



MEMORANDUM

TO: Judge Steven Rhodes, Transition Manager for Detroit Public Schools Community School District & Emergency Manager for Detroit Public Schools

FROM: Amanda Van Dusen; Michelle P. Crockett

RE: Jurisdiction of the State School Reform Office & Its Ability to Close DPSCD Priority Schools Pursuant to Public Act 192 of 2016

DATE: August 2, 2016

I. INTRODUCTION

On March 12, 2015, Governor Snyder signed Executive Order 2015-9 (“EO 2015-9”) which in pertinent part: 1) created the State School Reform/Redesign Office (“SRO”) as an autonomous entity within the Michigan Department of Technology, Management and Budget; and 2) transferred the State School Reform/Redesign School District from the Michigan Department of Education (“MDE”) to the newly created SRO. *See* Exhibit A. As a result, all authority, powers, duties, functions and responsibilities that were previously vested in MDE and the Superintendent of Public Instruction under Section 1280c of the Revised School Code, 1976 PA 451, MCL 380.1280c (“section 1280c”) and Section 15(6) of 1947 PA 336, MCL 423.215 were transferred to the SRO, which includes, but is not limited to:

- determining which public schools are among the lowest achieving 5% of all public schools in this state;
- posting on a website the federal work rules and formula for identifying the lowest achieving 5% of all public schools;¹
- publishing an annual list (by no later than September 1) identifying the public schools in this state that are determined to be among the lowest achieving 5%;
- issuing orders placing each school included on the lowest achieving list under the supervision of the State School Reform/Redesign Officer; and

¹ The “2013-2014 Business Ranking Rules” are the metrics utilized by the SRO to create the list of lowest achieving 5% schools. These rules have not been revised since August 7, 2014. *See* Exhibit B. Thus, the data the SRO is relying upon is outdated. In addition, the standardized tests which form part of the basis for the state-wide school rankings changed in the 2014-2015 school year. As a result, the relevance of the 2013-2014 Business Ranking Rules is questionable, at best.

- releasing public schools from redesign measures imposed pursuant to Section 1280c or from the jurisdiction of the SRO (which can include removal from the list of lowest achieving schools in the state) if the State School Reform/Redesign Officer determines that significant academic improvement has been made at a particular public school.

On June 21, 2016, Public Act 192 of 2016 (“Act 192”) amending The Revised School Code, 1976 PA 451, as amended MCL 380.1 to 380.1853 (the “Code”) was enacted with immediate effect. In pertinent part, Act 192 provides or had the effect that:

- Effective July 1, 2016, the School District of the City of Detroit (“DPS”) became a qualifying district under section 12b of the Code, MCL 380.12b, and a community district was created for the same geographic area of DPS to provide public educational services for residents of that geographic area (the “Detroit Public Schools Community District(“ or “DPSCD”) under section 383 of the Code, MCL 380.383;
- All functions, responsibilities and assets of DPS are transferred to DPSCD;
- DPS retains legacy debt and remains a separate, limited identify for the sole purpose of repaying that debt and the emergency loan acquired by the state to fund transitional operating costs;
- Until a new school board for DPSCD is elected in November 2016 and takes office on January 1, 2017, the functions and responsibilities of DPSCD are being exercised by a transition manager, Judge Steven W. Rhodes (“Judge Rhodes”)²;
- Beginning with the 2017-2018 school year, the SRO must establish and administer an accountability system for all DPSCD schools pursuant to section 390 of Act 192, MCL 380.390.
- Until the aforementioned accountability system has been in effect in DPSCD for at least 3 full school years, the SRO can exercise its authority under section 1280c and order DPSCD to close schools it operates that have been “among *the lowest achieving 5%* of all public schools in this state *for the immediately preceding 3 school years* as determined under section 1280c ... by no later than the end of the current school year.” *See* section 391(1) of Act 192, MCL 380.391(1) (emphasis added);

II. DPSCD DID NOT “OPERATE” THE SCHOOLS OUTLINED ON A LOWEST ACHIEVING 5% LIST FOR THE THREE IMMEDIATELY PRECEDING SCHOOL YEARS AND AS A RESULT THE SRO IS PRECLUDED FROM AUTOMATICALLY CLOSING THESE SCHOOLS.

MCL 380.391 permits the SRO to automatically close any DPSCD schools that have been on the lowest achieving 5% list for the immediately preceding three (3) school years. However,

² On June 21, 2016, acting pursuant to section 12b(3) of the Code, MCL 12b(3), Governor Snyder designated Judge Rhodes, the emergency manager of DPS under the Local Financial Stability & Choice Act, 2012 PA 436, MCL 141.1541 to 141.1575 (“Act 436”), as transition manager for DPSCD.

because DPSCD did not *operate* any of the schools outlined on the most recent lowest achieving list until July 1, 2016, the SRO cannot order the closure of these schools before July 1, 2019.

As explained above, MCL 380.391(1) states (in pertinent part) that:

...until the accountability system under section 390 has been in effect in the community district for at least 3 full years, if a school *operated* by a community district is among the lowest achieving 5% of all public schools in this state for the immediately preceding 3 school years, as determined under section 1280c, the state school reform/redesign officer shall order the community district to close the school effective no later than the end of the current school year (emphasis added).

