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State Takeovers of School Districts and Related Litigation: Michigan as a Case Study

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State Takeovers of School Districts and Related Litigation: Michigan as a Case Study

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In 2011, I published an article in which I argued that state takeovers of school districts are the best of the various legal mechanisms available to school districts in fiscal crisis—better than a general state receivership, and definitely better than municipal bankruptcy, which is not even available to school districts in 26 states.¹ I contended that takeover mechanisms should be gradual and progressive, providing a school district with ample notice and opportunity to try to get its own financial house in order before it is divested of some or all authority over financial matters.² One of the states I focused on as having a model takeover statute was my own state, Michigan.³ As that article was going to press, Michigan changed its emergency financial manager statute drastically, extending the authority of an emergency financial manager over the local government she or he manages and giving the governor substantially more autonomy when selecting the individuals whose new title, “emergency managers,” reflected that their authority was no longer limited to financial matters.⁴ These changes gained national attention.⁵

* Professor of Law, Michigan State University. This paper was presented at the ABA Section on State and Local Government’s fall 2012 conference about education law. Additionally, Patrick O’Brien provided excellent research and editorial assistance.

¹ Kristi L. Bowman, *Before School Districts Go Broke: A Proposal for Federal Reform*, 79 U. of Cinn. L. Rev. 895 (2011).

² *Id.* at 953-58.

³ *Id.* at 925-30, 953-58.

⁴ MICH. COMP. LAWS § 141.11501-31 (2011).

⁵ See, e.g., Rick Ungar, *The Michigan Monarchy Legislates Financial Martial Law—Nation Yawns*, Forbes, Mar. 18, 2011; The Colbert Report, “The Word—Autocratic for the People,” May 9, 2011, <http://www.colbertnation.com/the-colbert-report-videos/385702/may-09-2011/the-word---autocratic-for-the-people>. The Huffington Post (series of blog posts in spring 2011 by Michael K. Brown, Joseph Harris, Joyce Parker, Jack Martin, Mitchell Bean, Shea Howell, Hansen Clark, Patrick Geans).

Since it was enacted, Michigan citizens' resistance and challenges to the state's new emergency manager statute have been substantial, sometimes taking place in courtrooms⁶ and, in November 2012, at the ballot box.⁷

Because the question of the proper role of a state in school districts' fiscal crises is important beyond Michigan's borders and because various states have been grappling with that same question—Indiana, Missouri, and Rhode Island, for example⁸—learning about what has been happening in Michigan provides an exceptional opportunity for legislators, attorneys, academics, and advocates from across the country to reflect on how their own states should assist school districts in fiscal crisis, and when state intervention goes too far.⁹ Part I of this paper briefly discusses the various legal mechanisms for state intervention in school districts' and other municipalities' fiscal crises; it also analyzes Michigan's three takeover statutes and the litigation and other public opposition to those statutes. Part II focuses on four substantial shortcomings contained in Michigan's most recently enacted takeover statute, which was ultimately rescinded by Michigan voters.¹⁰

I. Michigan's Takeovers of School Districts

The question of if or how states should intervene in local governments' fiscal crises has presented itself often in recent years, which have been financially very challenging times for state and local governments including school districts. In 2011, Michigan

⁶ See cases cited and discussed *supra* Part I.B.2.

⁷ Bowman, *Before School Districts Go Broke*, *supra* note 1 at 927-30.

⁸ Michelle Wilde Anderson, *Democratic Dissolution: Radical Experimentation in State Takeovers of Local Governments*, -- Fordham Urban L.J. 8 (forthcoming 2012), analyzing the new takeover statutes in effect in Michigan and Rhode Island. Legislation is pending in Indiana. Available at <http://openstates.org/in/bills/2012/HB1324/>. Missouri also has pending legislation that would amend its state takeover statute R.S. Mo. 162.801, H.B. 1174. Available at: <http://www.house.mo.gov/billtracking/bills121/biltxt/senate/4621S.03C.htm>.

⁹ *Id.* Michelle Wilde Anderson is one of the few scholars to focus on Michigan's new statute.

¹⁰ Paul Egan, *Snyder: Voter Confusion Helped Defeat Emergency Manager Law*, Nov. 7, 2012, Detroit Free Press, available at: <http://www.freep.com/article/20121107/NEWS06/121107011>.

responded to this economic situation by modifying one of the legal mechanisms it makes available to local governments in fiscal crisis—its state takeover statute.¹¹ Michigan now has three school districts under the control of an emergency financial manager.¹²

A. Bankruptcy, Receivership, and State Takeover

The three legal mechanisms that may be available to a local government in fiscal distress are regulated by the state in which that local government entity is located. The first option that may come to mind, a Chapter 9 municipal bankruptcy,¹³ is a restructuring bankruptcy. It is not a liquidation bankruptcy because school districts, unlike for-profit businesses, cannot merely wind up their affairs without substantial public impact.¹⁴ Bankruptcy is a creature of federal law, and states must explicitly give permission for their local government entities to declare bankruptcy—only twenty four states do so, including Michigan.¹⁵ A Chapter 9 bankruptcy can be advantageous to a school district because the school district continues operations while its major expenditures are modified.¹⁶ Bankruptcy courts' powers are limited due to federalism concerns; because of this limitation, often a bankruptcy court cannot require the changes that would address the school district's underlying cause of fiscal distress.¹⁷ Let us also not forget that bankruptcy is a costly process.

Second, states often have parallel provisions to municipal bankruptcy, generally known as municipal receivership statutes. Only two states authorize school districts to

¹¹ Local Government and School District Fiscal Accountability Act, MCL §§ 141.1501- 141.1531 (2011).

