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THE RIGHT TO READ

KARY MOSS¹

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There is no keener revelation of a society's soul than the way it treats its children.

-Nelson Mandela

I. INTRODUCTION

"My name is [redacted] and I go to barber Focus school. The thing I wish the govern could do for my school is fix our bathroom, get us new computers, help us get more books, and more learning programs."²

In 2012, when this fifteen year old wrote these words, he was reading at the second- or third-grade level.³ A student in Highland Park, a small city that abuts Detroit, he, like nearly two thirds of fourth grade students and three quarters of its seventh grade students, is not reading proficient.⁴ Close to half of the students do not graduate in four years.⁵ Under Michigan law, these kinds of results should never happen. In

1. Kary L. Moss is the Executive Director of the ACLU of Michigan. Masters in International Affairs, Columbia University; J.D., City University at Queen's College. The author would like to thank Shana Schoem, Brooke Tucker, Elizabeth Lykins, and James Kelly for their assistance and contributions to this article as well as the University of Michigan Law School Education Law and Policy Society (ELPS) and its students who provided legal research on many issues discussed here: Joshua Arocho, Cari Carson, Cynthia Cho, Lora MacDonald, Nina Ruvinsky, Brendan Vandor, Anisha Asher, Fermin Mendez, Mathew Specht, and Daniel Wells.

2. Amended Complaint at 4, *S.S. ex rel. L.M. v. State*, --- N.W.2d --- (Mich. Ct. App. 2014) (No. 12-009231-CZ), 2014 WL 5881170 [hereinafter Amended Complaint], available at http://publicdocs.courts.mi.gov:81/opinions/final/coa/20141106_c317071_110_317071.opn.pdf.

3. *Id.*

4. Amended Complaint, *supra* note 2, at 20 (The city of Highland Park's population is 93.5% African American and of the 973 students in the district, about 82% qualify for federal free or reduced lunch).

5. *Id.* at 21.

accordance with the Michigan Constitution's mandate that the State "maintain and support a system of public education, a little known state statute, MCL 380.1278 (8), requires that every student who does not show proficiency on the Michigan Educational Assessment Program ("MEAP"), the State's standardized reading proficiency test, in 4th or 7th grade shall receive "special assistance reasonably expected to enable the pupil to bring his or her reading skills to grade level within 12 months."⁶ The statute, passed in the mid-1990s, creates a unique intervention, "special assistance" to raise student reading to grade level in twelve months. It targets a discrete population, fourth and seventh grade students who failed the reading portion of the MEAP.⁷ It embodies the notion that the ability to achieve reading proficiency appropriate to age and grade level constitutes the root of all learning.⁸ And it imposes on all school districts the duty to provide appropriate instruction and remedial assistance so that children can read at grade level by third grade—which experts consider the most critical milestone for students—and that they remain on track through eighth grade.⁹

Despite the foresight displayed by the legislature in crafting the protections at least theoretically afforded by this law, it appears never to have been implemented by the State, which has not had in place a structured literacy intervention plan, supplied the requisite literacy expertise, or woven literacy instruction throughout the curriculum at every grade level.¹⁰ The Michigan Department of Education has phased

6. Mich. Comp. Laws Ann. § 380.1278 (8) (West, Westlaw through 2014 Legis. Sess.).

7. *Id.*

8. See LEILA FIESTER, EARLY WARNING! WHY READING BY THE END OF THIRD GRADE Matters 9 (2010) available at http://www.nmvoices.org/attachments/natl_kc_learn_to_read_full_rpt_5-10.pdf (Students who fall behind in learning to read will be unable to "read to learn" or "us[e] their skills to gain more information in subjects such as math and science, to solve problems, to think critically about what they are learning, and to act upon and share that knowledge in the world around them"); see also STEPHANIE ROSE & KAREN SCHIMKE, THIRD GRADE LITERACY POLICIES: IDENTIFICATION, INTERVENTION, RETENTION (2012), available at <http://files.eric.ed.gov/fulltext/ED535949.pdf>.

9. Amended Complaint, *supra* note 2, at 21. Significantly, poor literacy skills only worsen as students move into the later grades – 90% failure rate for students tested in reading proficiency in the 11th grade; 97% for math; 94% for writing, 100% for social student and 100% for math.

10. Urgency Report of Dr. Elizabeth Moje at 1. Plaintiffs Brief of the Law on Article 9 of the Michigan Constitution and State Budget Act, S.S. ex rel. L.M. v. State, --- N.W.2d --- (Mich. Ct. App. 2014) (No. 12-009231-CZ), 2014 WL 5881170 [hereinafter Urgency Report] available at http://www.aclumich.org/sites/default/files/ACLU_HighlandPark_MojeReport.PDF (Dr. Moje is the Arthur F. Thurnau Professor and the Associate Dean for Research and Community Engagement in the School of Education at

out all literacy consultants and Wayne RESA, the regional educational service agency that provides a broad spectrum of services and support to Wayne County's 33 school districts and public school academies, has only two consultants in literacy to serve those districts and 110 charter schools/public school academies.¹¹

In June of 2012, the ACLU of Michigan filed a lawsuit¹² on behalf of eight children ranging in age from nine to seventeen whose reading levels fall far below grade level and thus have been deprived of the ability to obtain a basic education.¹³ The lawsuit asserts that the opportunity to achieve basic reading proficiency is a constitutional "bottom line."¹⁴ Just a few weeks after the ACLU filed suit, Governor Rick Snyder announced that he would move the entire district, which was facing an \$11 million deficit, into receivership and place it in the control of a for-profit charter operator, The Leona Group, L.L.C., with a five-year contract.¹⁵ The "Emergency Manager," who the Governor had

the University of Michigan. Moje is also a former high school history and biology teacher and certified reading specialist (grades K-12) in the State of Michigan. Her research focuses on youth literacy learning and development in and out of school, and she is an expert in literacy instruction and in working with children and youth who struggle with reading and writing. Her particular expertise is in supporting literacy development for both struggling and successful students in grades 4-12 and in urban settings).

11. Email from Sarah Lorenz, to Kary Moss, (Jan. 19, 2015, 12:11 PM) (on file with author).

12. Factual material in this Article comes from public records and discovery material obtained in *S.S. ex rel. L.M. v. State*, 2014 WL 5881170, and which are in the author's possession, as well as other sources.

13. The legal team included Kary Moss, Mike Steinberg, Mark Fancher, and Shana Schoem of the ACLU of Michigan; Mark Rosenbaum and David Sapp of the ACLU of Southern California; Steven Guggenheim, Catherine Moreno, Joni Ostler, and Doru Gavril of Wilson, Sonsini, Goodrich and Rosati, PC; and Jennifer Salvatore, Edward A. Macey and Nakisha N. Chaney of Nacht, Roumel, Salvatore, Blanchard and Walker, PC. See Lyndsey Layton, *ACLU Alleges Michigan School District Violated Students' Right to Learn to Read*, WASH. POST, (July 12, 2012), http://www.washingtonpost.com/local/education/aclu-alleges-michigan-school-district-violated-students-right-to-learn-to-read/2012/07/11/gJQArfljeW_story.htm; Jenny DeMonte, *The Right to Read: Suing a State for Better Teaching*, CENTER FOR AMERICAN PROGRESS (Dec. 5, 2013), <http://www.americanprogress.org/issues/education/news/2013/12/05/80350/the-right-to-read-suing-a-state-for-better-teaching/>.

