

Section 81 of the Michigan School Aid Act

Background: Section 81 was created by PA 94 of 1979 as 'per-pupil' ISD state aid and required ISDs to provide general education support services for local districts. Since 1979 there have been periodic specific allocations added to Section 81 to cover a number of support services and law changes including: "to comply with the requirements of the school code and state aid act" (Headlee), to make up adjustments due to loss of personal property taxes due to state adjustments to tables (Headlee), to provide for regional alternative education, to provide for early childhood education, pupil accounting (mandated; Headlee), school business services, teacher training, and regional media centers.

History: The '89-'90 Section 81 allocation was \$21.7M; it was 5.3% higher than the previous year therefore the '88-'89 allocation was \$20.6M.

School Aid Act HB 5123 of 1993 (passed Christmas Eve, 1993) allocated \$22M for '93-94 to Section 81; and froze that at \$22M again for '94-95. An additional \$4.4M was added for "technical assistance to locals to comply with school improvement measures", to provide for REMC's and in order to combine Sections 22, 23b, 46, 48, 83, 91, and 93 of the previous School Aid Act into Section 81 henceforth.

The Governor had proposed increasing Section 81 to \$50M and shifting the state's obligation for MPERS to the ISD's, but under a Christmas Eve compromise the state retained that obligation. (see document "H"). Additionally, HB 5123 included \$14.8M for FICA reimbursement through Section 146a to ISDs, PLUS \$27.7M of federal flow-through for MPERS reimbursement through Section 147 to ISDs, PLUS \$21.5M for MPERS from the school aid fund through Section 147 to ISDs.

The following year (1995-96) Section 81 was revised to include 90% of what the state had been obliged to pay for MPERS (Section 147.1) and 90% of FICA (Section 146a) obligation (document "I"). To do this Section 146a (FICA) was repealed and the allocation was rolled into Section 81 (see document "I"); and Section 147.1 (MPERS) was amended and the allocation rolled into Section 81. (see document "J")

Since 1995-1996 to present, for purposes of determining state aid the MDE has calculated each ISD's Section 81 allocation using a spreadsheet formula that includes the following "fields":

| | |
|---------------------------------|--------|
| Sec 81 General Formula | (14%) |
| Sec 21a School Improv Dev Costs | (02%) |
| Sec 83 Media Centers | (00%) |
| Sec 146a FICA | (34%) |
| Sec 147.1 Retirement | (47%) |
| Sec 11b ISD Supplement | (03%). |

The % indicates the portion of the total Section 81 Allocation. Analyzing MDE files it is obvious that FICA/Retirement have accounted for 77% of the Section 81 Allocation each year since 1995-96. The level of increase/decrease of Section 81 has been as follows:

| | |
|---------|------------------|
| 1996-97 | 3.05% |
| 1997-98 | 2.90% |
| 1998-99 | 0.00% |
| 1999-00 | 4.40% |
| 2000-01 | 5.30% |
| 2001-02 | 5.00% |
| 2002-03 | 3.10% |
| 2003-04 | -3.63% reduction |

School Aid Act Allocations

1989-90

\$21,714,200

Section 81 Allocation for "state aid to intermediates"
5.3% increase from previous year (\$20,621,300)
document "A"

\$??

Section 146 amount as necessary from Section 11 that is "equal to the employer's share of the intermediate district's federal social security obligation"... Section 11 is "school aid fund established by section 11 of state constitution... the sum necessary to fulfill the requirements of this act, and any deficiency is appropriated from the general fund"
documents "B" & "C"

1994-1995

\$ 22,950,000

Section 81 Allocation for "state aid to intermediates"
4% increase from previous year (92-93) (\$22,067,300)
document "D"

\$4,400,000

PLUS
for "technical assistance to locals to comply with school improvement measures", to provide for REMC's and in order to combine Sections 22, 23b, 46, 48, 83, 91, and 93 of the previous School Aid Act into Section 81 henceforth.

\$14,830,000

Section 146a from Section 11
document "E"

\$27,673,700

Section 147 from Section 11 "federal retirement contribution pass-through funds"

\$21,500,000

PLUS
"from the state school aid fund for funding the intermediate district retirement cost, for the public school employees' retirement system pursuant to MCL 38.1301 to 38.1408".
document "F"

\$91,353,700 total

1997-1998

\$ 81,266,700

AND

1998-1999

\$ 81,266,700

Section 81 Allocation for "state aid to intermediates"
2.9% increase from previous year (\$78,976,400)
document "G"

Questions:

Is MPSERS, as a "*pension plan and retirement system of the state*" a "*state*" obligation under constitution (Article IX, Sec. 24)?

If it is a state obligation, does Sect. 24 allow/prevent the state legislature from simply shifting that obligation to another political subdivision (a public school district) by legislative action?

If the state can shift it, doesn't Headlee (Sect. 29) "*prohibit*" the legislature "*from reducing the state financed proportion of the necessary costs of an existing activity or service required of the units of Local Government by state law*"?

If they can shift it, and they did reduce their "*proportion*", and the costs are "*necessary*" (constitutionally required), and it is an "*existing activity*" and it is "*required*" (constitutionally required) are they in violation of constitution (Headlee)?

Constitutional Implication #1

MPSERS is a contractual obligation of the State of Michigan under the State Constitution (Article IX, Section 24) to provide a "pension plan and retirement system of the state".

That contractual obligation had always been met by the State and not by the ISDs until the creation of Section 147 in 1992, when the State passed off its obligation for funding its own constitutionally required system to the ISD's.

With adoption of the School Aid Acts of 1994-95 and 1995-96 the funds were again shifted; this time to Section 81. Regardless of the shift, an argument can be made that the obligation is on the state to provide for the system, which includes funding that system.