¹² Chris Christoff, *Michigan Voters Risk Bankrupt Cities With Vote on Managers*, BLOOMBERG, <http://www.bloomberg.com/news/2012-10-10/michigan-voters-risk-bankrupt-cities-with-vote-on-state-managers.html> (last visited Oct. 18, 2012).

¹³ 11 USC §§ 901-946.

¹⁴ Bowman, *Before School Districts Go Broke*, *supra* note 1 at 918-20.

¹⁵ *Id.* at 919.

¹⁶ *Id.* at 922.

¹⁷ *Id.* at 921-22.

enter into municipal receivership.¹⁸ The authority of a court-appointed receiver is more far-reaching than that of a bankruptcy court, but receivership is almost never used. Receivership requires substantial expenditures by a school district due to the judicial nature of the mechanism and, moreover, receivership involves procedures often more stringent than a school district needs.¹⁹ Neither federal bankruptcy nor state receivership were designed for school districts, and thus it is not entirely surprising that those options are not a solid fit for addressing school districts' fiscal crises.

The third and final legal mechanism available to school districts in fiscal crisis is a state takeover mechanism.²⁰ Although general municipalities can be subject to state takeovers, statutes usually regulate the takeover of school districts separately from the takeover of other municipalities. Thirty-three states permit a state takeover of a school district for academic and/or fiscal reasons.²¹ The most comprehensive statutes specify factors that trigger various levels of state involvement, contain a series of escalating types of state involvement with a takeover being the most extreme form of state involvement, make clear the extent of the state's authority at the various levels of involvement, and contain criteria for terminating the state's involvement.²² At least seventy six state takeovers of school districts have occurred in the past thirty years, and school districts regularly emerge from takeovers with increased fiscal stability.²³

¹⁸*Id.* at 923. These states are Kentucky and Pennsylvania. *Id.*

¹⁹*Id.* at 924.

²⁰This is sometimes referred to as receivership, although it is different than the statutory authorization of a judicially imposed receivership. Thus, I designate this type of intervention as a takeover.

²¹Bowman, *Before School Districts Go Broke*, *supra* note 1 at 925.

²²*Id.* at 926-27. Michelle Wilde Anderson, *supra* note 6 at 8.

²³*Id.* at 925, 927. See Joseph O. Oluwole & Preson C. Green, III, *State Takeovers of School Districts: Race and the Equal Protection Clause*, 42 *Ind. L. Rev.* 343, 363-94 (2009). The takeover of public school districts in Detroit, Highland Park, and Muskegon Heights occurred after the publication of this article. That brings the total to 76, by my count, not including takeovers since 2009 in states other than Michigan.

Although takeovers regularly produce greater fiscal stability in school districts, they have not consistently been able to produce academic gains.²⁴ Additionally, local communities often resist state intervention and sometimes express this resistance through litigation.²⁵ I do not intend to suggest that either the resistance or the litigation that flow from a state takeover are entirely illegitimate, though—takeovers do replace elected officials in whole or in part with an agent appointed by the state, and the proper balance between state and local control is an important and controversial issue.

B. 1988-present: Michigan’s School District Takeover Legislation, Application, and Litigation

1. The Legislation

Since the late 1980s, three Michigan statutes have regulated state intervention in local governments in fiscal crisis. The first, the Local Government Fiscal Responsibility Act, was enacted in 1988. It created Michigan’s fiscal crisis early warning system and gave the state more extensive and clearer authority to intervene in fiscally troubled municipalities.²⁶ Because the 1988 statute did not apply to school districts, in 1989 a state senator introduced a bill that would repeal the statute and “re-enact it under the same name, containing virtually identical language for local units of government but adding similar provisions for school districts.”²⁷

Proponents of the second piece of legislation contended that the state’s existing means of monitoring and addressing school districts’ fiscal difficulties were “inadequate” because the state could require a district to submit a plan for eliminating a deficit, but the

²⁴*Bowman, Before School Districts Go Broke, supra* note 1 at 927.

²⁵*Id.* at 927-30.; *see also* cases cited *supra* Part I.B.2.

²⁶ 1988 Mich. Pub. Acts 101 (Repealed 1990); SENATE FISCAL AGENCY SECOND BILL ANALYSIS OF ENROLLED STATE BILL 625, (JULY 18, 1989).

²⁷ *Id.* SENATE FISCAL AGENCY FIRST BILL ANALYSIS OF ENROLLED SENATE BILL 175 (S-1) (AUG. 16, 1989).

only sanction the state could impose on a district that failed to comply was withholding the per-pupil state allocation in whole or in part.²⁸ The then-existing state statutory and regulatory framework did not permit any earlier, or any other, involvement by the state.²⁹ The need for state involvement was not abstract—nearly thirty school districts had a deficit in the 1988-1989 school year including the Detroit Public Schools, which had a deficit of about \$150 million or 19% of its operating expenses.³⁰ The bill introduced in 1989 became the state’s second municipal takeover statute in 1990 and has since been known in Michigan as Public Act 72.

