

IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS
Murphy, P.J., and Gleicher and Letica, JJ.

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

Plaintiffs-Appellants,

v.

STATE OF MICHIGAN, GOVERNOR,
DEPARTMENT OF EDUCATION, and
SUPERINTENDENT OF PUBLIC INSTRUCTION,

Defendants-Appellees.

MSC No. 158751

COA No. 343801

Trial Ct No. 17-000068-MB

**THE APPEAL INVOLVES
A RULING THAT A
PROVISION OF THE
CONSTITUTION, A
STATUTE, RULE OR
REGULATION, OR
OTHER STATE
GOVERNMENTAL
ACTION IS INVALID**

PLAINTIFFS-APPELLANTS' REPLY BRIEF

[CAPTION CONTINUED ON NEXT PAGE]

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I. INTRODUCTION

Plaintiffs assert that MCL 388.1752b provides public funding to private schools in violation of Const 1963, art 8, § 2. (Plaintiffs' Br at 13-25). Defendants concede this point (with one minor exception), and correctly acknowledge that § 152b violates this constitutional provision to the extent it appropriates funds to reimburse nonpublic schools for the costs they incur in complying with various state mandates. (Defendants' Br at 3). The one exception Defendants identify is for transportation-related funding, as Article 8, § 2 expressly states that "[t]he legislature may provide for the transportation of students to and from any school." Otherwise, Article 8, § 2 speaks plainly and unambiguously when it says that "[n]o public monies shall be appropriated or paid . . . directly or indirectly to aid or maintain any . . . nonpublic . . . school," and that no public funding "shall be provided, directly or indirectly, to support . . . the employment of any person at any such nonpublic school."¹

But even if Defendants are correct that, standing alone, transportation-related funding would be permissible under Article 8, § 2, there is no way for the Court to determine whether the Legislature would have enacted § 152b, or made the appropriation it did, had it known that only transportation-related costs may properly be reimbursed under Article 8, § 2. Thus, all of § 152b must be invalidated, as the Court of Claims and Court of Appeals dissent properly recognized. This Court should, therefore, reverse the Court of Appeals' decision and reinstate the Court of Claims' decision without remanding for further proceedings.

¹ The parties also agree that this prohibition does not violate the United States Constitution. (Defendants' Br at 28-33).

II. ARGUMENT

A. **The invalid application of § 152b to non-transportation related costs cannot be severed.**

Although § 152b can be severed from the rest of 2016 PA 249 (and the subsequent acts amending it), the invalid application of § 152b to non-transportation related costs cannot be severed from § 152b itself. As the Court of Appeals majority summarized, the funding authorized by § 152b seeks to reimburse nonpublic schools for the cost of complying with a number of state mandates, ranging from criminal background checks to teacher certification to playground equipment safety—more than thirty in total. (See COA Op at 3 n 2, App 18a). Of these mandates, two are transportation-related: school bus inspections (MCL 257.715a) and various requirements applicable to pupil transportation generally (MCL 257.1807 *et seq.*).

For each of the 2016-2017 and 2017-2018 school years, § 152b allocated \$2,500,000 for cost reimbursement, and \$250,000 for the 2018-2019 school year (with all of the unexpended funds carried over through the 2019-2020 school year). Because there is no way of knowing whether the Legislature would have made these appropriations—\$5,250,000 in total—had it known that only transportation-related costs were reimbursable, § 152b fails in its entirety.

MCL 8.5 addresses severability:

If any portion of an act or the application thereof to any person or circumstances shall be found to be invalid by a court, such invalidity shall not affect the remaining portions or applications of the act which can be given effect without the invalid portion or application, provided such remaining portions are not determined by the court to be inoperable, and to this end acts are declared to be severable.

In determining whether portions of a statute, “or the application thereof,” are severable upon a finding of unconstitutionality, this Court has long held that statutory provisions are not severable when they are “connected in subject matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning, that it cannot be

presumed the legislature would have passed the one without the other.” *People v McMurchy*, 249 Mich 147, 158; 228 NW 723 (1930) (citation omitted). Thus, a statute must fall in its entirety if its provisions are so mutually connected “as to warrant the belief that the legislature intended them as a whole, and if all could not be carried into effect the legislature would not pass the residue independently.” *Id.* at 159 (citation omitted). The residue can only be sustained if it is “complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected.” *Id.* at 158 (citation omitted). In other words, a statute cannot stand unless it is clear that the Legislature would have passed it in the absence of its unconstitutional provisions—i.e., it cannot simply be presumed that the Legislature would have passed the appropriation in the absence of the unconstitutional components.