14. Amended Complaint, *supra* note 2, at 3.

15. The Leona Group was guaranteed an annual management fee of \$780,000. Michigan State University Professor David Arsen notes this fee is guaranteed even if enrollment declines, "crowding out funds available for instruction. The issue is not so much that TLG has no financial incentive to maintain or increase enrollment, but rather that students, not TLG, bear the risk if enrollment declines sufficiently (i.e. Reducing the district's total state aid), which require the management fee would rise progressively above 12% of state aid as enrollment declined." Affidavit of Dr. David Arsen at 9, *S.S. v. State of Michigan* (Mich. Cir. Ct. Oct. 12, 2012) [hereinafter Arsen Affidavit].

previously put in charge of the school district,¹⁶ explained that the district could not continue in its present form and also repay its debt to the State.¹⁷ She opined: "The Leona Group offered the best fit for Highland Park students and families...In addition to their strong academic performance standards, Leona is committed to working in partnership with parents, the community, my office and the new board to ensure students in Highland Park receive the very best education possible."¹⁸

Yet there was little basis for such an enthusiastic assurance. The Leona Group is one of the largest for-profit education service providers in the country, hosting 60 sites and serving 18,000 students in Michigan, Indiana, Ohio, Arizona, and Florida.¹⁹ Students in almost half of Leona's schools nationwide do not meet state academic benchmarks.²⁰ In 2009, a charter school board in New Orleans elected not to renew its contract with Leona partly due to poor academic performance.²¹ Several charter schools in Florida have also revoked their contracts with the company.²² During the 2011-2012 school year, the majority of Leona schools in Michigan were ranked below the 25th percentile.²³ Data suggest that some of Leona's Michigan schools performed below comparable

16. Dave Murray, *Emergency Manager Recommends Highland Park Become a Charter School District, as State Educators Fear Plan Will Spread to Others*, MLIVE (June 18, 2012, 5:31 PM), http://www.mlive.com/education/index.ssf/2012/06/emergency_manager_recommends_h.html; Stephanie Banchemo & Matthew Dolan, *Michigan City Outsources All of Its Schools: Highland Park Turns Over Troubled Operations to For-Profit Charter Firm*, WALL ST. J. (Aug. 2, 2012, 7:57 PM), <http://online.wsj.com/news/articles/SB10000872396390443545504577565363559208238>.

17. Melanie Scott Dorsey, *Highland Park Selects Charter Provider to Operate Schools*, DETROIT FREE PRESS (July 27, 2012, 3:30 PM), <http://www.freep.com/article/20120727/NEWS02/120727054/Highland-Park-Schools-selects-charter-provider-to-operate-schools>.

18. *Id.*

19. David Zeman, *Failing Charter Operators Keep Expanding in Michigan*, EDUC. TRUST MIDWEST (May 29, 2013), <http://www.edtrust.org/midwest/press-room/press-release/failing-charter-operators-keep-expanding-in-michigan>; see also THE LEONA GROUP, <http://www.leonagroup.com/index.htm>.

20. Banchemo & Dolan, *supra* note 16.

21. Sarah Carr, *Some Charter Schools Cutting Ties With For-Profit Partners*, THE TIMES-PICAYUNE (April 24, 2009, 9:21 PM), http://www.nola.com/news/index.ssf/2009/04/some_charter-schools_cutting_t.html.

22. Sharona Coutts, *Charter Schools Outsource Education to Management Firms, With Mixed Results*, ProPublica (Apr. 6, 2011, 8:08 AM), <http://www.propublica.org/topic/for-profit-schools/>.

23. *Top to Bottom Rankings*, MICH. DEPT. OF EDUC., http://www.michigan.gov/mdel/0,4615,7-140-22709_56562---,00.html.

schools.²⁴ In Benton Harbor, Leona operates Mildred Wells Academy, where “only 6 percent of its students met state standards in math.”²⁵ The Leona students scored lower than students enrolled “in the struggling Benton Harbor Public Schools, and far below the state average of 40 percent.”²⁶ An audit of the Walter French Academy “revealed serious problems in instructional practice, teacher supervision, employee morale and school operations.”²⁷

This is the second time that Michigan Governor Rick Snyder has appointed an emergency manager over a low-performing district in financial distress who then turned the district over to a for-profit charter company. The first district was the City of Muskegon Heights, which was run by Mosaica Education.²⁸ In that district, Mosaica’s five year contract was terminated in 2013 after only two years because, according to Emergency Manager Gregory Weatherspoon, “Mosaica was running a deficit budget and not making a profit.”²⁹ As one education policy

24. Diane Bukowski, *Charter School Bidders Perform Worse than DPS Schools*, VOICE OF DETROIT (May 26, 2011), <http://voiceofdetroit.net/2011/05/26/charter-school-bidders-perform-worse-than-dps-schools/> (In 2011, only 39 percent of fourth grade students at Voyageur Academy, a Leona charter school in Detroit, met state reading level standards, compared to 55 percent of fourth graders enrolled in Detroit Public Schools).

25. Zeman, *supra* note 19.

26. *Id.*

27. Arsen Affidavit, *supra* note 15, at 12.

28. See, e.g., Steve Norton, *Muskegon Heights Schools to be Replaced With Charters?*, MICH. PARENTS FOR SCHOOLS (May 25, 2012, 1:17 PM), <http://www.miparentsforschools.org/node/168> (noting that the district’s emergency manager, “is proposing the conversion as part of his solution for the school district’s financial problems”); *Emergency Manager Turns Muskegon Heights Schools into Charter District, Terminates Staff*, MICH. EDUC. ASS’N (May 29, 2012, 2:04 PM) <http://www.mea.org/em-turns-muskegon-heights-schools-charter-district-terminates-staff> (Under the Emergency Manager’s plan, the district remained responsible for its 14 million dollars of debt while the new charter company entered “debt free [and] receive[d] state aid payments.”); Michigan Radio Newsroom, *Highland Park Public Schools Selects Leona Group to Manage Charter System*, MICH. RADIO (July 27, 2012), <http://michiganradio.org/post/highland-park-public-schools-selects-leona-group-manage-charter-system> (The plan projects Mosaica “will make a minimum \$8.75 million in annual fees”).

29. Lynn Moore, *Mosaica Out as Manager of Muskegon Heights Charter Schools; New Firm Being Sought*, MLIVE (Apr. 26, 2014, 2:13 PM), http://www.mlive.com/news/muskegon/index.ssf/2014/04/mosaica_out_as_manager_of_musk.html. Note that the Emergency Manager also assured the public that the separation was “not the result of dissatisfaction with academic progress of students in the K-12 Muskegon Heights Public School Academy.” *Id.* “They came here to do a service for the children,” Weatherspoon said. “They got the job done, but it didn’t fit their financial model. The profit just simply wasn’t there.” *Id.* Thus, apparently, the profit motive prevailed in the decision-making process about the educational services for these children. But, putting that aside, the

advocate observed at the time, “[o]ur concern is that, based on what we know about those operators...it would appear as if [this] opportunity may be wasted ... because those are two of the lowest-performing charter operators in Michigan.”³⁰

The Governor also placed a third district, Detroit Public Schools, under the control of an Emergency Manager,³¹ and created a new entity called the Education Achievement Authority (EAA), responsible for turning around schools that place in the bottom five percent.³² It has highly controversial for a number of reasons, including the fact that the amount being spent per child is not transparent³³ and that it has been using untested methods of educational interventions that were poorly conceived and implemented.³⁴ Critics point out that the EAA is facing the same challenge as all struggling school districts whose resources are insufficient to meet the needs of the student population including effective intervention strategies and wrap around services.³⁵ All three districts represent primarily black communities.³⁶

The legislation granting authority to Emergency Managers provided them with significant powers, including the ability to cancel contracts and collective bargaining agreements, giving them full control over all aspects of the school system.³⁷ However, the act “neither identifies standards for academic performance nor assigns any role for academic

assurance that “they got the job done,” has been questionable as reports of problems within the Mosaica have plagued the district. *Id.*

30. Katie Ash, *For-Profit Experiment Plays out in Two Mich. Districts*, EDUC. WEEK (May 1, 2013), www.edweek.org/ew/articles/2013/05/01/30charters_ep.h32.html.