Public Act 72 contained three parts. Article I explained the necessity of the program and the valid public purpose underlying it; Article II reenacted the 1988 statute under the section heading “Governmental Provisions”; Article III adapted the substance of Article II for school districts and was titled “School District Provisions.”³¹ Article III contained a series of detailed procedures regulating state involvement in financially troubled school districts, beginning with limited state involvement (primarily investigation, and the potential negotiation of a consent agreement between the district and the state) and, if a financial emergency did not abate, ultimately escalating to the appointment of an emergency financial manager.³² The state superintendent of public instruction was involved throughout all stages of state intervention; for example, although

²⁸ SENATE FISCAL AGENCY BILL FIRST ANALYSIS OF ENROLLED SENATE BILL 175 (S-1) (AUG. 16, 1989). Although withholding funding may seem to be a draconian measure that would penalize a financially troubled school district, this is the same remedy that provides the federal government with substantial authority to enforce compliance with Title IX of the Education Amendments of 1972. It does not appear, however, as though Michigan’s involvement in school districts’ fiscal crises’ was anywhere as extensive or effective as the federal government’s Title IX enforcement. *See* 20 U.S.C. § 1682 (1972).

²⁹SENATE FISCAL AGENCY BILL FIRST ANALYSIS OF ENROLLED SENATE BILL 175 (S-1) (AUG. 16, 1989).

³⁰*Id.*

³¹ 1990 Mich. Pub. Acts 72, 287 . Public Act 72 is in effect pending the vote of the electors regarding Proposal 1 at the November 2012 election.

³² MICH. COMP. LAWS § 141.1233-1235, 141.1238, 141.1242 (1990)(in effect pending the vote of the electors regarding Proposal 1 at the November 2012 election).

the governor appointed the emergency financial manager, the governor chose that person from a short list provided by the state board of education, and the state board selected its candidates from a longer list provided by the state superintendent of public instruction.³³ The emergency financial manager’s authority was delineated in the statute and included actions specific to school districts such as recommending school district consolidation to the governor.³⁴ The manager’s authority was substantial: it included the “authority and responsibilities affecting the financial condition of the school district that are prescribed by law to the school board and superintendent of the school district” and the ability to authorize the school district to proceed in a Chapter 9 federal bankruptcy.³⁵

Proponents of Public Act 72 contended that the statute would give the state a series of progressive steps that would constitute a meaningful way to help both local governments and school districts maintain their solvency.³⁶ This authority was, and is, especially important in school districts because, as the legislative history notes, “educational reform cannot be achieved in an environment of educational insolvency.”³⁷ Opponents of Public Act 72 contended that the legislation undermined local control and reduced or eliminated the public’s role in, and knowledge about, the operations of local government.³⁸

These arguments were magnified in 2011 when a state representative introduced a proposal to repeal Public Act 72 and implement new fiscal accountability measures for

³³ *Id.*

³⁴ Mich. Comp. Laws § 141.1241 (1990).

³⁵ Mich. Comp. Laws § 141.1241(2)(i), 141.1241(3) (1990).

³⁶ SENATE FISCAL AGENCY FIRST BILL ANALYSIS OF ENROLLED SENATE BILL 175 (S-1) 7, 8 (AUG. 16, 1989).

³⁷ *Id.*

³⁸ *Id.*

municipalities and school districts.³⁹ This bill, the Local Government and School District Fiscal Accountability Act, became effective on March 16, 2011. It was the state's third municipal takeover statute, known in Michigan as Public Act 4.⁴⁰

Public Act 4 differed from Public Act 72 in many ways.⁴¹ Although Public Act 4 contained many controversial provisions, it also is important to note some aspects of Public Act 4 that many would agree were improvements to Public Act 72. First, Public Act 4 contained specific criteria for determining whether a local government, including a school district, was in severe financial stress, in mild financial stress, or under no financial stress.⁴² Second, it contained measures that required more frequent and extensive public reporting by an emergency manager.⁴³ Public Act 4 also retained a basic principle from Public Act 72: state intervention escalates over time.⁴⁴

What was most controversial about Public Act 4 was that it vested substantially more authority in emergency managers than Public Act 72 had.⁴⁵ Under Public Act 4, when a school district was under emergency management, neither the school board nor the superintendent could “exercise any of the powers of those offices except as may be specifically authorized in writing by the emergency manager and are subject to any

³⁹ 2011 Mich. House Bill 4214.

⁴⁰ 2011 Mich. Pub. Act 4 (suspended pending the outcome of the Nov. 6 referendum on Proposal 1).

⁴¹ There is also a substantial structural change that appears to make almost no difference in substance: Public Act 4 contains one set of rules and procedures to govern municipalities and school districts alike, with some parallel sub-provisions for municipalities and school districts and one short additional section for school districts alone. *See, e.g.*, Mich. Comp. Laws § 141.1512(2)(o)-(p) (2011); *see Mich. Comp. Laws*. at § 141.1520. Public Act 4 does not explicitly allow an EFM to recommend to the governor that school districts consolidate. Nevertheless, this appears to be the only way in which a school district EFM's authority is more limited under Public Act 4 than under Public Act 72.

⁴² Mich. Comp. Laws § 141.1514 (2011); *see also* Anderson, *Democratic Dissolution*, *supra* note – at 23-24.

⁴³ *Id.* § 141.1522; *see also* Anderson, *Democratic Dissolution*, *supra* note – at 23-24.

⁴⁴ State of Michigan, Department of Treasury, *How a Financial Emergency Works*, http://www.michigan.gov/treasury/0,1607,7-121-1751_51556-198770--,00.html.

