

No. 18-1855/18-1871

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

GARY B.; JESSIE K., a minor, by Yvette K., guardian ad litem; **CRISTOPHER R.**, a minor, by Escarle R., guardian ad litem; **ISAIAS R.**, a minor, by Escarle R., guardian ad litem; **ESMERALDA V.**, a minor, by Laura V., guardian ad litem; **PAUL M.; JAIME R.**, a minor, by Karen R., guardian ad litem,

Plaintiffs - Appellants,

v.

RICHARD D. SNYDER, Governor; **JOHN C. AUSTIN**, member of MI Bd of Education; **MICHELLE FECTEAU**, member of the MI Bd of Education; **LUPE RAMOS-MONTIGNY**, member of the MI Bd of Education; **PAMELA PUGH**, member of the MI Bd of Education; **KATHLEEN N. STRAUS**, member of the MI Bd of Education; **CASANDRA E. ULBRICH**, member of the MI Bd of Education; **EILEEN WEISER**, member of the MI Bd of Education; **RICHARD ZEILE**, member of the MI Bd of Education; **BRIAN J. WHISTON**, Superintendent of Public Instruction for the State of MI; **DAVID B. BEHEN**, Director of the MI Dept of Technology; **NATASHA BAKER**, State School Reform/Redesign Officer, in their official capacities,

Defendants - Appellees.

On Appeal from the United States District Court for the
Eastern District of Michigan, the Honorable Stephen J. Murphy, III, Presiding
Case No. 2:16-cv-13292

**BRIEF OF *AMICUS CURIAE*
THE EDUCATION TRUST IN SUPPORT OF APPELLANTS**

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Pursuant to Federal Rule of Appellate Procedure 26.1, The Education Trust, Inc. hereby declares that it is a not-for-profit corporation organized under the laws of the District of Columbia. It does not have a parent corporation or subsidiaries, and has never issued shares or debt securities. No publicly held corporation owns 10% or more of its stock. It operates in Michigan under the name Education Trust-Midwest, in New York under the name Education Trust-New York, and in California under the name Education Trust-West.

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INTEREST OF AMICUS CURIAE

The Education Trust (“EdTrust”) is a national¹ not-for-profit organization that works to close opportunity gaps that disproportionately affect students of color and students from low-income families. Through research and advocacy, EdTrust supports efforts that expand excellence and equity in education from preschool through college, engage diverse communities dedicated to education equity, and increase political and public will to act on equity issues. Accordingly, its work is focused on students like Gary B. and the appellants.

EdTrust aggregates and analyzes data to help stakeholders and decision-makers in states and localities examine the success of their school system and compare their achievements, or failures, to others. EdTrust is deeply familiar with the problems that plague school districts and underserved students in communities like Detroit. While there are systemically disadvantaged students all over America, their schools are not the same, nor are their outcomes. Having examined the evidence, EdTrust knows that students can learn, regardless of their circumstances. That knowledge serves as the touchstone and driver of EdTrust’s mission: education can close the gaps that separate low-income students and students of color from other young Americans, and in doing so, improve the lives of these students and strengthen the fabric of our democracy.

¹ EdTrust maintains several offices in the United States, one of which is near Detroit, Michigan.

As experts in achievement and opportunity gaps and the factors that influence them, EdTrust files this brief to present the Court with data to refute several misguided assertions made in the district court proceedings. Specifically, the data demonstrate it is not correct that, as argued by defendants, the circumstances of the plaintiffs present insurmountable challenges to literacy. The data further show that, if it chooses to do so, the State could have been effective in providing an education in the schools that are the subject of this litigation. And, contrary to the defendants' claim, the State of Michigan actively controls and is responsible for education in all Michigan schools. To the extent the district court's decision relied on the defendants' misleading representations on these points, the Court should reverse the decision to dismiss the case.

EdTrust files a motion herewith pursuant to Federal Rule of Appellate Procedure 29(a)(3) seeking authority from this Court to file this brief.

STATEMENT OF AUTHORSHIP & CONTRIBUTION

Pursuant to Federal Rule of Appellate Procedure 29 (a)(4)(E), EdTrust certifies that no party's counsel authored this brief, in whole or in part. The brief has been authored exclusively by EdTrust and its counsel. No party or other person has contributed any money toward the preparation of this brief. No person other than Amicus Curiae, its members or counsel, contributed money intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

EdTrust files this brief in support of appellants to encourage course correction on three points, all of which arise out of the false notion raised in the district court proceedings that the widespread lack of literacy and math proficiency among these children is attributable to their circumstances and not to a failure by the State of Michigan. First, data show that nearly all students can learn to read if they are taught carefully and systematically using proven methods of instruction, methods that are not being used here. Second, a comparison among similar school districts shows that the appellants' lack of reading proficiency is attributable to the instruction and conditions of the Detroit schools identified in the Complaint, not simply appellants' socio-economic conditions. Detroit performs worse than other large urban school districts in which the children are mostly non-white and low-income. The factors that defendants argue cause these students' lack of academic success are not meaningfully different from the challenges faced by low-income and/or non-white students in Chicago, the District of Columbia, Atlanta, Baltimore, Cleveland, New York, or any other large city. These cities have a long way to go when it comes to educating all students to high levels, but they are doing considerably better in teaching their students to read than Detroit.

Third, we respectfully submit that the district court got it wrong when it posited that the Detroit schools should be compared only to other districts that have

been designated by the State of Michigan for emergency management or redesign. Limiting the comparators in this fashion does not reflect the reality of how the State of Michigan administers public education—it tests all students against State standards, holds each school accountable to those standards, and determines per-pupil funding for each district. Moreover, conducting a comparative analysis of only those districts under emergency managers or other special State designation precludes any meaningful equal protection analysis as to whether the State is meeting its obligation to treat students of different races equally under law. Michigan school districts that were placed under emergency administration are 85% non-white; only comparing them to each other in this case effectively recodifies the doctrine of separate but equal.

ARGUMENT

I. NEARLY ALL STUDENTS CAN LEARN TO READ WITH PROPER SCHOOL-ADMINISTERED INSTRUCTION

Nearly all students – regardless of race or socioeconomic status – can learn to read if they are taught carefully and systematically. In their motion to dismiss, the defendants advanced the notion that children in the Detroit school district faced circumstances that rendered 90% or more of them functionally illiterate. They wrote “[w]hile pointing the finger at Defendants, Plaintiffs ignore many other factors that contribute to illiteracy, such as poverty, parental involvement (or lack thereof), medical problems, intellectual limitations, domestic violence, trauma, and

other numerous influences.”² This is a canard designed to deflect from the State’s own negligence. The truth is that there is nothing uniquely difficult about the class of schoolchildren in this litigation that caused them to underperform on reading and math assessments. The existence of some challenges does not mean that these children cannot learn to read. The State has at its disposal well-established methods and tools that have been known for decades to achieve literacy, including and especially with respect to students who may be at-risk for reading failure.

These methods could have been applied by the State to achieve literacy for Detroit’s student population. In 2004, Joseph K. Torgesen, a professor of psychology and education at Florida State University and then-director of the Florida Center for Reading Research argued that it was once inevitable that significant numbers of school children would advance to the next level with inadequate skills, but educators now “have the knowledge and the tools to bring this percentage down to a single digit.”³ Prescriptions for success include word-level skills and reading comprehension taught in core classroom instruction, procedures to identify children falling behind in early reading stages, and more intensive and explicit instruction to those who need to catch up to the grade-

² Defendants’ Motion to Dismiss, at 14, Dkt. #60 (Nov. 17, 2016).