When undertaking statutory interpretation, the provisions of a statute should be read to ascertain the legislative intent. *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002) (citing *Wickens v Oakwood Healthcare System*, 465 Mich 53, 60; 631 NW2d 686 (2001)). Thus, courts lack authority to venture beyond the unambiguous text of a statute because their role is to simply interpret and not write the law. *Koontz*, 466 Mich at 312. As such, courts must give effect to every word, phrase, and clause in a statute; and must avoid an interpretation that would render any part of the statute nugatory. *Id* (citing *Wickens*, 465 Mich at 60). Further, undefined statutory terms are given their plain and ordinary meanings. *Id* (citing *Donajkowski v Alpena Power Co*, 460 Mich 243, 248-49; 596 NW2d 574; *Oakland Co Road Comm'rs v Michigan Property & Casualty Guaranty Ass'n*, 456 Mich 590, 604; 575 NW2d 751 (1998)). In these situations, dictionary definitions may be consulted. *Id*.

Another pertinent rule for construing a statute provides that “statutory provisions are not to be read in isolation; rather, context matters, and thus statutory provisions are to be read as a whole.” *Robinson v City of Lansing*, 486 Mich 1, 15; 782 NW2d 171 (2010).

Here, because the term “operated” is not defined under Act 192, the dictionary may be reviewed to ensure that the interpretation of the statute at issue is consistent with the Legislature’s intent and does not inadvertently render other portions of the statute invalid. *Koontz, supra* (citations omitted). The term “operate” is defined by Merriam-Webster as: to function or behave in a proper or particular way; to use and control something; or to have control of something. See <http://www.merriam-webster.com/dictionary/operate>. Upon application of this definition to the facts at issue, it is clear that DPSCD did not have control over any of the priority schools until the district was statutorily created on July 1, 2016. Thus, the only reasonable interpretation of MCL 391(1) that does not seemingly run afoul of the Legislature’s intent is that DPSCD should be permitted to *operate* the priority schools for a full 3 years before the SRO orders their closure. Any other interpretation would render DPSCD accountable for the academic performance of schools that they had no responsibility for, or control over, until July 1, 2016.

Additionally, when Act 192 is read as a whole, it is apparent that the primary purpose of the statute is to address DPS’s financial and academic crisis by creating a new debt-free community district that can successfully educate students and operate in place of DPS. If section 391(1) is interpreted in the manner the SRO suggests and priority schools are immediately closed before DPSCD has an opportunity to begin focusing on improving the academic achievement

and performance of students residing in the city of Detroit, then the enactment of Act 192 was a meaningless exercise in futility. The closure of these schools, when identified, would result in the loss of a significant per pupil allotment that has been relied upon by DPSCD and the state when evaluating the resources necessary to operate DPSCD and eradicate the legacy debt of DPS. In other words, an adoption of the SRO's isolated and narrow interpretation of MCL 391(1) could potentially sabotage the financial health of DPSCD before it even has an opportunity to begin educating Detroit's schoolchildren. This cannot be the outcome intended by the Legislature given the herculean efforts of the governor, the state House of Representatives and Senate to reach consensus and ultimately enact Act 192. *See* <http://www.detroitnews.com/story/opinion/columnists/ingrid-jacques/2016/05/25/jacques-detroit-public-schools-dps-michigan-legislature/84951494/>; and <http://www.freep.com/story/news/politics/2016/06/09/dps-package-wins-gop-support-headed-gov-snyder/85630880/>; and <http://www.detroitnews.com/story/news/politics/2016/06/21/snyder-detroit-public-schools-rescue-package/86194084/>.

III. BECAUSE, AS THE SRO ADMITS, THE 2015 LOWEST 5% ACHIEVING SCHOOL LIST IS BASED ON 2013 DATA THE STATE HAS NOT, AND CANNOT, SATISFY THE PREREQUISITE THAT DPSCD SCHOOLS SUBJECT TO CLOSING HAVE BEEN ON THE 5% LIST FOR THE THREE IMMEDIATELY PRECEDING SCHOOL YEARS.

EO 2015-9 and section 1280c of the Code, mandates that the SRO publish an annual list by no later than September 1 each year, identifying the lowest achieving 5% of all public schools in the state. *See* Exhibit A. Before the SRO can exercise its authority to close schools pursuant to section 391 of Act 192, those schools must have appeared on the lowest 5% achieving list for school years 2013-2014; 2014-2015 and 2015-2016, *i.e.*, the 3 years immediately preceding any closure announcement. *See* MCL 380.391(1).