⁴⁵ Anderson, *Democratic Dissolution*, *supra* note 6 at 10-12.

conditions required by the emergency manager.”⁴⁶ Instead, the emergency financial manager could “exercise the authority and responsibilities affecting the financial condition of the school district that are prescribed by law to the school board and superintendent of the school district.”⁴⁷ This included “issu[ing] to the appropriate local elected and appointed officials and employees . . . orders for the timely and satisfactory implementation of a financial and operating plan . . . including an academic and educational plan for a school district.”⁴⁸ Additionally, the emergency manager could unilaterally modify collective bargaining agreements,⁴⁹ suspend collective bargaining for up to five years, and remove all pension board members if the pension plan is not sufficiently funded.⁵⁰ These changes and others were summarized in a provision toward the end of Public Act 4, which stipulated that “[e]xcept as otherwise provided in this act . . . the authority of the chief administrative officer and governing body to exercise power for and on behalf of the local government under law, charter, and ordinance shall be suspended and vested in the emergency manager.”⁵¹

In addition to expanding the authority of emergency financial managers, Public Act 4 gave the governor substantially greater autonomy when appointing emergency managers than the governor had under Public Act 72. Under Public Act 72, the emergency financial assistance loan board appointed an emergency financial manager for a municipality,⁵² and the governor appointed an emergency financial manager for a school district with the advice and consent of the state senate after input from the state

⁴⁶ Mich. Comp. Laws §141.1515(4), *id.* § 141.1505(a)(vi).

⁴⁷ *Id.* §141.1241(2)(t)

⁴⁸ *Id.* § 141.1517(1); see also *id.* §141.1518(1)(e).

⁴⁹ *Id.* § 141.1519(k).

⁵⁰ *Id.* § 141.1519(m).

⁵¹ *Id.* §141.1519(2).

⁵² Mich. Comp. Laws § 141.1218 (1990) (in effect pending the vote of the electors regarding Proposal 1 at the November 2012 election).

superintendent and the state board of education.⁵³ Under Public Act 4, the governor appointed managers for municipalities and school districts without the advice and consent of the senate and without input required from other government officials, elected or appointed.⁵⁴

2. Application and Litigation

Between 1990 and 2011, when Public Act 72 was in force, emergency financial managers were appointed in seven municipalities and in one school district: Detroit Public Schools.⁵⁵ Emergency financial managers' authority was often contested publicly and sometimes even in court.⁵⁶ At least two lawsuits involved the Detroit Public Schools' 2009-2011 emergency financial manager Robert Bobb, who acted under the authority of Public Act 72. In the first lawsuit, Bobb's compensation was challenged because his salary was subsidized in part by the Eli Broad Foundation; the circuit court held that the salary subsidy was valid.⁵⁷ In the second lawsuit, the Detroit Public Schools Board of Education sued Bobb, claiming that he had overstepped his authority by making

⁵³ *Id.* § 141.1238 (in effect pending the vote of the electors regarding Proposal 1 at the November 2012 election).

⁵⁴ *Id.* § 141.1515(4).

⁵⁵ *Emergency Manager Information*, STATE OF MICHIGAN, <http://www.michigan.gov/printerFriendly/0,1687,7-1751> (last visited ___); *Past Financial Emergency Information*, STATE OF MICHIGAN, <http://www.michigan.gov/printerFriendly/0,1687,7-121-1751> (last visited ___).

⁵⁶ *See, e.g.*, *Davis v. Emergency Manager for the Detroit Public Schools*, 810 N.W.2d 555 (Mich. 2012); *Highland Park Policemen & Firemen Retirement System v. City of Highland Park*, 725 N.W.2d 460 (Mich. 2007); *Porter v. City of Highland Park*, 724 N.W.2d 282 (Mich. 2006); *Mixon v. City of Highland Park*, WL 63201 (Mich. Ct. App. 2009) (not reported); *Rutherford v. Flint*, WL 274631 (Mich. Ct. App. 2007) (not reported); *AFSCME Council 25 v. City of Highland Park*, 2006 WL 657114 (Mich. Ct. App. 2006) (not reported); *Attorney General v. Flint Council*, 713 N.W.2d 782 (Mich. Ct. App. 2005); *Ryner v. City of Hamtramck*, 2003 WL 22681424 (Mich. Ct. App. 2003) (not reported).

⁵⁷ Erik Kain, *Michigan Emergency Manager Robert Bobb Issues Layoff Notice to All Detroit Public School Teachers*, FORBES (April 19, 2011), <http://www.forbes.com/sites/erikkain/2011/04/19/michigan-emergency-manager-robert-bobb-issues-layoff-notice-to-all-detroit-public-school-teachers/>; *Bobb Can Get pay from Foundations, Judge Rules*, The Detroit News, May 22, 2010, at A5.

academic decisions and seeking to enjoin him from doing so in the future.⁵⁸ The school board initially won in the circuit court under Public Act 72.⁵⁹

Bobb's successor, Detroit Public Schools emergency manager Roy Roberts, was also involved in litigation. First, unions representing Detroit teachers, paraprofessionals, and office employees challenged the provision of Public Act 4 that gave emergency managers authority to unilaterally change collective bargaining agreements; the case was ultimately settled.⁶⁰ Second, an individual requested that the Michigan Attorney General oust Roberts from his office because Roberts had not taken an oath of office in a timely manner.⁶¹ This matter eventually came before the Michigan Supreme Court, but by that time Governor Rick Snyder had reappointed Roberts to the position, and Roberts immediately took an oath of office.⁶² Third, Roberts decided to shift 15 Detroit Public Schools—containing about 7,000 students—to a statewide school district composed of the state's poorest-performing schools. The school board contested that decision in court, but the decision was upheld.⁶³ The teachers' union has stated that it may sue to contest the termination of 400 union employees under a process established by the emergency manager, but it has not yet done so.⁶⁴

⁵⁸ Mark Brush and Jennifer Guerra, *Detroit Board of Education Wins Lawsuit Against Robert Bobb*, MICHIGAN PUBLIC RADIO (Dec. 6, 2010), <http://michiganradio.org/post/detroit-board-education-wins-lawsuit-against-robert-bobb>.

