STATE OF MICHIGAN

COURT OF CLAIMS

COUNCIL OF ORGANIZATIONS & OTHERS FOR EDUCATION ABOUT PAROCHIAID *et al.*,	**OPINION AND ORDER**
Plaintiffs,	
v	Case No. 17-000068-MZ
STATE OF MICHIGAN *et al.*,	Hon. Cynthia Diane Stephens
Defendants.	

Pending before the Court are the parties' competing motions for summary disposition. For the reasons articulated herein, the Court GRANTS summary disposition to plaintiffs pursuant to MCR 2.116(C)(10) and DENIES defendants' cross-motion for summary disposition. In accordance with this Court's order, plaintiffs are entitled to declaratory relief that MCL 388.1752b violates Const 1963, art 8, § 2, and defendants are hereby enjoined and restrained from distributing any funds under the statute.[1]

[1] Because the Court grants plaintiffs' requests for declaratory and injunctive relief, the Court concludes it is unnecessary to grant relief under Count II (writ of mandamus) of plaintiffs' complaint and amended complaint. See *Straus v Governor*, 459 Mich 526, 532; 592 NW2d 53 (1999) ("declaratory relief will normally suffice to induce the legislative and executive branches, the principal members of which have taken oaths of fealty to the constitution identical to that taken by the judiciary . . . to conform their actions to constitutional requirements or confine them within constitutional limits."). At this time, there is no basis to conclude that declaratory and injunctive relief will not suffice; consequently, mandamus is unnecessary.

The facts and procedural posture of this case are well known to the parties and, with few exceptions, do not bear repeating. In short, this case involves the constitutionality of the appropriation of public funds to nonpublic schools in certain, enumerated circumstances, as set forth in MCL 388.1752b. In a prior opinion and order, this Court granted preliminary injunctive relief to plaintiffs and enjoined and restrained defendants from disbursing any funds appropriated under MCL 388.1752b. The Court of Appeals and the Supreme Court denied leave to appeal. See *Council of Orgs & Others for Ed About Parochiaid v State*, unpublished order of the Court of Appeals, entered August 14, 2017 (Docket No. 339545). See also *Council of Orgs & Others for Ed About Parochiaid v State*, __ NW2d __ (2018); 2018 WL 1230556 (Docket No. 156392).

Plaintiffs originally took issue with MCL 388.1752b as it was enacted by 2016 PA 249 and the $2.5 million appropriation made for the 2016-2017 school year. As initially enacted, 2016 PA 249 appropriated $2.5 million for the 2016-2017 school year "to reimburse costs incurred by nonpublic schools as identified in the nonpublic school mandate report . . . ."[2] MCL 338.1752b(1), as enacted by 2016 PA 249. The statute required the Department of Education to publish a form containing requirements for reimbursement. Former MCL 338.1752b(2). Subsections (7) and (8) of the statute contained purported limits on the funds available under the act, providing that the funds appropriated under the act:

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

[2] This "Mandate Report," which has been attached to the parties' briefing, imposes mandates, via statute and regulation, on nonpublic schools.

> (8) Funds allocated under this section are not intended to aid or maintain any nonpublic school, support the attendance of any student at a nonpublic school, employ any person at a nonpublic school, support the attendance of any student at any location where instruction is offered to a nonpublic school student, or support the employment of any person at any location where instruction is offered to a nonpublic school student. [Former MCL 388.1752b(7)-(8).]

The statute defined a nonpublic school's "actual cost" to mean "the hourly wage for the employee or employees performing the reported task or tasks and is to be calculated in accordance with the form published by the department under subsection (2), which shall include a detailed itemization of cost." Former MCL 388.1752b(8).

Count I of plaintiffs' original complaint alleged that the appropriation effectuated by former MCL 338.1752b ran afoul of two constitutional provisions—Const 1963, art 4, § 30[3]; and art 8, § 2—and contained a request for declaratory relief. Count II of the complaint sought a writ of mandamus to prohibit the Superintendent of Public Instruction from paying out funds appropriated under former MCL 388.1752b. Count III requested preliminary and permanent injunctive relief.