31. *Id.*

32. See Tim Martin, *Is Michigan's Education Achievement Authority Establishing a Statewide School Reform District on the Fast Track?*, MLIVE (Nov. 18, 2012, 2:45 PM), http://www.mlive.com/politics/index.ssf/2012/11/michiga_schools_education_ach.html (the EAA began as an interlocal agreement between then Emergency Manager of Detroit Public Schools and Eastern Michigan University under a law that was later repealed by Michigan voters in 2012); *With Another Bad Year, 37 Schools Would Become Eligible for EAA*, MIRS (March 23, 2013, 9:39 PM) <http://blogpublic.lib.msu.edu/index.php/with-another-bad-year-37?blog=5>; See also EAA Interlocal Agreement, STATE OF MICH., available at https://ww.michigan.gov/documents/snyder/EducationAchievementAuthorityAgreement_356040_7.pdf.

33. <http://www.electablog.com/2013/01/michigans-failing-schools-chief-finds-he-cant-educate-kids-at-current-funding-levels.html>.

34. Curt Guyette, *The EAA Exposes: An Investigative Report*, METROTIMES, (Sept. 24, 2014), at <http://www.metrotimes.com/detroit/the-aaa-exposed-an-investigative-report/Content?oid=2249513>

35. See, e.g., Chad Livengood, *Michigan Senate Backs Unlimited EAA Expansion in '15*, DETROIT NEWS (Dec. 11, 2013) <http://www.detroitnews.com/article/20131211/SCHOOLS/312110093>.

36. Ash, *supra* note 30.

37. See Arsen Affidavit, *supra* note 15, at 5.

considerations in the decisions regarding the appointment or termination” of the Emergency Manager.³⁸ The law also does not require the Emergency Manager to possess any academic qualifications or expertise.³⁹ When a district is under the control of an emergency manager, the level of transparency available to the public is severely diminished on such issues as the selection process for charter schools because those decisions are not subject to the Open Meetings Act.⁴⁰

While these school districts may be in dire straits, there are many more in similarly fragile positions. In 2013, the Michigan Department of Education found that 49 school districts had run a deficit during the 2011-2012 school year.⁴¹ Economist and education expert Professor David Arsen, of Michigan State University, has explained the problem:

Between 2002 and 2011, real per-pupil funding of Michigan’s public schools fell by \$2,643 or 24.5 percent. Consequently, virtually all schools have cut services. Some of this decline is due to the state’s decade-long economic contraction which depressed sales, income and property tax collections. But that’s not the main story. Sixty percent of the revenue decline can be attributed to declining tax effort – in other words, policy decisions.⁴²

Unlike the generation of lawsuits over the last several decades that have challenged school financing or the meaning of an “adequate” education,⁴³ this case filed in Highland Park focused on one core skill—literacy—and on sub-standard learning conditions that few would or do

38. *Id.*

39. *Id.*

40. *Id.* at 6.

41. Mark Brush, *The 15 Michigan Schools Running the Biggest Deficits*, MICH. RADIO (May 17, 2013), <http://michiganradio.org/post/15-michigan-schools-running-biggest-deficits>.

42. David Arsen, *Faculty Viewpoint: On Michigan School Finance*, MICH. STATE UNIV. COLL. OF EDUC. (April 23, 2013), <http://edwp/educ.msu.edu/new-educator/2013/faculty-viewpoint/>.

43. See Michael A. Rebell, *Educational Adequacy, Democracy, and the Courts*, in *ACHIEVING HIGH EDUC. STANDARDS FOR ALL* (Christopher Edley et al. eds, 2002); see also Plaintiffs’ Opposition to State Defendants’ Supplemental Motion for Summary Disposition, at pp. 10-12, *S.S. ex rel. L.M. v. State*, --- N.W.2d --- (Mich. Ct. App. 2014) (No. 12-009231-CZ), 2014 WL 5881170 (Courts in at least nineteen states have held state governments liable for failing to enforce educational mandates in their state constitutions); *Campaign for Fiscal Equity, et al. v. New York*, 100 N.Y.2d 893, 908, 801 N.E.2d 326, 332 (2003) (In New York, for example, a “sound basic education” is now defined as the “opportunity for a meaningful high school education, one which prepares them to function productively as civic participants”)

find acceptable in any school district. Yet the story of the children of Highland Park has become one not of innovative and robust interventions but rather of how the State instead is now out-sourcing its constitutional and statutory duties in a climate that cannot provide a high quality, much less adequate, public education for them. It is the story of the abandonment of children to an untested model of public education that relies on the lowest bidder, rather than the most qualified, and on producing a profit, rather than on producing educational results. There is no win-win with this approach until, and unless, the State is willing to put the interests of children first.

II. *S.S. v. STATE OF MICHIGAN*

In a telling anecdote, Highland Park's high school until earlier this year previously served as a prison.⁴⁴ Classrooms had no or broken windows.⁴⁵ Textbooks were scarce, outdated, and in poor condition.⁴⁶ Students often had to wear their winter parkas and gloves in class, impeding their ability to concentrate and learn, because of inadequate heating. Neither of its two elementary schools had counselors or vice principals. Bathrooms were not properly maintained, often smeared with feces, lacking toilet paper and paper towels, and missing stall doors and other fixtures. School buildings were unsecured such that a homeless man was able to live and sleep in the facilities without detection by school officials. Classrooms and hallways were often filthy and damp from leaks. The libraries were inadequately resourced with books, and staff and students were often prohibited from checking out books.⁴⁷ The city no longer has a public library and, at one point, had to tear out its streetlights to cut costs.⁴⁸

44. Urgency Report, *supra* note 10, at 17.

45. *Id.*

46. Amended Complaint, *supra* note 2, at 23.

47. The litany of problems are fully described in the Amended Complaint. Additional issues related to the maintenance of records, relevant because they were so poorly maintained that it was not possible to ascertain how students were performing. Files, for example, did not include grade level performance assessments, current and post-test assessments, counseling records, attendance records or discipline records. Transfer student files were missing test results. Student files were not readily accessible to parents and school personnel sometimes actively resist disclosing their contents.

48. Alexander Eichler, *Highland Park, Michigan Tearing Out its Streetlights to Cut Costs*, THE HUFFINGTON POST (Nov. 7, 2011, 1:10 PM) http://www.huffingtonpost.com/2011/11/07/highland-park-streetlights_n_1079909.html; *McGregor Library*, CRAIN'S DETROIT BUS. (July 13, 2007, 4:39 PM) <http://www.crainsdetroit.com/article/20070713/sub/70713015>.

Although conditions were bleak before the Emergency Manager awarded the district to The Leona Group, the Education Management Organization (EMO) immediately reduced teacher salaries from an average of \$65,000 to \$36,000 per year⁴⁹ and the amount devoted to instructional spending per student to \$3,811, or 46% of total expenditures.⁵⁰ Four months into the school year, Wayne County Circuit Court Judge Ziolkowski ordered Plaintiff's expert, Dr. Elizabeth Moje from the University of Michigan's Department of Education, to examine the school conditions, teacher qualifications, and literacy intervention efforts. She found:

Although it is obvious that the staff at the System are working diligently with the materials they have available, my initial assessment of the programs identified by Superintendent William stands: The programs are not being used with the degree of structure, systematicity, and coherence necessary for the System/State to meet the Statute's demands. This is particularly evident at the upper grades.⁵¹

Specifically, she noted,

We were unable to identify a person on staff in any of the three schools or within the administration who could give dependably accurate answers as to the state of literacy achievement in the schools;⁵²...[w]e heard inconsistent and, in a number of cases, inaccurate, responses to questions (and sometimes no answers at all) regarding basic literacy processes; programs being used; how to read data, professional development teachers are receiving, and the names, titles and subject areas of various personnel⁵³...we observed teachers teaching students incorrect word meanings....we documented no evidence of any teacher

49. Casey Chaney, *Detroit-Area District, in Emergency, Outsources Schools*, HEARTLAND (Aug. 25, 2012) <http://news.heartland.org/newspaper-article/2012/08/25/detroit-area-district-emergency-outsources-schools-short>.

50. Diane Bukowski, *Charter School Bidders Perform Worse than DPS Schools*, VOICE OF DETROIT (May 26, 2011) <http://voiceofdetroit.net/2011/05/26/charter-school-bidders-perform-worse-than-dps-schools/>.

51. Urgency Report, *supra* note 10, at 11.

52. *Id.* at 5.