⁵⁹ *Judge Gives Robert Bobb Total Return of Detroit Public Schools Due to New Financial Manager Law*, (Mar. 19, 2011), http://blog.mlive.com/news/detroit_impact/print.html?entry=2011/03.

⁶⁰ Jennifer Chambers, *Detroit Schools Emergency Financial Manager Gives Teachers Bonuses*, THE DETROIT NEWS (Sept. 1, 2012), available at <http://www.detroitnews.com/article/20120901/SCHOOLS/209010351>.

⁶¹ *Davis v. Emergency Manager for the Detroit Public Schools*, 810 N.W.2d 555 (Mich. 2012).

⁶² *Id.*

⁶³ Jennifer Chambers, *Judge: DPS Board Controls Academics But Can't Take Back EAA Schools*, THE DETROIT NEWS (Aug. 14, 2012), available at <http://www.detroitnews.com/article/20120814/SCHOOLS/208140365>.

⁶⁴ *Id.*

After the enactment of Public Act 4, emergency managers were appointed to oversee two additional school districts, Highland Park and Muskegon Heights.⁶⁵ Highland Park School District exists as a figurative island in the middle of Detroit, while Muskegon Heights School District is located adjacent to the city of Muskegon on the west side of the state. Both districts have since turned over their academic programs to charter school companies.⁶⁶ In both districts, this decision was made by the emergency manager alone.⁶⁷ A Highland Park school board member who is himself the subject of federal corruption charges described this decision as “essentially dissolv[ing] the school district” and asked the Michigan Court of Appeals, in a separate ongoing lawsuit, to remove Highland Park’s emergency manager.⁶⁸ State Board members have expressed concern about the pattern of school districts under emergency management becoming districts of charter schools.⁶⁹

During this time, other litigation has challenged whether a governor-appointed financial review team was a public body subject to the open meetings act (an appellate court held in 2012 that it was not);⁷⁰ whether the state could refuse certain discovery requests in a case that challenged the facial validity of the law (an appellate court held in

⁶⁵*Id.*

⁶⁶ Shawn D. Lewis, *Charter Group Faces Scrutiny As it Takes Over Highland Park Schools*, The Detroit News (Aug. 22, 2012), available at <http://www.detroitnews.com/article/20120822/SCHOOLS/208220372>.

⁶⁷ Lynn Moore, *Muskegon Heights Emergency Manager: Charter School District Unaffected by Supreme Court Ruling*, MLIVE (Aug. 3, 2012), available at http://blog.mlive.com/chronicle/news_impact/print.html?entry=/2012/08/muskegon_heights_emergency_man.html.

⁶⁸ Shawn D. Lewis, *Highland Park School Board Member Asks Court to Remove Financial Manager*, The Detroit News (Aug. 29, 2012), available at <http://www.detroitnews.com/article/20120829/SCHOOLS/208290443>; Robert Davis, *Highland Park School Board Member, Faces More Charges from U.S. Attorney’s Office*, HUFFINGTONPOST.COM (May 21, 2012), http://www.huffingtonpost.com/2012/05/21/robert-davis-highland-parks-school-board-corruption-charges_n_1533065.html.

⁶⁹ Dave Murray, *Emergency Manager Recommends Highland Park Will Become A Charter School District, As State Educators Fear Plan Will Spread to Others*, MLIVE (June 18, 2012), http://www.mlive.com/education/index.ssf/2012/06/emergency_manager_recommends_h.html.

⁷⁰ *Davis v. City of Detroit Financial Review Team*, 2012 WL 1836854 (Mich. Ct. App. 2012)

2012 that it could);⁷¹ and—most significantly—whether a petition to initiate a public recall of Public Act 4 by placing the question on the November 2012 ballot complied with statutory requirements about the petition’s typeface (the Michigan Supreme Court held in *Stand Up for Democracy v. Secretary of State* that it did).⁷² The petition contained 203,238 valid signatures, far in excess of the number required for a ballot recall.⁷³

The Michigan Supreme Court issued its *Stand Up for Democracy* decision on Friday, August 3, 2012,⁷⁴ putting the recall question on the November 2012 ballot. Three days later, on Monday, August 6, 2012, Michigan Attorney General Bill Schuette issued an advisory opinion concluding that Public Act 4 was suspended until the results of the November 2012 ballot referendum were certified.⁷⁵ In the interim, Public Act 72 was “temporarily revived.” Furthermore, the Attorney General opined that if the voters were to nullify Public Act 4, which included a legislative repeal of Public Act 72, then Public Act 72 would be permanently revived.⁷⁶ A lawsuit subsequently challenged the Attorney General’s advisory opinion, arguing that the effect of staying Public Act 4 was not to revive Public Act 72, but rather to leave the state without an emergency manager statute.⁷⁷ Eight days after the Attorney General’s advisory opinion was issued, a circuit court judge held that under the then-temporarily-revived Public Act 72, the Detroit Public

⁷¹ *Brown v. Treasurer of Michigan*, 2012 WL 2402576 (Mich. Ct. App. 2012) (unpublished).

⁷² *Stand Up for Democracy v. Secretary of State*, 2012 WL 3155687 (Mich. 2012)

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ See generally Op. Atty. Gen. 2012, No. 7267 available at www.ag.state.mi.us/opinion/datafiles/2010s/op10346.htm.

