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STATE OF MICHIGAN

IN THE SUPREME COURT

WARREN CONSOLIDATED SCHOOL DISTRICT,

Plaintiff/Appellant,

v

Supreme Court No.
Court of Appeals No. 362948
Case No. 2020-000352-CZ

SCHOOL DISTRICT OF CITY OF HAZEL PARK,

Defendant/Appellee.

/

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**APPELLANT WARREN CONSOLIDATED SCHOOL DISTRICT'S APPLICATION FOR LEAVE TO APPEAL**

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## JURISDICTIONAL STATEMENT

Plaintiff/Appellant states that this Court has jurisdiction over this matter pursuant to MCR 7.303(B)(1), which provides:

> (B) Discretionary Review. The Supreme Court may
>
> (1) review by appeal a case pending in the Court of Appeals or after a decision by the Court of Appeals.

On August 22, 2024, the Court of Appeals issued an unpublished opinion affirming the Circuit Court's granting of summary disposition in favor of Appellee on a matter that concerns the State School Aid Act of 1979, MCL 388.1601, *et seq.* Appellant's Application for Leave to Appeal of that opinion and order is timely filed under MCR 7.305(C)(2)(a).

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## STATEMENT OF QUESTIONS INVOLVED

I. WHETHER THE MICHIGAN STATE SCHOOL AID ACT OF 1979, MCL 388.1601 *et seq.,* AND MICHIGAN PUPIL MEMBERSHIP AUDITING MANUAL, AS MODIFIED, PROVIDE AN ADMINISTRATIVE REMEDY FOR A SCHOOL DISTRICT TO CHALLENGE ANOTHER SCHOOL DISTRICT'S COUNTING OF NONRESIDENT, NONEXEMPT PUPILS IN MEMBERSHIP WITHOUT APPROVAL IN VIOLATION OF MCL 388.1606?

PLAINTIFF/APPELLANT ANSWERS: NO.

DEFENDANT/APPELLEE ANSWERS: YES.

COURT OF APPEALS: ASSUMED YES, BUT DID NOT ADDRESS.

CIRCUIT COURT: ASSUMED YES, BUT DID NOT ADDRESS.

II. WHETHER THE MICHIGAN DEPARTMENT OF EDUCATION STATE SUPERINTENDENT'S DECLINING TO ISSUE A DECLARATORY RULING REGARDING A SCHOOL DISTRICT'S CHALLENGE OF ANOTHER SCHOOL DISTRICT'S COUNTING OF NONRESIDENT, NONEXEMPT PUPILS IN MEMBERSHIP WITHOUT APPROVAL IN VIOLATION OF MCL 388.1606 REQUIRES AN APPEAL TO THE CIRCUIT COURT UNDER THE ADMINISTRATIVE PROCEDURES ACT?

PLAINTIFF/APPELLANT ANSWERS: NO.

DEFENDANT/APPELLEE ANSWERS: YES.

COURT OF APPEALS: YES.

CIRCUIT COURT: YES

III. WHETHER CIRCUIT COURT PROPERLY GRANTED SUMMARY DISPOSITION TO APPELLEE PURSUANT TO MCR 2.116(C)(4)?

PLAINTIFF/APPELLANT ANSWERS: NO.

DEFENDANT/APPELLEE ANSWERS: YES.

COURT OF APPEALS: YES.

CIRCUIT COURT: YES

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# I. STATEMENT OF FACTS

## A. GROUNDS FOR APPEAL.

This case concerns the State School Aid Act of 1979 ("SSSA") and its requirement that a school district not count nonresident pupils in membership for state-aid purposes without the approval of the pupil's school district of residence, unless an exemption applies. MCL 388.1606(4). Under the SSSA, Appellant Warren Consolidated School District ("WCS") filed an original action against Appellee School District of the City of Hazel Park ("Hazel Park") seeking declaratory and injunctive relief because of its systemic counting of nonresident, nonexempt pupils in membership without WCS's approval.

WCS's original action was in keeping with the Court of Appeals' decision in *Board of Education of Detroit Public Schools v Board of Education of Romulus Community Schools*, 227 Mich App 80; 575 NW2d 90 (1997). There, the Court of Appeals held that Detroit Public Schools could maintain an original action under the SSSA for injunctive relief against Romulus Community Schools after it opened an alternative education school within Detroit's geographical boundaries and began enrolling nonexempt Detroit residents without its approval.

Here, however, the Circuit Court and Court of Appeals ignored the *Romulus* decision and dismissed WCS's claims against Hazel Park. The basis for the dismissal was the erroneous belief that WCS, and school districts, generally, are required to exhaust an administrative remedy with the Michigan Department of Education ("MDE"), and then appeal the MDE's determination if they disagree.

The problem is there is *no administrative remedy* through the MDE when one school district wishes to challenge another school district's counting of pupils in membership in violation of the SSSA. This fact is *confirmed* by the State Superintendent and by the language of the Michigan Pupil Membership Auditing Manual ("PMAM") published by the MDE.

The effect of the Court of Appeals decision is three-fold. First, it reads MCL 388.1606(4)'s approval requirement completely out of the SSSA. Second, in doing so, it gives school districts like Hazel Park (here) and Romulus (in the *Romulus* case)

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carte blanche to count nonresident, nonexempt pupils in membership without the required approval. Third, it deprives injured school districts of the original action available under *Romulus* and forces them into an administrative process with no remedy, thereby ensuring the violations of the SSSA continue.

This is an issue of major legal significance to every school district in this state. If the Court of Appeals' decision is allowed to stand it will work a manifest injustice. It will allow schools districts the unfettered ability to "poach" pupils from other districts in order to improperly increase their own state aid at the expense of other districts, which stand to lose untold amounts of state funding. Therefore, this Court should grant WCS's application for leave to appeal to address this vital issue.

**B. SSSA REQUIREMENTS.**

Under the SSSA, public schools are eligible to receive state aid based on the number of pupils enrolled and in attendance on pupil membership count day and the supplemental pupil count day.[1] The state aid that districts receive is called a "foundation allowance," and it is the calculated amount a district receives for each "pupil in membership."[2] Who is eligible to be counted as a "pupil in membership" is defined in MCL 388.1606(6), which, in relevant part, states:

> (6) "Pupil" means an individual in membership in a public school. **A district must have the approval of the pupil's district of residence to count the pupil in membership**, except approval by the pupil's district of residence is not required for any of the following:
>
> (h) A pupil enrolled in an alternative education program operated by a district other than his or her district of residence who meets 1 or more of the following:
>
> (*i*) The pupil has been suspended or expelled from his or her district for any reason, including, but not limited to, a suspension or expulsion

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[1] MCL 388.1606a; MCL 388.1606(7) MCL 388.1701.

