

IN THE COMMON PLEAS COURT, PERRY COUNTY, OHIO

DALE R. DeROLPH, *et al.*, :
 : **Judge Linton D. Lewis, Jr.**
Plaintiffs, :
 :
v. : **Original Case No. 22043**
 :
 : **Ohio Supreme Court**
STATE OF OHIO, *et al.*, : **Case No. 99-570**
 :
Defendants. :

PLAINTIFFS' MOTION FOR COMPLIANCE CONFERENCE

Pursuant to this Court's 1999 Order requiring Defendants to forthwith prepare a report setting forth proposals for complying with the Court's judgment therein, and pursuant to the directives and mandate of the Ohio Supreme Court, Plaintiffs hereby move this Court to schedule and conduct a conference to address Defendants' compliance with the orders of this Court and the Ohio Supreme Court. The reasons for this Motion are set forth in the attached Memorandum in Support.

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MEMORANDUM IN SUPPORT

Introduction

“No man is above the law and no man below it: nor do we ask any man’s permission when we ask him to obey it.”

— Theodore Roosevelt

Before the bench, all parties stand as equals. The State of Ohio is subject to the law no less than the most common of our citizens. Today, Plaintiffs and the 1.8 million Ohio schoolchildren affected by the rulings in this case ask the Court to begin the process of overseeing the development of the school funding system to which they are entitled under the law.

In response to the State's Motion for Reconsideration of *DeRolph v. State* (2001), 93 Ohio St.3d 309, 754 N.E.2d 1184 ("*DeRolph III*"), the Supreme Court issued a decision on December 11, 2002, vacating its prior holding in *DeRolph III* and reinstating as the law of the case its prior decisions in *DeRolph v. State* (1997), 78 Ohio St.3d 193, 677 N.E.2d 733 ("*DeRolph I*") and *DeRolph v. State* (2000), 89 Ohio St.3d 1, 728 N.E.2d 993 ("*DeRolph II*"). *DeRolph v. State* (2002), 97 Ohio St.3d 434, 2002-Ohio-6750 ("*DeRolph IV*"). The Supreme Court's ruling established beyond question that "[D]eRolph I and DeRolph II are the law of the case and the current school funding system is unconstitutional." *Id.* at 435.

In reaching that decision, the Court recognized the intent of the framers to impose binding obligations on the General Assembly.

Otway Curry, a delegate from Union County, expressed his concern that the Thorough and Efficient Clause would "prove totally insufficient and powerless." *Were this court to avoid its*

responsibility to give continued meaning to the Constitution, his fears would become reality.

The Constitution of this state is the bedrock of our society. It expressly directs the General Assembly to secure a thorough and efficient system of common schools, and it does so expressly because the legislature of the mid-nineteenth century would not.

Id. at 436 (Internal citation omitted). (Emphasis added.) The Court specifically directed the result that must now be attained.

[T]he General Assembly has not focused on the core constitutional directive of *DeRolph I*: "a complete systematic overhaul" of the school-funding system. Today we reiterate that that is what is needed, not further nibbling at the edges. Accordingly, we direct the General Assembly to enact a school-funding system that is thorough and efficient, as explained in *DeRolph I*, *DeRolph II*, and the accompanying concurrences.

Id. at 435 (Internal citation omitted).

The Supreme Court did not retain jurisdiction of the case nor did it issue specific orders for further proceedings. The Court did, however, direct this Court, by judgment entry and mandate, both issued on December 11, 2002, to "proceed without delay to carry [the Supreme Court's] judgment in this cause into execution." *DeRolph v. State* (December 11, 2002), Case No. 99-570 (mandate of the Ohio Supreme Court, *DeRolph v. State*, 97 Ohio St.3d 434). (*Exhibits A and B*, attached.) Plaintiffs now move this Court to schedule and conduct a compliance conference to consider the State's plan for compliance with the orders of the Supreme Court, as well as with the remedial orders previously issued by this Court and stayed during the pendency of the appeal to the Supreme Court.

Because Plaintiffs' Amended Complaint in this case set forth valid claims for both a declaratory judgment *and* injunctive relief pursuant to that declaration, this Court has always had jurisdiction to address the latter, except during the pendency of the appeal. *DeRolph v. Ohio*, Case No. 22043 (First Amended Complaint for Declaratory and Injunctive Relief). (*Exhibit C*, attached.) With the declaratory judgment portion of this case conclusively ended by *DeRolph IV*, it is now time for this Court to proceed to secure the implementation of a remedy. The Court has both the right and responsibility to do so.