⁷⁶ See *id.*

⁷⁷ http://www.mlive.com/politics/index.ssf/2012/09/michigans_old_emergency_financ.html#incart_river_de_fault

Schools' board and superintendent had control over the district's academics, while the emergency financial manager controlled the district's finances.⁷⁸

On November 6, 2012, Michigan voters voted to rescind Public Act 4 via a ballot referendum by a slim margin; 52% of the votes cast were in favor of rescinding, 48% were against.⁷⁹

II. Lessons from Michigan

As the long stream of litigation and the successful ballot recall effort make clear, Public Act 4 was the subject of substantial resistance by Michigan citizens. Even though Public Act 4 was rescinded in November 2012, states—including Indiana, Michigan, Missouri, and Rhode Island—continue to actively examine the role they should play in local governments' and school districts' fiscal crises.⁸⁰ Thus it is still important to consider what we can learn from Public Act 4 about best practices for state intervention in school districts mired in fiscal crisis.

A. Comprehensive Takeover Triggered by Financial Crisis Alone

Some states' statutes permit a state to engage in a comprehensive (academic and fiscal) takeover of a local school district.⁸¹ When a comprehensive takeover occurs, it is common for that takeover to be triggered by both the district's financial shortcomings and its academic shortcomings.⁸² Public Act 72 authorized fiscal takeovers, and as such,

⁷⁸ Jennifer Chambers, *Judge: DPS Board Controls Academics But Can't Take Back EAA Schools*, THE DETROIT NEWS (Aug. 14, 2012), available at <http://www.detroitnews.com/article/20120814/SCHOOLS/208140365>.

⁷⁹ Paul Egan, *After Emergency Manager Act Repeal, Any New Legislation Will Be Balancing Act*, Detroit Free Press, Nov. 8, 2012, <http://www.freep.com/article/20121108/NEWS15/311080112/After-emergency-manager-law-repeal-any-new-legislation-will-be-balancing-act>.

⁸⁰ See Egan, *Snyder*, *supra* note 9.

⁸¹ Bowman, *Before School Districts Go Broke*, *supra* note – at Appendix.

⁸² See generally Miss. Code Ann. § 37-17-6, 37-18-7 Amendment: 2010 Miss. Laws Ch. 420 (H.B. 625) & CMSR § 36-000-069 (Mississippi's takeover statute); M.G.L.A. 69 § 1J, 1K & 603 CMR § 2.01-2.06, 2.03 (Massachusetts's takeover statute)

it only considered a district's fiscal situation when considering whether state involvement was appropriate.⁸³ Public Act 4 contained more specific criteria than Public Act 72 did for determining whether a district is in fiscal crisis and it continued to focus on a district's fiscal situation when deciding whether a takeover is appropriate. Under Public Act 4, however, a district's fiscal crisis alone triggered a comprehensive takeover.⁸⁴ Fiscal crisis and academic crisis often do go hand in hand,⁸⁵ but a high correlation between the two does not justify using a district's fiscal crisis to trigger a comprehensive takeover. It is a fundamental legal principle that a remedy should be tailored to the violation.⁸⁶ It is also a fundamental principle that education is, as the U.S. Supreme Court stated in *Brown v. Board of Education*, "perhaps the most important function of state and local governments."⁸⁷ To remove local control over a district's educational program without evaluating the quality of that academic program is to unfairly impose a radical executive branch remedy for a violation that has not been proven.

B. Where do Finances Stop and Academics Begin?

In the past three years, the Detroit Public Schools' board of education has sued two different emergency financial managers, contesting each manager's authority over academic affairs.⁸⁸ Under Public Act 72, the school board and superintendent had authority over academics and the emergency financial manager had authority over

⁸³ MICH. COMP. LAWS § 141.1233 (1990)(in effect pending the Nov. 6 referendum on proposal 1).

⁸⁴ MICH. COMP. LAWS § 141.1518 (2011)(suspended pending the Nov. 6 referendum on Proposal 1)

⁸⁵ Bowman, *Before School Districts Go Broke*, *supra* note – at 926. For example, Highland Park, Michigan, is the subject of a "right to read" lawsuit recently initiated by the ACLU. Lori Higgins, *ACLU Attorneys, state agree to Dec. 5 hearing in Right to Read Lawsuit*, Detroit Free Press, Nov. 1, 2012, available at: <http://www.freep.com/article/20121101/NEWS06/121101008/right-to-read-students-Highland-Park-Michigan>; ACLU Press Release, *Highland Park Students File Right to Read Lawsuit*, July 12, 2012, available at <http://www.aclu.org/human-rights/highland-park-students-file-class-action-right-read-lawsuit>.

⁸⁶ See generally *Horne v. Flores*, 557 U.S. 433 (2009)

⁸⁷ *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

⁸⁸ See *supra* part I.B.2.

finances; the division was straightforward but, as a circuit court judge who adjudicated one of these cases noted, “the devil is in the details.”⁸⁹ Under Public Act 4, school districts’ emergency financial managers had comprehensive authority over districts “academic plan[s]” as well as their finances. The question of authority thus had a clear-cut answer under Public Act 4, but easy answers are not always the best.

School districts are local government entities whose primary purpose is education. Emergency financial managers of school districts may or may not be well-versed in the pedagogical advantages and disadvantages of various academic policies, but their primary purpose is to bring financial stability to a district; therefore, emergency financial managers should have both municipal finance and budgetary expertise. Some changes an emergency financial manager may make are clearly non-academic: exposing corruption, streamlining administrative operations, and contracting out non-academic services will not affect a district’s educational mission.⁹⁰ But those types of changes can only take a manager so far. Sooner or later, discussion will turn to topics regarding the district’s instructional program, such as class size, length of school year, curriculum and materials. At a certain level, that is as it should be—an emergency financial manager should push a district to reevaluate whether the district is getting the most academic bang for its buck. Yet, classifying a policy change as financial *or* academic is difficult and sometimes impossible. The following excerpt from a 2010 *Time* magazine article about former Detroit Public Schools and emergency financial manager Robert Bobb illustrates the overlap:

⁸⁹ MICH. COMP. LAWS § 141.1233 (1990)(in effect pending the Nov. 6 referendum on Proposal 1).