53. *Id.*

talking about vocabulary instruction in research-based ways, and we saw no evidence of such instruction.⁵⁴

Most significantly,

[A] vital element to a clearly detailed and structured plan that is missing in the System is an expert literacy leader. Although there were a number of efforts to systematize instruction in generic ways across schools and classrooms...and despite the presence of a number of skilled and dedicated staff members, we did not have access to anyone who could accurately explain a *clear literacy turnaround plan* at grade bands, let alone the overall plan for all grades. ...We were unable to identify a person on staff in any of the three schools or within the administration who could give dependably accurate answers as to the state of literacy achievement in the schools, goals for children's literacy learning beyond increasing scores...a full understanding of the nature of literacy processes or of literacy learning, specific literacy teaching practice, or what constitutes literacy growth.⁵⁵

She identified a range of measures necessary to fulfill the statutory obligation of the "Right to Read" law: "This district requires systematic attention, expertise in literacy leadership, highly qualified literacy specialist, extensive professional development to educate all teachers in integrated literacy instruction, and scientifically based interventions to enable struggling students to achieve grade level skills."⁵⁶ In addition, the quality of information provided to Dr. Moje and upon which she relied for her analysis was likely even worse after it was discovered that the Superintendent ordered at least one teacher to backdate logs that they were required to produce for the litigation to make it appear that students were receiving individualized assistance for the first two months of the new school year when, in fact, they were not.⁵⁷

By the end of the EMO's first year in the district, close to 80 percent of current fourth graders and 73 percent of current seventh graders were

54. *Id.* at 14.

55. *Id.* at 5 (emphasis in original).

56. *Id.* at 3; *See also* Recommendations by the Joint Expert Witness Team, *S.S. v. State of Michigan* (Mich. Cir. Ct. May 8, 2013). The expert witness team that authored that report included Dr. Elizabeth Moje, retained by the Plaintiffs, and Drs. Rebecca Sipe and Linda Williams, who were retained by the Leona Group/System Defendants.

57. *See* Affidavit of Sara Midds, *S.S. v. State of Michigan* (Mich. Cr. Ct. June 27, 2013).

not testing as reading proficient.⁵⁸ By contrast, entering the 2012-13 school year, 65 percent of then-fourth graders and 75 percent of then-seventh graders required statutory intervention. After reviewing standardized test results, Dr. Moje noted:

The two...elementary schools saw an average 66% of their third grade students fail to meet the standards set on the MEAP, which predicts bleak futures for these children unless extremely robust and expert interventions are made immediately. The current lack of a systematic and expert turnaround plan positions HPRAs as *perpetually in need of specialized literacy instruction for the majority of its students to meet the demands of the State statute.*⁵⁹

Dr. Moje concludes: "This continued negative trend in student achievement represents a crisis of dramatic proportions for the children of this district. This failure to make even a dent on student achievement at the high school level indicates the flawed process in place in the System."⁶⁰

Although there was plenty of blame to go around, the State set out to divest itself of any responsibility by first arguing, broadly, that the Michigan Constitution and state law contain no explicit requirements but are merely policy statements and unenforceable as a matter of law.⁶¹ To the extent that the "right to read" law imposes any legal duty "...The plain language of MCL 380.1278(8) mentions only school officials and makes no reference to State Defendants."⁶² The State then argued that to the extent they might be liable, they enjoyed broad immunity for all

58. Defendant Michigan Department of Education released MEAP scores on February 11, 2013. See *MEAP Test Results*, MICH. DEPT. OF EDUC., http://www.michigan.gov/mde/0,4615,7-140-22709_31168_40135-294751--,00.html (last visited Jan. 15, 2013).

59. Affidavit of Dr. Elizabeth Moje at 14, *S.S. v. State of Michigan* (Mich. Cir. Ct. Oct. 12, 2012) [hereinafter *Moje Affidavit*] (emphasis added).

60. *Id.* at pp 6. (emphasis added).

61. See *State Defendants' Brief on Appeal* at 11, No. 317072 (Mich. App. Dec. 23, 2013) ("The plain language of art 8, 1, reveals that it is simply a policy statement; there is nothing within the text giving Plaintiffs any actionable rights.") However it is black letter law that a statute cannot immunize a state actor's unconstitutional activities or failure to perform constitutionally mandated duties. See *Burdette v. State*, 166 Mich App 406, 408-409; 421 NW2d 185 (1988); *Smith v. Dept of Public Health*, 428 Mich 540; 410 NW2d 749 (1987) aff'd 490 US 58 (1989) (governmental immunity not available in action alleging constitutional violations).

62. See *State Defendants' Brief on Appeal*, *supra* note 61, at 18, No. 317072 (Mich. App. Dec. 23, 2013).

decisions made by the Emergency Manager⁶³ and that “[t]he Legislature has plainly vested the day-to-day power and duty of educating K-1 pupils in the hands of local school districts.”⁶⁴ Thus, they had no responsibilities before the advent of the Emergency Manager; and bore none after the Emergency Manager either.

They also comfortably blamed the children themselves. As one attorney stated in open court:

I just want to mention that I think it’s fairly clear from the statute itself and it’s hard to imagine what really would be an effective strategy to bring children up to grade level within one year. That’s kind of the dirty little secret that’s been lurking around the edges of this case that people are reluctant to mention because the legislature decided at one point to put something aspirational into a much larger act. But, reality is reality.⁶⁵

The trial court refused to absolve the State of responsibility:

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 8.⁶⁶

Nor would the court allow them to blame local finances:⁶⁷

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

63. See *State Defendants’ Supplemental Motion for Summary Disposition, S.S. v. State of Michigan* (Mich. Cir. Ct. May 10, 2013) [hereinafter *Supplemental Motion*]; see also *Opinion and Order* at 12, Judge Marvin Stempien, *S.S. v. State of Michigan* (Mich. Cir. Ct. July 1, 2013). This argument was especially troubling since it would, if taken to its logical conclusion, mean that children living in districts outside of Emergency Manager control may sue for their civil rights but children living in districts under Emergency Manager control may not. The court rejected that argument as well.

64. *Supplemental Motion, supra* note 63, at 5.

65. *Transcript* at 75-76, *S.S. v. State of Michigan* (Mich. Cir. Ct. June 27, 2013) (Statement of Noel Massie).

66. *Opinion and Order* at 6, Judge Marvin Stempien, *S.S. v. State of Michigan* (Mich. Cir. Ct. July 1, 2013).

67. Plaintiffs sued the State of Michigan, Highland Park School District, Emergency Manager, and The Leona Group.

decentralized system of education which gives broad discretionary authority to local school districts, those districts, such as the Highland Park Public 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.*⁶⁸

The state appealed.⁶⁹

In the meantime, the school district itself was subjected to significant instability in leadership as four different Emergency Managers came and left in less than two years.⁷⁰ One of them, in a dramatic move whose message cannot be missed, was caught ordering school officials to throw out a valuable collection of black history books which were found in a

68. *S.S. v. State of Michigan*, No. 12-009231-CZ, (3rd Cir of Michigan) July 1, 2013, pg. 7 (emphasis added).

69. While the appeal was pending, the Governor signed into law a court reorganization plan that removed the case from Judge Zilkowski and Stempien and placed it in a new Court of Claims whose four judges are appointed by the Republican-majority Supreme Court. See Jonathan Oosting, *Snyder Signs Controversial Bill Moving Michigan Court of Claims: 'Let's Keep Improving Things'*, MLIVE (Nov. 12, 2013, 5:13 PM) http://www.mlive.com/politics/index.ssf/2013/11/michigan_gov_rick_snyder_igns_10.html.

