STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

S.S. as next friend of minor
L.M., et al.

Plaintiffs,

vs.

NO. 12-009231 CZ
Hon. Robert L. Ziolkowski

STATE OF MICHIGAN, STATE
BOARD OF EDUCATION, et al.,

Defendants.
_____/

OPINION AND ORDER

At a session of said Court held in
the City of Detroit, County of Wayne,
State of Michigan on
JUN 27 2013

PRESENT: MARVIN R. STEMPIEN
CIRCUIT COURT JUDGE

BACKGROUND

This case was filed on July 12, 2012. Presently before the Court is a motion by the Defendants, STATE of MICHIGAN, STATE BOARD of EDUCATION, MICHIGAN DEPARTMENT of EDUCATION, and MICHAEL P. FLANAGAN, (to whom I will refer in these rulings as the ***State Defendants***) for Summary Disposition under MCR 2.116(C)(4) and MCR 2.116(C)(8). Defendants JOYCE PARKER, HIGHLAND PARK SCHOOL DISTRICT, HIGHLAND PARK PUBLIC SCHOOL ACADEMY SYSTEM, and THE LEONA GROUP, L.L.C.(to whom I will refer in these rulings as the ***Highland Park***

Defendants) have also brought a separate motion for Summary Disposition pursuant to MCR 2.116(C)(4) and MCR 2.116(C)(8).

The minor Plaintiffs are all students who are enrolled in the public schools in the HIGHLAND PARK SCHOOL DISTRICT. The Amended Complaint seeks relief in Equity on their behalf in the nature of declaratory, injunctive, and Mandamus orders. There are four counts in the Amended Complaint. **COUNT I** claims violation of the rights of the Plaintiff students under MCL 380.1278(8). **COUNT II** claims violation of the rights of the Plaintiff students under Article 8, Sections 1 and 2 of the Constitution of this state. **COUNT III** claims violation of the rights of the Plaintiff students to equal protection of the law under Article 1, Section 2 of the Constitution. **COUNT IV** seeks an Order of Mandamus directed to the Defendants pursuant to MCL 600.4401, 600.4411, 600.4421, and 600.4431, and MCR 3.305.

Because much of the legal and factual basis that is presented by the Defendants in support of the two motions for Summary Disposition is the same, this ruling will be addressing many of the issues of both motions at the same time, without referring to each motion separately, except where there are issues that are not common to both.

STANDARD OF REVIEW

As to the standard of law to be applied here, a motion under MCR 2.116(C)(4) is determined by the Court as a matter of law on the facts that are alleged in the Complaint. It examines the subject matter presented in the Complaint for jurisdiction, or authority of the Court over that class of matters. If a court determines that it has no jurisdiction over the matter, it cannot proceed and must dismiss the action.

On the other hand, a motion for Summary Disposition pursuant to MCR 2.116(C)(8) requires the Court to examine whether the Complaint has stated a claim on which relief can be granted. MCR 2.116(C)(8) tests the legal sufficiency of the claims that are presented in the Complaint on the facts that are stated in the pleadings alone. It can be granted only if no factual evidence could be shown to justify recovery on the Claims that are pled.

For the following reasons, the motion of the State Defendants, and the motion of the Highland Park Defendants are each and both denied in part, and granted in part.

COUNT I – VIOLATION OF RIGHTS OF PUPILS UNDER MCL 380.1278(8)

As to **COUNT I**, it is urged by the Defendants that the Complaint should be dismissed pursuant to MCR 2.116(C)(8), because there is no right to a private cause of action under MCL 380.1278(8) which could give the Plaintiffs standing to make their claims under that statute. There is no express right of private action set out in the language of the statute. The issue, then, is whether such an action is implied by the statutory language. The test that is recognized by both the federal courts and the courts of this state as to whether a private cause of action is implied by a statute is whether the statute is designed to protect the public or the private sector. If it is designed for protection of the private sector, then generally a private right of action exists. Our Court of Appeals has ruled that a disregard of the command of a statute is a wrongful act, and where it results in damage to one of the class for whose special benefit the statute was enacted, the right to recover from the party who is in default of the statute is implied.