³ Joseph K. Torgesen, *Avoiding the Devastating Downward Spiral: The Evidence that Early Prevention Prevents Reading Failure*, *American Educator*, (Fall 2004), <https://www.aft.org/periodical/american-educator/fall-2004/avoiding-devastating-downward-spiral>.

appropriate level.⁴ As far back as 1990, studies have shown that delivering appropriate instruction to children identified as most at-risk for reading failure resulted in up to 92% of them achieving reading proficiency “well within the average range of reading ability.”⁵ This takes work and support. Torgesen urged:

⁴ *Id.*

⁵ In “*Avoiding the Devastating Downward Spiral: The Evidence That Early Intervention Prevents Reading Failure*,” *supra* note 3, Torgesen laid out the research that established that all but a very small percentage of students can be taught to read if provided with appropriate instruction. It included:

- Brown, I.S., and Felton R.H. (1990). *Effects of instruction on beginning reading skills in children at risk for reading disability*. *Reading and Writing: An Interdisciplinary Journal*, 2, 223–241.
- Foorman, B.R., Francis, D.J., Fletcher, J.M., Schatschneider, C., and Mehta, P. (1998). *The role of instruction in learning to read: Preventing reading failure in at-risk children*. *Journal of Educational Psychology*, 90, 37–55.
- Torgesen, J.K., Wagner, R.K., Rashotte, C.A., Rose, E., Lindamood, P., Conway, T., et al. (1999). *Preventing reading failure in young children with phonological processing disabilities: Group and individual responses to instruction*. *Journal of Educational Psychology*, 91, 579–593.
- Vellutino, F.R., Scanlon, D.M., Sipay, E.R., Small, S.G., Pratt, A., Chen, R., and Denckla, M.B. (1996). *Cognitive profiles of difficult-to-remediate and readily remediated poor readers: Early intervention as a vehicle for distinguishing between cognitive and experiential deficits as basic causes of specific reading disability*. *Journal of Educational Psychology*, 88, 601–638.
- Torgesen, J.K., Rashotte, C.A., Wagner, R.K., Herron, J. and Lindamood, P. (2003). *A comparison of two computer assisted*

First, we must ensure that core classroom instruction in kindergarten through grade three is skillfully delivered with a balanced emphasis on word-level skills (phonemic awareness, decoding, etc.) and reading comprehension (including the intensive build-up of content knowledge). Second, we must have procedures in place to accurately identify children who fall behind in early reading growth, even when they are provided strong classroom instruction. Third, we must provide these children who are behind with reading instruction that is more intensive, more explicit, and more supportive than can be provided by one teacher with a class of 20 or 30 children—and we should provide that extra support early, preferably in kindergarten and first grade.⁶

Illiteracy is therefore not an inevitability for Detroit's schoolchildren, and any suggestion otherwise should be rejected.

Schools and districts play a critical role in whether students learn to read. For the past 20 years, EdTrust has identified schools serving children of color in low-income communities that have achieved outcomes similar to statewide results for their privileged peers across all grades and subjects. EdTrust has found these schools in all regions of the country and in all types of locales – urban, rural and

approaches to the prevention of reading disabilities in young children. Unpublished manuscript, Florida State University, Tallahassee.

- Torgesen, J.K., Rashotte, C.A., Mathes, P.G., Menchetti, J.C., Grek, M.L., Robinson, C.S., et al. (2003). *Effects of teacher training and group size on reading outcomes for first-grade children at-risk for reading difficulties.* Unpublished manuscript. Florida State University, Tallahassee.

⁶ *Id.*

suburban.⁷ And it has found them in both the traditional public and charter sectors; in fact, the majority of such successful schools identified and studied over the years have been traditional public schools. For example, in 2005, George Hall Elementary School, a traditional public neighborhood school in Mobile, Alabama was one of the lowest performing schools in Mobile, which itself was one of the lowest performing districts in the state. After the state expressed concern about the poor performance of George Hall, Mobile's superintendent assigned a new principal who recruited seasoned teachers and implemented new routines, including dedicated time for careful reading instruction and special attention to developing vocabulary and practicing writing. Within a few years, George Hall was one of the highest-performing schools in the state, with 95 percent or more of its students meeting Alabama's reading and mathematics standards.⁸ In addition to its own state assessments, at the time, Alabama required that students take a national test; the average George Hall fifth-grader scored higher than 71 percent of all fifth-graders in the country.

Data show that change can happen on a district-wide scale, too. Using an analysis done by Dr. Sean Reardon, Professor of Poverty and Inequality at

⁷ See *Dispelling the Myth*, The Education Trust, (2018), https://edtrust.org/dispelling_the_myth/.

⁸ *DTM: George Hall Elementary School*, The Education Trust, (June 30, 2015), <https://edtrust.org/resource/dtm-george-hall-elementary-school/>.

Stanford University, EdTrust has conducted an in-depth analysis of several districts that demonstrates the power that well-supported educators have to help students overcome obstacles presented by poverty and discrimination.⁹ Dr. Reardon created the Stanford Education Data Archive (SEDA). Using 300 million standardized test scores, SEDA provides measures of educational opportunity, average test score performance, academic achievement gaps, and other information for about 12,000 public school districts in the United States.¹⁰ While Dr. Reardon's analysis found that there is a strong correlation between a family's socioeconomic status and a child's academic performance, it also showed that there is considerable variation, even among districts that are demographically similar. In other words, what districts do – the instructional and operational decisions they make – matters.

An example of this is found in Steubenville, Ohio. Steubenville is a small, urban district which has twice the level of poverty as the nation as a whole. According to Reardon's analysis, Steubenville's third graders are performing about four grade levels above those in Detroit. Eighteen years ago, the educators in Steubenville adopted a high-quality reading and math program that had proven success in high-poverty schools. The program, Success for All, provides teachers

⁹ *ExtraOrdinary Districts: Ordinary School Districts that get Extraordinary Results*, The Education Trust, (2018), <https://edtrust.org/extraordinary-districts/>.

¹⁰ *Bio of Dr. Sean Reardon*, Stanford CEPA Center for Education Policy Analysis, <https://cepa.stanford.edu/sean-reardon>.

with extensive curricular materials and training on reading instruction, how to collaborate on results, and what to do if students do not learn the first time they are taught. The program has been studied for decades; the federal What Works Clearinghouse has found it to be very effective in teaching alphabets and fluency and reading comprehension.¹¹ On Ohio's state assessments, 93 percent of Steubenville's 3rd graders and 85 percent of 5th graders were proficient readers in 2018¹² – compared to just 61 and 70 percent of 3rd and 5th graders statewide.¹³ According to Reardon's analysis, Steubenville's third graders score nearly two grade levels above the national average.¹⁴

Chicago, Illinois also has schoolchildren facing many of the same circumstances as Detroit's schoolchildren. In 1987, the Secretary of Education

¹¹ Valerie Strauss, *Yes, There Are Public School Educators Who Know What They're Doing. Take, For Example, the Folks in Steubenville, Ohio*, Washington Post, (Jan. 25, 2018), https://www.washingtonpost.com/news/answer-sheet/wp/2018/01/25/yes-there-are-public-school-educators-who-know-what-theyre-doing-take-for-example-the-folks-in-steubenville-ohio/?utm_term=.16a57f1d53cf.

¹² *Ohio Student Report Cards – Steubenville City District Grade*, Ohio Dep't of Educ., <https://reportcard.education.ohio.gov/district/achievement/044826>

¹³ *Student Achievement Increases Seen Statewide in 2018 Ohio School Report Cards*, Ohio Dep't of Educ., (2017-2018), https://reportcardstorage.education.ohio.gov/search/State_Report_Card.pdf.

