

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

GARY B.; JESSIE K., a minor, by)
Yvette K., guardian ad litem;)
CRISTOPHER R. and ISAIAS R.,)
minors, by Escarle R., guardian ad litem;)
ESMERALDA V., a minor, by Laura)
V., guardian ad litem; PAUL M.;)
JAIME R., a minor, by Karen R.,)
guardian ad litem, on behalf of)
themselves and all others similarly)
situated,)

Plaintiffs,)

v.)

RICHARD D. SNYDER, in his official)
capacity as Governor of the State of)
Michigan; JOHN C. AUSTIN,)
MICHELLE FECTEAU, LUPE)
RAMOS-MONTIGNY, PAMELA)
PUGH; KATHLEEN N. STRAUS,)
CASANDRA E. ULBRICH, EILEEN)
WEISER, and RICHARD ZEILE, in)
their official capacities as members of)
the Michigan Board of Education;)
BRIAN J. WHISTON, in his official)
capacity as Superintendent of Public)
Instruction for the State of Michigan;)
DAVID B. BEHEN, in his official)
capacity as Director of the Michigan)
Department of Technology,)
Management, and Budget; and)
NATASHA BAKER, in her official)
capacity as the State School)
Reform/Redesign Officer,)

Defendants.)

Civil Action No.: 16-CV-13292
Hon. Stephen J. Murphy, III

CLASS ACTION

**BRIEF OF AMICI CURIAE
MICHIGAN EDUCATION LAW AND
POLICY PROFESSORS IN
OPPOSITION TO DEFENDANTS'
MOTION TO DISMISS**

**BRIEF OF AMICI CURIAE MICHIGAN EDUCATION LAW AND POLICY
PROFESSORS IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

Associate Dean Kristi Bowman, Dr. David Arsen, and Dr. Sarah Reckhow, as *amici curiae*, respectfully submit this Brief, with the consent of the parties, in opposition to Defendants' Motion to Dismiss.

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INTEREST OF AMICI CURIAE

Amici are three Education Law and Policy professors whose expertise includes the role of the state of Michigan in public education including the emergency management of public school districts. Collectively, *amici* share an interest in assisting the court as it engages with complex legal and policy issues in this case of general public interest. Because of their expertise, *amici* are uniquely well situated to explain the legal and policy context of the issues presented in this case.

Dean Kristi Bowman is the Associate Dean for Academic Affairs and Professor of Law at Michigan State University College of Law. She is an elected member of the American Law Institute, an American Bar Foundation Fellow, a National Education Finance Academy Distinguished Fellow, the 2009 recipient of the Education Law Association's Steven S. Goldberg Award for Distinguished Scholarship in Education Law, and past chair and executive board member of the AALS Education Law Section. She is a co-author of the fifth edition of a seminal education law textbook (Yudof's *Educational Policy and the Law*), the editor of two other books, and the author of numerous law review and other articles. Since 2005, she has taught courses about education law. Dean Bowman's research areas include educational governance and school finance, racial and ethnic equity in K-12 public schools, and students' First Amendment rights. Her most recent scholarship is about the right to education in Michigan, school districts in fiscal crisis, and education federalism.

Dr. David Arsen is a Professor of Education Policy and Educational Administration in the College of Education at Michigan State University where he is coordinator of the Education Policy program. Dr. Arsen received his Ph.D. in Economics from the University of California, Berkeley. His research focuses on school finance, the competitive effects of school choice

policies, and urban school governance. He recently served on the Coalition for the Future of Detroit Schoolchildren.

Dr. Sarah Reckhow is an Assistant Professor in the Department of Political Science at Michigan State University. Her research and teaching focuses on education policy, nonprofits and philanthropy, state and local politics, and racial and ethnic politics. Dr. Reckhow has studied education policy reforms in New York City, Los Angeles, Detroit, Memphis, and Oakland. She has also examined the impact of state and mayoral takeovers of local school districts. She has published a book with Oxford University Press and recently published articles in *Journal of Urban Affairs*, *Urban Affairs Review*, *Policy Studies Journal*, and *Planning Theory*. Dr. Reckhow is affiliated with the Education Policy Center and the Global Urban Studies Program at Michigan State University.