While this case was pending, the Legislature amended the statute, effective July 14, 2017. See 2017 PA 108. The amended act allocates $2.5 million for the 2016-2017 and 2017-2018 school years "to reimburse actual costs incurred by nonpublic schools in complying with a health, safety, or welfare requirement mandated by a law or administrative rule of this state." MCL 388.1752b(1). Unlike the prior version of the statute, the amended act does not reference

[3] This challenge is premised on the notion that the appropriation in former MCL 338.1752b was an expenditure of public money for private purposes that was enacted without the requisite 2/3 majority vote of the Legislature. By all accounts, the Senate passed 2016 PA 249 by a simple majority, not a 2/3 majority vote. The same is true of the amended act.

the mandate report, but instead requires the Department of Education to publish a form on which nonpublic schools can report "actual costs incurred by a nonpublic school in complying with a health, safety, or welfare requirement mandated under state law . . . ." MCL 388.1752b(2). In addition, the amended act contains the same limitations imposed in subsections (7) and (8) as did the prior version of the statute. With regard to "actual costs" incurred by a nonpublic school, the statute specified that the term means "the hourly wage for the employee or employees performing a task or tasks required to comply with a health, safety, or welfare requirement under a law or administrative rule of this state identified by the department under subsection (2) . . . ." MCL 388.1752b(9). Finally, the statute specifies that "actual cost incurred by a nonpublic school" includes the cost incurred by a nonpublic school:

> for taking daily student attendance shall be considered an actual cost in complying with a health, safety, or welfare requirement under a law or administrative rule of this state. Training fees, inspection fees, and criminal background check fees are considered actual costs in complying with a health, safety, or welfare requirement under a law or administrative rule of this state. [MCL 338.1752b(10).]

In an amended complaint,[4] plaintiffs challenge the constitutionality of the amended statute, as well as the appropriation made under the 2016 version of the statute. In short, plaintiffs argue that the appropriation of funds will directly or indirectly aid or maintain nonpublic schools, in violation of Const 1963, art 8, § 2. In addition, they argue that both versions of the statute appropriate public funds for private purposes, such that they were required to be passed with a 2/3 majority vote; however, neither act gained the requisite 2/3 majority, in contravention of Const 1963, art 4, § 30. Once again, plaintiffs have requested declaratory relief

[4] Issues related to the amended complaint were resolved by this Court's prior orders entered on March 12, 2018, and April 12, 2018.

(Count I), mandamus relief (Count II), and preliminary and permanent injunctive relief (Count III).

The parties have submitted thorough and extensive briefing in support of their respective motions for summary disposition. In addition, this Court held oral argument on the competing motions on April 16, 2018. Both parties contend that the facts of this case are not in dispute. On the record before this Court, the Court agrees that there is no genuine issue of material fact, and that the matter is now ripe for adjudication on summary disposition under MCR 2.116(C)(10). See *Johnson v Dep't of Natural Resources*, 310 Mich App 635, 650; 873 NW2d 842 (2015).

As a threshold issue that must be reached before addressing the merits of the case, defendants argued in their initial brief in support of summary disposition—but have not pursued the same argument in subsequent briefing filed with this Court—that plaintiffs lack standing in this matter. The Court agrees with plaintiffs that they possess standing in this matter. Whether a party has standing is a question of law. *Id.* Here, the Court finds that plaintiffs have an interest in the disbursement of public funds to nonpublic schools and that this interest is substantial and distinct from the citizenry at large. See *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372-373; 792 NW2d 686 (2010). According to plaintiffs, the appropriations at issue divert funds that would otherwise be directed towards the coffers of the states' public schools. Hence, standing exists in the instant case. In addition, the Court finds that an actual controversy exists, such that plaintiffs may seek declaratory relief under MCR 2.605 in order to preserve plaintiffs'

legal rights. See *Lansing Sch Ed Ass'n v Lansing Bd of Ed (On Remand)*, 293 Mich App 506, 515-516; 810 NW2d 95 (2011).[5]

Moving to the merits of plaintiffs' complaint, plaintiffs challenge the constitutionality of MCL 338.1752b, as enacted and as amended. In general, a statute is presumed constitutional, and the party challenging its validity bears the burden of demonstrating otherwise. *Mayor of Cadillac v Blackburn*, 306 Mich App 512, 516; 857 NW2d 529 (2014). In addition, a court has a duty to construe a statute as constitutional "unless its unconstitutionality is clearly apparent." *Id.* (citation and quotation marks omitted). "A constitutional challenge to the validity of a statute can be brought in one of two ways: by either a facial challenge or an as-applied challenge." *In re Forfeiture of 2000 GMC Denali & Contents*, 316 Mich App 562, 569; 892 NW2d 388 (2016). "To make a successful facial challenge to the constitutionality of a statute, the challenger must establish that no set of circumstances exists under which the [a]ct would be valid." *Varran v Granneman*, 312 Mich App 591, 609; 880 NW2d 242 (2015) (citation and quotation marks omitted). With regard to an as-applied challenge, plaintiffs must demonstrate "a present infringement or denial of a specific right or of a particular injury in process of actual execution of government action." *In re Forfeiture of 2000 GMC Denali & Contents*, 316 Mich App at 569 (citation and quotation marks omitted). "The practical effect of holding a statute unconstitutional 'as applied' is to prevent its future application in a similar context, but not to render it utterly