¹⁴ Emily Badger and Kevin Quealy, *How Effective Is Your School District? A New Measure Shows Where Students Learn the Most*, NY Times, (Dec. 5, 2017), <https://www.nytimes.com/interactive/2017/12/05/upshot/a-better-way-to-compare-public-schools.html>

called Chicago the worst school district in the country; Chicago officials responded by saying that Detroit's schools were worse.¹⁵ Since then, Chicago Public Schools have improved enormously. One way they did so was by incorporating techniques which research and data have shown will help children learn how to read. These include providing teachers with training about the science of reading instruction and "improving the knowledge, skill, training, and support of school principals who, in turn, are expected to set the conditions under which instruction improves and teachers become leaders of their work."¹⁶ Now the Chicago school district "grows" its students the most of any large or medium-sized district in the country: Reardon's analysis found that Chicago's 3rd graders score 1.3 grade levels below the national average, but by 8th grade, Chicago's students score less than half a year below the national average.¹⁷ Reardon's analysis of Chicago's performance on state test scores is consonant with the city's performance on an entirely different assessment: the Trial Urban District Assessment (TUDA), which is a special

¹⁵ *Id.*; *Schools in Chicago Are Called the Worst by Education Chief*, NY Times, (Nov. 8, 1987), <https://www.nytimes.com/1987/11/08/us/schools-in-chicago-are-called-the-worst-by-education-chief.html>; *ExtraOrdinary Districts Podcast: Chicago, Part 1 – Nowhere to Go But Up*, The Education Trust, (Nov. 13, 2017), <https://edtrust.org/the-equity-line/chicago-part-1-nowhere-go/>.

¹⁶ Karin Chenoweth, *To learn about improving urban public schools, we should study Chicago. Yes, Chicago.*, Washington Post, (Feb. 9, 2018), https://www.washingtonpost.com/news/answer-sheet/wp/2018/02/09/to-learn-about-improving-urban-public-schools-we-should-study-chicago-yes-chicago/?utm_term=.9cfed70a7aa9

¹⁷ Badger and Quealy, *supra* note 14.

sampling of the National Assessment of Educational Progress, sometimes called the Nation's Report Card. (See more about NAEP and TUDA *infra* Section II). In 2002, when Chicago began participating in TUDA, Chicago's fourth graders scored significantly below fourth graders in the rest of the country in reading. By 2015 they had caught up to their peers in other large city districts.¹⁸ The Chicago school district demonstrates that significant growth is possible in a large city district with a student body that is majority low-income children of color.¹⁹

Adequate and equitable distribution of resources is imperative to district-wide improvement in educational outcomes. While Detroit Public Schools are no longer under emergency management, the State still plays a critical role in determining the potential of Detroit to succeed. At present, the State is a long way off from enabling Detroit Public Schools to make those gains. Per a 2016 report issued by The Education Trust – Midwest, “Michigan ranks an abysmal 42nd of 47 states in the fairness of its funding system, with significantly fewer dollars spent per student in the highest poverty districts than in the lowest poverty districts” like

¹⁸ *NAEP Data Explorer 4th Grade Reading Results*, Nations Report Card, (2002 and 2015), <https://www.nationsreportcard.gov/ndecore/xplore/NDE>.

¹⁹ Black and Hispanic students comprise more than 80 percent of Chicago Public Schools' student body; 76.6 percent come from families with low incomes. *See CPS Stats and Facts*, Chicago Public Schools, (last updated November 2018), https://cps.edu/About_CPS/At-a-glance/Pages/Stats_and_facts.aspx.

Detroit.²⁰ Although district-wide improvement is possible, Detroit Public Schools cannot do it alone.

II. DETROIT PERFORMS WORSE THAN OTHER LARGE CITY DISTRICTS DO FOR SIMILAR STUDENTS

The problem in Detroit's school district is not the children. The problem is Detroit's schools. As the district court recognized, these schools are deplorable.²¹ This has had a marked effect on the academic performance of the children who are required to attend them day after day. The State attempted to mask that effect, arguing that the students attending the schools identified in the Complaint should only be compared to other schools in Detroit.²² This comparison would mislead the court because it occludes the very real impact of the State's choices with respect to school maintenance, management, and instruction on Detroit's children. The cumulative effect of the State's choices is that Detroit performs worse than nearly all other large city districts do for students of similar race and socioeconomic backgrounds in nearly every category. And Detroit's scores have gotten worse over time.

²⁰ Amber Arellano and Suneet Bedi, *Michigan's Talent Crisis: The Economic Case for Rebuilding Michigan's Broken Public Education System*, at 21, The Education Trust-Midwest, (2016), <https://midwest.edtrust.org/resource/michigans-talent-crisis-the-economic-case-for-rebuilding-michigans-broken-public-education-system/>.

²¹ Hrg. Tr. 5: 3-4, Dkt. #109 (Aug. 10, 2017).

²² Defendants' Motion to Dismiss, at 34, Dkt. # 60 (Nov. 17, 2016).

A. Average Reading Scores for Large Urban School Districts

The National Assessment of Education Progress (NAEP) is a congressionally mandated project administered by the National Center for Education Statistics, and it is responsible for creating assessments in key subjects of education, including reading and mathematics. The NAEP is administered every two years to a sample of students in every state and a number of large urban districts, including Detroit. Each assessment is scored on a scale of 0-500, and results are reported in terms of both scale scores and achievement levels (Below Basic, Basic, Proficient, and Advanced). Scores for achievement levels are set by a panel of experts and periodically revised. Fourth graders, for example, are considered proficient in reading if they score between 238 and 267, indicating that they can, for example, “identify implicit main ideas and recognize relevant information that supports them” in fictional or literary texts, as well as “locate relevant information, integrate information across texts, and evaluate the way an author presents information” in informational texts.²³ Students scoring between

²³ *The NAEP Reading Achievement Levels by Grade*, Nation’s Report Card, <https://nces.ed.gov/nationsreportcard/reading/achieve.aspx#2009>.