70. The district was first put under the control of Jack Martin in January 2012. See *Jack Martin Reappointed as Highland Park Emergency Manager, Will Partner with Detroit Public Schools*, HUFFINGTON POST DETROIT (Mar. 2, 2012, 12:38 PM) http://www.huffingtonpost.com/2012/03/02/jack-martin-reappointed-highland-park-schools-emergency-manager_n_1316483.html. He remained for five months and then became Emergency Manager for the Detroit Public Schools. The Governor appointed Joyce Parker. *Snyder Appoints Parker as Successor-Emergency Manager for Highland Park Schools*, STATE OF MICH., DEPT. OF TREASURY PRESS RELEASE, (May 10, 2012) http://michigan.gov/documents/highlandparkschools/Parker_HPS_SuccessorEM_384831_7.PDF. She remained for five months when she left to take over the City of Allen Park. See Melanie Scott Dorsey, *Joyce Parker Named Emergency Manager for Allen Park*, DETROIT FREE PRESS (Oct. 26, 2012) <http://www.freep.com/article/20121026/NEWS02/310260095/Joyce-Parker-named-emergency-manager-for-Allen-Park?odyssey=mod%7Cnewswell%7Ctext%7CMichigan%20news%7Cp>. The Governor then appointed Donald Weatherspoon who remained for a year. He resigned to take over the Pontiac Schools and was replaced with his brother, Gregory Weatherspoon. *Gov. Snyder Appoints Gregory Weatherspoon to Fill Emergency Manager Role in Highland Park, Muskegon Heights School Districts*, MICH. STATE DEPT. OF TREASURY (Oct. 15, 2013) http://www.michigan.gov/treasury/0,4679,7-121-1755_1963-314484--,00.html.

dumpster.⁷¹ The collection was described by one resident: “In diversity, range and depth, that library rivaled most community college libraries.... The purpose of black studies is to build self-esteem, self-confidence, to engender a sense of self-worth. The fundamental idea is that if black children learn to respect themselves, they’ll respect others.”⁷² When asked to explain, the Emergency Manager clarified, as reported by Alexis Wiley of Fox 2 News on June 24, 2013: “...[B]ottom line, the district is no longer interested in being responsible for the books.”⁷³

III. THE DOWNWARD SPIRAL OF EDUCATION POLICY THAT LED TO THE ACLU’S LAWSUIT

Despite the defense attorney’s statement that “reality is reality,” ensuring core literacy skills is achievable. Children who are growing up in poverty can learn. As one example, the Education Trust-Midwest recently spotlighted the stellar academic performance of students of all races and ethnicities at North Godwin Elementary School, located just outside of Grand Rapids, Michigan.⁷⁴ In the Baylor Woodson School in Inkster, Michigan, a demographically similar district to Highland Park, 98% of its students met reading and math standards on the 2010 MEAP and, in the 5th grade, 73% of students scored “Advanced” in Math and 63% scored “Advanced” in Reading.⁷⁵

However, this kind of success is the exception rather than the rule because the underlying structure rests on a shaky foundation. While an estimated \$14 billion is appropriated each year to schools via the State School Aid Act of 1979, the financing scheme results in the loss of the per pupil funding allotment when students leave the district thus consigning the poorest or those students who are not mobile to whatever

71. Lori Higgins, *African American History Books Were Tossed by Mistake*, *Official Says*, DETROIT FREE PRESS (June 25, 2013, 9:57 PM) <http://archive.freep.com/article/20130625/NEWS02/306250101/Highland-Park-African-American-books-thrown-out>.

72. *Id.*

73. *African American History Books Found in School Dumpster*, MYFOXCHICAGO (June 25, 2013, 10:58 PM), <http://www.myfoxchicago.com/story/22687533/african-american-history-books-found-in-school-dumpster>; then follow link to embedded video (emphasis added).

74. *Becoming a Leader in Education: An Agenda for Michigan*, THE EDUC. TRUST-MIDWEST (Jan. 11, 2011), <http://www.edtrust.org/midwest/publication/becoming-a-leader-in-education-an-agenda-for-michigan>.

75. *What Our Students Deserve: Facing the Truth About Education in the Great Lakes State*, THE EDUCATION TRUST-MIDWEST (Feb. 9, 2012), <http://www.edtrust.org/midwest/publication/what-our-students-deserve-facing-the-truth-about-education-in-the-great-lakes-st>.

is left behind.⁷⁶ The system fails any district that is suffering a declining population.

Until 1994, public schools were financed through locally raised property taxes and then, with the adoption of Proposal A, a constitutionally guaranteed per pupil allowance as well as a state real estate tax, dedicated sales tax, lottery revenue, and other state taxes. Wayne State Law School Professor Peter Hammer has observed: "In many respects, Proposal A simply ratified existing forms of absolute inequality into the state finance formula, with a soft commitment to try to narrow the bands of inequality over time."⁷⁷ Further, "[W]hen school financing is tied to local financing, the fate of the local schools is largely tied to the state of the local economy."⁷⁸ Professor Arsen notes that "Michigan's school choice policies promote sustained outflows of students and revenue from districts charged with educating the highest needs children, significantly contributing to fiscal stress and the prospect of state emergency management."⁷⁹ Even wealthier districts, like the City of Ann Arbor, are resorting to desperate measures by, for example, attempting to launch what they termed a "tuition-based" model for those students seeking to take a seventh hour course for credit.⁸⁰

But the starkest inequities are apparent in the funding scheme for capital improvements which depend entirely on local districts' ability to raise funds through local property taxes. "Variations in per-pupil property wealth across communities create huge inequalities in local districts' ability to pay for school facilities. Consequently, dramatic disparities in facility quality across Michigan districts are strongly correlated with local property wealth."⁸¹

Rather than address this set of fundamental problems related to financing, Governor Rick Snyder focused on reforming school

76. See PUBLIC EDUCATION GOVERNANCE IN MICHIGAN, CITIZENS RESEARCH COUNCIL OF MICHIGAN (Jan. 2010).

77. Peter Hammer, *The Fate of the Detroit Public Schools: Governance, Finance and Competition*, 13 J.L. SOCIETY 111, 124-25 (2011) (hereinafter Hammer).

78. *Id.* at 136.

79. Arsen, *supra* note 42.

80. Danielle Arndt, *Letter: ACLU Calls School Board's Decision to Charge Students for 7th Hour 'Misguided and Illegal'*, THE ANN ARBOR NEWS (June 13, 2013, 6:05 PM), http://www.annarbor.co/2013/06/13/ACLU_Letter_AnnArborPublicSchools.pdf. This "optional" hour was necessary though if students were to participate in band, theatre, choir, or cosmetology or homebuilders programs. The ACLU of Michigan then filed a lawsuit, *Coombe v Ann Arbor School District*, No. 13-788-CZ (Mich. Cir. Ct. Aug. 7, 2013) asking a circuit court to stop the school district from implementing a new "tuition-based" program. A week later the school board reversed its decision and plaintiffs' voluntarily dismissed the complaint.

81. Arsen, *supra* note 42.

governance, eliminating budget deficits, and developing accountability mechanisms for teachers.⁸² He advocated for “performance based school districts” and the lifting of caps on the number of charter schools, rather than support placing quality controls on them.⁸³ Legislators soon introduced House Bill 5923⁸⁴ to enact his “Any Time, Any Place, Any Way, Any Pace” model.⁸⁵ The bill would have created new forms of public schools, expanded online education, and new means for alternative instructor certification.⁸⁶ New types of schools included online academies, university affiliated schools, employer-supported schools, cultural institution supported schools, and schools with out-of-state pupils paying tuition,⁸⁷ which would be licensed and controlled by separate authorizing bodies, rather than the Department of Education. The bill would have allowed at least some of these specially designated new schools to practice selective enrollment and admissions policies, made extensive changes to the State’s school code, and allowed for a significantly expanded list of sponsors to run school operations.⁸⁸

Opponents warned that it would “further tilt[] the uneven playing field to the unfair advantage of corporate run schools” noting that the “[Michigan Department of Education] does not have the authority to revoke a failing school with a special designation.”⁸⁹ A Board of Education Trustee for the Ann Arbor Public Schools argued it would “allow any ‘thing’ (employer, municipality, etc.) to become a school.

82. See Rick Snyder, *A Special Message from Governor Rick Snyder: Education Reform*, STATE OF MICHIGAN (Apr. 27, 2011), available at http://www.michigan.gov/documents/snyder/SpecialMessageonEducationReform_351586_7.pdf.