In this Court's initial *DeRolph* decision, issued July 1, 1994, and in its decision of February 26, 1999, the Court recognized the necessity for remedial orders and issued orders appropriate to the unique nature of this case. *DeRolph v. Ohio* (July 1, 1994), Perry C.P. No. 22043, unreported; *DeRolph v. State* (1999), 98 Ohio Misc. 2d 1, 712 N.E.2d 125. In the latter decision, after ruling that the State had failed to comply with the Supreme Court's *DeRolph I* mandates, the Court issued the following direction to Defendants:

It is this Court's desire to retain jurisdiction for a period of time to assure that this Order is followed and steps are being taken to resolve the matters involved in the case at bar. Therefore, the Superintendent of Public Instruction for the State of Ohio and the State Board of Education are required to forthwith prepare a report setting forth proposals for complying with the Order of this Court and the directives of the Ohio Supreme Court. The same shall be presented to the Legislature upon completion. Thereafter, the State Superintendent and the State Board of Education shall forthwith prepare a report after the legislative session for calendar year 1999 setting forth the steps taken to resolve the issues in the case at bar.

DeRolph v. State, 98 Ohio Misc.2d at 263. The Court's orders (hereafter, the "1999 orders") were clearly designed to require the State to begin the development of a constitutional funding system while not unduly encroaching upon the legislative process necessary to enact that system. The Court expressly retained jurisdiction to assure compliance with its 1999 orders, and it indicated that it would monitor the State's progress, "[u]pon a timely motion by either party or by a motion of this Court." *Id.* at 252.

The Court's 1999 orders were stayed pending the State's appeal to the Supreme Court. (*Exhibit D*, attached.) That stay expired on December 11, 2002, when the Supreme Court issued its *DeRolph IV* decision, a decision which confirmed this Court's declaration that the school funding system is unconstitutional. The Supreme Court has now relinquished its jurisdiction over this case. Consequently, jurisdiction has re-vested in this Court for remedial actions consistent with the decisions of the Supreme Court. The fact that no specific directions were given to this Court by the Supreme Court (other than the mandate to carry the Supreme Court's judgment into effect) is consistent with common law and statutory authority which require no such direction to enable trial courts to carry into execution the judgments of appellate courts.

This Court's 1999 remedial orders represent a reasonable approach to the difficult issue of judicial oversight of the legislative process. While Plaintiffs are not asking the Court to dictate the content of remedial legislation, the Court also cannot permit the continued denial of Plaintiffs' right to a constitutionally compliant

system of public education. Judicial monitoring and oversight are essential if such a system is to be developed in Ohio. Indeed, it is more critical today than it was in 1999 that the Court fulfill this role, since without oversight by this Court, it is apparent that Plaintiffs will continue to be denied their constitutional right to a thorough and efficient system of public education.¹

I. This Court Has Continuing Jurisdiction To Enforce The Supreme Court's *DeRolph IV* Decision.

This Court derives its authority from the Ohio Constitution and laws enacted in furtherance of the constitutional grant of judicial power. In particular, Section 4 of Article IV includes the grant of original jurisdiction to common pleas courts over "[a]ll justiciable matters *** as may be provided by law."

This case was initially brought as an action for both declaratory and injunctive relief pursuant to R.C. Chapter 2721. The law is well established that a common pleas court may not only declare the rights of the parties in a declaratory judgment action brought under R.C. Chapter 2721, but it also may order injunctive relief consistent with the rights so declared. Although R.C. 2721.09 authorizes the filing of additional pleadings seeking further relief following a judicial declaration of rights, additional pleadings are not required where, as in this case, the initial complaint included claims for injunctive relief. *Peltz v. City of South Euclid* (1967),

¹ Public pronouncements of Defendants and Governor Taft since the Supreme Court's *DeRolph IV* decision make it clear that Defendants mistakenly believe that because the Supreme Court did not retain jurisdiction of this case, they are under no obligation to take any action to comply with *DeRolph IV*. But it is fundamental that orders of the Supreme Court directed to the Defendants are binding on them and, as demonstrated herein, are enforceable in this Court. Additional direction from the Supreme Court to this Court was unnecessary.

