

**IN THE SUPREME COURT OF OHIO**

<b>DALE R. DEROLPH, et al.,</b>	:	
	:	<b>Case No. 99-0570</b>
	:	
<b>Plaintiffs-Appellees,</b>	:	
	:	
<b>v.</b>	:	<b>Appeal from the Common Pleas</b>
	:	<b>Court of Perry County, Ohio,</b>
<b>STATE OF OHIO, et al.</b>	:	<b>Case No. 22043 as Remanded By</b>
	:	<b>The Ohio Supreme Court,</b>
	:	<b>Case No. 95-2066</b>
<b>Defendants-Appellants.</b>	:	

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**PLAINTIFFS-APPELLEES' MOTION FOR ORDER REQUIRING  
DEFENDANTS-APPELLANTS (1) TO PAY THE COSTS OF THE  
UNFUNDED MANDATES, AND (2) TO FILE A MASTER PLAN FOR  
ACHIEVING COMPLIANCE WITH THIS COURT'S ORDERS  
AND TO FILE SUBSEQUENT PROGRESS REPORTS**

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Counsel for Appellants

Now come the Plaintiffs-Appellees, Dale R. DeRolph, et al. ("Plaintiffs"), by and through counsel, and hereby move the Court to issue an order that requires the Defendants-Appellants (hereinafter "the State") (1) to pay the costs of the unfunded mandates imposed on school districts by Sub.H.B. No. 412 ("H.B. 412") and Am.Sub.S.B. No. 55 ("S.B. 55"), and (2) to file with this Court a master plan specifically indicating how the State will achieve compliance with the previous directives of this Court by the June 15, 2001, deadline, and to file with this Court (or with a special master appointed for the purpose) subsequent monthly progress reports concerning the same. The grounds upon which this Motion is based are set forth below.

### **INTRODUCTION**

On March 24, 1997, this Court declared that Ohio's school funding system failed to meet the mandates of the Ohio Constitution. The Court found that Ohio's school funding formula "caused or permitted to continue vast wealth-based disparities among Ohio's schools, depriving many of Ohio's public school students of high quality educational opportunities." *DeRolph v. State* (1997), 78 Ohio St.3d 193, 198, 677 N.E.2d 733 ("*DeRolph I*"). Concluding that "[t]he funding laws reviewed today are inherently incapable of achieving their constitutional purpose," the Court gave the State one year in which to accomplish a "complete systematic overhaul" of those laws. *Id.* at 212. The Court declared *all* vestiges of the State's school funding system

unconstitutional and ordered *all* of them eliminated. *Id.* at 276 (Moyer, C.J., dissenting).

Yet on May 11 of this year, reviewing the efforts of the State in the intervening three-plus years, the Court found that despite some alterations to the system by the General Assembly, "the current formula is almost identical to its predecessor." *DeRolph v. State* (2000), 89 Ohio St.3d 1, 17, 728 N.E.2d 993 ("*DeRolph II*"). The Court concluded that "what had been a problematical system \*\*\* has reached crisis proportions throughout the state \*\*\* escalated in part due to 'unfunded mandates.'" *Id.* at 8. The Court confirmed that it would not "retreat from our mandate in *DeRolph I*, requiring Ohio's public school financing scheme to undergo a 'complete systematic overhaul,'" *id.* at 17, and the Court expressly rejected any notion that it lacked the authority to compel a remedy for the constitutional wrongs it had declared.

[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 it 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.*

*Id.* at 12 (Emphasis added). Emphasizing the importance and the magnitude of the funding crisis plaguing Ohio's schools, the Court directed the legislature to give this matter its "undivided attention." *Id.* at 6. Among

other mandated reforms, the Court directed the legislature to fund *immediately* the unfunded mandates of H.B. 412 and S.B. 55. *Id.* at 37.

It has now been more than six months since this Court's clear directive that the General Assembly *immediately* pay the cost of the unfunded mandates of H.B. 412 and S.B. 55. Yet the State not only has failed to respond to this Court's mandate, but it also has refused even to respond to interrogatories from Plaintiffs asking when the State intends to fund those mandates. (See attached Exhibit A) Meanwhile, and notwithstanding the orders of this Court, virtually *nothing has changed* for the public school children of Ohio. Nearly a decade after this suit was commenced, many of the children of this state continue to be denied their constitutional entitlement, forced instead to endure an inadequate educational program in an unsafe school environment.