2 MCL 388.1620.

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> under section 1310,1311, or 1311a of the revised school code, MCL 380.1310, 380.1311, and 380.1311a.
>
> (*ii*) The pupil has previously dropped out of school. (Emphasis added).

The SSSA also provides that if a pupil is educated in a district other than the district of residence and no approval is obtained and no exemption applies, then "the pupil shall not be counted in membership in any district."[3] This provision is intended to serve a self-regulating function. School districts are not likely to educate nonresident pupils for whom they can receive no state aid, which results in the pupil enrolling and being counted in membership and educated in their home district.

Once a school district's membership count is submitted, the SSSA mandates that each school district have an annual audit to determine whether the district has received the proper foundation allowance.[4] These audits are subject to the requirements established by the MDE in the PMAM.[5] Notably, these audits are sample audits. Auditors do not look at every pupil counted to determine whether they are lawfully enrolled in the school district.[6] Auditors also do not determine whether a nonresident pupil is validly claimed under an exemption, such as having "dropped out."[7] With respect to these audits, the 2019-2020 PMAM provided for "informal agency" review of an "adverse audit adjustment" (*i.e.*, the removal of a pupil from a

---

[3] MCL 388.1606(4)(b).

[4] MCL 388.1618(3).

[5] *Id.*

[6] (App'x A, Kruppe Dep. Tr. pp. 60:4-25; 61:1-13.)

[7] (App'x B, April 25, 2016 MDE Email.)

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school district's membership count).[8] This review process remains unchanged up through the 2023-2024 PMAM.[9]

The PMAM is update every year. Prior to 2019-2020, the 2016-2017 PMAM provided that "The district may appeal the ISD **audit adjustment**" and that "A district shall file its appeal of an ISD's audit findings with the Assistant Director within 30 days of **receiving** the ISD's audit report."[10] As discussed below, 2016 was the same time frame in which WCS's attempted to appeal Hazel Park's membership counts to the MDE, only to be told by the Assistant Director that only the *audited district* could appeal an adjustment to its membership count, not another school district. The State Superintendent has since confirmed that only the school receiving the adverse audit adjustment can use the informal review process.[11] It cannot be used by a different school district to challenge another district's membership counts.

### C. HISTORY.

WCS is home to a large Chaldean population. In 2009, WCS learned that Hazel Park had contracted with a Chaldean organization, International Network for Vocational Educational Skills Training ("INVEST") to provide "adult education." These contracts commenced on July 14, 2014 and ran through at least Jun 30, 2023.[12] The pupils would enroll through Hazel Park's adult education program, but then be educated at schools run by INVEST, with Hazel Park keeping between 15% and 25%

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[8] (App'x C, 2019-2020 Michigan Pupil Membership Auditing Manual pp. 58-59.)

[9] (App'x D, 2023-2024 Michigan Pupil Membership Auditing Manual pp. 81-82, available at https://www.michigan.gov/mde/-/media/Project/Websites/mde/Links2/2024/PMAM_2023-2024.pdf?rev=b2a2ea5f5be445a1b38cabaf9686c248 (last visited on Oct. 2, 2024).

[10] (App'x E, 2016-2017 Michigan Pupil Membership Auditing Manual p. 39) (emphasis added.)

[11] (App'x F, Jan. 8, 2020 Ltr. from State Superintendent.)

[12] (App'x G, Hazel Park/INVEST Contracts.)

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of the state aid received for each pupil before passing the rest on to INVEST.[13] Through this program, Hazel Park targeted elementary, middle, and high school-aged Chaldean residents of WCS—who would otherwise enroll in WCS—and lured them to INVEST. Hazel Park blanket labeled these pupils as having "dropped out," in order to avoid the SSSA requirement that it obtain WCS's approval.

All told, WCS has identified at least 1,436 times that Hazel Park counted nonexempt WCS's residents in its membership, some as young as 6 years old, under the guise of them being "dropouts."[14] WCS's loss of these pupils has caused it to lose over 10 million dollars in state funding.[15]

On May 6, 2012, WCS filed a Complaint seeking declaratory and injunctive relief against Hazel Park for this violation of the SSSA for the school years of 2008-2009 through 2012-2013. On February 26, 2014, the Circuit Court dismissed WCS's Complaint finding that WCS had not exhausted a supposed administrative remedy under the 2012 PMAM.[16] Notably, at the time, PMAM referred to it as an "informal appeal process," and it was *not* limited to only "audit adjustments" or "adverse audit adjustments," as it was by at least 2016.[17] While WCS believed that the Circuit Court's decision was in error, it opted to appeal to the MDE. On April 19, 2016, WCS received an initial response from the MDE's Assistant Director informing it "Please

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[13] (*Id.*); (Kruppe Dep. Tr. pp. 19:10-25; 20:1-25; 21:1-12.)

[14] It should go without saying that elementary-school-aged pupils cannot drop out, they are required to attend school under Michigan's compulsory attendance law. See MCL 380.1516.

[15] (App'x H, Dumas Aff. ¶ 5.) The exhibits to the Affidavit are over 400 pages that are subject to a protective over because they contain student's names, addresses, and dates of birth. These exhibits, though indisputable proof of Hazel Park's unlawful poaching practices, have been omitted because they are unnecessary to resolve the issues presented in this application.

[16] (App'x I, Feb. 26, 2014 Op. and Order.)

[17] (App'x J, 2012 Michigan Pupil Membership Auditing Manual pp. 47-48.)

