

## **PUBLIC FUNDING FOR SPECIAL NEEDS STUDENTS AT NONPUBLIC SCHOOLS**

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**House Joint Resolution B as reported from committee**  
**Sponsor: Rep. Tim Kelly**  
**Committee: Education**  
**Complete to 5-5-16**

Analysis available at  
<http://www.legislature.mi.gov>

***BRIEF SUMMARY:*** House Joint Resolution B would amend Article VIII, Section 2, of the Michigan Constitution of 1963 to require the legislature to provide financial support for children with special needs to attend the school of their choice, including a nonpublic school, as long as the cost of that financial support does not exceed the amount that would be used for that child at a public school.

***FISCAL IMPACT:*** House Joint Resolution B would have an indeterminate fiscal impact on both the state and local school districts and intermediate districts (ISDs). See ***Fiscal Information***, below, for additional information.

### ***THE APPARENT PROBLEM:***

Currently, if parents want their child to attend a private or parochial school, they must pay the entire amount, in addition to their part in funding public education, of which their child does not partake. The resolution would be a continuation of the “dollars follow the child” funding model utilized in traditional public schools and charter schools. It would allow funding for a child with special needs to the extent that he or she would receive funding at a private school.

### ***THE CONTENT OF THE RESOLUTION:***

House Joint Resolution B would amend Article VIII, Section 2, of the Michigan Constitution of 1963 to require the legislature to provide financial support for children with special needs to attend the school of their choice, including a nonpublic school, as long as the cost of that financial support does not exceed the amount that would be used for that child at a public school.

This language would be added to a section that currently says:

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 *or at any location or institution where instruction is offered in whole or in*

*part to such nonpublic school students.* The legislature may provide for the transportation of students to and from any school.

The resolution also would strike the italicized language above, which was found unconstitutional by the Michigan Supreme Court in 1971. (See ***Background***, below.)

The resolution would require voter approval at the next general election after the adoption of the resolution by the legislature, which requires a two-thirds vote in each house. General elections are held in November of even-numbered years.

## ***BACKGROUND INFORMATION:***

### **1963: Not mentioned in Michigan Constitution**

Section 2 of the 1963 Constitution originally stated merely that “[t]he legislature shall maintain and support a system of free public elementary and secondary schools as defined by law. Every school district shall provide for the education of its pupils without discrimination as to religion, creed, race, color, or national origin.”

### **1968-1970: Legislature moves toward “parochial aid”**

In 1968, the legislature created a joint committee to study the question of aid to private schools. In its report, the committee recommended that the legislature enact “parochial aid,” or a form of direct or indirect public aid for parochial and other nonpublic schools. Three 1968-1969 bills which would have implemented the committee’s recommendations failed to garner enough votes for passage.

In 1970, Public Act 100 was enacted, providing direct support to eligible private schools, which could be used only for instruction in nonreligious topics. According to the legislative finding included in the act, “large numbers of children are being educated in nonpublic elementary and high schools in this state and... increasing costs of education are impairing the quality of secular education of children enrolled in nonpublic schools lawfully selected by their parents.” In order to receive the funding, nonpublic schools were required to submit an application for financial support and to be in compliance with applicable federal and state laws.

### **1970: Michigan Supreme Court declares “parochial aid” constitutional**

The Michigan Supreme Court issued an advisory opinion<sup>1</sup> in September of that year, declaring the statute constitutional. They determined that (1) there was a secular legislative purpose for the law and (2) there was a primary effect that neither advanced nor inhibited religion. Accordingly, they found the act to be constitutional under both the federal and Michigan constitutions.