ARGUMENT

To understand the lack of meaningful educational opportunities in the city of Detroit today, one must situate the present moment within a complex history of regulation of public education by the state of Michigan. This regulation has occurred through legislative, executive, and judicial action. When taken together, the regulation demonstrates the state's invasive and escalating control over public education. This increasing involvement by the state is particularly apparent in the Detroit public schools, which have been in fiscal crisis for forty years, by some measures.¹

I. The State of Michigan Directly Regulates Michigan School Districts' Governance and Finances in Significant Ways

Detroit's public school district has been in fiscal crisis for decades, and the state of Michigan has intervened in the district for many years in response to the fiscal and academic

¹ Some of the research for this brief was conducted by Kristi Bowman while writing *The Failure of Education Federalism*, which is available online in draft form at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2876889. Any text herein that is identical to that draft is excerpted with the permission of the author.

challenges the district has faced. Although the state's efforts arguably have been more extensive in Detroit than in any other district, the state has played an increasingly important role in a handful of school districts via state-appointed emergency managers. The state's authority over public education is also demonstrated by the unusual centralization of the school finance scheme. That centralization creates financial difficulties for districts with declining enrollments, which often are the result of other state policies enacted via statute.

A. For Nearly Twenty Years, The State of Michigan Has Actively Intervened in the Governance and Finances of Detroit's Public Schools

Since 1999, the state of Michigan has replaced Detroit's elected school board with an appointed board, appointed a series of emergency managers to assume the role of the superintendent and the school board, and moved all of the students and assets from the old Detroit district (which presumably will be dissolved when the old district's debt is retired) into a newly created, debt-free district.

1. The State of Michigan Replaced Detroit's Elected School Board With An Appointed "Reform Board" from 1999-2005, Prior to Emergency Management

The state of Michigan's active intervention in Detroit public schools' governance and finances began a decade before an emergency manager was appointed. In 1999, in an effort to reform the district both academically and administratively, the legislature passed and Governor Engler signed into law a statute that removed Detroit's elected school board from office and replaced it for a period of time with six members appointed by the mayor of Detroit in addition to the state superintendent of education. MCL 380.371-75. The law was challenged in court and upheld. Curt Guyette, *After Six Years and Four State-appointed Managers, Detroit Public Schools' Debt Has Grown Even Deeper*, Metro Times (Feb. 25, 2015). In 2005, when voters elected school board members for the first time in six years, the district had a \$200 million deficit.

2. Detroit Was the First Michigan School District to Come Under Emergency Management in 2009 Under a 1990 Statute

In 1988, Michigan enacted its first emergency fiscal management law, and in 1990 the law was amended so that it also applied to school districts. MCL 141.1201-1244 (repealed). In 2009, Governor Granholm appointed the first emergency manager of Detroit Public Schools, who was also the first emergency financial manager of a school district appointed under this statute. At that point, the district's total net deficit was nearly \$370 million and the district's long-term debt was \$1.5 billion. Guyette, *After Six Years*. Local resistance to the state takeover was so significant that it led to at least five lawsuits in which Detroit public school board members or other local entities sued various state-appointed emergency managers of the Detroit Public Schools. During this same time, at least three other lawsuits statewide challenged the emergency manager law in other ways. Kristi L. Bowman, *State Takeovers of School Districts and Related Litigation: Michigan as a Case Study*, 45 *The Urban Lawyer* 1, 8-11.

Post-recession, the disproportionate impact of emergency management on Michigan's African-American citizens and communities caused tensions. Michele Wilde Anderson, *Democratic Dissolution: Radical Experimentation in State Takeovers of Local Governments*, 39 *Fordham Urb. L.J.* 577, 590-91, 616 (2012). Michigan State University Professor David Arsen and his colleagues concluded that "state policies were in large part responsible for the underlying financial problems" that, when combined with intense charter penetration, high levels of participation in schools of choice, and higher concentrations of students with disabilities, "triggered financial emergencies in a small but vital subset of Michigan districts and established grounds for state intervention." David Arsen et al., *Which Districts Get Into Financial Trouble and Why: Michigan's Story*, 42 *Journal of Education Finance* 100-126 (2016, in press).