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be advised that the appeal afforded under the Pupil Membership Auditing Manual ("PMAM") is available only to the audited district. The Department's appeal process does not allow one district to appeal another district's audit adjustment or lack thereof."[18]

Thereafter, on October 18, 2016, WCS received a final response from the MDE's Assistant Director rejecting WCS's appeal because, again, "there is no review available for one district to file an appeal regarding another district's pupil membership count" and "The Department has determined that Warren Consolidated does not have standing to file an administrative appeal regarding Hazel Park."[19] WCS appealed this decision to the State Superintendent for the MDE and, on January 8, 2020, he confirmed WCS could not challenge another district's pupil membership count and declined to issue a declaratory ruling because WCS has no standing.[20]

Given the MDE's determination that WCS had no administrative remedy to exhaust, on January 28, 2020, WCS filed another Complaint against Hazel Park for the years of 2008-2009 up through the present.[21] However, the Circuit Court again dismissed WCS's Complaint, admonishing it for not appealing the MDE's determination that no administrative remedy exists—a determination WCS *agrees* with—to the Circuit Court.[22] WCS appealed this dismissal with the Court of Appeals, which remanded the matter to the Circuit Court. In so doing, it ignored that no administrative remedy exists and remanded simply because there was question as to whether the MDE's determination as in a "contested case" (*i.e.*, one in which an evidentiary hearing is available) that required an appeal under Administrative Procedures Act ("APA"). Notably, that panel of the Court of Appeals held that the

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[18] (App'x K, Apr. 19, 2016 Ltr. from MDE Assistant Director.)

[19] (App'x L, Oct. 18, 2016 Ltr. from MDE Assistant Director.)

[20] (Jan. 8, 2020 Ltr. from State Superintendent.)

[21] (App'x M, WCS Compl.)

[22] (App'x N, June 29, 2020 Op. and Order.)

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State Superintendent's declining to issue a declaratory ruling *did not* require an appeal under the APA.[23]

On remand, the issue the Court of Appeals remanded to have addressed was undisputed—WCS had no right to an evidentiary hearing before the MDE, and it was not a "contested case" that required an appeal. However, instead of allowing WCS's original action to then proceed, the Circuit Court dismissed WCS's Complaint again, finding that, contrary to the Court of Appeal's opinion, it was required to appeal the State Superintendent's declining to issue a declaratory ruling.[24] In reaching its decision, the Circuit Court ignored that the PMAM had changed over the years, removing the appeal process and replacing it with a review process for only *audit adjustments*, which is *not* what WCS is seeking to challenge.

WCS's filed another appeal with the Court of Appeals. But, instead of addressing the fact that the PMAM had changed and the broader issue of the complete lack of an administrative remedy, the Circuit Court *reversed* itself and affirmed the Circuit Court's decision, holding that the State Superintendent's declining to issue a declaratory ruling *did* required an appeal.[25]

There is a reality to this case, not just for WCS, but for all school districts: there is no administrative remedy available to a school district to challenge the membership counts of another school district that is violating the SSSA. The State Superintendent has determined as much, and the PMAM makes its clear. The Court of Appeals failure to address this issue eviscerates one of the core protections afforded to school districts under the SSSA—the requirement that a school district approve of another school district's counting of one of its residents in membership.

With no administrative remedy and no ability to maintain an original action, the Court of Appeals has read a essential section out of the SSSA, and insulated

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[23] (App'x O, Dec. 2, 2021 Op. and Order.)

[24] (App'x P, Sept. 8, 2022 Op. and Order.)

[25] (App'x Q, Aug. 22, 2024 Op. and Order.)

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offending districts from any and all review and requital. If this does not change, it will be open season for school districts to poach each other's residents, undermining local control of education and leading to the loss of countless dollars in state aid to school districts that can ill afford such loss. For these reasons, this Court should grant WCS's application for leave to appeal to address this vital issue and, ultimately, reverse the opinions and orders of the Circuit Court granting summary disposition in favor of Hazel Park.

## II. LAW AND ARGUMENT

### A. WCS HAS NO ADMINISTRATIVE REMEDY.

#### 1. *STANDARD OF REVIEW.*

"An executive agency's power derives from statute." *O'Halloran v Sec'y of State*, ----NW3d---, 2024 WL 3976495, at *8 (Mich. Aug. 28, 2024). "Yet an agency has the authority to interpret the statutes it administers and enforces." *Id.* An agency's interpretation of its own rules and regulations is entitled to considerable deference. *Thomas Twp v John Sexton Corp of Michigan*, 173 Mich App 507, 514; 434 NW2d 644 (1988); *Gravely v Pfizer, Inc*, 170 Mich App 262, 267; 427 NW2d 613 (1988). An agency's interpretation of its own administrative rule "is entitled to respectful consideration and, if persuasive, should not be overruled without cogent reasons." *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 108; 754 NW2d 259 (2008).

"If an administrative agency or circuit court interprets a statute, such a determination is a question of law subject to review de novo." *Mericka v Dep't of Comm Health*, 283 Mich App 29, 36; 770 NW2d 24 (2009). "This Court reviews de novo the interpretation of administrative regulations." *In re Petition of Attorney General for Investigative Subpoenas*, 274 Mich App 696, 698; 736 NW2d 594 (2007).

"This Court reviews the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). "Summary disposition under MCR 2.116(C)(4) is proper when a 'court lacks jurisdiction of the subject matter.' " *Wells Fargo Rail Corp*, 344 Mich App 351, 358; 1 NW3d 373 (2022), quoting MCR 2.116(C)(4). When a plaintiff has failed to exhaust its administrative remedies,

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summary disposition pursuant to MCR 2.116(C)(4) is proper. *Citizens for Common Sense in Gov't v Attorney General*, 243 Mich App 43, 50, 620 NW2d 546 (2000). "For jurisdictional questions under MCR 2.116(C)(4), this Court determines whether the affidavits, together with the pleadings, depositions, admissions, and documentary evidence, demonstrate a lack of subject matter jurisdiction." *Wells Fargo Rail*, 344 Mich App at 358. (quotation marks and citation omitted). The issue of subject-matter jurisdiction presented in this case involves questions of statutory interpretation, which this Court review de novo. *Id.* (quotation marks and citation omitted).

**2. WCS HAS NO ADMINISTRATIVE REMEDY UNDER THE PMAM.**

The genesis of this application began with the Circuit Court's original sin of believing that WCS could challenge Hazel Park's membership counts through an administrative process. It couldn't then, and it can't now. Yet, this sin has been repeated over and over again by the Circuit Court and Court of Appeals.[26] First, by refusing to acknowledge an afforded deference to the State Superintendent's determination that no school district can challenge the membership counts of another school district through the MDE's review process. Second, by refusing to acknowledge that the PMAM has changed in crucial ways since the Circuit Court's 2014 decision that make it clear WCS has no administrative remedy.