### **1970: Prop. C amends Constitution; prohibits use of public funds at nonpublic schools**

However, Public Act 100 and the advisory opinion prompted a November 1970 referendum, Proposal C, which specifically prohibited the use of public funds at nonpublic

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<sup>1</sup> *Michigan Supreme Court Advisory Opinion Re Constitutionality of PA 1970, No 100*, 384 Mich 82, 180 NW2d 265 (1971) <http://law.justia.com/cases/michigan/supreme-court/1971/384-mich-82-2.html>

institutions. Approved by 56% of Michigan voters, Proposal C added a second paragraph to Section 2 of Article VIII, stating that:

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 or at any location or institution where instruction is offered in whole or in part to such nonpublic school students.* The legislature may provide for the transportation of students to and from any school

[emphasis added; sticken language declared unconstitutional by 1971 Michigan Supreme Court decision, below, and would be removed by this resolution]

### **1970: Michigan Attorney General issues opinion on effect of Proposal C**

At the time that Proposal C was on the ballot, Attorney General Frank J. Kelley issued an advisory opinion<sup>2</sup> as to its effect. He concluded that it would prohibit most use of public funds for private or parochial schools, including for auxiliary and shared time programs, but (1) would continue to allow public transportation programs for nonpublic school students, (2) property owned by nonpublic schools would continue to be tax exempt, and (3) the equal protection clause of the Fourteenth Amendment to the U.S. Constitution ensured that normal government services such as police and fire protection would still be provided.

### **1971: Michigan Supreme Court declares part of Proposal C unconstitutional**

In 1971, the Traverse City School District sought a declaratory judgment to resolve the constitutionality of the language added to the Constitution by Proposal C. The state Supreme Court answered the certified questions posed by the lower court,<sup>3</sup> finding that the following language was unconstitutional: “or at any location or institution where instruction is offered in whole or in part to such nonpublic school students.” The court concluded that the plain meaning of that language is that once a nonpublic school student receives any service from a public school, the public school becomes “an institution where instruction is offered...to such nonpublic school students,” and likewise ineligible for public money.

This effect would violate the equal protection clause of the Fourteenth Amendment and the free exercise of religion guaranteed by the First Amendment to the U.S. Constitution. As such, the court held that language unconstitutional, void, and unenforceable, but concluded that it could be removed from Article 8, Section 2, without altering the purpose or effect

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<sup>2</sup> Michigan Attorney General Advisory Opinion No. 4715 (re: Proposal C)

<http://www.ag.state.mi.us/opinion/datafiles/1960s/op04019.pdf>

<sup>3</sup> *Traverse City School Dist v Atty Gen*, 384 Mich 390, 185 NW2d 9 (1971)

<http://law.justia.com/cases/michigan/supreme-court/1971/384-mich-390-2.html>

of the section. Although its effect was removed at that time, the language itself has remained in the state Constitution; this resolution would remove it.

### **1978 and 2000: School vouchers rejected by voters**

Since 1971, Michigan voters have twice voted against allowing school vouchers to be used for public education. In 1978, Proposal H would have prohibited the use of property taxes for school operating expenses and established a voucher system for financing education of students at public and nonpublic schools. It was defeated 26 percent to 74 percent.

In 2000, Proposal 1 would have offered vouchers to students in “failing” school districts, where less than two-thirds of students graduate. In 1999, when the voucher campaign began, 38 districts fell into that category, but that number had dropped to seven by Election Day. Ultimately, Michigan voters defeated the proposal, 31 percent to 69 percent.<sup>4</sup>

### **Public funding for nonpublic schools in other states**

At least twenty-one states currently subsidize tuition at public schools through vouchers or tax credits, and five states have instituted educational savings accounts (ESAs) in the past five years. Arizona created “empowerment scholarship accounts” in 2011, which apply to children in underperforming schools, foster children, children of active-duty military families, and children with “special needs.” Tennessee’s and Mississippi’s ESA programs also apply to students with special needs, as is contemplated in this resolution. Florida’s ESA program applies to “a student with a disability,” with disability defined. Finally, Nevada instituted “universal” ESAs in 2016, where all students are eligible for at least 90 percent of the state’s per-pupil funding, with 100 percent available for children with special needs or from low-income families.

The National Conference of State Legislators explanation of education savings accounts: <http://www.ncsl.org/research/education/the-next-generation-of-school-vouchers-education-savings-accounts.aspx>

### ***FISCAL INFORMATION:***

House Joint Resolution B would have an indeterminate fiscal impact on both the state and local school districts and intermediate districts (ISDs).