11 Ohio St.2d 128, 40 O.O.2d 129, 228 N.E.2d 320 (permanently enjoining the enforcement of an ordinance "to the extent of its constitutional infirmity"); *American Life & Acc. Ins. Co. of Ky. v. Jones* (1949), 152 Ohio St. 287, 40 O.O. 326, 89 N.E.2d 301 (interpreting G.C. 12102-8, predecessor to R.C. 2721.09, as providing authority to grant any further necessary or proper relief following an entry of declaratory judgment); *Clermont County ADAMH Boards v. Hogan et al.* (1995), 1995 Ohio App. LEXIS 4795, *aff'd in part, rev'd in part* on other grounds, (1997), 79 Ohio St.3d 358, 1997 Ohio 31, 681 N.E.2d 1322, citing *Central Motors Corp. v. Pepper Pike* (1979), 63 Ohio App.2d 34, 62, 409 N.E.2d 258 ("[a] trial court has continuing authority under R.C.2721.09 and its general equity powers to fashion any remedy necessary to assure the enforcement of its decree"). Accord *McCann v. Kerner et al.* (C.A.7, 1971), 436 F.2d 1342 ("[Section 2202, Title 28, U.S. Code, the federal analog to R.C. 2721.09] contemplates that subsequent to the issuance of a declaratory judgment [holding a state statute unconstitutional], a court may upon notice and hearing grant injunctive relief to protect and enforce its judgment"); *Vermont Structural Slate Co. v. Tatko Bros. Slate Co.* (C.A.2, 1958), 253 F.2d 29 ("[t]here was ample residual power in the court to issue this permanent injunction [under Section 2202, Title 28, U.S. Code], even though the original decree contained no such provision"). Thus, it is within the general equity powers of this Court to fashion any remedial orders necessary to the enforcement of its decree.

This Court's 1999 orders were remedial in nature and issued pursuant to the Court's declaration that Ohio's school funding system was unconstitutional, a

declaration consistent with the Ohio Supreme Court's *DeRolph I* decision and since confirmed by the subsequent decisions of that court.² Had there been no appeal of the 1999 decision and orders, there would be no question that the Court not only had jurisdiction to enforce those orders, but also that the Court expressly retained that jurisdiction for the purpose of enforcement. See *Horn & Hardart Co. v. National RR. Passenger Corp.* (D.C. 1987), 659 F.Supp. 1258, *aff'd*, (C.A.D.C. 1988), 843 F.2d 546 (“it would be incongruous for district courts to have the absolute right to hear petitions for further relief when no appeal is lodged but no right after an appeal unless expressly granted by an appellate court”).

The intervening appeal to the Ohio Supreme Court stayed, but did not diminish in any way, this Court's inherent authority to enforce the remedial 1999 orders. To the contrary, the intervening decisions of the Supreme Court in *DeRolph II* and *DeRolph IV* have clearly established, as the law of this case, the unconstitutionality of Ohio's school funding system and the requirement of comprehensive reform. The declaratory judgment portion of this case is now concluded, but this Court remains vested with the authority to enforce the development and implementation of a remedy.

II. The Supreme Court's Mandate In *DeRolph IV* Must Be Enforced By This Court.

Separate and apart from the foregoing grounds for monitoring compliance, this Court is obliged to comply with the Supreme Court's mandate to "proceed

² Of course, the passage of time has made the compliance dates obsolete and an updated compliance schedule is now appropriate.

without delay to carry [the Supreme Court's] judgment in this cause into execution." *DeRolph v. State*, Case No. 99-570 (mandate of the Ohio Supreme Court). (*Exhibit A*.) The Supreme Court's mandate provides independent authority for the Court's monitoring and oversight of the State's progress in remedying that which has been declared unconstitutional. See *International Union of Operating Engineers, Local 18 v. Dan Wannemacher Masonry Co.* (1990), 67 Ohio App.3d 672, 675, 588 N.E.2d 176, 178, citing 5B Corpus Juris Secundum (1958) 529, Appeal and Error, Section 1958 ("The mandate of the appellate court is the order directing the action to be taken or disposition to be made of the cause by the lower court, returning the proceedings to the lower court, *and reinvesting it with jurisdiction thereof*"). (Emphasis added.)

The Ohio Revised Code broadly empowers the Supreme Court to send its judgments to the court below "for specific or general execution, or to the inferior courts for further proceedings." R.C. 2503.44. Moreover, R.C. 2505.39 provides as follows:

A court that reverses or affirms a final order, judgment, or decree of a lower court upon appeal on questions of law, shall not issue execution, but shall send a special mandate to the lower court for execution or further proceedings. *The court to which such mandate is sent shall proceed as if the final order, judgment, or decree had been rendered in it.*

R.C. 2505.39. (Emphasis added.)