On September 1, 2015, the SRO published a list of the "Priority Schools Named in the Bottom 5% *in 2014*." *See* http://www.michigan.gov/sro/0,5916,7-340-71975_73751---,00.html (emphasis added); Exhibit C. The SRO admits that this list was based on 2013 data because there was a change in state testing from the MEAP, a fall test, to M-STEP, a spring test in the 2014-2015 school year. *See* "6/17/2016 Answer to Plaintiffs' 5/26/2016 Emergency Motion For Ex Parte Temporary Restraining Order, Order to Show Cause and Preliminary Injunction", pp. 9-10 (hereinafter referenced as "Answer to Plaintiffs' Emergency Motion") (attached hereto as Exhibit D). As a result, "there was no new data available from the Michigan Department of Education" so the SRO "published the Priority List *based on the prior year data* and removed any schools that the SRO released from Priority status in April and August of 2015." *Id* (emphasis added).³ In other words, the September 2015 lowest performing list was, in essence,

³ It is important to note that the Priority List referenced by the state in its Answer to Plaintiffs Emergency Motion is completely separate and distinct from the lowest achieving 5% list. Although the state seems to use those terms interchangeably, as explained by the SRO, "priority" status does not mean that a school's ranking is still below 5% because the "priority" designation remains for four years regardless of the ranking a school may have during that time period. *See* http://www.michigan.gov/sro/0,5916,7-340-71975_73751---,00.html. Thus, the Priority List published by the SRO in February 2016 should not be confused with the lowest achieving 5% list that was published on September 1, 2015. *See* Exhibits C & E

a reiteration of the list published in 2014, which was based on 2013 data. The 2015 list cannot accurately reflect academic performance for the 2014-2015 school year. This assertion is further corroborated by a public statement issued by MDE about the spring 2015 M-STEP data serving as a baseline by which future year's data can be compared. *See* http://www.michigan.gov/mde/0,4615,7-140-22709_70117_40135---,00.html. Simply put, the MEAP and M-STEP cannot be compared to one another because they are so vastly different. Thus, the only testing data available to the SRO as of the September 2015 publication of the lowest 5% achieving list was the fall 2013 MEAP scores since there was no standardized test administered in the 2014 calendar year. Moreover, the standards and measures employed by the SRO to determine which schools should be included on the lowest achieving 5% school list were last revised in August 2014, prior to the adoption of M-STEP. *See* Exhibit B.

At a minimum, the SRO must wait until there are 3 consecutive years of data, preferably M-STEP, to compare before ordering the automatic closure of DPSCD schools. Failure to do so would be a violation of state law and DPSCD's due process rights. While there is no question that public education in our nation is committed to the control of state and local authorities, if a state elects to furnish free compulsory public education to *any* of its citizens, it must do so in a manner, respecting *all* of its residents, which comport with basic Fourteenth Amendment equal protection and due process structures. *See Wayne v Shadowen*, 15 Fed Appx 271, 283 (2001) (citing *Brown v Board of Education of Topeka*, 347 US 483, 493; 74 SCt 686; 98 LED 873 (1954)) (emphasis added).

Here, DPSCD and its predecessor, DPS, have not been informed of the standards and/or measures the SRO has utilized to determine what schools should remain on, or be removed from, the lowest achieving 5% school list. Consequently, they have no understanding as to what measures must be implemented to improve academic performance. Additionally, the SRO's reliance on data that is now almost 3 years old does not suggest a fair or accurate process by which schools are designated as low achieving, and accordingly subject to automatic closure pursuant to section 391 of Act 192. Further, the SRO's publication of the February 2016 Priority List referenced by the state in its Answer to Plaintiffs' Emergency Motion does not help to satisfy their burden under section 391(1). As explained above, the February 2016 Priority List is completely different than the lowest achieving 5% school list. Even if the lists were the same, the data relied upon to create both is still outdated given the fact it was collected in 2013.

As the U.S. Supreme Court has determined, the fundamental principle that laws regulating persons or entities must give fair notice of what conduct is required or proscribed is essential to due process protections. *See FCC v Fox Television Stations, Inc*, 132 SCt 2307, 2308; 183 LEd2d 234 (2012) (citations omitted). The *FCC* Court also concluded that "regulated parties should know what is required of them so they may act accordingly; and precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way. *FCC v Fox Television Stations, Inc*, 132 SCt at 2308. Thus, to permit the SRO to automatically close schools without establishing clear, unambiguous standards not only violates DPSCD's due process rights, but at a basic level, is fundamentally unfair to DPSCD and its students.

IV. CONCLUSION

For all the reasons stated herein, the SRO is precluded by law from closing DPSCD priority schools under MCL 380.391. The prerequisites for doing so have not been satisfied. DPSCD has not operated or controlled any schools for the three years required by section 391(1) of the Revised School Code. Further, the SRO does not have the data required to close any schools, and has not published a 5% list for the three years immediately preceding the current school year. The 2015 Priority List on which the SRO seems to rely is not the same as the 5% list required by section 391 to be determined pursuant to section 1280c, which requires that list to be developed, posted and published each year, and the SRO has not updated the business rules for identifying 5% schools since the adoption of M-STEP. In any event, closure of DPSCD schools at this time by the SRO would severely undermine the prospects for success, both financially and academically, of DPSCD, in accordance with the publicly expressed goals of the State.

DPSCD welcomes the opportunity to engage in additional discussions with the SRO in an effort to identify solutions that are in line with the law and the Legislature's intent; such that all Detroit students have access to a world class public education.

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