"The principal goal of statutory interpretation is to give effect to the Legislature's intent, and the most reliable evidence of that intent is the plain language of the statute. When interpreting a statute, we must give effect to every word, phrase, and clause and avoid an interpretation that would render any part of the statute surplusage or nugatory." *South Dearborn Env't Improvement Ass'n, Inc v Dep't of Env't Quality*, 502 Mich 349, 361; 917 NW2d 603 (2018) (quotation marks

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[26] To fit its opinion, the Court of Appels stated in a footnote that it considered WCS to have abandoned this issue even though the brief included the oft-recited statutory interpretation case law included in this application, there was and is no case law to be cited interpreting the PMAM, and the lack of a review process in the absence of an "audit adjustment" or "adverse audit adjustment" is clear from the *plain language* of the PMAM. It was clear error for the Court of Appeals to not consider this issue, given the magnitude of the harm all school districts stand to suffer.

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and citation omitted). "Statutes must be construed reasonably, keeping in mind the purpose of the act, and to avoid absurd results." *Dep't of Transp v Outfront Media, LLC*, 344 Mich App 672, 681; 1 NW3d 845 (2022) (quotation marks and citation omitted). "Moreover, '[n]ontechnical words and phrases' should be construed according to their plain meaning, taking into account the context in which the words are used. When a word or phrase is not defined by the statute in question, it is appropriate to consult dictionary definitions to determine [its] plain and ordinary meaning . . . ." *South Dearborn*, 502 Mich at 608-09. "Administrative rules are interpreted in an identical manner." *South Dearborn Env't Improvement Ass'n, Inc v Dep't of Env't Quality*, 336 Mich App 490, 502; 971 NW2d 46 (2021), citing *Brang, Inc v Liquor Control Comm*, 320 Mich App 652, 661; 910 NW2d 309 (2017) ("Just as with statutes, the foremost rule in construing an administrative rule, and our primary task, is to discern and give effect to the administrative agency's intent.").

The 2012 PMAM originally relied on by the Circuit Court provided:

> **ISD Audit Appeal Process**
>
> The appeal of an ISD audit is a two-step process at the state level. Prior to that, ISDs may offer an informal appeal process. **The district *may* appeal the ISD audit to the Director of the Office of Audits**. The district may then appeal the Director's decision to the Superintendent of Public Instruction. That appeal will be assigned to the Department's Administrative Law staff that will act on behalf of the Superintendent.
>
> 1. Appeals to the Director of the Office of Audits
>
> (a) **District appeals of the ISD's audit findings must be made to the Director of the Office of Audits within 30 days of *receiving* the ISD's audit report** or ISD's decision on the informal appeal. The appeals must include a description of the memberships appealed along with rationale and legal references

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> supporting the district's position. A copy of the appeal should be forwarded to the ISD auditor.[27]

The word "may" should have alerted the Circuit Court to the fact that the MDE's appeal process was *permissive*, not mandatory, and did not foreclose WCS from filing an original action. *Murphy v Sears, Roebuck & Co*, 190 Mich App 384, 387; 476 NW2d 639 (1991) (holding that the use of the term "may" in relation to an administrative dispute resolution process was optional.) And the word "receiving" should have tipped the Circuit Court off to the fact that *only* the audited district had a right of appeal because only the audited district would "receive" the audit report. *City of Coldwater v Consumers Energy Co*, 500 Mich 158, 177 n 8; 895 NW2d 154 (2017), quoting *Black's Law Dictionary* (10th ed.) (The word "receive" is defined as "[t]o take (something offered, given, sent, etc.); to come into possession of or get from some outside source[.]")

Regardless, by the time litigation was recommenced in 2020, the PMAM had been changed in 2019-2020 to provide:

> **CHAPTER 4 – INFORMAL AGENCY REVIEW OF INTERMEDIATE SCHOOL DISTRICT AND CERTIFIED PUBLIC ACCOUNTANT PUPIL MEMBERSHIP AUDITS**
>
> Section 18(4) of the State School Aid Act, MCL 388.1618(4), requires an intermediate school district (ISD) or certified public accountant (CPA) audit of each district's pupil accounting records at least annually and at such other times as determined by the department. The ISD or CPA audit includes a review of district-provided documentation to substantiate membership data submitted to the Michigan Student Data System (MSDS). Following the audit, the ISD auditor or the CPA may adjust a pupil membership count in accordance with statutes, administrative rules, the Pupil Accounting Manual, the Pupil Membership Auditing Manual (PMAM), and department policies. **A**

[27] (2012 Michigan Pupil Membership Auditing Manual pp. 47-48) (emphasis added.)

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**district *may* request informal agency review of an *adverse ISD or CPA audit adjustment* as described below**.

A. **A district *may* file a written request for informal agency review of an *adverse ISD or CPA audit adjustment* with the department no later than 30 days after the date of the decision.** The request for informal agency review must include a detailed description of each pupil membership or part of a full-time equated (FTE) membership in dispute and the rationale for and legal references supporting the district's position. With the request for informal agency review, the district may submit only documents that were available to the ISD auditor or the CPA.[28]

The language from the 2016-2017 PMAM remains unchanged in all material respects up though the 2023-2024 PMAM, and the term "may," indicating the permissiveness of the MDE review process, has been retained.

However, additional qualifying language has been added that was *not* present in the 2012 PMAM, making review only available for "adverse audit adjustments." The PMAM does not contain any definitions, but Merriam-Webster defines "adverse" as "acting against or in a contrary direction" or "causing harm."[29] And it defines

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[28] (2019-2020 Michigan Pupil Membership Auditing Manual pp. 58-59) (emphasis added.) While the "A" in "A district" is an indefinite article that reflects "generalizing force," see *Barrow v City of Detroit Election Comm'n,* 301 Mich App 404, 414; 836 NW2d 498 (2013), in context the PMAM contemplates that "A district" means only the district that received the audit adjustment. The PMAM's use of an indefinite article is unsurprising. All schools districts may, at one time or another, receive an audit adjacent that they wish to have reviewed. This review process is prospective, and referring to any school district with specificity in the PMAM would make little sense. See *People v. Julian*, 2013 WL 6244705, unpublished per curiam opinion of the Court of Appeals, Dec. 3, 2013 (Docket No. 312316) (holding that the word "an," while an indefinite article referred to one specific evaluation because "the evaluation was merely *prospective;* thus, referring to it with any type of specificity would have been dubious.")