Plaintiffs approach the Court at this time with a sense of urgency. For the children now passing through Ohio's public schools, a remedy deferred is a remedy denied. This Court has twice declared the obligations of the State, and it is past time for the State to fulfill them. In particular, while the Court has afforded the State a limited amount of additional time in which to accomplish a comprehensive fix of the school funding system, the Court has been unmistakably clear in ordering that certain of the deficiencies – specifically, those related to H.B. 412 and S.B. 55 – be remedied *at once*. Because the State has failed to comply with this specific decree and has made

no significant progress toward the larger goal of a complete remedy, it is necessary and appropriate for the Court, which has retained continuing jurisdiction in this matter, to take further action now to compel compliance with its previous orders. Accordingly, Plaintiffs respectfully request that the Court order the State to take the following specific actions.

**I. The State Should Be Compelled To Comply With The May 11 Order Of This Court Requiring *Immediate* Funding Of The Unfunded Mandates Of H.B. 412 And S.B. 55.**

In its May 11 decision, the Court reviewed at length the unfunded mandates of H.B. 412 and S.B. 55, concluding that while accountability is important, "[w]hat is problematic, however, is a system that increases academic requirements and accountability, yet fails to provide adequate funding." *DeRolph II* at 33. The Court went on to note that "if a district does not have sufficient funds in its existing budget, then it may have to seek additional funds from other sources, such as passing additional levies or borrowing from lenders." *Id.* In concluding that the State must *immediately* fund the mandates of H.B. 412 and S.B. 55, the Court considered testimony that the General Assembly intended to fund the mandated expenditures of those laws with the proceeds of a sales tax increase; the sales tax increase failed, but the mandates were nonetheless imposed. *Id.* Thus, school districts already suffering under an unconstitutional school funding system were compelled by the State to allocate scarce funds to satisfy the mandated set-aside amounts and other requirements – without the benefit of additional

revenue to pay those costs. In view of these circumstances, the Court on May 11 issued a clear and explicit order to the State to pay "immediately" the cost of those mandates. The State has since defied that order.

**A. The State Should Be Ordered To Establish A Process By Which Districts Submit, And The State Pays, The Past And Present Costs Of Complying With The Unfunded Mandates.**

The fiscal impact of the unfunded mandates imposed by H.B. 412 and S.B. 55 varies by district and has not been comprehensively calculated by the State. The determination of the total fiscal impact of the mandates requires, for each district, consideration of three different components for each year during which the mandates have been in effect. First, the amounts required to be set aside for textbooks and instructional materials, and for capital and maintenance expenditures, are established by rule, and the amounts so determined constitute the costs incurred by districts on account of these particular set-asides.<sup>1</sup> Second, the actual cost of the budget reserve requirements of H.B. 412 must be calculated based upon the fiscal circumstances of each district. Third, the costs of implementing the

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<sup>1</sup> The methodology for calculating the set-asides for textbooks and instructional materials and for capital improvements is set forth in Ohio Adm.Code 117-6-03, 117-6-05, and 3301-92-01. The rules have required that set-aside amounts be calculated for the two set-aside funds as a percentage of a district's annual total qualifying revenue – 2% of such amount for each fund for the fiscal year ending June 30, 1999, and 3% of such amount for each fund for the fiscal years ending June 30, 2000 and thereafter.

additional programs mandated by S.B. 55 must likewise be calculated based upon the unique needs and circumstances of the district.<sup>2</sup>

While each of the foregoing amounts will differ from one school district to another, the amounts are readily capable of determination by the districts themselves. Plaintiffs therefore request that the State be ordered to establish, within thirty days, a process by which each Ohio public school district, having determined the total cost of the mandates for each year in which the mandates have been in effect, submits the whole of its costs for verification and payment in full by the State. In view of the State's unwillingness heretofore to comply with the Court's previous order regarding immediate funding of the unfunded mandates, Plaintiffs further suggest that a Special Master be appointed by the Court to oversee this process.

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<sup>2</sup> S.B. 55 required school districts to increase the number of high school credits required for graduation and mandated remediation and intervention services for students who do not pass the fourth-grade reading test. Some school districts may already have met the requirements of S.B. 55 and thus were not required to make any additional expenditures to satisfy the requirements of the legislation. Yet, as noted by the Court,

The Legislative Budget Office conducted a random survey of twenty school districts in an attempt to determine the potential impact of S.B. 55, and fourteen of the twenty districts indicated that they would incur additional expenses as a result of the bill. Additional costs may be incurred in establishing appropriate scientific laboratories and in hiring more teachers, especially those qualified to teach mathematics and science courses. The Department of Education estimates that the average cost for a biology laboratory is \$140,000. Districts may also face increased costs as a consequence of R.C. 3313.608(B) through (E), which require remediation and intervention services for those students who do not pass the fourth-grade reading test.