[5] Because plaintiffs have standing, and because defendants have declined to continue to pursue their arguments regarding standing, the Court declines to address plaintiffs' contentions as to whether standing exists under MCL 600.2041(3) and whether the Court of Appeals' decision in *Mich Ed Ass'n v Superintendent of Public Instruction*, 272 Mich App 1; 724 NW2d 478 (2006)—which held that MCL 600.2041(3) was unconstitutional—is invalid in light of the Supreme Court's decision in *Lansing Sch Ed Ass'n*, 487 Mich 349.

inoperative." *Id.* (citation and quotation marks omitted). In this case, plaintiffs' primary contention is that MCL 388.1752b is unconstitutional on its face. In the alternative, they assert an as-applied challenge.

Plaintiffs argue that MCL 388.1752b, as originally enacted and as amended, offends two constitutional provisions: art 8, § 2, and art 4, § 30. The Court agrees with plaintiffs as it concerns art 8, § 2. As originally enacted, art 8, § 2 required the Legislature to "maintain and support a system of free public elementary and secondary schools," which schools were to be provided "without discrimination as to religion, creed, race, color, or national origin." *Traverse City Sch Dist v Attorney General*, 384 Mich 390, 404; 185 NW2d 9 (1971). This state's electorate, by way of Proposal C, added the following paragraph to art 8, § 2:

> No public monies or property shall be appropriated or paid or any public credit utilized, by the legislature, or any other political subdivision or agency of the state directly or indirectly to aid or maintain any private, denominational or other nonpublic, pre-elementary, elementary, or secondary school. No payment, credit, tax benefit, exemption or deductions, tuition voucher, subsidy, grant or loan of public monies or property shall be provided, directly or indirectly, to support the attendance of any student or the employment of any person at any such nonpublic school . . . .[6] The legislature may provide for the transportation of students to and from any school.

In *Traverse City Sch Dist*, 384 Mich at 413, the Supreme Court declined to adopt a strict, "no benefits" interpretation of art 8, § 2. Nevertheless, the Court recognized certain prohibitions effectuated by art 8, § 2:

> 1. No public money 'to aid or maintain' a nonpublic school;

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[6] The Michigan Supreme Court struck the portion of art 8, § 2 omitted from this opinion in *Traverse City Sch Dist*, 384 Mich at 390.

2. No public money 'to support the attendance of any student' at a nonpublic school;

3. No public money to employ any one at a nonpublic school;[7]

Pertinent to the instant case, the Court in *Traverse City Sch Dist* held that art 8, § 2 did not prohibit so-called "shared-time"[8] instruction of nonpublic school students as long as "ultimate and immediate control of the subject matter, the personnel and the premises are under the public school system authorities and the courses are open to all eligible to attend the public school . . . ." *Id.* at 435. Alternatively, shared-time instruction was permissible when it was "merely 'incidental' or 'casual' or noninstructional in character . . . ." *Id.* In finding that shared-time instruction was permissible, the Court contrasted it with "parochiaid"—directly providing public funds to nonpublic schools—in three respects:

> First, under parochiaid the public funds are paid to a private agency whereas under shared time they are paid to a public agency. Second, parochiaid permitted the private school to choose and to control a lay teacher where as under shared time the public school district chooses and controls the teacher. Thirdly, parochiaid permitted the private school to choose the subjects to be taught, so long as they are secular, whereas shared time means the public school system prescribes the public school subjects. [*Id.* at 413-414.]

In short, the Court expressed concerns about the direct payment of public funds to nonpublic schools, as well as whether the public school or nonpublic school exercised control over the instruction.

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[7] In *Traverse City Sch Dist*, 384 Mich at 411. As Proposal C was initially enacted, there were two additional prohibitions contained within art 8, § 2; however, in *Traverse City Sch Dist*, 384 Mich at 414-415, the Supreme Court struck these last two prohibitions.

[8] Shared-time instruction is, in a nutshell, instruction of nonpublic school students in certain subjects by a public school teacher.

