gov/documents/sos/Const_Amend_189834_7.pdf>(accessed July 17, 2018).

Today—as at the time of its passage and in 2000—Article 8, § 2 vindicates the will of the Michigan electorate that state funds be used to support public education.

II. SECTION 152B WILL FURTHER DISADVANTAGE MICHIGAN PUBLIC SCHOOL STUDENTS

A. Chronic Public School Underfunding Directly Impacts Michigan Students

The issue at the forefront of voters’ approval of Article 8, § 2 in 1970, and the rationale for reserving public funds exclusively for public schools, persists today.

Michigan’s funding of public schools remains “woefully insufficient and grievously inequitable,” particularly in city and other districts serving high proportions of low-income students and students who are at-risk from household and neighborhood poverty, ELLs, and students with disabilities (collectively, “special needs students”). Rowe, *Study: Michigan School Funding Is Inadequate and Inequitable*, <<http://aftmichigan.org/study-michigan-school-funding-is-inadequate-and-inequitable/>> (accessed July 17, 2018). Michigan’s public school system, once one of the best-funded school systems, has fallen to 38th place—a drop described as “nothing short of shameful.” *Id.* Michigan’s per-pupil spending also ranks near the bottom compared with other Midwestern states. See Binelli, *Michigan Gambled on Charter Schools. Its Children Lost*, *New York Times* (September 5, 2017) <<https://nyti.ms/2x7whOQ>> (accessed July 17, 2018).

The chronic funding shortfall has a direct and deleterious impact on Michigan’s public school students. In Highland Park, for example, lack of funds means a school roof leak is addressed not by repairing the roof but by placing buckets on the floor and garbage bags over blackboards. *Id.* Several schools use a single bus per school to save costs, forcing students to sit in bus aisles and atop one another. See Sparks, *Parents Outraged After Picture of Crowded School*

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Bus Surfaces Online, WWMT-TV (October 10, 2014) (“With a tight budget, school leaders stuck to one bus, because adding a second bus for the route would cost \$7,000.”). A class action lawsuit has raised claims that in one Detroit school, after a math teacher quit mid-school year, an eighth-grade student taught math classes for a month. See Compl *Gary B. v Snyder*, No 16-CV-13292 (ED Mich September 13, 2016); see also Compl *DR v Mich Dep’t of Ed*, No 16-CV-13694-AJT-APP, 2016 WL 6080952 ¶¶ 76–83 (ED Mich October 18, 2016) (explaining that students in Flint Community Schools who have disabilities are not being provided with crucial special education services); *id.* ¶¶ 84–88 (explaining that the Flint Community Schools’ budget is inadequate to provide special education and related services for disabilities); Testimony of Superintendent Bilal Kareem Tawwab, *The Flint Water Crisis: Lessons for Protecting America’s Children*, House Democratic Steering and Policy Committee (February 10, 2016) (testifying that Flint schools will need “expanded special education resources,” which must include comprehensive screening and evaluation, early intervention programs, year-round schooling, and the resources to attract and retain highly skilled special education teachers and support staff).

The State’s own studies confirm the depth and severity of public school underfunding and the impact on student outcomes and performance. In 2014, the State retained Augenblick, Palaich and Associates (“APA”)—a school finance consultant firm with substantial expertise in analyzing state school funding—to examine the deficiencies in Michigan’s finance system and to determine the level of resources needed for each Michigan school district to meet State student proficiency benchmarks. See State of Michigan, *Contract No. 071B6600004: Exhibit A*, <http://www.michigan.gov/documents/localgov/6600004_503606_7.pdf>(accessed July 17, 2018). The APA assessment focused on student performance for the 2009–2010 and 2013–2014 school years. *Id.* at 4. APA published its findings in 2016 (the “Finance Study”). See APA,

Michigan Education Finance Study (2016) <https://www.michigan.gov/documents/budget/Michigan_Education_Finance_Study_527806_7.pdf>.

Subsequently, a group of Michigan education experts and business executives, called the School Finance Research Collaborative, hired APA and another educational analysis consultancy, Picus, Odden, and Associates (“POA”), to complete a more comprehensive study on public school funding in Michigan. See APA & POA, *Costing out the Resources Needed to Meet Michigan’s Standards and Requirements* (2018) <<https://www.fundmischools.org/wp-content/uploads/2018/01/School-Finance-Research-Collaborative-Report.pdf>>, pp 1–3. APA and POA sought to determine whether Michigan schools had the resources necessary to provide students with reasonable opportunities to achieve State academic standards.² APA and POA published the second report in January 2018 as *Costing Out the Resources Needed to Meet Michigan’s Standards and Requirements* (the “Resources Report”).