*DeRolph II* at 33.

Once such a process is established, every school district should be reimbursed for the full costs of the unfunded mandates without regard to the past fiscal practices of the district. That is, reimbursement should be provided even to those districts that were able to generate sufficient revenue to enable them to choose, even prior to the enactment of the mandates, to expend funds in a manner consonant with the subsequently-enacted mandates; reimbursement is properly due these districts for all mandated expenses incurred *after* the effective dates of the mandates because, once the mandates became law, the districts were deprived of the ability to exercise the local prerogative to make other expenditure choices. Moreover, as the State *never* provided any State money for the purposes of these mandates, any district which allocated funds for such purposes – whether before or after the enactments of H.B. 412 and S.B. 55 – necessarily did so primarily with locally-generated funds, a circumstance that contributed to the unconstitutionality of the State's system.

The continuing over-reliance of the school funding system on local property taxes causes almost all school districts to seek or need additional tax levies to meet necessary operating expenses, a situation exacerbated for all districts by the addition of the H.B. 412 and S.B. 55 mandates. Some districts have passed levies but still lack sufficient revenues, while other

districts have been unsuccessful in passing needed levies.<sup>3</sup> Still others view even asking for additional taxes as hopeless because property valuation and taxpayer income are so low that the exercise would be futile. But any district that has not yet resorted to additional levies will soon find it necessary to do so if the current system remains in place.

Once reimbursed for the past and present costs of the unfunded mandates, each school district could be required to apply these funds to, or preserve them for, the uses specified in H.B. 412 and S.B. 55. Such a limitation would ensure that the funds are in all cases used to address, on an ongoing basis, the areas of critical educational need identified as priorities by the legislature in H.B. 412 and S.B. 55.

Plaintiffs are cognizant of the fact that, in just the past several weeks, after having done nothing substantive since the May 11 decision of the Court, the General Assembly finally has "scrambled to enact" legislation which purports to respond to the Court's directives regarding the unfunded mandates. However, the legislation – Substitute Senate Bill 345 – does not satisfy the State's obligations regarding the unfunded mandates as enunciated by this Court, both because that bill has not yet become law and, more significantly, because the modifications to the unfunded mandates contained in the bill are not responsive to the May 11 order of the Court that the mandates be funded.

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<sup>3</sup> Since January 1, 1998, over 577 school district operating levies have been proposed to the voters of Ohio; 382 of these have passed.

Indeed, far from responding to the Court's order concerning the unfunded mandates, Sub. S.B. 345 is an undisguised effort to evade that order. To that end, the bill contains a legislative declaration that attempts to nullify the prior findings of this Court:

Section 5. Sections 3315.17 and 3315.18 of the Revised Code, which were enacted by Sub. H.B. 412 of the 122nd General Assembly, required school districts to set aside percentages of their general operating funds for textbooks and instructional materials and for capital and maintenance costs. Section 3313.603 of the Revised Code, enacted by Am. Sub. S.B. 55 of the 122nd General Assembly, increased from eighteen to twenty-one the minimum number of academic units required for students graduating from high school in this state after September 15, 2001. *The Ohio Supreme Court, in DeRolph v. State (2000), 89 Ohio St. 3d 1, concluded that all of these requirements impermissibly imposed unfunded mandates upon school districts.*

*The General Assembly finds that the costs of the set-aside requirements of sections 3315.17 and 3315.18 are not unfunded to the extent the required set-asides are percentages of the base cost formula amount.*

Sub. S.B. 345 (Emphasis added)<sup>4</sup> This bill thus appears to reflect an

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<sup>4</sup> The legislature thus professes to infer that, contrary to the conclusion of this Court, the base cost has always included sufficient funds for set-asides, *so long as the set-asides are calculated as a percentage of base costs*. But even were the legislature correct in this inference, which it is not, Sub. S.B. 345 does nothing to change the fact that, to date, the set-asides have been calculated *not* on the basis of base cost but on the basis of each district's *total revenues*. Thus, even by the legislature's own, flawed analysis, the set-asides have imposed significant unfunded mandates that will not be redressed by Sub. S.B. 345 – assuming it becomes law – as there is still no funding for the mandates. It is also worth noting that Sub. S.B. 345 will more heavily burden poor districts, since the bill has the effect of requiring them to set-aside larger amounts. This is because the set-asides required by Sub. S.B.