Another issue in *Traverse City Sch Dist* that bears noting in the instant case was the issue of "auxiliary services." In that case, the auxiliary services at issue were "special educational services designed to remedy physical and mental deficiencies of school children and provide for their physical health and safety." *Id.* at 418-419. Functionally, remarked the Court, these were "general health and safety measures." *Id.* at 419. At issue in that case was whether the provision of such auxiliary services to nonpublic school students "at any nonpublic school or at any other location or institution where instruction is offered in whole or in part to nonpublic school students" violated the prohibitions of art 8, § 2. *Id.* at 417. The Court answered this question in the negative, explaining that "[s]ince auxiliary services are general health and welfare measures, they have only an incidental relation to the instruction of private school children." *Id.* at 419. The Court remarked that "the prohibitions of [art 8, § 2] which are keyed into prohibiting the passage of public funds into private school hands for purposes of running the private school operation are not applicable to auxiliary services which only incidentally involve the operation of educating private school children." *Id.* at 419-420. Once again, the issue of control factored into the Court's reasoning. In that respect, it was pertinent that, as it concerned auxiliary services "private schools exercise no control over them. They are performed by public employees under the exclusive direction of public authorities and are given to private school children by statutory direction, not by an administrative order from a private school." *Id.* at 420. The Court stressed that its holding was "limited to those services" at issue in that case and that the Legislature was not to be given "a blank check to make any service a health and safety measure outside the reach of [art 8, § 2] simply by calling it an auxiliary service." *Id.*

With the Supreme Court's decision in *Traverse City Sch Dist* and its interpretation of art 8, § 2 as a backdrop, the Court concludes that the appropriations effectuated by either iteration of

MCL 388.1752b violate the prohibitions of art 8, § 2.[9] At the outset, the appropriations authorized by the statute are rendered suspect because they effectuate the direct payment of public funds to nonpublic schools. See *Traverse City Sch Dist*, 384 Mich at 413 (emphasizing the entity to which the funds were paid). Furthermore, these appropriations aid or maintain the nonpublic schools by supporting the employment of persons at nonpublic schools. See Const 1963, art 8, § 2. In this respect, MCL 388.1752b(9) specifies that the "actual costs" to be provided to nonpublic schools under the act means the "hourly wage for the employee or employees performing a task or task" required by the Department of Education. This violates the prohibition in art 8, § 2 regarding direct or indirect aid to support the employment of persons at nonpublic schools. See *Traverse City Sch Dist*, 384 Mich at 420-421. Indeed, the funds are expressly linked to wages owed to nonpublic school employees.

In arguing to the contrary, defendants emphasize the portion of the Supreme Court's opinion in *Traverse City Sch Dist* indicating that the prohibition on the expenditure of public funds to support the employment of persons at a nonpublic school "is a part of the educational article of the constitution," which the Supreme Court construed "to mean employment *for educational purposes only*." *Id.* at 421 (emphasis added). According to defendants, the funds here are *not* appropriated for educational purposes, but instead are appropriated for health, safety, and welfare purposes. The Court does not agree with defendants' position. As an initial matter, the text of MCL 388.1752b(7) contradicts defendants' position by declaring that "[t]he funds appropriated under this section *are for purposes related to education* . . . ." (Emphasis added).

[9] At oral argument, defendants appeared to concede the constitutional infirmity of the 2016 statute. Nevertheless, the Court finds that the same constitutional flaws exist in both the 2016 and 2017 versions of the statute—although they exist to a greater degree in the 2016 legislation.

Moreover, the passage of *Traverse City Sch Dist* quoted by defendants came at the end of a discussion in which the Supreme Court explained that firefighters and police officers could provide services at nonpublic schools without offending the constitutional prohibition against public expenditures to support the employment of persons at nonpublic schools. *Traverse City Sch Dist*, 384 Mich at 420-421. Such services clearly touched on employment that was unrelated to educational purposes. Here, in contrast to firefighters and police officers, who not employed by a nonpublic school, MCL 388.1752b provides funds to offset the cost of compliance for work done by nonpublic school employees. The Court agrees with plaintiffs that this supports the employment of nonpublic school employees.

Moreover, the Court agrees with plaintiffs that the necessary element of control is missing from MCL 388.1752b. Contrary to the shared-time services and the auxiliary services at issue in *Traverse City Sch Dist*, MCL 388.1752b cedes a significant degree of control to the nonpublic schools. Under both versions of the statute, the nonpublic school controls the employees who are the subject of wage reimbursement. The nonpublic school also has control over the type of activities—some of which touch on curriculum and specific courses to be taught—to which the funds can be applied. In addition, the nonpublic school has complete control of the funds after they are dispersed. This is in direct contrast to the type of incidental aid that was found to be constitutional in *Traverse City Sch Dist*. See *Traverse City Sch Dist*, 384 Mich at 413. The instant case does not involve the mere purchasing of services under the control of a public school; it involves sending funds directly to a nonpublic school.