Both studies confirm that the majority of Michigan public school districts lack sufficient funds to meet the needs of all of their students and, as a result, many students, especially those in districts with high poverty levels, are not meeting the State’s own proficiency benchmarks on prescribed tests and assessments.

1. Most Michigan Public School Students Perform Below Proficiency Levels in Most Subjects

The Finance Study commissioned by the State demonstrates that most Michigan public school students perform below proficiency levels in most subjects. In the Finance Study, APA collected performance data by grade level for each state standardized test and for each school

² APA and POA undertook this analysis by first reviewing professional standards and studies on the resource needs of successful schools nationwide and then supplementing that evidence with feedback from over 250 Michigan educators to determine the cost of an adequate education for a student in Michigan. *Finance Study*, pp 1–3.

district in Michigan. *Finance Study*, p 4. It used this data to identify districts in which the percentage of students scoring at or above the proficient level for all subjects was above the state average (the “successful districts”). *Id.* at 7. Thus, in “successful” districts the percentage of students scoring at or above the proficient level exceeded 36% for math, 65% for reading, 20% for science, 29% for social studies, and 47% for writing. *Id.* at 7–8.

In most districts, the Finance Study revealed that a majority of students are performing below the level considered proficient according to Michigan’s “merit standard.”³ See *Finance Study*, p 9. The Finance Study noted that “[a]verage proficient and above levels were relatively low for most test areas, with all subjects but Reading below 50%.” *Id.* Despite this low bar, only 186 districts, or 34.4%, consistently performed above these levels in each of the five subject areas and were therefore categorized as “successful districts.” *Id.* Because the State set the applicable proficiency standard in terms of relative performance rather than some objective metric, these so-called “successful” districts typically had a majority of their students performing at non-proficient levels in up to four of the five core subjects. See *id.* at 10 (showing that only 34 districts had more than 50% of their students scoring at proficient levels in math, writing, and reading, while still exceeding 20% proficiency in science and 29% proficiency in social studies). And even the “high-performing” districts—the highest category—still had a majority of their students performing at non-proficient levels in science and social studies.⁴ *Id.* at 9–10.

³ Student performance under Michigan’s “merit standard” is assessed annually through the standardized Michigan Merit Examination, which measures student proficiency in five core areas: reading, writing, math, science, and social studies. See Michigan Department of Education, *Guide to State Assessments*, <http://www.michigan.gov/documents/mde/Spring_2017_Guide_to_State_Assessments_jl_536062_7.pdf> (accessed July 17, 2018).

⁴ To be considered a “high-performing” district, at a minimum, 51% of the students must be proficient in math, 80% in reading, 31% in science, 43% in social studies, and 63% in writing. *Finance Study*, p 10. In contrast, to be considered a “successful” district, only 36% of the

2. The Underfunding of Michigan School Districts Impacts Student Performance

The Finance Study and other studies demonstrate that Michigan school districts are underfunded and that expenditures correlate with performance outcomes. After categorizing the school districts based on their students' performance, the Finance Study analyzed their revenues and expenditures. *Id.* at 15–29. These data revealed significant discrepancies in per-student spending across the State and showed that increased funding had a positive impact on student educational outcomes. The Study also analyzed the level of funding needed to afford all Michigan students a meaningful opportunity to achieve the proficiency levels of students in “high-performing” districts.

The Finance Study found that “successful” districts, on average, spent more on a per-student basis than districts that were not “successful”—not only on educational instruction itself, but also on support services such as transportation. *Id.* at 22. The spending gap was even larger when comparing “high-performing” and “non-high-performing” districts. Specifically, “high-performing” districts spent, on average, \$1,589 more per student each year than even “successful” districts.⁵ *Id.* at 26. This difference represents a 17.4% increase over the “successful” districts’ average spending of \$9,158 per student. See *id.* The follow-up Resources Report confirmed that

students must be proficient in math, 65% in reading, 20% in science, 29% in social studies, and 47% in writing. *Id.* at 7–8.

