

The Detroit News

Michigan Supreme Court may settle issue of public aid for private schools

[Jonathan Oosting](#), The Detroit News

Published 9:12 a.m. ET June 25, 2019 | Updated 7:21 p.m. ET June 25, 2019

Michigan's Supreme Court on Jan. 1, 2019: L-R by row from top, justices Brian Zahra, Richard Bernstein, Megan Cavanagh, Elizabeth Clement, David Viviano, Bridget Mary McCormack and chief justice Stephen Markman. (Photo: Rod Sanford, Special to The Detroit News)



Lansing — The Michigan Supreme Court has agreed to reconsider a high-stakes case that tests the limits of the state's constitutional ban on using public taxpayer money to support private school education.

At issue is \$5 million in funding approved by Michigan's Republican-led Legislature to reimburse religious and other non-public schools for state mandates that do not directly support student education.

Public school advocates argue the spending is a "slippery slope" and sued the state in 2017 over an initial \$2.5 million appropriation to reimburse private schools for fire drills, inspections and other state requirements. Lawmakers later approved another \$2.5 million for fiscal year 2018.

A divided state Court of Appeals panel [upheld the spending](#) in October 2018, ruling the state can reimburse private schools for "incidental" costs that do not support a "primary" function critical to the school's existence or result in "excessive religious entanglement."

Plaintiffs challenged the ruling, and the state Supreme Court on Tuesday granted their application for leave to appeal.

In doing so, Justice Stephen Markman said allowing the state funding plan to proceed "would perhaps be in tension with the Establishment Clause" of the U.S. Constitution, which generally prohibits government support for religious institutions.

But banning the funding "would perhaps be in tension with the Free Exercise Clause," which prohibits the government from limiting religious beliefs or rituals, he wrote in the order.

Markman urged attorneys who will file briefs in the case to explore the implications of a 2017 U.S. Supreme Court ruling that Missouri violated the free exercise rights of a Missouri church by denying playground resurfacing grants to religious entities.

“This Court owes the parties, and the people of this state, a final decision in this case that fairly considers all inextricably connected issues,” Markman wrote, noting it has been three years since the initial appropriation.

The Michigan Supreme Court does not announce the positions of each justice when issuing appeals orders, but Markman chose to explain his decision in a concurring opinion.

Justice Beth Clement did not participate because of her past role as chief legal counsel to former Gov. Rick Snyder, who approved the initial spending but acknowledged legal uncertainty about the private school reimbursements.

Snyder requested an advisory opinion from the state Supreme Court in October 2016, but justices [declined his request](#) at that time.

Whether the spending is “ultimately sustained, or nullified, it is long past time that this Court, the highest of our state, determine decisively which of these outcomes is warranted, so that the product of our legislative process is no longer maintained in limbo,” Markman wrote in the Tuesday order.

The American Civil Liberties Union of Michigan, which is party to the suit, welcomed the Supreme Court review and urged justices to reinstate an original ruling by Court of Claims Judge Cynthia Diane Stephens, who had called the private school mandate reimbursement funding unconstitutional.

The appropriations were “an attempt to really undermine a very basic part of our constitution, which is that public funds should be preserved for public schools,” said Dan Korobkin, deputy legal director for the ACLU of Michigan.

“We’ll see what happens, but we’re glad that the Michigan Supreme Court is taking up this case.”

Paul Long, president and chief executive officer of the Michigan Catholic Conference, also said he is happy the Michigan Supreme Court is taking up the case and will “give the matter the attention it deserves.”

The Catholic Conference supported the state appropriations, which Long called “good public policy” and legally sound.

“The appropriation was designed to help ensure that children across the state, regardless of the school in which they are educated, have the health and safety protections that they deserve,” he said.

It's not clear how Michigan Gov. Gretchen Whitmer and Attorney General Dana Nessel will approach the case or if they may change the state's defense. The suit had been argued before either Democrat took office.

The administration does not comment on pending legal matters," Whitmer spokeswoman Tiffany Brown said. "But in general, the administration supports public funding for public schools," she said.

A Nessel spokeswoman said the attorney general's office just learned of the Supreme Court decision to take up the case and was "reviewing our options."

The Michigan Catholic Conference and the Michigan Association of Non-Public Schools filed legal briefs in lower courts defending the appropriations. They plan to do so again to the state Supreme Court.

Brian Broderick, executive director of the non-public school association, said he hopes Nessel approaches the case the same way as her predecessor, Republican former Attorney General Bill Schuette.

"When push comes to shove, we think she is obligated as the state's attorney to defend Michigan law," Broderick said.

The [Michigan Constitution](#) prohibits the state from appropriating public monies or property to "directly or indirectly to aid or maintain any private, denominational or other nonpublic, pre-elementary, elementary, or secondary school."

Courts have interpreted the state Constitution to bar support for general educational programs unless the main effect is to further a "substantial" governmental purpose.

Because of the ongoing legal battle, the state has not given non-public schools any of the reimbursement funding that was appropriated, Broderick noted.

"We're pleased that the Supreme Court has decided to take it up," he said. "It is an important issue, and we've been waiting a long time to get some sort of clarity on it."

joosting@detroitnews.com

<https://www.detroitnews.com/story/news/politics/2019/06/25/public-funding-private-michigan-supreme/1556586001/>