Accordingly, the Court must proceed as if the judgment in *DeRolph IV* had been rendered in this Court. See *Cleveland Elec. Illuminating Co. v. Public Util. Comm. of Ohio* (1976), 46 Ohio St.2d 105, 110, 346 N.E.2d 778, 782, citing *Carey v.*

Kemper (1887), 45 Ohio St. 93, 11 N.E. 130 ("The judgment is given legal effect when it is executed by the lower tribunal, and the judgment as rendered is that of the tribunal to which the cause had been remanded").³ See, also, *Hunt v. Westlake City School Dist. Bd. of Edn.* (1996), 114 Ohio App.3d 563, 568, 683 N.E.2d 803, 807 (holding that a special mandate to the court of common pleas to carry a judgment into execution affords jurisdiction to enforce the judgment of the appellate court). The judgment that has been entered herein is that Ohio's system of school funding is unconstitutional, and the Court thus has the authority to require that appropriate plans are in place to accomplish the "complete systematic overhaul" required by *DeRolph I*, *DeRolph II*, and *DeRolph IV*. *DeRolph v. State*, 97 Ohio St.3d at 435.

The Court not only has the authority – that is, jurisdiction – to enforce a remedy; it also has a *duty* to do so. When a mandate from a superior court to an inferior court is presented, the inferior court has no discretion to obey or refuse, but must proceed in accordance with the mandate. *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 462 N.E.2d 410. See, also, *State ex rel. Potain v. Mathews* (1979), 59 Ohio St.2d 29, 32, 13 O.O.3d 17, 391 N.E.2d 343, 345 ("A lower court has no discretion,

³ The absence of the term "remand" in *DeRolph IV* has no bearing on this Court's authority to enforce the judgment. In *DeRolph I*, the Supreme Court used the term in connection with its establishment of a unique protocol, involving a stay of the Supreme Court's judgment, a further hearing on the merits in this Court, and a subsequent direct appeal to the Supreme Court. By comparison, at this juncture, no special instructions from the Supreme Court are necessary or appropriate. The unconstitutionality of the school funding system has been conclusively determined by the Supreme Court, no stay was issued, and the judgment is presently effective and enforceable. The Mandate expressly directs this Court to execute that judgment, and the Court now has the duty to use its inherent enforcement authority to do so.

absent extraordinary circumstances, to disregard the mandate of a superior court in a prior appeal in the same case"); Ohio Jurisprudence 3d (1979, Supp.2002), Appellate Review, Section 616. Consequently, this Court has no discretion but to "proceed without delay" to carry the Supreme Court's judgment into execution. *DeRolph v. State*, Case No. 99-570 (mandate of the Ohio Supreme Court). (*Exhibit A.*)

This Court's inherent authority to enforce a remedy thus derives additional vitality from the Supreme Court's mandate, which expressly requires the Court to carry the judgment into execution. As the judgment itself declares the current school funding system unconstitutional, the mandate necessarily embraces the authority of this Court to oversee the State's progress toward remedying the underlying constitutional infirmities. See *International Union of Operating Engineers, Local 18 v. Dan Wannemacher Masonry Co.* (1990), 67 Ohio App.3d 672, 675 ("We agree that the trial court may not alter or disobey the mandate from an appellate court. We do not agree that the trial court may not take additional action in the case not specifically authorized by the mandate").

As the Supreme Court made clear in *DeRolph IV*, "the General Assembly has not focused on the core constitutional directive of *DeRolph I*: 'a complete systematic overhaul' of the school funding system." *DeRolph v. State*, 97 Ohio St.3d at 435, citing *DeRolph v. State*, 78 Ohio St.3d at 212. It is therefore both necessary and appropriate at this time for the Court to exercise its jurisdiction to require the State

to articulate its plan of action for remedying what the Supreme Court has deemed – in no uncertain terms – to be an unconstitutional system of school funding.

III. Without The Oversight Of This Court, Plaintiffs Will Be Denied a Remedy.

Throughout the twelve-year history of this case, the State has steadfastly refused meaningful steps toward compliance with the directives of the courts. Since July 1, 1994, there have been *two* decisions of this Court and *four* decisions of the Ohio Supreme Court, all holding that Ohio does not have a constitutional school funding system. Most recently, the Supreme Court in *DeRolph IV* ruled unequivocally that the current funding system "*is unconstitutional.*" *DeRolph v. State*, 97 Ohio St.3d at 435.