[29] Merriam-Webster Dictionary, Adverse, https://www.merriam-webster.com/dictionary/adverse (last visited Oct. 2, 2024).

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"adjustment" as "a correction or modification to reflect actual conditions."[30] Thus the plain language of the PMAM provides for a review *only* when a school district has received a harmful modification to its membership count. In this case, it has always been undisputed that: 1) Hazel Park never received a harmful modification to its membership count, because 2) the auditor does not determine whether a pupil is lawfully counted under an exemption and is not even given the forms Hazel Park uses to claim pupils are "dropouts."[31] Consequently, even if the PMAM required WCS to challenge Hazel Park's membership count through a review process—which it does not—WCS had nothing to challenge because Hazel Park's membership counts had never been reduced based on its unlawful counting of nonresident, nonexempt pupils in membership without WCS's approval. Thusly, the PMAM does not require WCS's to seek administrative review with the MDE, and the dismissal of its Complaint against Hazel Park for all the years this scheme has gone on was clearly erroneous.

Beyond this fact, interpreting the PMAM to require school districts to purse an administrative review process with the MDE renders an entire section of the SSSA surplusage and nugatory and leads to an absurd result. MCL 388.1606(4) *requires* that Hazel Park obtain WCS's approval before counting nonresident, nonexempt pupils in its membership. This approval requirement is made *meaningless* if school districts, like WCS, are forced into a fruitless administrative review process, with the resultant vicious cycle of: 1) Hazel Park counting WCS residents in its membership without proper approval; 2) WCS, through Court compulsion, seeking administrative review by the MDE; 3) the MDE determining exactly what it has three times before—WCS cannot seek review or obtain any remedy from the MDE; 4) WCS filing an

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[30] Merriam-Webster Dictionary, Adverse, https://www.merriam-webster.com/dictionary/adjustment (last visited Oct. 2, 2024).

[31] (April 25, 2016 Ltr. from MDE Assistant Director); (App'x R, Hayes Dep. Tr. pp. 19:18-25; 20:1-2; 22:20-25; 23:1-8.)

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original action against Hazel Park; and 5) the Circuit Court dismissing WCS's original action based on a non-existent administrative remedy.

All the while, Hazel Park, and other school districts like it, continue unlawfully poaching pupils, essentially stealing state aid from WCS. And, despite the SSSA requirements, WCS, and other injured school districts, can do *nothing* about it. It should go without saying, but unfortunately doesn't, that denying school districts, like WCS, which has lost over 10 million dollars in state aid, any and all due process under the SSSA is the epitome of a manifestly absurd and unjust result. Therefore, this Court should grant WCS's application to address this vital issue.

### 3. *EXHAUSTION OF NONEXISTENT ADMINISTRATIVE REMEDIES IS NOT REQUIRED.*

In *Board of Education of Detroit Public School v Board of Education of Romulus Community Schools*, 227 Mich App 80; 575 NW2d 90 (1997), the Court of Appeals considered a nearly identical challenge under the SSSA. In that case, Romulus Community Schools opened up a school of choice within Detroit's geographical boundaries and began enrolling Detroit residents. Detroit Public Schools responded by filing an original action in the Circuit Court seeking an injunction against Romulus Community Schools. The SSSA provision at issue in the case was the same as it is here, MCL 388.1606, which provides that "'[a] district must have the approval of the pupil's district of residence to count the pupil in membership" and thus receive state aid for a nonresident." *Id.* at 84, quoting MCL 388.1606. Unlike the "dropout" exemption in this case, there the exemption at issue related to an exemption where approval was not required "for pupils enrolled in a district other than their district of residence but within the same intermediate district if the educating district enrolls nonresident pupils in accordance with section 105." *Id.*, citing MCL 388.1750.

Romulus Community Schools argued that approval was not required to count Detroit residents in its membership under this exception because its school was located in Detroit. The Court of Appels disagreed, holding that the exemption did not apply because the pupils were geographically enrolled "in" a school in their district of

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residence, albeit one run by a different public school system. *Id.* at 86-87. In reaching this decision the Court of Appeals specifically noted two important things. First, Detroit Public Schools had standing to seek the injunction because "Detroit Public Schools has a specific statutory right to approve or disapprove of the enrollment of Detroit pupils at the Romulus–Baron Academy." *Id.* at 82. Second, the court noted the importance of local control of education: "the principle of local control of public schools is deeply rooted and long established. *Id.* at 88.

There is no reason that WCS should be precluded from bringing an original action under MCL 388.1606 when Detroit Public Schools was able to bring one under the exact same provision of the SSSA, especially when it is undisputed that the MDE does not have the power to enjoin Hazel Park's unlawful conduct.

"The doctrine of exhaustion of administrative remedies requires that where an administrative agency provides a remedy, a party must seek such relief before petitioning the court." *Cummins v Robinson Twp*, 283 Mich App 677, 691; 770 NW2d 421 (2009) (citation omitted). "The converse, however, is that where the administrative appellate body cannot provide the relief sought, the doctrine does not apply." *Id. (*citation omitted); see also *Schwall v City of Dearborn*, 31 Mich App 169, 171; 187 NW2d 543 (1971). "Exhaustion of administrative remedies is not an inflexible condition precedent to judicial consideration, however, and will not be required if review of the agency's final decision would not provide an adequate remedy, i.e., if it would run counter to the policies which underlie the doctrine." *Int'l Bus Machines Corp v State, Dep't of Treasury, Revenue Div*, 75 Mich App 604, 610; 255 NW2d 702 (1977); see also *L & L Wine & Liquor Corp v Liquor Control Comm'n*, 274 Mich App 354, 359-60; 733 NW2d 107 (2007).