83. *Id.* at 5.

84. See Legislative Fast Facts: House Bill 5923, OAKLAND SCHOOLS (Oct. 8, 2012), available at http://Downloads/HB_5923-1.selective_schools.fast.pdf.

85. *Disaggregating High School Education*, OXFORD FOUND. MICH. (Sept. 29, 2012), <http://oxfordfoundationmi.com/2012/10/02/disaggregating-high-school-education> (the Oxford Foundation, founded in 1991, has led an effort to reform the system of school financing, see <http://oxfordfoundationmi.com/2012/11/19/michigan-public-education>); see also Diane Ravitch, *Michigan is on Its Way to Ending Public Education* (June 2, 2012), <http://dianeravitch.net/category/vouchers>; Paul Egan & Chastity Pratt Dawsey, *Education Funding Proposal Allows School Choice, More Online Learning*, DETROIT FREE PRESS, (Nov. 18, 2012), <http://www.freep.com/article/20121118/NEWS15/311180296/Education-funding-proposal-allows-school-choice-more-online-learning>.

86. *Disaggregating High School Education*, OXFORD FOUN. MICH, *supra* note 85.

87. *Id.*

88. H.B. 5923, 96th Leg. (Mich. 2012).

89. Legislative Fast Facts: House Bill 5923, OAKLAND SCHOOLS, *supra* note 84.

There are no quality controls that they will be held accountable to.”⁹⁰
Lou Glazer, President of Michigan Future, observed it would

undermine the purpose and structure of our education system. Serious proposals to substitute an open market place of just about any education provider without quality standards which will create an existential threat to all local public school districts. And proposals to make education institutions primarily suppliers to meet the immediate job demands of Michigan employers.⁹¹

It was perhaps Michigan State University’s Professor David Arsen’s critique⁹² that was especially poignant. He noted that the legislation would not address the declining revenues for Michigan’s schools, but instead would drain school budgets- budgets that have already experienced a 24% decline between 2002 and 2011.⁹³ The Act did nothing to address adequacy or equity because it failed to account for the differential costs associated with educating different types of students.⁹⁴ Districts would be highly incentivized to attract inexpensive-to-teach students to inexpensive online classes. Special needs students, on the other hand, who often require more financial resources to educate, would be more likely to remain in their original districts which would then have fewer funds to educate them.⁹⁵ Additionally, the problems associated with declining enrollment for districts that cannot attract students in the open enrollment program would only be compounded. Finally, Arsen noted that the bill would do nothing to address school facilities issues.⁹⁶ As he explained with respect to Highland Park’s situation:

The fundamental reason for these deplorable conditions is the State of Michigan’s system for funding school facilities. Michigan is one of a handful of states nationwide where school

90. Christine Stead, *Parents: Pay Attention to HB 5923. It Will Become Law in the Next 9 Legislative Session Days* (Nov. 9, 2012), <http://k12christinestead.com/?s=HB+5923>.

91. Lou Glazer, “Wrong Track on Education Policy, (Feb. 28, 2013), <http://www.michiganfuture.org/02/2013/wrong-track-on-education-policy/>. Additionally, Professor Peter Hammer has written persuasively on how the current funding scheme – Proposal A – has led to the neglect of other aspects of equity. See Hammer, *supra* note 77.

92. Arsen, *supra* note 42.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* Poor school districts would have to levy taxes at ten times the rate that their rich counterparts levy to raise the same per-pupil revenues for facilities.

facilities are entirely funded by local property taxes. The state provides no equalizing state aid to fund school facilities. So the quality of school facilities varies dramatically across Michigan school districts and this variation in facility quality is strongly correlated with variations in local district ability to pay (ie. Taxable property value per pupil) not local tax effort (ie. Millage rates). Essentially low-property wealth districts, like Highland Park, lack the ability to pay for adequate facilities.⁹⁷

Indeed Highland Park is *the* poster child to illustrate how the State's neglect of its constitutional responsibilities has harmed the education of children in low-wealth districts. A few years ago, the W.K. Kellogg Foundation, Skillman, and Frey Foundations funded the Education Policy Center at Michigan State University and the Citizen's Research Council of Michigan to conduct a study of school facility quality in every Michigan school district who found that among Michigan's 5523 school districts, Highland Park City Schools had the lowest taxable property value per pupil of any district.⁹⁸

Failing to address how facilities are funded ensures that students will continue to be taught in a poor learning environment:

Academic research shows that building quality affects student and teacher health, attendance and performance. Research also shows that teacher turnover, a major problem in low-income schools, is significantly influenced by school building quality. Other things equal, it is difficult to attain and retain top-notch educators to work in dilapidated and uncomfortable buildings when other schools offer much more hospitable work environments.⁹⁹

And the expert observations of Dr. Moje with respect to conditions in Highland Park spoke expressly to this point: "Consigning adolescents to a windowless building for 6 or more hours a day is not a conducive educational experience and it is certainly not providing these youth an equitable experience when compared with other high schools across the state."¹⁰⁰ And failing to address that issue means, equally, that the deficit

97. Arsen Affidavit, *supra* note 15, at 10.

98. *Id.*

99. *Id.* (citing Jack Buckley et al. *Fix it and They Might Stay: School Facility Quality and Teacher Retention in Washington, DC*, 107(5) TEACHERS COLL. RECORD 1107-1123 (2005); Susanna Loeb et al., *How Teaching Conditions Predict Teacher Turnover in California Schools*, 80(3) PEABODY J. OF EDUC. 544-70 (2008).

100. Urgency Report, *supra* note 10, at 25.

situations are unlikely to be resolved. Well over a year after Mosaica had taken over Muskegon Heights schools, the Public School Academy, for example, reported a deficit of \$550,000 because the district could not secure a loan for capital improvements.¹⁰¹

While the bill failed, the author anticipates it will soon return in a similar form even though Michigan now boasts the highest number of for-profit school management organizations in the nation --a total of 43 companies operate 181 schools in the state.¹⁰² The state has an "A" from the Center for Education Reform, which ranked Michigan's charter-school law, revised in 2011, as the fourth-strongest in the nation,¹⁰³ and placed Michigan 11th in the nation for "parent power."¹⁰⁴ Its individual assessment of the state's school-choice environment noted: "Michigan is prohibited from offering private school choices...but it makes up for that...with its robust charter law, which is expansive and responsive to consumers." It is not, therefore, that parents don't have choices in Michigan. It is a question of who has them and the unintended consequences of a political environment that cannot or will not take on a financing scheme that results in large inequities between and among traditional public schools. The growth of for-profit education industry across the United States has been astoundingly rapid, though not uniformly so. As Professor Gary Miron notes: "[F]or-profit... schools are highly concentrated in lower elementary schools, where the per-pupil

101. Andrew Trzaska, *Muskegon Heights Public School Academy Charter District Slips Onto Deficit Watch List*, WUVS 103.7 (Dec. 16, 2013), <http://www.1037thebeat.com/muskegon-heights-charter-academy-slips-onto-deficit-watch-list/>.

102. GARY MIRON ET AL., PROFILES OF FOR-PROFIT AND NONPROFIT EDUCATION MANAGEMENT ORGANIZATIONS, THIRTEENTH ANNUAL REPORT, 2010-2011, NAT'L EDUC. POLICY CTR. 18 (Jan. 2012), available at <http://nepc.colorado.edu/publication/EMO-profiles-10-11>. These efforts have been enthusiastically supported by Florida Governor Jeb Bush who has traveled to Michigan to support Governor's Snyder's reform efforts. See Lee Fang, *How Online Learning Companies Bought America's Schools*, THE NATION (Nov. 16, 2011), <http://www.thenation.com/article/164651/selling-schools-out?page=full>. Florida has been a fast adopter of such privatization measures, following intense private lobbying. See also Amy Baral, *Education for Profit: The Darker Side of Charter Schools*, NEXT NEW DEAL (July 5, 2012), <http://www.nextnewdeal.net/new-guard/education-profit-darker-side-charter-schools>; David Arsen & Yongmei Ni, *Is Administration Leaning in Charter Schools? Resource Allocation in Charter and Traditional Public Schools*, EDUC. POLICY ANALYSIS ARCHIVES (March 2012), <http://epaa.asu.edu/ojs/article/view/1016>.