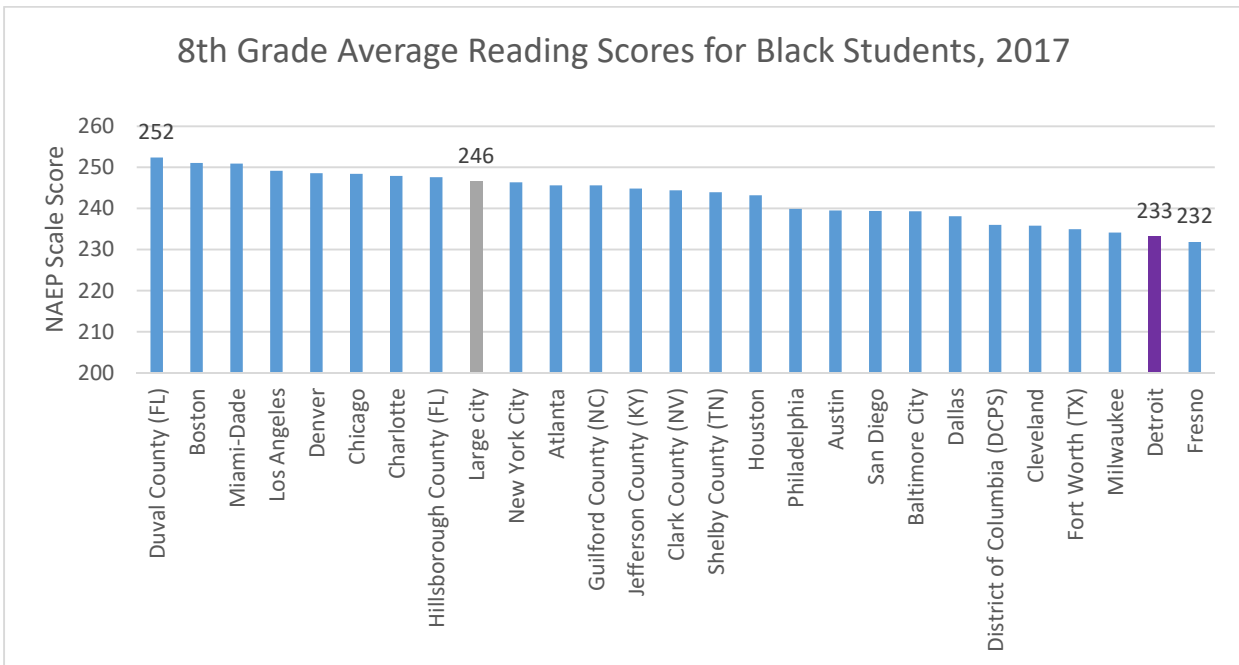
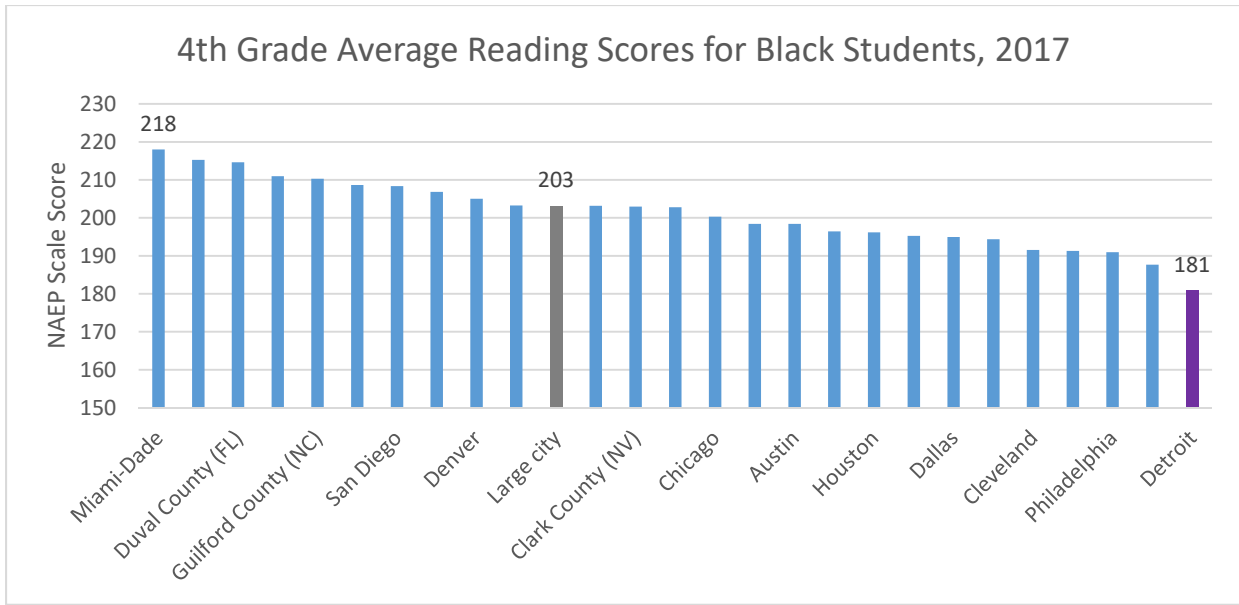
208 and 237 are considered to be at the Basic level, while those scoring at 207 and below are considered Below Basic.²⁴

Twenty-seven large urban districts participate in NAEP separately from their respective states through the Trial Urban District Assessment (TUDA) program. Resulting data allow comparisons of how these districts perform in 4th and 8th grade reading and math. These data demonstrate two things: 1) that some districts are far more successful than others in teaching students of similar socioeconomic backgrounds to read, and 2) that Detroit consistently performs worse for its students than other large city districts. In 2017, Detroit's 4th grade students had an average score of 182, which was the lowest among large city reading scores by thirteen NAEP scale points and well below the national average of 221.²⁵ Detroit's 8th graders had a score of 235. Only seven percent of the 8th graders in Detroit scored high enough to qualify as proficient in 2017.

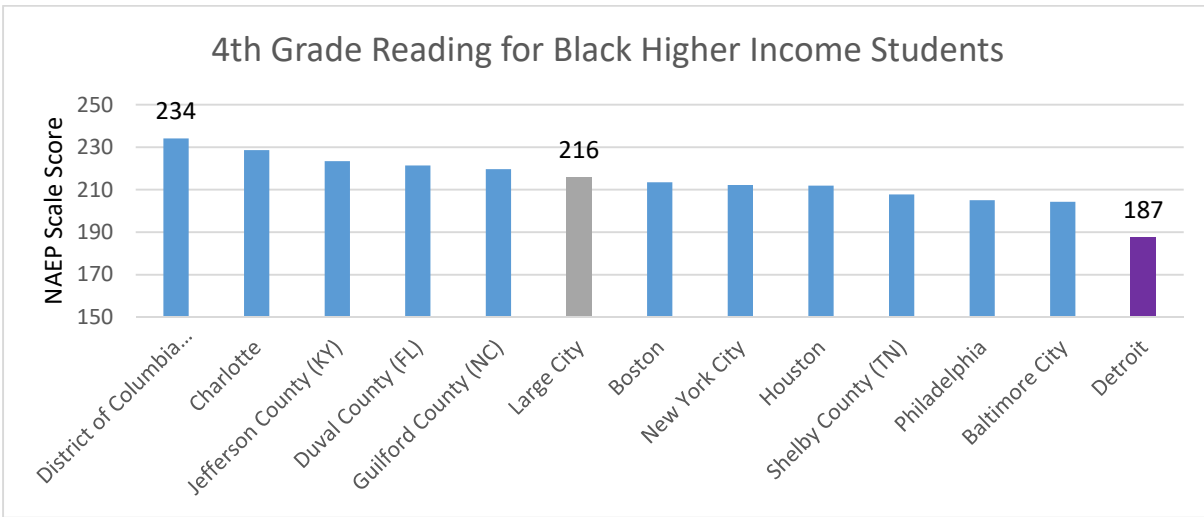
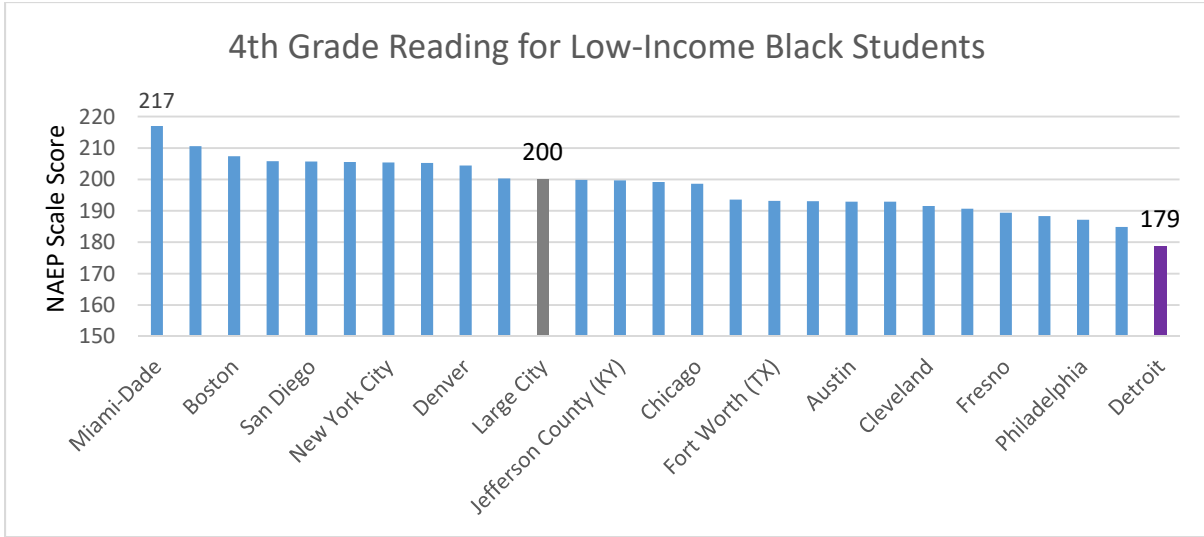
Not only does Detroit perform worse on average than other large urban districts, it performs worse than other districts composed of students of similar socioeconomic backgrounds. The district scores dead last in reading for Black 4th graders. In 8th grade, Detroit's results for Black students were lower than all but one district:

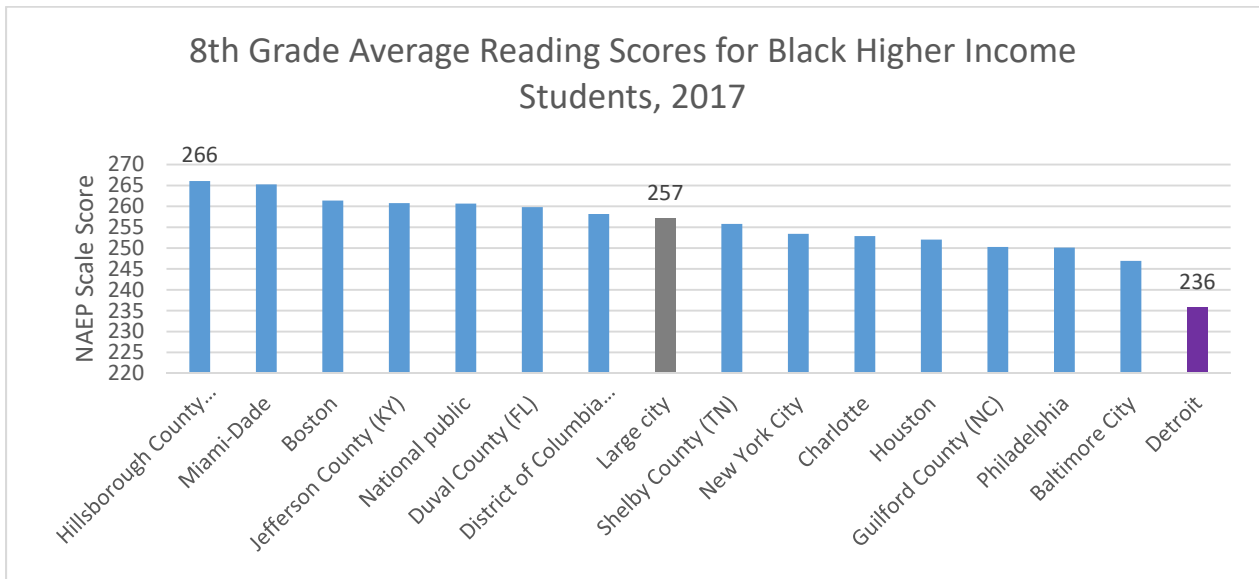
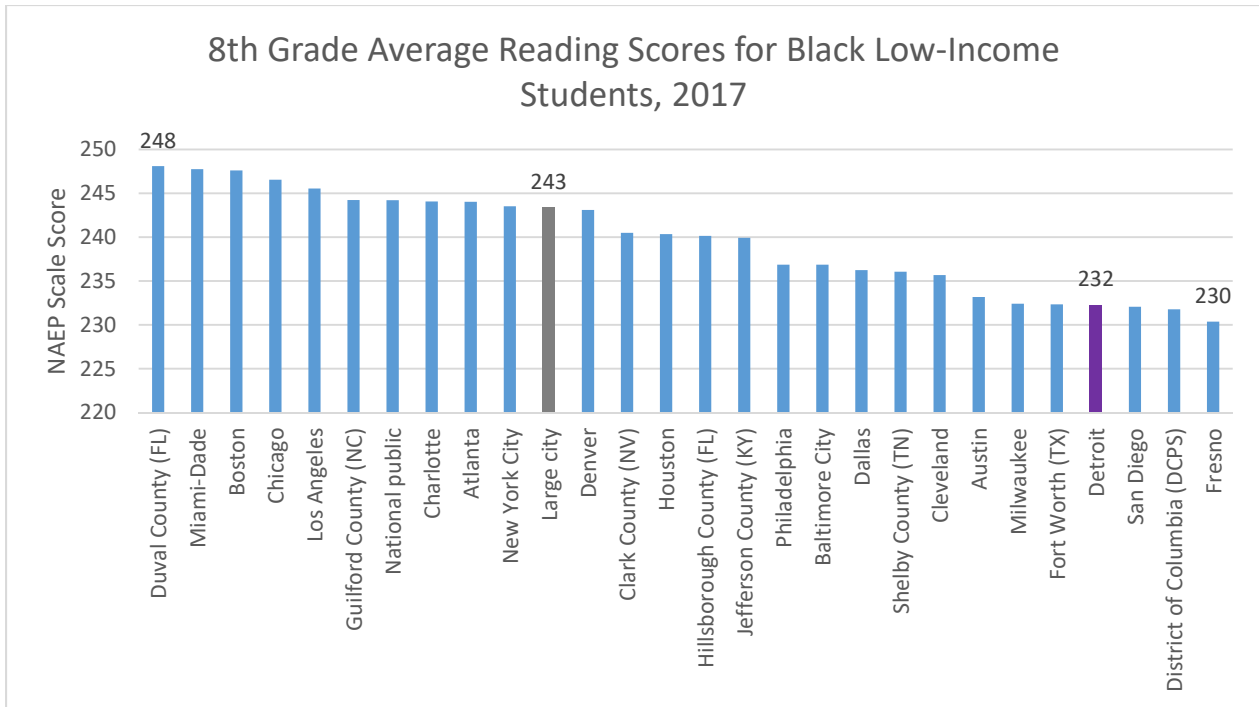
²⁴ *Id.*

²⁵ *NAEP Reading Report Card District Average Scores*, Nation's Report Card, (2017), https://www.nationsreportcard.gov/reading_2017/districts/scores?grade=4.