Furthermore, this lack of control is not cured by the Department of Education-issued reimbursement form set forth in MCL 388.1752b(2). Indeed, "an invalid statute is not redeemed by compensating actions on the part of its administrators." *Council of Orgs & Others for Ed*

About Parochiaid, Inc v Governor, 455 Mich 557, 571; 566 NW2d 208 (1997). Rather, "[t]he constitutionality of a law must be tested by what may be done under it without offending any express provision of the constitution." *Id.* And here, MCL 388.1752b directs an unconstitutional appropriation of public funds to nonpublic schools. Post-hoc efforts to cure this violation by way of a form generated by the Department of Education do not remedy the original constitutional ill.

Furthermore, that the form itself cannot cure the constitutional violation or insulate the statute from review is apparent when the matters for which reimbursement are provided are considered. To that end, the mere labeling of these matters as "health, safety or welfare," see MCL 388.1752b(1), or as merely being "incidental to the operation of a nonpublic school," see MCL 388.1752b(7), will not insulate the statute from this Court's review. See *Traverse City Sch Dist*, 384 Mich at 420 (explaining that a reviewing court will not simply defer to the Legislature's labeling of a particular service as an "auxiliary service" that passes constitutional muster, but will instead evaluate the aid in light of the pertinent constitutional prohibitions). As plaintiffs point out, the matters for which nonpublic schools can seek funds relate to mandates imposed on the nonpublic schools; these mandates must be complied with in order for the nonpublic schools to function. These mandates also touch on the curriculum that must be provided at the nonpublic schools. See MCL 380.1561(3)(a) (specifying a nonpublic school's curriculum requirements). The nature of these matters indicates that the appropriation made under MCL 388.1752b is more than merely incidental aid, but instead is aid that touches on some of the primary functions of the nonpublic schools and that, without certifying compliance with these measures, the nonpublic schools could not operate as schools. The Court agrees that this nature of the aid renders the statute unconstitutional on its face. Cf. *Traverse City Sch Dist*, 384

Mich at 413, 436 (upholding aid that was merely incidental to a nonpublic school's operation and existence).

In this sense, the Court finds that the direct payment of funds to nonpublic schools in this situation is more akin to the purchase of textbooks at issue—and found to be unconstitutional—in *In re Advisory Opinion Re Constitutionality of 1974 PA 242*, 394 Mich 41; 228 NW2d 772 (1975). At issue in that case was the purchase of textbooks and supplies for nonpublic schools with public funds. In analyzing the issue, the Supreme Court summarized its prior decision in *Traverse City Sch Dist* and concluded that "incidental services" provided to "an otherwise viable school . . . are not the type of services that flout the intent of the electorate expressed through Proposal C [i.e., art 8, § 2.]" *Id.* at 48. Textbooks and supplies did not fit within the "incidental services" allowed under *Traverse City Sch Dist*, because they were "essential aids that constitute a 'primary feature' of the educational process and a 'primary element required for any school to exist." *Id.* Returning to the instant case, several of the mandates for which nonpublic schools can seek funds appropriated under MCL 388.1752b relate to matters that are required by the state for a nonpublic school—or any school—to operate. Hence, they are much more in the nature of "primary element[s]" than mere "incidental services." As a result, the aid effectuated by MCL 388.1752b is not the type of incidental aid permitted by the Supreme Court in *Traverse City Sch Dist*. See *id.* at 49 (differentiating between "incidental services" that are "useful only to an otherwise viable school"—which do not violate art 8, § 2—and " 'primary elements necessary for the school's survival as an educational institution.").[10]

[10] In this sense, the Court is not construing art 8, § 2 in a manner that would prohibit all benefits, primary or incidental, to nonpublic schools. Such an interpretation would not only be contrary to

IT IS HEREBY ORDERED that plaintiffs' motion for summary disposition is GRANTED under MCR 2.116(C)(10).[11]

IT IS HEREBY FURTHER ORDERED that defendants' cross-motion for summary disposition is DENIED.

This order resolves the last pending claim and closes the case.

Dated:

Hon. Cynthia Diane Stephens
Court of Claims Judge

Traverse City Sch Dist, but could potentially risk running afoul of the recent United States Supreme Court decision of *Trinity Lutheran Church of Columbia, Inc v Comer*, __ US__; 137 S Ct 2012; 198 L Ed 2d 551 (2017). Rather, the Court concludes that the aid provided in this case, which is not like the mere incidental aid or auxiliary services at issue in *Traverse City Sch Dist*, violates art 8, § 2.

[11] Because the Court concludes that MCL 388.1752b is unconstitutional under art 8, § 2, it need not address plaintiffs' alternative argument regarding whether the statute also violates art 4, § 30, which requires a two-thirds legislative vote for the appropriation of public funds for private purposes.