103. *Charter School Law Rankings and Scorecard*, CTR. FOR EDUC. REFORM (2014), available at <https://www.edreform.com/wp-content/uploads/2014/03/2014CharterSchoolLawScorecardLink.pdf>.

104. *Parent Power Index: Michigan*, CENTER FOR EDUC. REFORM, <http://www.edreform.com/in-the-states/parent-power-index/states/mi/> (last visited Jan. 4, 2015).

cost is substantially lower than in upper grades.”¹⁰⁵ As of 2010-2011, 758 schools in the U.S. were managed by for-profit EMOs.¹⁰⁶ Large EMOs account for 526 of these schools.¹⁰⁷ Charter schools account for nearly 93.9% for all EMO-managed schools.¹⁰⁸ Yet, only three of nine charter school operators in Michigan have more than half of their schools placing in the top 25% of schools.¹⁰⁹ Thirty-six charter schools in the state are in the bottom 10% and for-profit charter schools represent 80% of Michigan’s charter schools.¹¹⁰

The experience of Highland Park is a testament to the difficulty of allowing education policy to operate on untested assumptions, lack of empirical research, and a “lowest bidder” mentality. Similarly, Muskegon Heights has struggled at every level since it was taken over by Mosaica.¹¹¹ One investigation uncovered at least eight non-certified teachers or a little more than ten percent of the teaching staff.¹¹² One in four teachers left the district in the first few months of the new operation¹¹³ amid complaints about working conditions and salary.¹¹⁴ The high school had at least three principals in the space of four months.¹¹⁵

105. MIRON ET AL., *supra* note 102, at 13.

106. *Id.* at 8.

107. *Id.*

108. *Id.* at 9.

109. *Charter School Expansion Approved by Michigan State Senate*, HUFF POST EDUC. (Oct. 7, 2011, 3:54 PM), http://www.huffingtonpost.com/2011/10/07/charter-schools-expansion_n_1000644.html.

110. *Id.*; see also *Michigan Charter Schools: Legislature Continues Debate Over For-Profits*, HUFF POST DETROIT (Nov. 29, 2011, 6:27 PM), http://www.huffingtonpost.com/2011/11/29/michigan-legislature-charter-school-debate_n_1119392.html.

111. Ash, *supra* note 30; Katie Ash, *Private Firms Run Two Mich. Districts*, EDUC. WEEK (May 7, 2013), http://www.edweek.org/ew/articles/2013/05/08/30charters_ep-2.h32.html. For additional coverage of the oversight problem in the nation’s Education Management Organizations, see Stephanie Strom, *For School Company, Issues of Money and Control*, N.Y. TIMES (Apr. 23, 2010), <http://www.nytimes.com/2010/04/24/education/24imagine.html?pagewanted=all>.

112. Lindsey Smith, *Investigation Uncovers Non-Certified Teachers at Muskegon Heights New Charter School*, MICH. RADIO (Feb. 12, 2013), <http://michiganradio.org/post/investigation-uncovers-non-certified-teachers-muskegon-heights-new-charter-school>.

113. Lindsey Smith, *1 in 4 Teachers at Muskegon Heights Schools Quit During First 3 Months of School Year*, MICH. RADIO (Dec. 3, 2012), <http://michiganradio.org/post/1-4-teachers-muskegon-heights-schools-quit-during-first-3-months-school-year>.

114. Lindsey Smith, *“I Couldn’t Accept That.” Why Muskegon Heights Teachers Quit and How it Impacts Students*, MICH. RADIO (Jan. 3, 2013), <http://michiganradio.org/post/i-couldnt-accept-why-muskegon-heights-teachers-quit-and-how-it-impacts-students>.

115. Lynn Moore, *Muskegon Heights High School Has a New Principal, Again*, MLIVE (Feb. 4, 2013), http://www.mlive.com/news/muskegon/index.ssf/2013/02/muskegon_heights_high_school_h.html.

While there was at least one favorable report of results,¹¹⁶ there have been also reports of mounting pressure on the district because of poor results.¹¹⁷ Arsen notes a number of reasons why EMO's with strong performance records would be unlikely to offer bids to manage districts like these, including their inability to select the student population, the contractual relationship, and risky long-term prospects of being able to retain control.¹¹⁸

Rather than rectify the shaky financial underpinning of school districts, the State is consigning children in the poorest communities to conditions that breed failure – unstable leadership, lack of a coherent intervention plan, refusal to invest in proven strategies, and poor learning conditions. Rather than impose quality controls on charter schools and the selection process itself, the Governor and others have aggressively advocated lifting the cap on them. Rather than devise a funding scheme that will breed equity and adequacy, the Governor has lauded a program that would exacerbate the inequities, leaving poor children with no options at all.¹¹⁹ And, rather than comply with the “Right to Read” statute and place the school system in the hands of literacy intervention experts, the State has ceded control to Emergency Managers who lack any academic expertise and whose bottom line is debt reduction, not public education.

We cannot afford to ignore the tremendous human and economic costs of failure. According to the National Institute for Literacy, 47% of Detroiters (200,000 adults) are functionally illiterate, unable to fill out basic forms, read newspaper articles, complete job applications, or read prescriptions.¹²⁰ The Michigan League for Human Services reports that nearly 400,000 working-age adults in Michigan lack a high school

116. Lynn Moore, *Muskegon Heights Charter Schools Monitor 'Very Impressed' by High School*, MLIVE (Sept. 25, 2013), http://www.mlive.com/news/muskegon/index.ssf/2013/09/muskegon_heights_charter_schoo_16.html.

117. Lynn Moore, *Pressure on Mosaica to Improve Muskegon Heights Schools Growing, Documents Show*, MLIVE (Sept. 6, 2013), http://www.mlive.com/news/muskegon/index.ssf/2013/09/pressure_on_mosaica_to_improve.htm.

118. Arsen Affidavit, *supra* note 15, at 8-9.

119. GARY MIRON & BROOKS APPLÉGATE, *TEACHER ATTRITION IN CHARTER SCHOOLS* (2007), available at <http://nepc.colorado.edu/files/EPSSL-0705-234-EPRU-exec.pdf>. One financing option under discussion is weighted funding which would, presumably, address the reality that some students cost more to educate. See Dan Varner, *Weighted Funding: What It Is and Why Michigan Needs It*, HUFF POST DETROIT (Aug. 26, 2013, 6:32 PM), http://www.huffingtonpost.com/dan-varner/weighted-funding-what-it-_b_3817995.html.

120. ADDRESSING DETROIT'S BASIC SKILL CRISIS, THE DETROIT REGIONAL WORKFORCE FUND 2 (2011) available at <http://www.skilledwork.org/sites/default/files/BasicSkillsReport.pdf>. Other district literacy rates include Pontiac at 34%; Inkster at 34%; Southfield at 24%, Warren at 17%, and Macomb and Oakland Counties at 13%.

diploma or equivalent, for example, and that one in every 12 Michigan adults lack basic literacy skills.¹²¹ And the Alliance for Excellent Education reports that for some 46,300 students not graduating from Michigan high schools in 2008, the State has lost \$2.2 billion in household wealth, \$12.3 billion in lost wages; \$750 million in incurred health care costs; and \$126.5 million in remedial training costs.¹²² Michigan, according to *Education Week*, gets a D in its K-12 Achievement Index, ranking the lowest of all the big ten states on 18 indicators, including current achievement, improvement over time, poverty-based disparities.¹²³ Further, Michigan ranks 42nd among all states -- 2 states below Alabama, 6 states below Arkansas, 15 states below Georgia, 23 states below Kentucky, and 36 states below Florida.¹²⁴ It is certainly not a new concept that the ability to acquire an education is a basic human and civil right. However, we are at the cusp of a new era in which the State's willingness to provide a decent public education for low-income students has never been more at risk.