A remedy is inadequate when there is "something in the nature of the action or proceeding that indicates to the court that it will not be able to protect the rights of the litigants or afford them adequate redress otherwise than through the exercise of this extraordinary jurisdiction." *Bennett v Royal Oak Sch Dist*, 10 Mich App 265, 269; 159 NW2d 245 (1968). Additionally, a judicially created exception to the exhaustion requirement arises when an appeal to the administrative agency would

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be futile. *L & L Wine*, 274 Mich App at 358. To invoke this exception, it must be clear that an agency appeal would be an exercise in futility and nothing more than a formal step on the way to the courthouse. *Id.*; see also *Michigan Waste Sys, Inc v Dep't of Nat Res*, 157 Mich App 746, 758-59; 403 NW2d 608 (1987) ("exhaustion of administrative remedies is not required where the administrative decision maker is predisposed to rule against the aggrieved party.").

As addressed above, WCS's does not have an administrative remedy to exhaust under the PMAM. But even if it did, it would be an inadequate and futile remedy to pursue. *Romulus* establishes that WCS has an undeniable protected right to approve pupils under MCL 388.1606, which Hazel Park has denied to it for nearly 16 years. The goal here, as it was in *Romulus*, is to enjoin the Hazel Park's continued counting of nonexempt WCS's residents in membership without WCS's approval. The MDE *does not* have injunctive power. The best the MDE can do is recover any state aid that was improperly paid to Hazel Park,[32] but that state aid does not then go to WCS,[33] and, in any event, auditors still do not determine whether a nonresident pupil is properly counted in membership under MCL 388.1606. The sample audits simply do not include that granular detail. Given these facts, it makes no sense, and is indefensible, to force WCS to exhaust a supposed administrative remedy, when the primary relief WCS's seeks is *not* relief the MDE has the power to grant and is predicated on issue (*i.e.*, which students, if any, were lawful dropouts) that the MDE does not determine. Therefore, this Court should grant WCS's application to address this vital issue.

### B. THE APA DOES NOT APPLY TO WCS'S CLAIMS.

#### 1. *STANDARD OF REVIEW.*

"This Court reviews the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law." *Maiden v*

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[32] See MCL 388.1615.

[33] See MCL 388.1606(4)(b).

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*Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). "Summary disposition under MCR 2.116(C)(4) is proper when a 'court lacks jurisdiction of the subject matter.' " *Wells Fargo Rail Corp*, 344 Mich App 351, 358; 1 NW3d 373 (2022), quoting MCR 2.116(C)(4). When a plaintiff has failed to exhaust its administrative remedies, summary disposition pursuant to MCR 2.116(C)(4) is proper. *Citizens for Common Sense in Gov't v Attorney General*, 243 Mich App 43, 50, 620 N.W.2d 546 (2000). "For jurisdictional questions under MCR 2.116(C)(4), this Court determines whether the affidavits, together with the pleadings, depositions, admissions, and documentary evidence, demonstrate a lack of subject matter jurisdiction." *Wells Fargo Rail*, 344 Mich App at 358. (quotation marks and citation omitted). The issue of subject-matter jurisdiction presented in this case involves questions of statutory interpretation, which this Court reviews de novo. *Id.* (quotation marks and citation omitted).

**2. *WCS WAS NOT REQUIRED TO APPEAL UNDER MCL 24.263.***

By ignoring WCS's clear lack of an administrative remedy under the PMAM, the Circuit Court and Court of Appels boxed themselves in trying to squeeze a square peg (WCS's challenge to Hazel Park's *non-adverse* membership counts) into a round hole (the APA). In doing so, the courts made a number of clearly erroneous decisions, which will plague school districts for years to come.

*a. The State Superintendent's declining to issue a declaratory ruling is not a declaratory ruling under MCL 24.236.*

The first of these erroneous decisions related to the APA under MCL 24.263, which provides, in relevant part, "[o]n request of **an interested person**, an agency may issue a declaratory ruling as to the applicability to **an actual state of facts** of a statute administered by the agency or of a rule or order of the agency." (Emphasis added). "[T]he term 'may' presupposes discretion and does not mandate an action." *In re Weber Estate*, 257 Mich App 558, 562; 669 NW2d 288 (2003). If issued, the "declaratory ruling is binding on the agency and the person requesting it unless it is altered or set aside by any court." MCL 24.263. Importantly though, only "[a] **declaratory ruling** is subject to judicial review in the same manner as an agency

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final decision or order in a contested case." (Emphasis added). MCL 24.263 *does not* say that the *declining* to issue any ruling requires an appeal to Circuit Court. This makes sense. Black's Law Dictionary defines "ruling" in this context as a "legal ruling," which is "a term ordinarily used to signify the outcome of applying a legal test when that outcome is one of relatively narrow impact. The immediate effect is to decide an issue in a single case."[34] Here, the State Superintendent did not apply MCL 388.1606 to the facts presented by WCS and decline to issue a ruling because WCS was wrong on the law or because Hazel Park did not poach WCS's residents without approval. These would have been rulings deciding the legal issue presented. Instead, the State Superintendent found that the law and facts as presented by WCS don't matter because only the audited school district can use the MDE's review process.

The problem with treating the non-issuance of a declaratory ruling where a party lacks standing as though it is an actual "declaratory ruling" on the merits has an even greater problem. Declaratory rulings are reviewed on appeal by the Circuit Court the same as a decision in "contested cases." However, "contested case" under the APA requires an *evidentiary hearing*.[35] Had the State Superintendent reviewed the facts submitted by WCS, given WCS an opportunity to be heard, and declined to issue a declaratory ruling based on specific factual findings, that would be one thing. In such case, the Circuit Court would then have an entire record to review on appeal. But here, there is no record, WCS's was not given the opportunity to be heard, and the MDE made no factual findings. So, what purpose is served by such an appeal other than to deny a school district their day in court?

The State Superintendent determined WCS has no right to seek review, his decision is entitled to deference, and the Circuit Court does not have the power to

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[34] Black's Law Dictionary, Ruling (12th ed.)