⁹⁰ Emergency financial managers can be corrupt, though, as well. *People v. Blackwell*, 2012 WL 2579680 (Mich. Ct. App. 2012).

Bobb acknowledges that cost-shaving measures have made some high school classrooms “look like lecture halls.” They have also raised the potential for clashes between students from rival schools and neighborhoods suddenly thrown together under the same roof; as a result 137 guidance counselors cut by Bobb were later hired back. Bobb had a similar change of heart after 20 piano teachers were dismissed. “You go back to your apartment and think, how can you have a school of music without a piano teacher?” Bobb says. So he hired them back too. Barbara Byrd-Bennett, Bobb’s chief academic officer and a former CEO of Cleveland’s public schools, says she often greeted Bobb’s proposed cuts with a single question: “Is this good for the kids?”⁹¹

To answer that question, an emergency financial manager ideally would work cooperatively with the school board, superintendent, and administrative staff—people who have devoted years and careers to a school district and who have a long-term investment in the education that district provides. But a cooperative relationship between a manager and the superintendent/board rarely seems to develop, and thus a manager is left making decisions about academics without the benefit of the people in the district who may know the district, and who may know education, better than the emergency financial manager. A constant stream of litigation often results. Even though granting emergency financial managers complete authority over a school district’s academics—as

⁹¹ Steven Gray, *Can Robert Bobb Fix Detroit’s Public Schools?*, TIME (Jan. 25, 2010), available at <http://www.time.com/time/magazine/article/0,9171,1953694,00.html>.

Public Act 4 would have had it—would end that stream of litigation, doing so is dangerous.

For example, as previously mentioned, two Michigan school districts under the control of emergency managers became districts of charter schools during summer 2012. In both districts, the decision to convert all public schools to charter schools was made by the emergency manager alone—not by the superintendent, not by the school board. Admittedly this is a financially creative approach because the charter schools will operate on state funding alone while the local property tax revenues will be applied to each school district’s debt.⁹² Additionally, this approach returns the educational program to educators and relieves an emergency manager of the need to make detailed programmatic decisions that may be beyond his or her expertise. Despite these positive effects, however, converting to a district of charter schools is still a major change—it is an abdication of local control over the district’s educational program. Furthermore, even though making detailed decisions about the instructional program is beyond the expertise of most emergency managers, and even though turning over schools to charter operators puts educators back in control of the instructional program, an emergency manager is also arguably poorly qualified to make the very decision that outsources the district’s instructional program to a charter school operator. For those reasons, this decision and other less-extreme decisions that emergency managers make about academics often lack legitimacy.⁹³ Furthermore, these decisions demonstrate what Michelle Wilde Anderson has termed “democratic dissolution”: a local government’s “municipal corporate form” is

⁹² Dave Murray, *Emergency Manager Recommends Highland Park Will Become A Charter School District, As State Educators Fear Plan Will Spread to Others*, MLIVE (June 18, 2012), http://www.mlive.com/education/index.ssf/2012/06/emergency_manager_recommends_h.html.

⁹³ Anderson, *Democratic Dissolution*, *supra* note – at 28.

preserved, but its self-rule is “functionally dissolve[d].”⁹⁴ Public Act 72 did not go so far that it essentially dissolved the local government aspect of public education. Public Act 4 did, and the consequences of this remain visible in Highland Park and Muskegon Heights.

C. The Students in the School Districts in Fiscal Crisis

In Michigan, and quite likely in other states, school districts subject to state takeover are not a random sample of all of the districts across the state. As Anderson has highlighted, the general municipalities under emergency managers’ authority in Michigan are disproportionately full of African-American citizens.⁹⁵ The Michigan school districts under emergency managers’ control share this disparate impact, which may be particularly troubling given our nation’s history of disenfranchising African-Americans.⁹⁶ Included on the next page, Table 1 provides the most recent demographics for the three now-taken-over districts and for all Michigan public schools.

⁹⁴ Anderson, *Democratic Dissolution*, *supra* note – at 13.

⁹⁵ Anderson, *Democratic Dissolution*, *supra* note – at 13.

⁹⁶ Voting Rights Act, 42 U.S.C. §§ 1973–1973aa (1965); *see also* South Carolina v. Katzenbach, 383 U.S. 301, 308 & 327 (1966) (describing the history of disenfranchisement that led up to the Voting Rights Act); Northwest Austin Mun. Utility Dist. No. One v. Holder, 557 U.S. 193, 198 (2009) (describing voting rights disparities since 1965).

Table 1. 2010-2011 Racial/Ethnic Composition of Michigan School Districts Under Emergency Managers' Authority in 2012.*

	Detroit Public Schools	Highland Park School District	Muskegon Heights School District	Michigan—all public schools	% of 2009-10 statewide students in 2012 EFM districts
American Indian/Alaskan	<1% (242)	0	<1% (4)	<1% (14,423)	2% (246)
Asian/ Pacific Islander	1% (754)	0	<1% (2)	3% (42,419)	2% (756)
Black	87% (64,732)	100% (1,265)	93% (1,360)	19% (293,517)	23% (67,357)
Hispanic	9% (6,616)	<1% (1)	3% (50)	6% (89,911)	7% (6,667)
White	3% (1,917)	<1% (3)	3% (45)	70% (1,084,441)	<1% (1,965)
Two or more races	<1% (15)	0	<1% (5)	2% (29,013)	<1% (20)
Free and Reduced Lunch	80% (59,457)	72% (916)	92% (1,343)	46% (719,800)	9% (61,716)
Limited English Proficient/English Language Learner	9% (6,875)	0	0	4% (56,474)	1% (6,875)
Total enrollment	74,261	1,269	1,461	1,552,046	5% (76,991)

* Table generated from U.S. Department of Education Common Core of Data. <http://nces.ed.gov/ccd/bat/index.asp>.