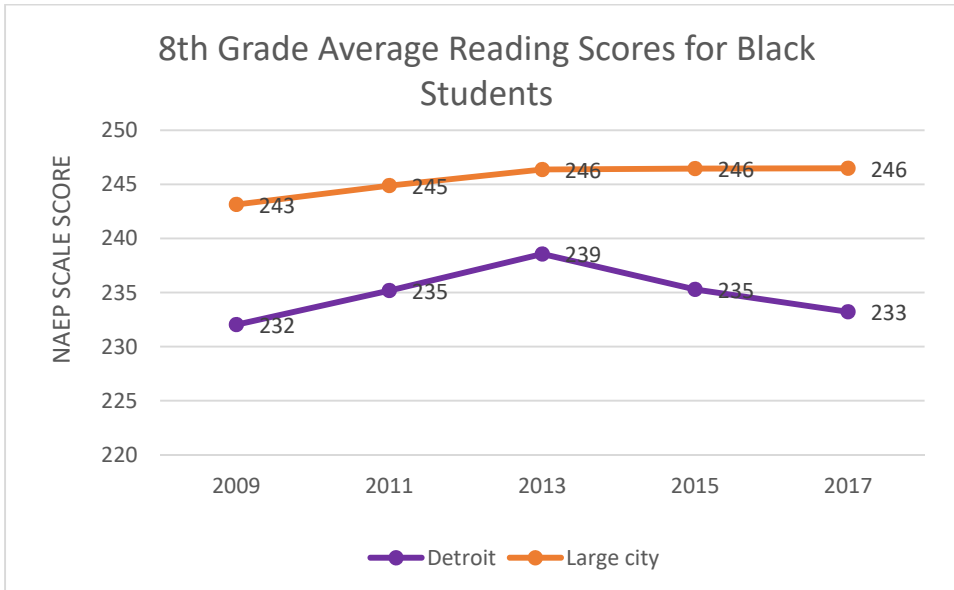
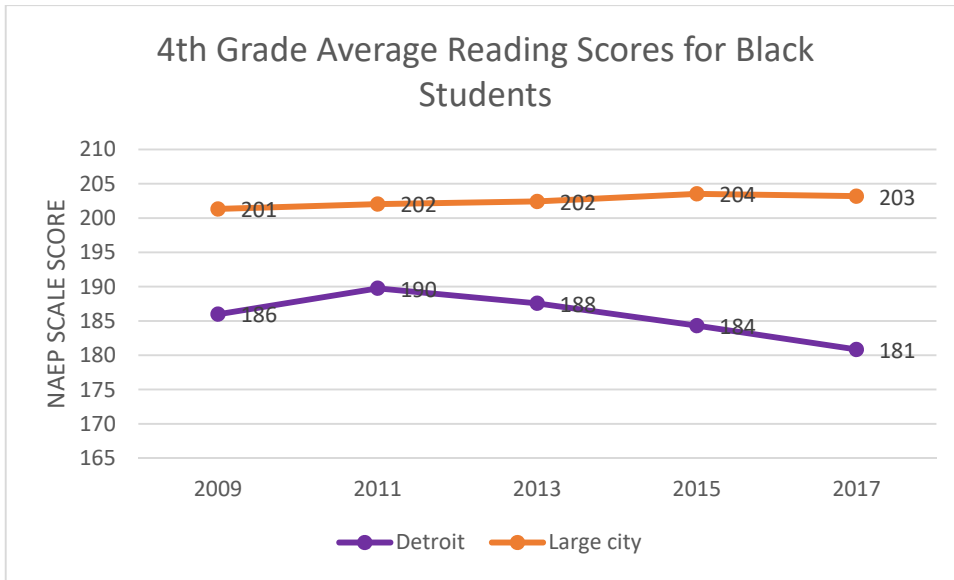
Detroit’s reading scores for Black students are worse than other large urban districts’ regardless of students’ family income. In 4th grade reading, Detroit’s results are lower than any other participating district’s for both low-income and higher income Black students. Eighth grade results evince a similar pattern.



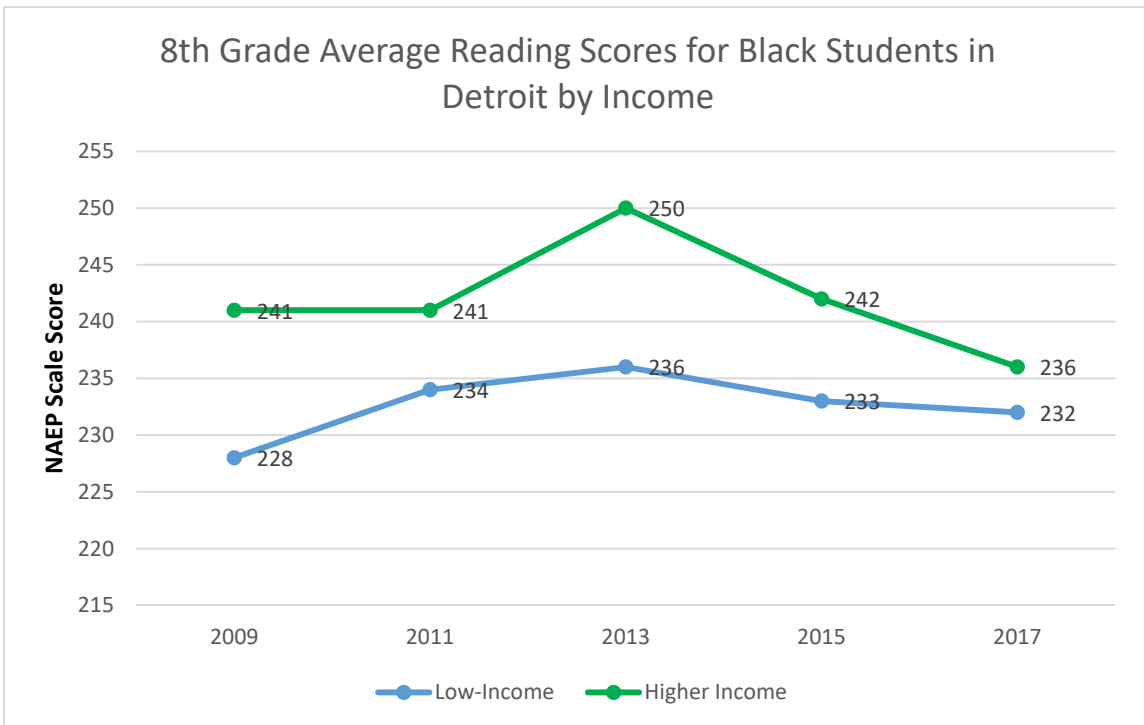
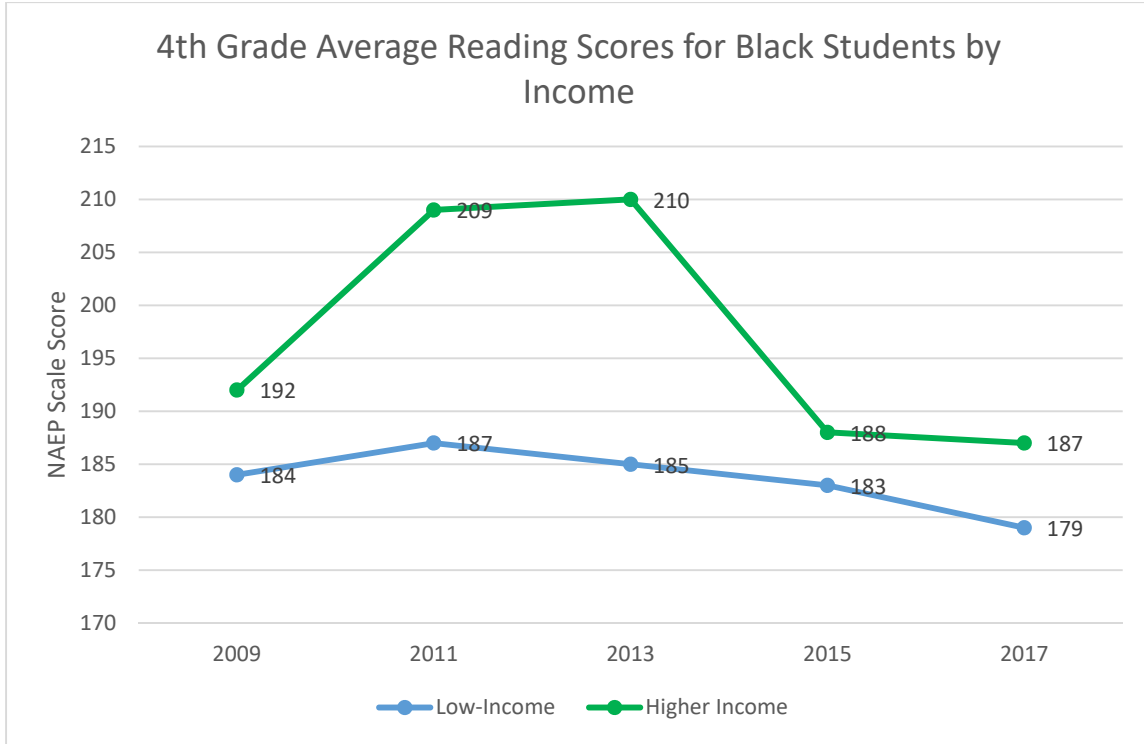


B. Detroit’s Outcomes are Getting Worse

Detroit’s students are achieving progressively lower outcomes each year. The district’s Black 4th graders are performing worse than they did in 2009 – the first year Detroit participated in TUDA. The district’s 8th grader average scores have declined by six points over the last four years.