IV. MOVING FORWARD

The need is indisputable for States to possess turnaround plans for all low-performing schools, establish professional learning communities, and deploy strategically integrated technological resources to improve teaching and learning. As observed by Kevin G. Welner:

These opportunity gaps will not be closed by lawmakers who reach for the quick fix – policies like grade retention that are enticing and easily marketed but that are ultimately worthless. Rather, progress will follow from policies that promote deep,

121. GOOD IDEAS ARE NOT ENOUGH: MICHIGAN'S ADULT LEARNING SYSTEM NEEDS MORE STATE FUNDING, MICHIGAN LEAGUE FOR HUMAN SERVICES (2010), available at <http://www.milhs.org/wpcontent/uploads/2010/07/PR/GoodIdeasNotEnoughMay2010.pdf>.

122. JASON AMOS, DROPOUTS, DIPLOMAS AND DOLLARS: US HIGH SCHOOLS AND THE NATION'S ECONOMY, ALLIANCE FOR EXCELLENT EDUC. 37-41 (Aug. 2008), available at <http://www.all4ed.org/files/Econ2008.pdf> <http://www.all4ed.org/files/Econ2008.pdf>.

123. REPORT AWARDS STATE GRADES FOR EDUCATION PERFORMANCE, POLICY; NATION EARNS A D-PLUS ON ACHIEVEMENT, SOME MOVEMENT SEEN ON REFORM INITIATIVES DESPITE RECESSION, EDUC. WEEK 5 (2011) available at http://www.edweek.org/ew/marketplace/products/qc2011_digitaledition.html?intc=EW-QC11-LFTNAV.

124. *Id.*

systemic, long term changes in a system that shortchanges children in so many ways.¹²⁵

At a minimum, the key features of special intervention programs designed to bring the most basic of skills to all our children, namely literacy, should be identified and quantified.¹²⁶ Dr. Moje has challenged the notion that that effective literacy intervention would necessarily be more expensive: “Most important, a more carefully constructed and cost-effective system is within reach but is not being pursued by the System/State.”¹²⁷ Her work has uncovered concrete and viable recommendations to improve literacy outcomes, including successful programs already underway in neighboring, and affluent, Oakland County: “The advantage of these tactics is that they are systematic and sustainable programs that focus on developing other expertise rather than sinking enormous accounts of money into programs that will need to be updated within a few years and that do not support teachers across the district in learning how to teach more effectively.”¹²⁸ The first line of intervention is to provide:

...highly qualified teachers, particularly in literacy and mathematics instruction at the lower grades, and in disciplinary literacy instruction at the upper grades. For children who are as far behind as the available data suggest, it is critical to provide more than regular instruction, which require even greater expertise on the part of the classroom teachers than might be necessary in settings where student are achieving at developmentally appropriate levels.¹²⁹

With that expertise, the system could effectively and systematically plan an intervention that would benefit the children and youth of the district.

125. Kevin G. Welner, *Grade Retention and Other Dead-End Educational Policies*, THE ATLANTIC (Apr. 24, 2012), <http://www.theatlantic.com/national/archive/2012/04/grade-retention-and-other-dead-end-educational-policies/256307/>.

126. Some states have used the “*successful schools*” model in which researchers select a group of schools or districts meeting a certain level of achievement, and then use the average expenditures of those schools as the basis for an adequate amount. “Successful schools” is essentially a statistical modeling approach that calculates the cost of an adequate education based on specific data regarding resource inputs, student test scores, and other precisely defined outcome measures. See *A Costing-Out Primer*, ACCESS, http://www.schoolfunding.info/resource_center/costingoutprimer.php3 (updated June 1, 2006).

127. Urgency Report, *supra* note 10, at 22.

128. *Id.* at 14.

129. *Id.* at 29.

With attention to the hiring (and borrowing) of expertise through strategic partnering with regional educational agencies and local universities, a literacy turnaround effort could be mounted.¹³⁰

Unfortunately, as this article went to press, the Michigan Court of Appeals ruled in a 2-1 decision that the case should be dismissed against all the defendants except The Leona Group.¹³¹ First, the court ruled that Art. 8 of Michigan's Constitution "merely encourages education, but does not mandate it," and only requires the legislature to provide for and finance a system of free public schools while delegating the actual delivery of educational services to local school districts. Further, the "right to read" law is only "advisory" and imposes no duties on the State but instead delegates to local school districts responsibility for establishing and implementing curriculum. Nor may individual students sue school districts under the law. Finally, the court determined that any remedy involving would be too individualized and subjective for courts to fashion.¹³²

In a strongly worded dissent, Judge Douglas Shapiro called the majority opinion as "miserly."¹³³ He observed that even if the exact nature of the assistance students require might be discretionary, it is well within the court's function to hold that the state defendants have failed to perform their constitutional and statutory duties and order them to do so. While courts should avoid managing schools or fine tuning educational policy, "this does not excuse the majority's abandonment of our essential judicial roles, that of enforcement of the rule of law even where the defendants are governmental entities, and of protecting the rights of all those who live within Michigan's borders, particularly those, like children, who do not have a voice in the political process." That decision is now on appeal.

V. CONCLUSION

In 1973, the U.S. Supreme Court broke the hearts of many when it ruled, in *Rodriguez v. San Antonio ISD*,¹³⁴ that the U.S. Constitution does not create a fundamental interest in education. The legal community then

130. *Id.* at 42.

131. S.S. ex rel. L.M. v. State, --- N.W.2d --- (Mich. Ct. App. 2014) (No. 12-009231-CZ), 2014 WL 5881170.

132. The court also determined that The Local Financial Stability and Choice Act, which governs emergency managers, *does not* provide the state defendants with immunity against claims arising under the Constitution and MCL 380.1278(8).

133. S.S. ex rel. L.M. v. State, --- N.W.2d --- (Mich. Ct. App. 2014) (No. 12-009231-CZ), 2014 WL 5881170 (Shapiro, D., dissenting).

134. 411 U.S. 1 (1973).

turned to the state courts where, in some cases, they could make better use of strongly worded state constitutions and use litigation to bring together stakeholders and push reforms.¹³⁵

The economic downturn, constrained fiscal environments, demographic shifts and declining populations in particular areas have set the stage for political polarization and paralysis. This environment calls into question the most fundamental values that underlie what has always been a strong national commitment to public education as a core element of our democracy, especially reaffirmed in *Brown v. Board of Education*.¹³⁶ While de jure segregation may be over, institutionalized forces have reified segregation and ensured that in many districts there is little or no education happening, much less an “equal” education. The irony is that there is much that Democrats and Republicans alike can agree upon: education is a driver of economic prosperity for individuals, communities and the state; school conditions that feature a lack of books or access to computers or unsafe conditions are not acceptable; children should be well positioned to plan and apply to college; children should have high quality teachers; the classroom matters; state oversight matters; and early literacy is essential to “read to learn.”

And yet the nature of the political game has led us to place where we cannot come together on solutions. Here, the remedy was simple: individualized literacy intervention for children not reading at grade level. Yet, market-based philosophies that prioritize governance issues—not high quality educational interventions—drive the discussion. The executive and legislative arenas punt to the districts. The districts blame the finances and the families. The judiciary punts to the legislature or the ballot box. Somehow, within this beautiful system of checks and balances, the voices and needs of the children are lost.

135. In *Williams v. California*, for example, the ACLU of Southern California used strong state constitutional language to focus on the lack of quality of materials and instruction and entered a settlement with the State of California to ensure that the quality of education was equal and sufficient, devised a financial remedy that directed extra funding to the poorest schools, and placed extra oversight requirements on the state’s most disadvantaged schools. See SALLY CHUNG, *WILLIAMS V. CALIFORNIA: LESSONS FROM NINE YEARS OF IMPLEMENTATION*, ACLU (Sept. 29, 2013), available at <http://www.aclusocal.org/cases/williams-v-california/nineyears/>.

136. *Brown v. Board of Education*, 347 U.S. 483 (1954).