Enrollments in all three districts are falling—and that is part of the problem, that each district receives less total state funding year after year because state funding is allocated primarily on a per capita basis,⁹⁷ and districts' debt mounts. When the 2011-2012 school year ended, the Muskegon Heights district had 1,331 students and the Highland Park

⁹⁷ Bowman, *Before School Districts Go Broke*, *supra* note – at 902; <http://www.michiganinbrief.org/edition07/Chapter5/K12Funding.htm>

district had 969 students.⁹⁸ When the 2012-2013 school year began, Detroit Public Schools were projected to have about 52,000 students (not all of the decrease in Detroit was pure attrition—a substantial number of students formerly counted as Detroit Public School students now are in schools turned over to an emergency school district created by the state).⁹⁹

Even though the enrollments are falling, it is highly unlikely that these three districts are becoming substantially more diverse. Thus, the 2010-2011 district demographics can be considered a rough approximation of the districts' current racial/ethnic composition. In 2010-2011, students in the three districts now under the authority of emergency financial managers comprised 5% of all Michigan public school students, including 9% of the state's students in poverty, as measured by those who receive a free or reduced lunch,¹⁰⁰ and 23% of the state's African-American students. This data can lead to a variety of conclusions. On one hand, if roughly a quarter of the state's African-American students are in school districts that are in fiscal crisis, it would be unacceptable for the state to ignore those districts. On the other hand, the reality is that Public Act 4 permitted emergency managers so much authority over school districts that one emergency manager alone could turn control of a district's schools over to charter school operators. While that may be a choice that the school board or superintendent would

⁹⁸ Dave Murray, *Emergency Manager Recommends Highland Park Will Become A Charter School District, As State Educators Fear Plan Will Spread to Others*, MLIVE (June 18, 2012), http://www.mlive.com/education/index.ssf/2012/06/emergency_manager_recommends_h.html; 3 *Appointed to Aid Highland Park District's Transition to Charter District*, THE DETROIT FREE PRESS (July 27, 2012), available at <http://www.freep.com/article/20120727/NEWS02/120727033/3-appointed-to-aid-Highland-Park-district-s-transition-to-charter-district>.

⁹⁹ Corey Williams, *DPS Interim Superintendent Waiting for PA4 Defeat*, THE DETROIT NEWS (Aug. 26, 2012), available at <http://www.detroitnews.com/article/20120826/SCHOOLS/208260307>; Christina A. Samuels, *K.C. Schools Chief to Run 'Reform' District*, EDUCATION WEEK (Sept. 21, 2011), available at <http://www.edweek.org/ew/articles/2011/09/14/03brief-b1.h31.html>.

¹⁰⁰ <http://www.fns.usda.gov/cnd/governance/notices/iegs/iegs.htm>

make, it should not be a decision forced on students, especially students who are disproportionately African-American and Latino, without any involvement by elected officials or the professional educators they select. Both extremes are incredibly problematic, but they are not the only options. Public Act 72 provided more of a middle ground.

D. The Governor's Appointment Authority

Under Public Act 72, the state superintendent and the state board of education respectively generated and whittled down list of nominees for emergency financial manager of a school district; the governor made the final selection. Under Public Act 4, the governor could appoint the emergency financial manager for a school district without consulting with either the state board or the state superintendent, and without any regard for those officeholders' preferred candidates.¹⁰¹

Like other aspects of Public Act 4, this part of Public Act 4 also squeezed out professional educators and those who were elected to make decisions about public education, including the state's chief educational officer. (This time, however, it was state level officials who were excluded from the process of the state takeover rather than local level officials.) Furthermore, Public Act 4 eliminated the requirement that emergency managers were appointed with the advice and consent of the state senate. There was no check on who the governor appointed to serve as a school district's emergency manager, and the procedural loss was significant. Coupling these changes in how emergency managers are selected with the provision that expanded emergency managers' authority to include academic matters illustrates that these four changes working in tandem undermined public education in Michigan.

¹⁰¹ Mich. Comp. Laws §141.1241(2)(t)

III. Conclusion

School districts such as those in Detroit, Highland Park, and Muskegon Heights have been in fiscal crisis. They have needed outside help and, through Michigan's state takeover statutes, they have received some. But, did Public Act 4 require that districts receive too much "help"? I have contended here that it did, and that other states would be wise to learn from Michigan's legislative and political story. States should not leave school districts in fiscal crisis to fend for themselves, but states also should be mindful of the strong tradition of local control over education and what is often still a strong local investment in public schools by elected board members, appointed superintendents, parents, community members, and of course life-long educators. If public schools are to continue to be anchors for our communities, then state and especially local level educators and elected educational officials should not be completely cut out of the process of reforming them.¹⁰²

¹⁰² See, e.g., David Arsen & Mary L. Mason, *Seeking Accountability Through State-Appointed Emergency District Management*, Michigan State University Education Policy Center working paper, Oct. 2012, available at: http://education.msu.edu/epc/publications/documents/WP28Seekingaccountability11812_000.pdf