The resolution would change the way special education is funded for both nonpublic students and public special education students who would like to participate in school choice across ISD boundaries, for whom that choice is currently limited under Section 105c of the State School Aid Act. While the resolution provides that the funding would only be available to the extent that the financial support does not exceed the amount that would be spent on a child if he or she attended a public school, and thus would suggest costs would remain the same or be reduced, by requiring legislative financial support, it would shift an increased share of special education costs to the state and away from local districts for both

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<sup>4</sup> *Initiatives and Referenda Under the Constitution of the State of Michigan of 1963*, [http://www.michigan.gov/documents/sos/Const\\_Amend\\_189834\\_7.pdf](http://www.michigan.gov/documents/sos/Const_Amend_189834_7.pdf)

nonpublic students and public school students participating in school choice across ISD boundaries.

Currently special education is provided by local public school districts and intermediate districts through a combination of local ISD special education millage revenue, local district general operating funds, state special education funding, and federal special education funding.

Districts (either the district of residence or the district in which the nonpublic school is located, depending on the service) must provide nonpublic school students with special education services at the public school, but do not have to pay for services provided by the nonpublic school.

Public school special education students are limited to choice across ISD boundaries in situations in which both the resident and receiving ISDs have a written agreement in place with regard to the responsibility for payment of the added costs of special education programs and services (because the State does not equalize special education funding, which is largely supported by ISD millage revenue that varies significantly from one ISD to the next).

The fiscal impact would depend on the following:

- The number of nonpublic school students whose parents currently decline special education services provided by their resident public school or ISD who would utilize state funds if they were available through a voucher to their nonpublic school of choice.
- The number of public school special education students who would choose to attend a nonpublic school under the revised provisions.
- The number of public school special education students who would choose to attend a public school outside their ISD of residence under the revised provisions.
- The extent to which the costs of special education services vary between public schools and nonpublic schools.
- The interpretation of the term “special needs” which is not current defined in federal or state law.

### ***ARGUMENTS:***

#### ***For:***

Proponents argued that this resolution will expand parent choice, by allowing students to receive the same funding support, no matter which school they attend—whether traditional public or charter schools, or private or parochial schools.

In response to concerns about quality control and accountability, they stated that any spending would be approved by the state. Not only would any public funds have strings attached, but nonpublic schools would also be held to the same nondiscrimination laws that apply to public schools.

***Against:***

Above all, opponents argued that the education savings accounts contemplated in this resolution are unconstitutional, according to Article VIII, Section 2, of the Michigan Constitution, as amended by Proposal C in 1970. As described above, the constitution does not allow public money to be spent “directly or indirectly to aid or maintain any private, denominational or other nonpublic” school, or “to support the attendance of any student” at a nonpublic school. This proposal seems clearly counter to that purpose, in opposition to the laws of the state and the will of the people, opponents held.

Opponents also argued that since “special needs” is not defined in the resolution, it would be impossible to determine the resolution’s effect. The term could be used to apply to gifted and talented children, as well as those with food allergies or terminal illness. The education community, and the Revised School Code, use the terms “special education” and “student with a disability” to apply to services designed for students with disabilities, with applicable disabilities described in the Individuals with Disabilities Education Act.

***POSITIONS:***

The Michigan Catholic Conference supports this resolution. (4-28-16)

A representative of the Michigan Association of School Boards testified in opposition to this resolution. (4-28-16)

The following organizations oppose this resolution (4-28-16):

- Michigan Association of School Administrators
- Michigan Association of Intermediate School Administrators
- Wayne Regional Educational Service Agency
- Michigan Education Association
- Barry Intermediate School District
- Branch Intermediate School District
- Calhoun Intermediate School District
- Jackson Intermediate School District
- Lenawee Intermediate School District
- Monroe Intermediate School District
- West Michigan Talent Triangle
- Oakland Schools
- Michigan Association of Secondary School Principals
- American Federation of Teachers-Michigan
- Michigan Small and Rural Schools Association

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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.