3. The State Enacted a More Aggressive Emergency Manager Law in 2011, Which Voters Nullified in 2012 and the State Effectively Reenacted Six Weeks Later

In 2011, the legislature adopted and Governor Snyder signed into law a new emergency manager statute that expanded the scope of the manager's authority from financial only to academic *and* financial matters. MCL 141.1101 - 141.1118 (repealed); Bowman, *State Takeovers*. State-wide resistance to the 2011 emergency manager law was so significant that the statute was repealed via a referendum at the ballot box in November 2012. Paul Egan, *After Emergency Manager Law Repeal, Any New Legislation Will Be Balancing Act*, Detroit Free Press (Nov. 8, 2012). However, during the lame duck session in late December 2012, the legislature passed a slightly modified version of the prior emergency manager statute and Governor Snyder signed it into law. MCL 141.1541-1575. Because the new emergency manager law contained an appropriations provision, it could not be repealed via a referendum.

Since 2009, five Michigan school districts including Detroit have been taken over by state-appointed emergency managers who displaced the superintendent and elected school board. MICH. DEPT. OF TREASURY, EMERGENCY MANAGER INFORMATION (2016). None of the school districts taken over by emergency managers have yet been returned to local control.

4. The Emergency Management of Detroit Public Schools Was Not Enough to Rescue It From Fiscal Crisis, Thus The State Created A New School District for Detroit's Students and Assets in 2016, And Left The Debt With The Old School District

Although Detroit's series of emergency managers initially were able to help the district gain some ground financially, the district's debt kept ratcheting up. The Citizens Research Council of Michigan reported at the end of FY2015 that "DPS has over \$3.5 billion outstanding in combined operating and capital liabilities. This includes nearly \$1.9 billion in employee legacy costs and cash flow borrowings and almost \$1.7 billion in multi-year bonds/notes and

state loans.” Citizens Research Council, *Detroit Public Schools’ Legacy Costs and Indebtedness*, 1 (Jan. 2016). Roughly \$1.4 billion of this total was due or overdue state pension contributions, including contributions to make up for the statewide plan’s unfunded liability. *Id.* at 2. The \$1.7 billion of bonded debt, notes, and state loans financed capital expenditures and also, beginning in 2005, allowed the district to convert short-term borrowing to long-term debt. *Id.* at 8-11.

In 2016, the staggering debt led the state legislature and Governor to enact a statute that radically reconfigured the district; the restructuring was inspired by private-sector bankruptcy. MCL 141.1633 et al., 141.932 et al., 12.252 et al., 380.3 et al., 423.202a, and 423.206. The legislative package brought many changes, including the creation of a new, debt-free district to which the Detroit public schools’ students and assets were transferred. The old district remained in name only and exists for the sole purpose of paying down the old district’s debt. David Eggert, *Michigan Governor Rick Snyder Signs \$617M Detroit Schools Bailout*, Detroit Free Press (June 21, 2016). Presumably it will be dissolved when the debt is retired. The reconfiguration was inspired by the “Old-GM, New-GM” model used in the General Motors bankruptcy a few years prior, except that the purpose of having an “Old GM” was so that the old company could go through bankruptcy. The “Old DPS” will not take that path.

B. Michigan’s Unusually Centralized School Finance System Has Governance and Budgetary Consequences For Local School Districts, Including Detroit

As the nonpartisan Citizens Research Council of Michigan wrote in 2010, fifteen years after the enactment of Michigan’s current school finance system, “Education [in Michigan] used to be primarily governed and funded at the local level, but passage of [the funding legislation] in 1994 centralized school funding and the state has been reasserting its authority over education governance The state now controls almost all funds supporting K-12 education, including local property tax revenues.” Citizens Research Council, *Public*

Education Governance in Michigan, VI, 15 (2010). To be clear, Michigan school districts make spending decisions and they raise funds for capital improvements if the voters in their district approve a referendum, but the vast majority of school districts' revenue—all operating funds—come from or through the state. *Id.* at 16, 42.

Michigan's unusually centralized school funding scheme means that volatile school district enrollments reduce school districts' operating revenues in significant and often unanticipated ways, and school districts are unable to reduce their expenditures proportionally. Joshua M. Cowen, *A Look at Michigan's Schools of Choice*, GREEN & WRITE – EDUC. POL'Y RES. INSIGHTS (Apr. 6, 2016); Ryan Grimes, *Education Policy Expert: Proposed DPS Legislation "is really a step forward,"* MichiganRadio.org (Mar. 22, 2016) (quoting Dr. David Arsen). State laws that enable students to easily move out of their home district and into a charter school or into a neighboring district via schools of choice enable much of this volatility.² MCL 380.501 (charter schools, known in Michigan as public school academies); MCL 388.1705-1705c (open enrollment, known in Michigan as schools of choice).