⁵ The difference persisted, albeit less starkly, even when APA excluded the 13 districts in Michigan that spend substantially above the state average (\$21,030 or more per student annually). *Id.* at 6. When those 13 districts are excluded, the remaining high-performing districts still outspend successful districts by \$817 per student per year. *Id.* at 26. In any event, even these outlier high-performing districts demonstrate the dramatic inequity in Michigan’s public education system.

the average amount spent per student is woefully inadequate.⁶ According to this evidence-based study, school districts would have to spend a base level of \$10,136 per student—before additional spending necessary for special needs students and for transportation and food costs—to provide Michigan students an adequate education.⁷ See *Resources Report*, pp 171–172.

These spending patterns reflect disparities in the level and allocation of state and local funding through Michigan’s finance system to school districts across the state. Differences in local revenue alone—primarily property taxes—provide the 34 “high-performing” school districts an extra \$1,311 per student to spend each year, as compared to the lower-performing “successful” districts. See *id.* at 20. Because Michigan fails to provide enough state revenue to offset these gaps, levels of funding among school districts vary widely, leaving districts with low property wealth communities and high levels of at-risk students with less funding than their more affluent counterparts.

These funding disparities are confirmed by national studies. An annual study on school funding recently ranked the state 24th in the nation for its expenditures on school funding in 2015. Baker, Farrie & Sciarra, *Is School Funding Fair? A National Report Card* (Newark: Education

⁶ Although there is a difference between the level of funding reported in this study and the Finance Study, this difference is likely explained by differences in the regression model used to calculate per-pupil spending.

⁷ These two studies join the wealth of existing literature that shows increased funding is needed in underperforming public schools. See, e.g., Jackson, Johnson & Persico, *The Effect of School Finance Reforms on the Distribution of Spending, Academic Achievement, and Adult Outcomes*, Nat’l Bureau of Economic Research Working Paper No 20118 (2014) (analyzing school data on per-pupil spending from 1967–2010 and finding that there is a significant causal relationship between school funding and improvements in long-term educational outcomes).

Law Center, 2018), pp 10, 32.⁸ Further, Michigan does not provide additional funding to those schools that cannot avail themselves of stable local funding streams through taxation and/or that have higher levels of student need. *Finance Study*, pp 20–21. At the same time, the share of Michigan’s gross state domestic product that corresponds to public education costs was only \$36 for every \$1,000 generated in economic productivity in 2015, earning Michigan a “C” grade on an A-F scale for its fiscal efforts towards funding public education. See *A National Report Card*, pp 15–16. As the deficiencies in public school funding continue to grow, “Michigan has gone from being a fairly average state in elementary reading and math achievement to the bottom ten states.” The Education Trust–Midwest, *Michigan’s Talent Crisis: The Economic Case for Rebuilding Michigan’s Broken Public Education System*, <<https://files.eric.ed.gov/fulltext/ED570142.pdf>> (accessed July 16, 2018).

3. Michigan’s Students with Special Needs Require Higher Levels of Funding

The Finance Study further demonstrates that underspending in Michigan disproportionately affects districts serving high populations of special needs students. See *Finance Study*, p 13. The study identified only 9 of Michigan’s 541 districts in which *both* the general student population and those with special needs performed above their respective state averages. *Id.* at 12–13. The difference in spending was stark between those 9 districts and the “successful” districts in which special needs students did not perform as well. The 9 districts where special needs students outperformed the state average spent an average of \$3,918 more per student each year than the “successful” districts. *Id.* at 26.

⁸ Although there is a difference between the level of funding reported in this study and the Finance Study, this difference is likely explained by differences in the regression model used to calculate per-pupil spending.

The Finance Study recommended an increase in proportional funding for low-income or economically disadvantaged students and ELLs. *Id.* at xi. Currently, for every \$1,000 in baseline per-student spending on a general population student, even successful districts were spending only an extra \$110 on each at-risk (including economically disadvantaged) student and an extra \$240 on each ELL. *Id.* The Finance Study noted that such funding was far below the levels recommended by nationwide research into optimal per-district spending and far below the levels currently available for comparable districts in many other states. *Id.* at xi–xii, 2, 32–33, 144. APA advised that, for every \$1,000 in baseline per-student spending, Michigan school districts should spend an additional \$300 for each at-risk student and \$400 for each ELL. *Id.* at xi.