Detroit’s scores have declined for both higher income and low-income Black students, suggesting that these drops cannot be explained by changes in family income levels alone. Between 2013 and 2017, Black higher-income fourth and eighth graders’ average reading scores dropped 23 and 14 points, respectively.



NAEP scores are not the only data to show that Detroit is underserving its students.

Research from Dr. Reardon show that students in the district start out behind, and

fall farther behind as their education continues. According to these data, Detroit third graders score 2.1 grade levels below the average in reading and math, but by 8th grade, these students are 2.6 years behind.²⁶

These data tell a story of a school district that is consistently and persistently underserving its students and getting worse over time. They permit an inference that year after year, decisions were made by the State in its governance of the Detroit school district that failed to account for known problems, and those decisions – collectively – were ineffective in reaching educational objectives. This need not be how the story ends. In other large city school districts, which have similar demographics to Detroit, choices have been made and programs implemented which yield high achievement outcomes and growth in literacy rates.

III. DETROIT SCHOOLS SHOULD BE COMPARED TO DISTRICTS STATEWIDE

The district court stated that the “appropriate comparators for an equal-protection claim are [] other Michigan schools that have come under the control of emergency managers, have been designated a Priority School, or were governed by the EAA.” *Gary B. v. Snyder*, 329 F. Supp. 3d 344 at 368 (E.D. Mich. 2018).

²⁶ Emily Badger and Kevin Quealy, *How Effective Is Your School District? A New Measure Shows Where Students Learn the Most*, New York Times, (Dec. 5, 2017), <https://www.nytimes.com/interactive/2017/12/05/upshot/a-better-way-to-compare-public-schools.html>

Then, among these schools, it ruled that plaintiffs would have to state an instance

where Defendants intervened in a school with a different racial makeup and treated that school disparately. Without this type of comparison, the Complaint fails to state a claim that Defendants have classified or otherwise differently treated Plaintiffs on account of race.

Id. This is the wrong test for two reasons. First, it departs from how the State of Michigan operates with respect to its own schools. Second, it masks racial disparities in the state's treatment of students by focusing the analysis solely on majority-minority school districts because none of Michigan's various emergency manager laws or EAA programs has been invoked with respect to any school district with significantly different demographic makeups than Detroit Public Schools. The more appropriate comparison is between other school districts in the state, on the one hand, and Detroit Public Schools, on the other.

A. The State of Michigan Exercises Control Over All Public Schools

The Court should compare schools in this case the same way the State of Michigan does—by comparing all public school districts statewide to each other. The State exercises control over all school districts in the state, regularly tests students in all of them against standards it has set, rates them, and makes per-pupil funding determinations on a district-by-district basis. There is no reason to supplant the State's own practice and limit analysis to the schools which the State has designated the worst in either academic or fiscal performance.

1. State Performance Assessments

The State measures the academic performance of schools and districts in Michigan against each other on an annual basis. Both traditional public and charter schools in the State of Michigan are accountable to the State and are subject to potential intervention or closure if they chronically underperform in the State’s judgment. The State mandates regular statewide assessments through the Superintendent of Public Education and the State Board of Education. Before 2015, these tests were the “Michigan Educational Assessment Program” or MEAP,²⁷ and the Michigan Merit Exam²⁸ (for high school students). In 2015, the State began using the M-STEP Michigan Student Test of Educational Progress.²⁹ Based on these tests, Michigan law requires the Superintendent of Public Education to identify “persistently lowest achieving” schools every year, which are the lowest achieving 5 percent of all public schools in the state.³⁰ Mich. Comp. Laws Ann. § 380.1280c(1) (West 2018). The Superintendent is then to determine

²⁷ *Find out What is the Purpose of the MEAP?*, Michigan Office of Regulatory Reinvention, (2018), <https://www.michigan.gov/som/0,4669,7-192-41009-2252--,00.html>

²⁸ *Michigan Merit Examination (MME)*, Michigan Dep’t of Educ. (2018), https://www.michigan.gov/mde/0,4615,7-140-22709_35150---,00.html.

²⁹ *Michigan Student Test of Educational Progress (M-Step)*, Michigan Dep’t of Educ., (2018), https://www.michigan.gov/mde/0,4615,7-140-22709_70117---,00.html; see also

³⁰ *Race to the Top II Accelerate Michigan*, Michigan Dep’t of Educ., https://www.michigan.gov/documents/mde/MDE-RTTT2-Part_E_320550_7.pdf.

which schools belong in that category by compiling the scores of each and assessing them according to the U.S. Department of Education’s “Business Rules for School Ranking.”³¹ Based on how a school does in this comparison, the State will exercise more control if it determines that a school is too far below its standards. It has done so in the past by delegating its authority to the School Reform/Redesign Officer (“SRO”) over low-performing schools, and to entities formed through agreements authorized by the Education Achievement Authority.

2. Statewide Rating and Comparability of School Districts

Michigan conducts a multi-faceted analysis of school and district performance on a statewide basis using factors that would be relevant to the plaintiffs’ equal protection analysis. In the past, the Michigan Department of Education published what it called the “Top-to-Bottom” ranking in which it listed all of its schools and assigned them a percentile ranking based on their performance relative to one another.³² This ranking has since been replaced by the Parent Dashboard for School Transparency and the Michigan School Index

³¹ *Business Rules for School Ranking*, Appx. E-6 at 22, Michigan Dep’t of Educ., <http://www.mdoe.state.mi.us/MDEDocuments/Mi%20Final%20RT3%20Appendices%20with%20Budget%205.26.10.pdf>.

³² *See, e.g., Top-to-Bottom School Rankings*, Michigan Dep’t of Educ., https://www.michigan.gov/mde/0,4615,7-140-81376_81377_56562---,00.html

System³³ operated by the Center for Educational Performance and Information (“CEPI”), which is a State agency established by the Michigan Legislature through the State School Aid Act of 1979.³⁴ CEPI is overseen by an Advisory Council created by Executive Order; per that order,³⁵ members of the Council included the Superintendent of Public Instruction, the Director of the Department of Technology, Management, and Budget, the Director of the Department of Energy, Labor, and Economic Growth, the State Treasurer, the State Budget Director, the Chief Executive Officer of the Early Childhood Investment Corporation, and twelve other individuals appointed by the Governor.³⁶ CEPI evaluates and compares Michigan school districts on the basis of educator effectiveness, *i.e.*, percentage of classes taught by highly qualified experienced teachers and their relative distribution among schools with a high/low percentage of minority

³³ *Id.*; Parent Dashboard for School Transparency, Michigan Dep’t of Educ. MI School Data, <https://www.mischooldata.org/DistrictSchoolProfiles2/AssessmentResults/AssessmentSummary.aspx>.