It is a longstanding theorem of jurisprudence that "an unconstitutional act is not a law, but a nullity." *Thomas v. State ex rel. Gilbert* (1907), 76 Ohio St. 341, 361, 81 N.E. 437, 439. Accordingly, the former statutory framework for the distribution of state funds for public education *no longer exists*, having been declared unconstitutional, with finality, in *DeRolph IV*. In these circumstances, Plaintiffs not only continue to suffer under an indisputably unconstitutional system of public education, but they also now are at risk of not having *any* system of public education. Unlike the Supreme Court's previous declarations of unconstitutionality, this one contained *no stay of execution*, and, consistent with the absence of a stay, the mandate to this Court has directed the Court "to proceed without delay to carry the [Supreme Court's] judgment in this cause into execution." *DeRolph v. State*, Case No. 99-570 (mandate of the Ohio Supreme Court). (*Exhibit A.*)

The State's cavalier disregard of the Supreme Court's decisions – together with its seeming lack of concern for the impending collapse of the system of public education in Ohio – underscores the fact that, without judicial oversight, no remedy will be forthcoming in this case. Unbelievably, rather than commencing a good faith effort to comply with the orders of the Supreme Court, the State is now considering *cutting* the already-inadequate funds for education and seeking to balance the State's budget on the backs of its school districts.

This Motion does not ask the Court to intrude into the legislative process. But fundamental principles of jurisprudence establish both the right and the obligation of the judiciary to serve as the guardian of constitutional rights. As the Supreme Court has cautioned, judicial abdication in the face of legislative resistance would result in the judiciary becoming a "[w]illing participant in divesting the courts of judicial power and a conspirator in the abdication of fundamental individual rights and liberties contained in our Constitution." *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 501, 715 N.E.2d 1062, 1102. Moreover, as that court confirmed in *DeRolph II*, it is not sufficient for the judiciary merely to declare constitutional rights without also ensuring that remedial action ensues.

[W]hile it is for the General Assembly to legislate a remedy, courts *do* possess the authority to enforce their orders, since the power to declare a particular law or enactment unconstitutional must include the power to require a revision of that enactment, to ensure that it is then constitutional. If did not, then the power to find a particular act unconstitutional would be a nullity. As a result there would be no enforceable remedy. A remedy that is never enforced is truly not a remedy.

DeRolph v. State, 89 Ohio St.3d at 12. (Emphasis in original.)

In the present case, as the Supreme Court warned in *DeRolph II*, the now-final declaration of Plaintiffs' rights will be a nullity without orders reasonably designed to bring about enforcement of those rights. This Court has already issued such orders, recognizing judicial monitoring as essential to assure compliance. Today, all Plaintiffs ask is that the Court begin the monitoring process by convening a conference and requiring the State to advise the Court and Plaintiffs as to when and how it intends to comply with *DeRolph IV* and the 1999 orders of this Court. This is an exceedingly modest request, especially in light of the fulsome scope of the remedy to which Plaintiffs are entitled. And given the *absolute obligation* of the State to comply with the directives of the Supreme Court, it is a request that adds little, if anything, to the obligations already borne by the State. Otherwise stated, this is hardly a burdensome request; to the extent that the State intends in good faith to respond to *DeRolph IV*, there is no reason for the State to oppose it.

Should the Court decline, however, there is little doubt that the concerns of Delegate Curry – that the constitutional guarantee of a thorough and efficient system of public education could become "totally inefficient and powerless" – will be realized. *DeRolph v. State*, 97 Ohio St.3d at 436. Our Constitution will be rendered a meaningless historical document and our judicial system a mere "paper tiger." The twelve years spent litigating the rights of Ohio's school children will amount to little more than an academic exercise if, at the end, the State is free to disregard the consequent declarations of rights by the highest court of the state.

It now falls to this Court to determine whether the rule of law has meaning – for Plaintiffs and Ohio's 1.8 million public school pupils, as well as for future plaintiffs seeking declaratory judgments against the State. In the process, the Court will also signal whether those charged with making and enforcing the laws of Ohio must live within the constitution or are free to ignore it with impunity.

Conclusion

This matter is now before the Court pursuant to the Court's jurisdiction to enforce both its own prior Orders and those of the Supreme Court. Plaintiffs ask the Court to commence its exercise of its enforcement authority by scheduling a compliance conference at the earliest possible time, in order to ensure that the State initiates, without further delay, the process of formulating a school funding system that satisfies the mandates of the Supreme Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Plaintiffs' Motion For Compliance Conference has been sent by regular U.S. Mail, postage prepaid, on this ____ day of March, 2003, to Roger F. Carroll, Assistant Attorney General, Office of the Attorney General of the State of Ohio, 30 East Broad Street, 16th Floor, Columbus, Ohio 43215-3428.

Nicholas A. Pittner