The language of MCL 380.1278(8) is part of the School Code of this state, which is the principal expression of the legislature of its response to its duty under Article 8 of

the Michigan Constitution to encourage and maintain free public education. The language of that section of the School Code specifically uses in its scope the term **"pupils"**, and it defines **"pupils"** who fall into four categories. It then states a specific duty in regard to those **"pupils"** who are in one of those stated categories. The use of that language by the legislature in the context of that section of the School Code clearly indicates a legislative intent to protect the individual interests of those particular **"pupils"** who are in that particular one of those four categories. The command of the statute is directed to the special benefit of those **"pupils"** who are in that group that is singled out in the statute. It is worthy of note here that MCL 380.1278(8) is a mandate for the provision of special assistance to certain pupils with reading skill deficiencies, and that it was added to the School Code by the legislature by P.A. 335 of 1993, that was effective as recently as December 31, 1993.

The question here, then, is do the Plaintiffs have standing, as pupils in the one of the four categories that is singled out in the statute to bring their claims that are stated in **COUNT I**? The answer is "yes."

To have standing, a party must have a legally protected interest that is in jeopardy of being adversely affected. There must be a special right or injury, or a special interest that will be detrimentally affected by violation of the statute in question in a manner that is different from that of the public at large. The Plaintiff must be asserting his own legal rights and interests under the statute.

In the Amended Complaint here, the pleadings allege that the minor Plaintiffs are each and all pupils of the HIGHLAND PARK SCHOOL DISTRICT, who fall into the one

category of the four that are outlined in MCL 380.1278(8) to receive special assistance. They are each alleged in the Complaint to have failed to score satisfactorily on the 4th grade or the 7th grade MEAP reading test, and who have not been provided the special assistance that meets the standard that is expressly set out in the statute. Each of them is alleged in the Amended Complaint to have had their lawful interests adversely affected by the disregard of the command of MCL 380.1278(8). Therefore, each of them has standing to bring their claims under **COUNT I**. The motions are denied as to **Count I**.

VIOLATION OF PUPILS RIGHTS UNDER ARTICLE 8, SECTION 1 & 2 OF THE MICHIGAN CONSTITUTION

As to **COUNT II**, the Defendants urge dismissal under MCR 2.116(C)(8), claiming that the constitutional provisions in Const., Article 8, that are relied upon in the Complaint, are a policy statement only, and, are a directive to the legislature. The Defendants argue therefore, that it does not impose any explicit requirements upon the particular State Defendants and the Highland Park Defendants who are named in the Complaint.

The error of that legal position is starkly pointed out by the rationale of Chief Justice Williams, in his careful review of the constitutional and legal history of Const., Article 8, in the case of Durant v. State Board of Education; Department of Management and Budget; and State Treasurer, 424 Mich 364 (1986). There the Chief Justice reviews and explains the duty of the State of Michigan that is imposed upon it by the people in their Constitution regarding free public education for their children. Beginning *id* at page 676, the Chief Justice points out that Michigan has always placed a high

value on education. Even before statehood, the Northwest Ordinance of 1787 proclaimed that schools and the means of education shall forever be encouraged. In addition, for over 75 years, the appellate case law of Michigan has recognized that free public education is a state responsibility. In the previous Constitution of 1908, the people required our legislature to continue a system of primary schools. That 1908 constitutional provision was determined on judicial review by our Supreme Court, to establish the duty for public schools to be in the state legislature, separate and distinct from any duties relating to local government. The Supreme Court has ruled that the duty for public education is no part of local self-government, except so far as the legislature may choose to make it such.

Therefore, under our present Const., Article 8, the legislature has enacted statutes to implement their constitutional duty to encourage and maintain free public education, which laws set forth both general and specific criteria for schools. In its scheme for public education, the legislature gave to local communities the task of management of the schools and school districts. However, in Durant, above, the Chief Justice concludes that the support of education is the concern of the state under the mandate of Const., Article 8, even though the legislature has directed the local school boards to provide education for children in their respective districts.

Likewise in this present case, the public school system in HIGHLAND PARK SCHOOL DISTRICT is a state function, and the school district there is an instrumentality of the State of Michigan that our legislature has created for administrative convenience in order to carry out the duty of the legislature under the mandate of the people of this State in Const., Article 8. Appellate case law tells us that

the State of Michigan has a broad compelling state interest in the provision of an education to all children. Although the legislature has chosen to establish a decentralized system of education which gives broad discretionary authority to local school districts, those districts, such as the HIGHLAND PARK SCHOOL DISTRICT, are still carrying out a delegated duty of the state under Const., Article 8. It follows, then, that by simply enacting statutes that mandate specific criteria for the local school districts in order to carry out the constitutional duties of the legislature to encourage and maintain education of children, the legislature cannot abandon the education of those children to the vagaries of local school finances. In the HIGHLAND PARK SCHOOL DISTRICT, the education of all children who are enrolled there is the duty and concern of the State of Michigan, and that local school district has the duty to carry out the general and specific criteria for schools as they are mandated by the legislature. An alleged violation of those duties is a proper foundation for a claim, such as that which is presented in **Count II**. The motions are denied as to **Count II**.