The state could argue that Proposal A took care of that shift. It is clear, however, that the shift of responsibility occurred statutorily and not constitutionally. Proposal A, the constitutional amendment voted on March 15, 1994 did not include language to shift the state's financial constitutional obligation. Proposal A only provided for: minimum foundation level; super majority for property tax increases; \$.02 cents sales tax; 2 classes of property (homestead & non-homestead). The laundry list of bills passed Christmas Eve 1993 is often referred to as "Proposal A" but it is not.

Constitutional Implication #2

Headlee prohibits the state from "reducing the proportion of state spending in the form of aid to local governments".

A strong argument can be made that the state has already violated this Headlee provision of the constitution because it has reduced the "proportion" of state funding in the form of aid to local governments. Schools are included in the definition of local governments in this section of the constitution. If Section 81 is reduced further the state will unquestionably not meet it's obligation to maintain it's proportion of the MPSERS contribution. Some would argue they already have failed that obligation because state aid increases in Section 81 have not kept pace with increases in the MPSERS rate.

Constitutional Implication #3

Headlee prohibits the state from "from shifting the tax burden to local governments".

A strong argument can be made that the state has already violated Headlee because the tax burden for MPSERS has been shifted to the local government (schools and ISDs) using the same argument that state aid increases have not kept pace with increases in the MPSERS rate.

The state would argue they have provided more than the MPSERS rate obligation under Headlee, but when you deduct their obligation for Special Ed. Under Durant, and the constitutional guarantee under Proposal A to maintain the foundation at '94 levels that is a questionable argument.

Constitutional Implication #4

Headlee prohibits the state from "requiring any new activities by local governments without full financing". The financial obligation for funding MPSERS is certainly a "new activity" for ISDs or local schools and the state has unquestionably not provided "full financing" for that new activity. A strong argument can be made that the state has already violated Headlee in this regard. Further reduction of Section 81 would make this violation worse.

Constitutional Implication #5

Headlee prohibits the state from "reducing the state financed proportion of the necessary costs of any existing activity or service required of the units of Local Government by state law. The state unquestionably financed a proportion of the necessary cost of the MPSERS system prior to 1994-95. The state has arguably already reduced its proportion of those costs. If they were to reduce Section 81 they would violate this provision of Headlee even deeper.

Constitutional Implication #6

Often the state argues they have no Headlee obligation because the activity is optional and not necessary. There is no question that the activity of fully funding the MPSERS system is necessary. The state in fact, is obliged under constitutional law to do so.

Constitutional Implication #7

Headlee prohibits the state from requiring from Local Governments any new activity or service, or require an increase in the level of any activity or service beyond that required by existing law (at the time Headlee was approved) unless a state appropriation is made for any necessary increased costs. Again a strong argument can be made that the state has already failed this constitutional obligation, and any reduction in Section 81 funds will certainly put them in violation.

Constitutional Implication #8

Headlee includes a provision that any taxpayer of the state shall have standing to bring suit against the state in the Michigan Court of Appeals, and if sustained all costs of bringing suit shall be reimbursed to the plaintiff.

Conclusion: It appears that there are serious constitutional issues at play already with the state's shift of responsibility to ISD's and local schools for their obligation for maintenance of a school employees public pension plan and retirement system. Additionally, most of these arguments can be made regarding the employee's cost of FICA as well because they are necessary and required.

It appears that perhaps the only portions of Section 81 available for 'recapture' are those portions allocated for 'unnecessary' activities, however, with mandates to provide an employee for pupil accounting purposes, and mandates to provide technical support in a number of areas that amount is minimal.

Analysis of the MDE calculation formula shows that 47% of allocation is earmarked for MPSERS, 34% for FICA, 2% for mandated school improvement technical assistance, 3% for supplement to correct personal property tax tables leaving only 14%. From within that 14% ISDs must also provide for a mandated pupil accounting employee.

If the state is already in violation of Sections 24, 25, and 29 of the Michigan Constitution then there would be no room for recapture at all, and in fact the state is in a position of considerable liability. The estimated 2003-04 annual cost of MPSERS for ISD's alone is \$84.7M and FICA is \$49.8M. The total Section 81 Allocation for 2003-04 was \$95M.

Perhaps local school districts and ISD's will consider a legal analysis of the constitutional implications outlined above and at such time as that analysis is complete, they may entertain a class action against the state, in much the way Durant occurred?

Applicable Portions of

Michigan Constitution of 1963

Article IX

Public pension plans and retirement systems, obligation.

Section 24. *The accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby.*

(Headlee)

Section 25 ... *The state is prohibited from requiring any new or expanded activities by local governments without full state financing, from reducing the proportion of state spending in the form of aid to local governments, or from shifting the tax burden to local government.*

Section 29 ... *The state is hereby prohibited from reducing the state financed proportion of the necessary costs of any existing activity or service required of the units of Local Government by state law.*

A new activity or service or an increase in the level of any activity or service beyond that required by existing law shall not be required by the legislature or any state agency of units of Local Government, unless a state appropriation is made and disbursed to pay the unit of Local Government for any necessary increased costs. The provision of this section shall not apply to costs incurred pursuant to Article VI, Section 18 (salaries of county probate or district judges).

Suit to enforce sections 25 to 31.

Section 32. *Any taxpayer of the state shall have standing to bring suit in the Michigan State Court of Appeals to enforce the provisions of Sections 25 through 341, inclusive, of this Article and, if the suit is sustained, shall receive from the applicable unit of government his costs incurred in maintaining such a suit.*

Definitions applicable to Sections 25 to 31.

Section 33. ... *"Local Government" means any political subdivision of the state, including, but not restricted to, school districts, cities, villages...*