[35] "'Contested case'" means a proceeding, including rate-making, price-fixing, and licensing, in which a determination of the legal rights, duties, or privileges of a named party is required by law to be made by an agency after an opportunity for an evidentiary hearing. MCL 24.203(3).

craft an MDE review process for WCS out of whole cloth. The process is a legal dead end. Hazel Park knows it. And, the Circuit Court and Court of Appeals knew it, too. That should have at least given them pause before dismissing WCS's claim for not appealing the MDE's non-issuance of a declaratory ruling, when such an appeal leads to nowhere and to nothing—it didn't.

b. *Human Rights Party, which is not precedentially binding, should be revisited.*

Instead, the Court of Appeals relied on a pre-November 1, 1990 case, which is not precedentially binding under MCR 7.215(J)(1), that holds that "a *refusal* to issue a declaratory ruling under MCL 24.263 is subject to judicial review as an agency final decision or order in a contested case" *Human Rights Party v Mich Corrections Comm*, 76 Mich App 204, 208-09; 256 NW2d 439 (1977) (emphasis added). This decision is an aberrant decision that was supported by little to no authority and no analysis of the rule, itself. This fact was specifically noted by the court, stating: **Although this is not specifically provided for in the statute**, we find that the intent of the Legislature in establishing this declaratory ruling provision is to afford judicial review of an agency's refusal to make any ruling." *Id.* at 209 (emphasis added). However, the accompanying footnote made clear that the authority the court was relying upon was limited to when "**in appropriate cases**, the refusal of the agency to make a ruling could be appealed to the courts." *Id.* at 209 n 3, quoting 1 Cooper, State Administrative Law, p. 243 (emphasis added). The court ignored this limiting language and adopted wholesale the appellant's position that "It is axiomatic that refusal to issue a declaratory ruling is controlled by the same review process." *Id.* at 209 n 3. At minimum, this is an issue that needs to be reviewed by this Court because the uncritical reliance on *Human Rights Party* by lower courts is and will deny school district any forum to redress violations of the SSSA.

c. *MCL 24.236 is inapplicable because there was no "actual state of facts" and WCS is not "an interested person," as required.*

However, with respect to MCL 24.263, analysis of *Human Rights Party* is not even necessary to establish that WCS's was not required to appeal the State



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Superintendent's determination to the Circuit Court. First, MCL 24.263 is only triggered when a declaratory ruling is requested as to an "actual state of facts." Merriam-Webster Dictionary defined "actual" as "existing in fact or reality."[36] Here, the review sought by MDE did not concern *facts* it concerned *allegations* that Hazel Park had been systematically counting nonexempt WCS residents in its membership—allegations that Hazel Park disputes and the merits of which have *never* been reviewed by the courts. The State Superintendent even noted the problem with this fact, stating: "There are questions of fact regarding the circumstance of each involved child that are no appropriate to be resolved through the declaratory ruling process."[37] There is not now, nor has there even been, an "actual state of facts" in this case, meaning MCL 24.263 is completely inapplicable and no appeal was required.

However, the errors by the courts do not stop there. In order for MCL 24.263 to apply to WCS it also must be "an interested person," which it is not. With respect to MCL 24.263, *Human Rights Party* specifically held in order for an interested person, under MCL 24.263, to seek judicial review of an agencies final decision under MCL 24.301, there must be a "direct effect on his legally protected interests." 76 Mich App at 213. The Court of Appels disagreed, holding that the quote language from *Human Rights Party* has nothing to do with who is an interested person under MCL 24.263, even though such a reading is at odds with the plain language of the opinion.

Having eliminated the standard under *Human Rights Party*, the Court of Appeals proceeded to apply the "interested person" definition arrived at *Forner v Bureau of Constr Codes*, 2022 WL 3692267, unpublished per curiam opinion of the Court of Appeals, issued Aug. 25, 2022 (Docket No. 357335). The problem is that case incorrectly relied on the lay definition of "interested," as opposed to the legal definition of interested. The consequence of this was to hold that WCS was "an interested person" merely because it is "affected by the application of a statute or rule

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[36] Merriam-Webster Dictionary, Adverse, https://www.merriam-webster.com/dictionary/actual (last visited Oct. 2, 2024).

[37] (Jan. 8, 2020 Ltr. from State Superintendent.)

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to an actual state of facts, as opposed to the impairment of its legal rights under *Human Rights Party*. *Id.*at * 4. The application of this lay definition was manifestly improper and unjust, and in fact *conflicts* with another Court of Appeals decision: *Forner v Robinson Twp Bldg Dep't*, 2009 WL 691876, unpublished per curiam opinion of the Court of Appeals, issued Mar. 17, 2009 (Docket No. 282007).

In that case, the Court of Appeals correctly noted that, while lay dictionary definitions may be consulted, "a legal term of art must be constructed in accordance with its peculiar and appropriate legal meaning *Id.* at * 2, citing *Brackett v Focus Hope, Inc,* 482 Mich 269, 276; 753 NW2d 207 (2008). While MCL 24.263 was not at issue in the case, another statute using the undefined legal term "interest person," was at issue. Therefore, the court looked to Black's Law Dictionary, which defines "interested party" as "[a] party who has a recognizable stake (and therefore standing) in a matter." *Id.* at * 2, quoting Black's Law Dictionary (7th ed.) Based on this definition the court concluded that to be an "interested person" the person must have standing:

> We find the terms "recognizable stake" and "standing" in that definition significant. A "stake" is defined as "a personal interest or involvement." *Random House Webster's College Dictionary* (2000). We conclude that to satisfy the "interested person" requirement under MCL 125.1514(1) or MCL 125.1516(1), a party must have a recognizable, personal interest; **he must demonstrate standing**. "To have standing, a party must demonstrate more than the ability to vigorously advocate; the party must also demonstrate it has a substantial interest that will be detrimentally affected in a manner different from the interests of the public at large." *Id.* at * 2, quoting *Moses, Inc v Southeast Mich Council of Gov't*s, 270 Mich App 401, 412; 716 NW2d 278 (2006) (emphasis added.)