EQUAL PROTECTION OF LAW VIOLATIONS

As to **Count III**, the Defendants urge dismissal pursuant to MCR 2.116(C)(8) on their claim that the Equal Protection of the laws provision of Const., Article 1 does not support the request for relief that the Plaintiffs assert in that count. Briefly stated, the Plaintiffs allege in **Count III** of their Amended Complaint that their rights to equal protection of the law has been violated by the Defendants, because their basic educational opportunities are not equal to those that children receive in other districts in Michigan.

It is uncontested that education is not a fundamental constitutional right of citizenship. The parties all agree that the Equal Protection claims of the Plaintiffs are subject to a "rational basis" examination in this case. It is the view of the Defendants that educational opportunities are subject to too many variables in order to compare whether one set of students is unfairly disadvantaged as measured against the treatment of students in a different school district in Michigan. The Defendants point to potential definitional difficulties, differences in educational philosophies, different student abilities, student motivation, background and experiences. Those issues may or may not be insurmountable when comparing the respective circumstances in different school districts in the Michigan educational scheme. However, they are not dispositive of the motions of the Defendants for Summary Disposition on **Count III**.

What is dispositive of those two motions on **Count III** of the Amended Complaint under MCL 2.116(C)(8), is that the Amended Complaint fails to state facts as are required by MCR 2.111, which outline the elements of a cause of action for denial of constitutional Equal Protection that is based on particular specified educational inadequacies. It contains no facts to support a claim that the treatment of pupils in HIGHLAND PARK SCHOOL DISTRICT is different from the treatment of other pupils in Michigan school districts other than the HIGHLAND PARK SCHOOL DISTRICT. There are no factual allegations to claim which Michigan school districts are similar to the HIGHLAND PARK SCHOOL DISTRICT. Nor is there any factual basis set out in the Amended Complaint regarding the alleged conditions concerning compliance with MCL 380.1278(8) of pupils in other Michigan school districts that are similar to the HIGHLAND PARK SCHOOL DISTRICT.

Thus, **Count III** fails to state a claim upon which relief can be granted, as required by MCR 2.116(C)(8). Both motions are granted as to **Count III** of the Amended Complaint.

PRIVATE CAUSE OF ACTION AND MANDAMUS

As to **Count IV**, Defendants seek dismissal under MCR 2.116(C)(8), alleging that MCL 380.1278(8) does not provide a remedy that is achievable through a private cause of action (which has been dealt with in the ruling under **Count I**, above), and further that Plaintiffs have failed to plead facts in the Amended Complaint that are sufficient to support a claim for an Order of Mandamus.

A proper foundation for issuance of an Order of Mandamus requires the proof of a clear legal right to the performance of the specific duty that is sought to be compelled, and proof that the defendant has a clear legal duty to perform that duty. The act that is the subject of the requested relief must be a ministerial act. Appellate case law has established that Mandamus may be ordered by a court to compel the exercise of discretion, but not to compel its exercise in a particular manner.

The Defendants urge that no valid foundation for an Order of Mandamus has been pled in the Amended Complaint. Further, they claim that MCL 380.1278(8) does not impose a clear legal duty of a ministerial nature, thus Mandamus cannot lie in this case. Both of those arguments are contradicted by the facts that are alleged in the pleadings in the Amended Complaint, as the law of Mandamus applies to those facts. The Amended Complaint cites the language of MCL 380.1278(8) that, "a pupil who does not score satisfactorily on the 4th or 7th grade Michigan educational assessment

program reading test." It goes on to plead facts that each Plaintiff has not scored satisfactorily on either the 4th grade or the 7th grade MEAP reading test, and that each of them has not had his or her reading skills brought to grade level within 12 months.

In addition, MCL 380.1278(8) sets out a specific duty to be performed and a standard for performance of that duty that must be achieved regarding pupils who are in the class of the Plaintiffs as described in the statute. MCL 380.1278(8) mandates the duty to provide special assistance. Although that special assistance is not described in the statute, the mandate sets a standard of special assistance that is reasonably expected to accomplish the goal of enabling the pupil to bring his or her reading skills to grade level within 12 months. Both the duty and the standard for its exercise are clearly stated by the legislation in specific mandatory terms. The language of the statute clearly sets out a legal right in those pupils who are described in it. The language does allow for the exercise of discretion concerning just how the standard shall be accomplished. However, as case law prescribes, Mandamus is proper to compel the exercise of that discretion which will accomplish the objectives of MCL 380.1278(8). Both motions are denied as to **Count IV**.