extraordinary belief on the part of the drafters that the legislature can simply declare – and then operate pursuant to – a legislative finding that is directly contrary to a previously-declared judicial finding. This approach to the unconstitutionality of the school funding system is not new; it is reminiscent, for example, of the legislature's attempt to respond to the already-declared unconstitutionality of school district borrowing by renaming loans as "advancements" – ergo, no more borrowing problem. Were such tactics valid, no legislative body could ever be held accountable to the constitution by any judicial authority. This Court has already firmly rejected the notion that it lacks either the ability to adjudicate liability or the authority to require a remedy in the instant matter. *DeRolph II* at 12.

Beyond being a contemptuous affront to the Court, the legislature's attempt to characterize its funding level as adequate to cover the costs of the new mandates is no more persuasive than was its earlier attempt to legislatively declare adequacy – a declaration flatly rejected by this Court in *DeRolph II*. The current effort to characterize the mandates as already-funded is simply implausible, premised as it is upon the methodology used first by Dr. Augenblick and then by the legislature to establish what has since been determined to be an unconstitutional level of school funding.<sup>5</sup>

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345 are calculated as a percentage of State foundation funds, and a greater portion of poorer districts' budgets are derived from foundation funds.

<sup>5</sup> Section 5 of Sub. S.B. 345 provides, in part, as follows:

Significantly, the set-asides created by H.B. 412 and S.B. 55 did not apply to the FY 96 data examined by Dr. Augenblick as the basis for his recommendations, and Dr. Augenblick never factored these new costs into his recommended "base cost" – a funding level that was further reduced by the legislature. (Augenblick Tr. 958), *DeRolph v. State* (1999), 98 Ohio Misc.2d 1, 104, 113-116, 118, 712 N.E.2d 125.

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The General Assembly has reanalyzed fiscal year 1996 fiscal data of the one hundred three model effective school districts, described in section 3317.012 of the Revised Code, which served as the basis for the fiscal policies contained in Am. Sub. H.B. 650. This analysis is based on testimony and evidence presented in 2000 before the Joint Committee to Examine the Base Cost of an Adequate Education, which clearly demonstrated that in fiscal year 1996, the model school districts spent at least the percentages prescribed in sections 3315.17 and 3315.18 of the Revised Code for textbooks and instructional materials and capital and maintenance costs as those percentages were adjusted by the auditor of state under those sections. The base cost formula amount enacted in Am. Sub. H.B. 650 was derived from these districts' costs, which include their expenditures for textbooks and instructional materials and capital and maintenance costs. The base cost formula amount therefore includes an amount adequate for school districts to meet the requirements of sections 3315.17 and 3315.18 provided that the required set-asides are percentages of the base cost amount and not of school district total revenues. Accordingly, this act amends the set-aside requirements to reflect this finding.

But see *DeRolph v. State* (1999), 98 Ohio Misc.2d 1, 249, 712 N.E.2d 125 ("the funding methodology enacted in H.B. 650 itself is fraught with a stunning array of problems including (1) that it is based on the cost levels of an already unconstitutional funding system, (2) that it is based on one year's data even though the performance of students in that data is achieved through many years of expenditures, (3) that it is based on 1996 per pupil costs and completely ignores the new costs mandated under H.B. 412 and S.B. 55, (4) that it is unsupported by any studies or analysis which demonstrate reliability or predictability of the methodology, and (5) that the methodology was modified to achieve a lower base cost number over the objections of Dr. Goff and by decision of individual legislators, none of whom presented evidence of expertise.").

More fundamentally, however, Dr. Augenblick's entire methodology was thoroughly discredited at the remedy hearing in this matter. *DeRolph v. State* (1999), 98 Ohio Misc.2d 1, 91-104, 712 N.E.2d 125.<sup>6</sup> Plaintiffs have previously summarized to this Court the pervasive and legally fatal flaws in the unscientific approach utilized by Dr. Augenblick as follows:

As described by Dr. Augenblick, his methodology had few fixed principles and was susceptible to infinite manipulations that produced an unlimited range of base costs, all of which he considered rational. [(See Augenblick Tr. 738-739, 740, 749-750, 757-758, 767, 890, 924)] Dr. Augenblick conceded that his "inferential approach" merely described what exists; it is used "by people who do not want to deal with questions of what ought to be." (Augenblick Tr. 818) Dr. Augenblick's Ohio methodology had never before been used to determine school funding levels in any state. (Dec. 105)

Brief of Plaintiffs/Appellees, Filed September 1, 1999, at 5.