The Resources Report corroborated these findings. In that report, panels of experienced Michigan educators agreed that significant extra resources were required beyond the base cost to address the needs of economically disadvantaged students, ELLs, and students with disabilities. *Resources Report*, p 60. For medium-sized districts, these educators recommended spending an additional \$290 to \$430 per student living in poverty for every \$1,000 spent on a general population student. *Id.* at 60–61. Similarly, for ELLs in medium-sized districts, they recommended additional spending of \$220 to \$510 per student for every \$1,000 spent on a general population student. *Id.*

This concern for insufficient funding for students with special needs has recently been echoed by a subcommittee of a Special Education Task Force chaired by Michigan Lieutenant Governor Brian Calley. The subcommittee’s 2017 report concluded that the educational performance of Michigan’s students with disabilities was lagging far behind that of other states. See Special Education Funding Subcommittee, *Special Education Funding Subcommittee Report* (2017), p 3. Further, the report documented the severe deficits in the funding provided to school

districts to deliver special education services mandated by state and federal law. More specifically, the report found “a \$692 million shortfall in the special education finance system” across the state and recommended several steps “be taken today to ensure a brighter tomorrow for *all* students and families in Michigan.” *Id.* at 12 (emphasis in original).

Both the Finance Study and Resource Report surveyed the existing research literature to identify best practices for spending in support of Michigan’s special needs students. For example, they noted that various studies have shown that hiring additional school counselors, full-time nurses, and instructional coaches for teachers is statistically correlated to improved student attendance and thereby student performance. See, e.g., Smith & Sherrod, *School Nurses and Student Absenteeism: The Role of School Nurse Staffing Levels in NC’s Efforts to Turn Around Low-Performing Schools* (Raleigh: Public School of North Carolina, 2013); Lapan, Whitcomb & Aleman, *Connecticut Professional School Counselors: College and Career Counseling Services and Smaller Ratios Benefit Students*, 16 Prof Sch Counseling 117, 119–120, 122 (2012); Allen et al., *An Interaction-Based Approach to Enhancing Secondary School Instruction and Student Achievement*, 333 Sci 1034, 1035–1036 (2011). The Finance Study recommended adding these crucial support personnel and resources as an essential strategy to improve the performance of economically disadvantaged students and ELLs. *Finance Study*, pp 48–49. And the Resources Report recommended one full-time instructional coach for every 200 students in a school, from the elementary to high school level. *Resources Report*, pp 72, 88–90.

4. Michigan Fails to Equitably Allocate Funding and Resources Among Districts

Finally, the Finance Study analyzed whether Michigan’s school finance system equitably allocates resources across districts and across schools and students—controlling for differences in student need (*e.g.*, for special needs students), district characteristics (*e.g.*, population density and

enrollment rate), and district revenue-raising capacity—and determined that “Michigan’s school finance system is moderately inequitable.” *Finance Study*, pp ix, 68, 79. Specifically, Michigan schools have considerably more variation in per-student revenues and expenditures across districts than is considered equitable, both in terms of treating students equally when they have equivalent characteristics and in terms of allocating greater resources to special needs students. *Id.* at ix, 79. In addition, the Finance Study found that Michigan schools have higher-than-recommended variation in terms of allocating resources equally across districts without regard to local wealth. *Id.* More alarming, the Finance Study observed that the trend toward greater inequity was increasing over time. *Id.*

Consistent with this finding, since 2011, Michigan has received “C” grades on an A-F scale for funding distribution patterns that fail to allocate more resources for students in settings of high poverty compared to their less needy peers. *A National Report Card*, pp 9, 33.

B. If Section 152b Goes into Effect, It Will Exacerbate Michigan’s Severe Public School Underfunding

As the Court below found, the diversion of public funds to Michigan’s nonpublic schools under Section 152b would violate the plain language of the Constitution, which states that “[n]o public monies or property shall be appropriated or paid . . . directly or indirectly to aid or maintain” nonpublic schools. See Const 1963, art 8, § 2. But the violation is even more egregious in light of the numerous studies and reports that overwhelmingly document the severe and chronic underfunding of Michigan’s public schools and the persistent failure to provide all public school students a meaningful opportunity for academic success. To make matters worse, the glaring deficits in essential education resources attributable to the State’s underfunding of the public schools are the very same resources Section 152b would support through the diversion of public funds to nonpublic schools.