ADMINISTRATIVE REMEDIES

As a separate issue, pursuant to MCR 2.116(C)(4), the Defendants urge that the Amended Complaint should be dismissed entirely because the Plaintiffs have failed to exhaust an administrative remedy that is available to them, which Defendants argue would resolve their claims. In that regard, they point to the procedure that has been established by the State Board of Education under the Administrative Procedures Act,

for the Plaintiffs to seek a declaratory ruling regarding statutory rights of a person. However, complete relief to resolve the complaints of the Plaintiffs is not available in that executive branch forum. A declaratory ruling in that forum would be binding only on the specific state agency to which it is directed. It would not be binding on all of the Defendants in this action. That forum also cannot provide the injunctive relief, the relief by Mandamus, or the relief concerning the constitutional claims of the minor Plaintiffs that are brought by the Amended Complaint in this forum. If the Plaintiffs can be successful in their proofs at trial on their allegations that are contained in the Amended Complaint, adequate and complete relief is available only by declaratory, injunctive or other relief in Equity that are available in the courts of this state. Under the facts that are alleged in the Amended Complaint, the Plaintiffs are not required to pursue the administrative action that the Defendants point to in order to have standing in this case.

JURISDICTION

The HIGHLAND PARK Defendants also claim that the court should decline jurisdiction over the complaints of the Plaintiffs under MCL 380.1278(8). The claim in that regard is that there is no issue to be determined by the court, because of mootness. They say that judicial intervention is not necessary to force the Defendants to take action, as the Plaintiffs are requesting in Equity. They also argue that there is a contract promise by the current operator of the schools in the HIGHLAND PARK SCHOOL DISTRICT to undertake compliance with MCL 380.1278(8), thus it is too early to determine whether there is compliance with the statute. It is also claimed that there is no showing that the state appointed Emergency Financial Manager has not fulfilled the responsibility to comply with MCL 380.1278(8). But, each of those assertions depends

upon the proof of the true facts, which is what the conclusion of this litigation is designed to accomplish. The court will not decline jurisdiction on the requested grounds.

GOVERNMENTAL IMMUNITY

Finally, in a Supplemental Brief, the State Defendants claim that the entire Complaint should be dismissed, because MCL 141.1572 grants them and the HIGHLAND PARK Defendants immunity from the claims that are stated in the Amended Complaint. The immunity that is pointed to there is part of the revised Emergency Financial Manager statute that became law, effective on March 28, 2013. Section 32 of that Act, MCL 141.1572, bars liability against the state, any department, agency, or other entity of the state, any officer or employee of the state, and any member of a receivership transition board, for certain specific conduct. All of the named defendants in this case are included in those stated categories of persons and entities. The actions of those persons and entities that are stated to be covered by that statutory immunity are actions that are taken by any local government under the Act, or failure to comply with the provisions of the Act by any local government. That section of the statute goes on to provide that a cause of action against the state or any department, agency, or entity of the state or any officer or employee of the state, or any member of a receivership transition advisory board may not be maintained for any activity authorized by the Act, or for the act of a local government filing under chapter 9.

In this case, MCL 141.1572 is not applicable, because the Amended Complaint cites no activity which is enumerated in that provision for immunity. On the contrary,

every duty, every act, every activity, and every failure to act that is cited in the Amended Complaint arises under, or occurred in relation to Const., Article 1, Section 2, Const., Article 8, Sections 1 and 2, and MCL 380.1278(8). The Amended Complaint alleges duties, conduct, and inaction that is independent of the subject matter of MCL 141.1572. Significantly, the matters that are complained of by the Plaintiffs here arise to a great degree because of rights that are alleged to be a part of their individual constitutional rights. No statutory enactment can grant immunity from answering for violation of individual constitutional rights. Here, there is no immunity on the part of any of the Defendants from answering for the allegations in the Amended Complaint.

CONCLUSION

Therefore the ruling of the court on the two motions for Summary Disposition is that they are both denied as to **Count I**, **Count II**, and **Count IV**, and they are both granted as to **Count III**.

Marvin R. Stempien

Honorable Marvin R. Stempien