The districts losing students often enter a sort of death spiral, which is exaggerated by state law requiring unusually high contributions to the underfunded teachers' pension system, and by state decisions that put all burden for capital improvement on local districts. MCL 38.1301 – 38.1467; HOUSE FISCAL AGENCY, MICHIGAN PUBLIC SCHOOLS' EMPLOYEES RETIREMENT SYSTEM 36 (2015); Michigan School Business Officials, *FY2016-17 Employer Contribution Rates* (Oct. 2015); CTR. FOR CITIES + SCH. UNIV. OF CAL. BERKELEY, STATE FUNDING FOR K-12 SCHOOL FACILITIES: A SURVEY OF THE STATES (2014). Additionally, Detroit's enrollment decline was further exacerbated by the state's decision to move 15 Detroit

² The performance of Michigan's charters has been incredibly weak thus students often move to worse educational situations than those in their home districts. Education Trust Midwest, *Accountability for All: 2016*, 10 (Feb. 2016).

schools into the newly created Education Achievement Authority reform district in 2011. MCL 380.1280c; MCL 124.505; MCL 388.1603.

II. The State of Michigan Has Assumed Much Of Local School Districts' Control Over Public Education Since The 1970

The state of Michigan has plenary authority over education and although it delegates the delivery of education to districts, school districts do not have home rule authority. Citizens Research Council, *Public Education Governance in Michigan*, 4, 45 (2010). The state's increasing regulation of education over time, and the corresponding reduction of local school districts' control, can be seen in various areas of education policy in addition to the laws discussed earlier that directly and indirectly impact school districts' governance and finances.

First, creation and dissolution of school districts. The state of Michigan can abolish school districts, and in fact it did just that in 2013, dissolving Buena Vista and Inkster school districts and distributing the districts' students and property to neighboring districts. MCL 380.12, 12a. As discussed above, it can also create districts, as it demonstrated when it created a new Detroit public school district in 2016 while leaving the old Detroit public school district in existence to pay down debt. MCL 141.1633 et al., 141.932 et al., 12.252 et al., 380.3 et al., 423.202a, and 423.206.

Second, curriculum. Determining what is taught is the core policy decision in all of education. Local Michigan school districts used to make those decisions, and consistent with national practice, in 2006 the state of Michigan adopted the Michigan Merit Curriculum and statutorily mandated that districts follow that curriculum. Citizens Research Council, *Public Education Governance in Michigan*, 14; MCL 380.1278a.

Third, regulating some districts more invasively. Like many states, Michigan has long treated its one major urban district differently than other districts under state law. It created a class of school districts defined by size of which there was only one member—Detroit. MCL

380.401a, 411a-412a. When the Detroit public schools' enrollment fell below the threshold that defined that class of one, the state Attorney General opined that the district continued to merit the special status and thus increased scrutiny.

Fourth, the school calendar. Since 2007, a state statute has prohibited schools from beginning classes before Labor Day, although the state has been granting an increasing number of waivers of this provision in recent years. MCL 380.1284a-1284b; David Eggert, *More Mich. Schools Waived From Post Labor-Day Start* Associated Press, (Aug. 27, 2016).

Given this breadth and depth of increasing state control over education, it should not be surprising that in 2014, P.A. 555 amended the Revised School Code to authorize and fund a study to determine the cost of providing the “sufficient resources per pupil to provide a public education that enables a pupil to demonstrate successful completion, in terms of proficiency, of all of the credit requirements of the Michigan merit standard” As an official legislative finding and declaration to support the costing-out study, P.A. 555 declared: “Under the state constitution of 1963, long-standing state law, and federal law, Michigan children have the right to a free, quality, equitable public education.” The Michigan legislature adopted this language and Governor Snyder signed it into law on January 15, 2015. MCL 380.1281a.

CONCLUSION

Because of the state of Michigan's involvement in school districts'—and especially the Detroit school districts—existence, governance, finance, curriculum, and other matters, the state defendants are proper defendants in this lawsuit. *Amici Curiae* respectfully request the Court deny Defendants' Motion to Dismiss.

Respectfully submitted,

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Dated: January 13, 2017

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing instrument was filed with the U.S. District Court through the ECF filing system and that all parties to the above cause was served via the ECF filing system on January 13, 2017.

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