For example, the Finance Study recommended that Michigan public school districts improve student performance by hiring more nurses and counselors and providing coaching for new teachers. See *Finance Study*, pp 47–49. Section 152b would reimburse nonpublic schools for similar costs, such as expenditures related to “[t]eacher certification,” “[c]ertification of [s]chool [c]ounselors,” and “[m]entor teachers for noncertified instructors,” as well as health-related costs, such as “[i]mmunizations,” “[i]mmunization statements and vision screening,” and “[p]ossession/[u]se of inhalers/epinephrine auto-injector.” Michigan Department of Education, *Section 152b Reimbursement Form*, <https://www.michigan.gov/documents/mde/2018.Section.152b.Reimbursement.Form_610867_7.xlsx> (accessed July 16, 2018). Additionally, Section 152b would divert funds to compensate nonpublic schools for the “hourly wage for the employee or employees performing a task” associated with each of the mandated requirements. See MCL 388.1752b(9); *CAP*, unpub op at 10 (“[T]he funds [allocated under Section 152b] are expressly linked to wages owed to nonpublic school employees.”). Yet recent data show that Michigan’s public school teachers are paid 80% of the salary paid to other professionals of similar age in the same labor market—a figure that placed Michigan in the lower half of the states for teacher wage competitiveness relative to other comparable professions in 2015, a precipitous fall from a rank of 8th in 2012. See *A National Report Card*, pp 26, 38. The same study linked teacher wage competitiveness with “[a] state’s ability to attract and retain high quality teachers,” which is, in turn, “a fundamental component of a strong and equitable school system.” *Id.* at 23. In the face of a steep decline in the wage competitiveness of Michigan public school teachers, Section 152b would divert funds that could be used to improve their compensation to instead augment the salaries of nonpublic school teachers.

As the Michigan Supreme Court has acknowledged, “the continuing effect that underfunding has on the continuing operation” of underfunded school districts results in “innumerable consequences” that students must endure. *Durant v Michigan*, 456 Mich 175, 219–220; 566 NW2d 272 (1997). The Court has also recognized that the harm to students from underfunding is “real and deserving of relief.” *Id.* at 220. Courts across the country have similarly recognized that increased funding is correlated to improved student outcomes. See, e.g., *Brigham v Vermont*, 166 Vt. 246, 256; 692 A2d 384 (1997) (“[T]here is no reasonable doubt that substantial funding differences significantly affect opportunities to learn.”); *Abbott v Burke*, 136 NJ 444, 455; 643 A2d 575 (1994) (“[T]here is a significant connection between the sums expended and the quality of the educational opportunity.” (quoting *Robinson v Cahill*, 62 NJ 473, 481; 303 A2d 273 (1973))); *Tennessee Small Sch Sys v McWherter*, 851 SW2d 139, 141 (Tenn. 1993) (“[T]here is a direct correlation between dollars expended and the quality of education a student receives.” (internal quotation marks omitted)); *Rose v Council for Better Ed, Inc*, 790 SW2d 186, 197 (Ky. 1989) (“The achievement test scores in the poorer districts are lower than those in the richer districts and expert opinion clearly established that there is a correlation between those scores and the wealth of the district.”); *Edgewood Indep Sch Dist v Kirby*, 777 SW2d 391, 393 (Tex. 1989) (“The amount of money spent on a student’s education has a real and meaningful impact on the educational opportunity offered that student.”).⁹

Article 8, § 2 expressly prohibits the diversion of public funds to nonpublic schools without regard to the performance and quality of Michigan’s public schools. But given the severe resource

⁹ The New Jersey Supreme Court recently acknowledged that the increased funding provided by the state to support the public education of students in the state’s high poverty urban districts “has enabled” those students “to show measurable educational improvement.” *Abbott v Burke*, 196 NJ 544, 549; 960 A2d 360 (2008).

deficits in far too many of Michigan’s underfunded public schools—indeed, deficits in the very resources Section 152b would fund in nonpublic schools—Section 152b’s violation of the no-funding amendment could not be more stark.

CONCLUSION

For all the foregoing reasons, ELC respectfully requests that this Court affirm the Court of Claims’ holding that Section 152b of 2016 PA 249 is unconstitutional.

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CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2018, I electronically filed the foregoing with the Clerk of the Court using the TrueFiling system, which will automatically send notice of electronic filing (NEF) to all registered users listed below:

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