Contrary to the Court of Appels opinion, *standing* is the standard to be employed when determining who is "an interested person" under MCL 24.263. And, it is well-established that to have standing a party must have "a legally protected interest that is in jeopardy of being adversely affected" and a "special injury or right, or substantial interest that will be detrimentally affected in a manner different from the citizenry at large." *Newton v Progressive Marathon Ins Co*, ---NW3d---, 2024 WL

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56008, at *4 (Mich. Ct. App. Jan. 4, 2024). Under either the correct standing analysis or the Court of Appeals flawed "affected by" analysis, the Court of Appeals would have understood that WCS is not an interested person under MCL 24.263 if it had actually understood WCS's claims. This case is and always has been obtaining injunctive relief to prevent Hazel Park from continuing to count nonexempt WCS's residents in membership without its approval. This the MDE can indisputably not provide. Yet, the Court of Appeals concluded its Opinion with a completely inaccurate recitation of WCS's claims, stating:

> Specifically, **plaintiff maintains that, during each school year, the MDE did not include pupils who resided within its district boundaries as part of its membership count**, thereby decreasing plaintiff's allotted school funding. By its own claims, plaintiff was directly affected by the MDE's application of the statute.[38]

WCS has *never* maintained that the MDE did not include pupils who resided in its district in WCS's membership count. If it were the case that WCS enrolled students that the MDE failed to include in its membership, thereby causing WCS to lose state aid, WCS would have sought an informal review under the PMAM. That is *exactly* what the PMAM review process is intended to be used for—a district challenging its own membership audit. That's not this case, and the fact that the Court of Appeals did not understand that undermines its entire Opinion, and its implicit belief that WCS had a remedy through the MDE.

It is axiomatic that WCS cannot have standing with the MDE, when the relief WCS is seeking is relief the MDE is powerless to grant. Therefore, WCS was not required to appeal the State Superintendents determination under MCL 24.263, and its original action against Hazel Park should not have been dismissed.

*d. WCS was allowed to maintain an original action against Hazel Park under MCL 24.264.*

The Court of Appeals decision is further undermined because MCL 24.264 allows WCS to maintain an original action against Hazel Park even when its request

[38] (Aug. 22, 2024 Op. and Order) (emphasis added.)

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for a declaratory ruling is declined. MCL 24.264 provides that the "applicability of a rule . . . may be determined in an action for declaratory judgment . . . . **An action for declaratory judgment may not be commenced under this section unless the plaintiff has first requested the agency for a declaratory ruling and the agency has denied the request or failed to act upon it expeditiously**." (Emphasis added). This Court recently held that in order to be a "rule" under the APA the following elements must be met: 1) it is an agency regulation, statement, standard, policy, ruling, or instruction; 2) it is of general applicability; 3) it implements or applies law enforced or administered by the agency, or it prescribes the organization, procedure, or practice of the agency; and 4) it, in itself, has the force and effect of law. *Mich Farm Bureau v Dep't of Env't, Great Lakes, & Energy*, ---NW3d---, 2024 WL 3610196 at * 12 (Mich. July 31, 2024).[39] [40] "Michigan courts have considered a statement to be of general applicability when it is capable of being applied to or is relevant to an open-ended class or category of entities or situations." *Id.*

Here, the SSSA, in MCL 338.1606(4), provides that a district may not count nonresident, nonexempt pupils in membership with the approval of the home district. Moreover, the SSSA, in MCL 388.1618(4) provides that pupil membership audits will be conducted in accordance with the PMAM. Consequently, the PMAM is: 1) an MDE regulation; 2) that is generally applicable; 3) that implements the provisions of the SSSA; and 4) that has the force and effect of law. Therefore, all of the requirements

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[39] "[I]n order to reflect the APA's preference for policy determinations pursuant to rules, the definition of 'rule' is to be broadly construed, while the exceptions are to be narrowly construed." *Associated Builders & Contractors of Michigan v Dep't of Tech, Mgmt, & Budget*, ---NW3d---, 2024 WL 387089, at *11 (Mich. Ct. App. Feb. 1, 2024).

[40] Assuming, *arguendo*, that the PMAM is merely an interpretive statement or guideline, it does not have the force and effect of law and it is unclear how or why WCS could be required to appeal a determination made under a manual that lacks legal force and effect. *Mich Farm Bureau*, 2024 WL 3610196 at * 11; *O'Halloran*, 2024 WL 3976495 at * 8.

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under MCL 24.264 are met in order for WCS to maintain an original action for a declaratory judgment against Hazel Park irrespective of the fact that the State Superintendent declined to issue a declaratory ruling.

Therefore, no matter how this is analyzed, WCS was not required under the APA to appeal the State Superintendents' declining of a declaratory ruling to the Circuit Court, and the Circuit Court had subject matter jurisdiction over WCS's original claims, which should not have been dismissed. Therefore, this Court should grant WCS's application for leave to appeal to address this vital issue.

## III. CONCLUSION AND REQUESTED RELIEF

Over the past 16 years, Hazel Park has unlawfully counted WCS residents in its membership 1,436 times, causing WCS to lose over 10 million dollars in state funding. For years, WCS has sought redress only to be turned away at every door. Not because Hazel Park didn't violate the State School Aid Act—it did— but because the courts have forced WCS into an administrative review process with the MDE, which the State Superintendent has determined does not exist. The courts are well-aware of this determination and the unavailability of any remedy through the MDE, yet, incomprehensively, they continue to dismiss WCS's original action against Hazel Park because it did not appeal the non-existence of an administrative remedy to the Circuit Court. If that sounds absurd, it should. Now, because of the Court of Appeals' decisions, that absurdity will affect every school district in this state that, like WCS, is having its residents poached and its state aid siphoned by school districts in clear violation of the State School Aid Act. Like WCS, they will not be allowed to bring an original action for declaratory and injunctive relief against the offending school district. Instead, they will be required to exhaust the same non-existent administrative remedies with the MDE, and then file a futile appeal to the Circuit Court after the MDE rightly determines (again) that no remedy exists. All the while, the offending school districts continue pilfering their residents and plundering their state aid. This pre-ordained outcome is manifestly unjust.

Whether it is because no administrative remedy ever existed (which it hasn't), or because the Membership Pupil Accounting Manuals have been changed to preclude

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the very administrative review process the courts are requiring (it has), or because the WCS was not required to appeal the MDE's determination at all under the Administrative Procedures Act (it wasn't), this Court should grant this application for leave to appeal to address these vital issues that promise to affect and injure not just WCS, but every other school district at one time or another and, ultimately, reverse the opinions and orders of the Circuit Court granting summary disposition in favor of Hazel Park.

Respectfully submitted,

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Dated: October 3, 2024

**CERTIFICATE OF COMPLIANCE WITH MCR 7.212(B)(1)**

I certify that Appellant Warren Consolidated School District's Application for Leave to Appeal complies with the type-volume limitation of MCR 7.212(B)(1) because this brief contains 8,483 words, as counted by the word processing system employed by O'Reilly Rancilio P.C.

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