³⁴ *Our Mission*, State of Michigan Center for Education Performance and Information, (2018), https://www.michigan.gov/cepi/0,4546,7-113-985_71769---,00.html.

³⁵ In 2014, the Governor adjusted the composition of the Advisory Council. See, *Executive Order 2014-6*, at V, State of Michigan, (Mar. 10, 2014), https://www.michigan.gov/documents/snyder/Executive_Order_2014-6_450304_7.pdf.

³⁶ *Executive Order No. 2010-15*, State of Michigan, (Aug. 18, 2010), [http://www.legislature.mi.gov/\(S\(2lzxrs4510g0q5mevi3xrl45\)\)/documents/2009-2010/executiveorder/htm/2010-EO-15.htm](http://www.legislature.mi.gov/(S(2lzxrs4510g0q5mevi3xrl45))/documents/2009-2010/executiveorder/htm/2010-EO-15.htm)

students and/or poverty; student growth; and performance levels by school, district, and statewide of students broken down by race/ethnicity and level of income.³⁷

The State acts upon this information to design and implement policy to improve education outcomes for all of Michigan's children. Michigan is currently administering a plan to make Michigan a top ten education state in ten years, a plan which contemplates "a significantly new role for the Michigan Department of Education as a facilitator and coordinator of efforts" toward this end.³⁸ The State's involvement in educational policy to be implemented is direct, detailed, and thorough. For instance, after data collected by the State showed a decline in reading proficiency scores, Governor Snyder established the Third-Grade Reading Workgroup, "to analyze Michigan's reading proficiency at the third-grade level and to suggest policy to improve this necessary element of future academic and career success."³⁹

³⁷ See *State of Michigan Overview, categories Grades 3-8 Assessments, Equitable Distribution Report of Effective Educators, and Equity – Student Growth*, <https://www.mischooldata.org/ParentDashboard/ParentDashboardState.aspx>.

³⁸ *Michigan Department of Education – Strategic Plan*, https://www.michigan.gov/documents/mde/10_in_10_Action_Plan_543856_7.pdf
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³⁹ *Third-Grade Reading Workgroup Report to Governor Rick Snyder*, (June 3, 2015), https://www.michigan.gov/documents/snyder/3rd_Grade_Reading_Workgroup_Report_490977_7.pdf

3. State-Administered Funding & Needs Assessment

In addition to setting, testing, and enforcing state standards, the State makes individualized funding decisions about each district. The State has controlled school funding since the passage of a 1994 ballot initiative known as Proposal A, which led to schools being largely funded through statewide sales taxes.⁴⁰ In this system, the State determines the amount of per-pupil funding to be awarded to each school district in the State.⁴¹ It then distributes the funding – which varies widely – to the districts. Per Section 31a of the State School Aid Act, Michigan also apportions “At-Risk” funding to districts with children who it deems at-risk of academic failure.⁴² As with performance assessments, the State is involved in each district as a matter of law; the level of involvement varies only by degrees. It is more involved when school districts lack the funds to meet their needs and become insolvent. When the State chose to invoke emergency manager laws to sort out how Detroit’s funding and other district assets should be managed, it was an

⁴⁰ *School Finance Reform in Michigan Proposal A: Retrospective*, Michigan Dep’t of Treasury Office of Revenue and Tax Analysis, at 4, (Dec. 2002), https://www.michigan.gov/documents/propa_3172_7.pdf.

⁴¹ *Per-Pupil Foundation Allowance Ten –Year History for Schools FYs 2009-10 through 2018-19 (estimated)*, Michigan Senate Fiscal Agency, (Aug. 8, 2018), http://www.senate.michigan.gov/sfa/departments/datacharts/dck12_foundationhistory.pdf.

⁴² *2017 Accountability for Section 31a At-Risk Students at a Glance*, Michigan Dep’t of Educ., https://www.michigan.gov/documents/mde/Section_31a_At-Risk_Accountability_at_a_Glance_560934_7.pdf

extension of the role the State had already played in determining the Detroit school district's resources.

B. The District Court's Chosen Comparator Masks Racial Disparities

Students in all the districts selected by the district court as comparators—whether districts that had emergency managers, EAA, or SRO involvement—are overwhelmingly students of color from low-income families. Six school districts have had emergency managers appointed under Michigan's various emergency manager laws: Inkster Public Schools (Appointed: 2002), Detroit Public Schools (Appointed: 2009), Highland Park Schools (Appointed: 2012), Muskegon Heights Schools (Appointed: 2012), Pontiac Public Schools (Appointed: 2013) and Benton Harbor Area Schools (Appointed: 2014). Both Inkster Public Schools and Buena Vista School District were dissolved while under emergency management in 2013.⁴³ At the time that an emergency manager was appointed, each district's student population was *at least* 85 percent non-white. In fact, with the sole exception of Pontiac Public Schools, which has a larger population of Latino students, Detroit Public Schools had the lowest percentage of African American students (88 percent), the *highest* percentage of White students (3 percent) and

⁴³ *Inkster and Buena Vista Schools fail to submit requested documentation*, Press Release, Michigan Dep't of Treasury (July 22, 2013), <https://www.michigan.gov/treasury/0,4679,7-121--309862--,00.html>

mirrored the average for proportion of low-income students among all districts with an emergency manager (79 percent).

School District	Appointment Year	White	African American	Hispanic	Low- Income
Inkster Public Schools	2002	2%	98%	0%	82%
Detroit Public Schools	2009	3%	88%	8%	79%
Highland Park Schools	2012	0%	99%	0%	83%
Muskegon Heights Schools	2012	3%	94%	2%	78%
Benton Harbor Area Schools	2014	2%	91%	5%	81%
Pontiac Public Schools	2013	10%	58%	27%	74%
Average		3%	87%	9%	79%
Average, excluding Detroit Public Schools		5%	79%	13%	78%

Similarly, all 15 of the schools directly overseen by the Education Achievement Authority were in the City of Detroit.⁴⁴

Because the district court's comparator school districts either closely resemble the demographics of Detroit Public Schools or are in fact the same schools, a comparison between them will not yield meaningful information about the extent to which different demographics (i.e., white students) have been widely burdened by the State's acts or omissions. Whatever benefits the mostly white student populations receive through their State-administered public education—

⁴⁴ Dustin Walsh, *Education Achievement Authority Picks First 15 Schools – all in Detroit – for Improvement*, Crain's Detroit Business, (Mar. 13, 2012), <https://www.crainsdetroit.com/article/20120313/FREE/120319959/education-achievement-authority-picks-first-15-schools-all-in>

benefits that have resulted in significantly greater reading and math proficiency— will never come under consideration in the district court’s analysis for plaintiffs and children in the same demographic. This is de facto separate but equal, without the equality part.

The Court should analyze the appellants’ equal protection claim the same way the State of Michigan itself measures whether students are receiving an effective education and have their needs met: against all other school districts in the state.

CONCLUSION

For the foregoing reasons, Amicus Curiae The Education Trust respectfully submits that the Court should reverse the decision of the district court and remand for further proceedings.

Respectfully submitted,

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Date: November 26, 2018

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CERTIFICATE OF COMPLIANCE

Amicus curiae has complied with Federal Rules of Appellate Procedure 29(5) and 32(7)(B)(i). This brief contains 5,576 words, excluding the cover page, the table of authorities, and the table of contents.

s/ Tara J. Plochocki _____

Tara J. Plochocki

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system on November 26, 2018.

I certify that all parties in the case are registered CM/ECF users and that service will be accomplished by appellate CM/ECF system.

DATED: November 26, 2018

Respectfully submitted,

/s/

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