Sometimes severability is possible in the appropriations context, such as when the Legislature has placed unconstitutional conditions on the expenditure of funds, but the conditions are not central to the purpose of the appropriation. In such a case, it may be possible to sever the invalid conditions. For example, in *State Bd of Agriculture v State Admin Bd*, 226 Mich 417; 197 NW 160 (1924), the Legislature appropriated funds for use by the then-Michigan Agricultural College (now Michigan State University) in carrying on cooperative extension work with agricultural colleges in other states under a federal grant. *Id.* at 418-419 (Moore, J., concurring). However, the appropriated funds were made subject to the State Administrative Board’s supervisory control. The Court found this to be an impermissible intrusion on the college’s independent constitutional authority, but reasoned that invalidating the supervisory control condition did not require invalidating the appropriation itself. *Id.* at 428.

The Court explained that the “main purpose” of the legislation was “the appropriation,” which was “necessary to carry on the very important work of taking the college to the people.” *Id.* On the other hand, “[t]he supervisory control was but incidental,” being part of the Legislature’s “fixed habit” of giving the State Administrative Board “general supervisory control over all appropriations.” *Id.* Under those circumstances, the Court concluded that the Legislature “did not intend the appropriation to fail, and that the attempt to confer unconstitutional authority on the state administrative board did not nullify the balance of the act.” *Id.* See also *Mich Sheriffs' Ass'n v Mich Dep't of Treasury*, 75 Mich App 516, 524; 255 NW2d 666 (1977) (holding that an appropriation’s restrictive language could be severed without undermining the Legislature’s intent behind the appropriation).

The same cannot be said here, as it is impossible for the Court to know that the Legislature would have enacted § 152b at all, or whether it would have provided the amount of funding it did, had it known that only transportation-related funding was constitutionally permissible. The Legislature made one lump-sum appropriation for purposes of reimbursing many different costs. There is nothing in the legislation or legislative history to indicate that the Legislature intended its entire appropriation to independently fund only those costs that are transportation related.

In contrast with *State Bd of Agriculture*, the situation here is much more like the one faced by the Massachusetts Supreme Court in *Mayor of Boston v Treasurer and Receiver Gen*, 384 Mass 718; 429 NE2d 691 (1981). There, the Massachusetts Legislature appropriated \$348 million in financial aid to all cities and towns in the state. But, in doing so, it conditioned the distribution of funds to Boston on the city’s maintaining police and fire services and facilities at the same level it did the previous year. After finding the conditional grant to Boston

unconstitutional, the court determined that the entire aid provision—\$348 million to all cities and towns—had to be struck down. The court explained that it was unable to determine that the funds would have been appropriated in the same manner in the absence of the limitation placed on the distribution of funds to Boston:

We cannot say that the General Court would have enacted the same budget item without the limitation if it had known the limitation to be illegal. Perhaps the Legislature granted Boston extra funds, by its adjustment of the distribution formula, because of the additional burden of the limitation concerning police and fire services in Boston. As to the entire budget item, perhaps the Legislature would have appropriated some amount other than \$348,000,000 or it might have directed the funds to be distributed among municipalities according to a different formula. It is sheer conjecture to say what, if any, alternative the Legislature would have adopted. [*Id.* at 725-726.]

The court reasoned that “we would be engaging in legislating ourselves if we were to determine that (1) Boston may receive its share of the additional local aid funds free of the limitation or (2) the portion of the additional local aid funds not going to Boston should be distributed without regard to the invalidity of the conditional grant to Boston.” *Id.* at 726.

In striking down the entire appropriation in *Mayor of Boston*, the court applied the same severability principles that this Court has long recognized:

If the court is unable to know whether the Legislature would have enacted a particular bill without the unconstitutional provision, it will not sever the unconstitutional provision, but will strike the entire statute. [*Id.* at 725.]

That analysis applies with equal force here. This Court can no more than guess at whether the Legislature would have enacted § 152b solely to reimburse nonpublic schools for transportation-related costs, which account for only a fraction of the numerous mandates for which § 152b seeks to provide reimbursement. (See Plaintiffs’ Br at 5-6). Likewise, the Legislature may have appropriated fewer funds, or appropriated funds according to a different formula. Either way, the Court would have to employ “sheer conjecture,” and substitute its judgment for that of the Legislature, in order to uphold § 152b only to the extent it appropriates funds for transportation-

related costs. Because the invalid application of § 152b to non-transportation related costs cannot be severed, the statute fails in its entirety.

B. The Court of Claims’ decision should be fully reinstated; no remand is required.

In their complaint, Plaintiffs also challenged § 152b on the ground that it violates Const 1963, art 4, § 30’s requirement that an expenditure of public money for private purposes be approved by a two-thirds majority vote in both houses of the Legislature. However, because the entirety of § 152b must be stricken as violative of Article 8, § 2, there is no need for the Court of Claims to address that issue. The Court of Claims’ decision should instead be fully reinstated.

III. CONCLUSION AND RELIEF REQUESTED

Plaintiffs respectfully request that this Court reverse the Court of Appeals majority’s decision upholding the constitutionality of MCL 388.1752b and reinstate the Court of Claims’ decision finding § 152b to violate Const 1963, art 8, § 2.

Respectfully submitted,

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Dated: December 27, 2019