Though nominally an "expert," Dr. Augenblick testified that he knew little about Ohio's schools (Augenblick Tr. 719, 812, 854-58, 865-68, 877-78, 936-37, 948); that he relied largely upon others to provide the data, make the decisions, and perform the technical analyses (which he did not verify and about which he remained uninformed) that resulted in the formula he

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<sup>6</sup> In its findings of fact, the trial court recited the litany of "Problems & Defects in Augenblick's Methodology" in over a dozen pages of text organized under the following subheadings: "General Deficiencies in Dr. Augenblick's Approach," "Problems with Base Cost 18 Criteria," "Undue Reliance Upon Proficiency Tests," "Overemphasis on Graduate or Dropout Rates," "Arbitrarily Screening Out Districts Due to Wealth," "Disregard for a District's Per Pupil Expenditures and Programming, as Well as Student's Demographics and Socioeconomic Status," "Cannot Premise the Cost of Education on a Single Year's Data," "Adjustments Are Unrelated to Costs," "Deficiencies in Determining Funding and Weights for Special Education," and "Recommendation for DPIA is Flawed." *DeRolph v. State* (1999), 98 Ohio Misc.2d at 113-116. That court was persuaded that, "Dr. Augenblick's recommendations cannot be relied upon with any assurance that they will provide adequate funding for Ohio's public schools." *Id.* at 102.

recommended (*id.* 841, 887-96, 905-11); that he chose "eyeballing" a graph over more sophisticated and statistically-complex analyses as the basis for decisions affecting Ohio's 1.8 million school children (*id.* 737-39, 852-58); that he neither determined nor knew how to determine whether particular districts spend more or less than necessary to provide an adequate education (*id.* 852); and that he neither knew nor cared to know the results that would flow from the funding model he recommended (*id.* 719, 852, 878-81, 927-32, 957-58). Faced with only one of these failings – the absence of rationale – the New Jersey supreme court rejected what it disparagingly termed "putative" expert opinion. *Abbott v. Burke* (1997), 149 N.J. 145, 185, 693 A.2d 417, 437.

*Id.* at fn. 9.

When Dr. Augenblick's methodology was exposed to the light of professional review, it was revealed as nothing more than "junk science." (Dec. 87) The trial court characterized the modified version of Dr. Augenblick's methodology enacted by the legislature in H.B. 650, as "fraught with a stunning array of problems." (Dec. 224) Commenting upon Dr. Augenblick's testimony, the trial court concluded that if "rational means anything, then rational means nothing." (Dec. 223-224)

*Id.* at 6. In the wake of such testimony and the repeated declarations of unconstitutionality by the trial court and this Court, *it should be absolutely clear to the legislature that there is no further legitimate role in Ohio for the methodology espoused by Dr. Augenblick* – whether in connection with the unfunded mandates or any other aspect of the school funding remedy.<sup>7</sup>

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<sup>7</sup> Studies conducted since this Court's May 11 decision provide further confirmation of just how far Dr. Augenblick was from a determination of actual costs. Rather than increasing funding for special education, it is now evident that H.B. 650 (founded upon Dr. Augenblick's base costs and the special education weights added thereto) actually *reduced* such funding by at least \$20 million. R. Gregory Browning, *Special Education Finance in Ohio: Analysis and Recommendations*, Ohio Coalition for the Education of Children With Disabilities, November, 2000, at 3. Compare Brief of State Appellants,

In short, the legislature cannot solve the unconstitutionality of the unfunded mandates by the simple expedient of declaring the problem solved – again with no new money. Analyzed pursuant to *DeRolph II*, there can be no question but that school districts throughout Ohio will continue to be saddled with unfunded mandates under Sub. S.B. 345 (even if at a lesser rate than previously)<sup>8</sup>; the bill does absolutely nothing to compensate districts for costs incurred in past or in future years as a result of those mandates. This legislation clearly is not responsive to the Court's requirement that the State immediately fund the mandates of H.B. 412 and S.B. 55 – and there is no other response on the horizon.

**B. The State Cannot Evade Its Constitutional Duty By Claiming Poverty.**

The State's duties with respect to educational funding are established by the constitution, as construed by this Court. These duties are not limited by the amount of funds already appropriated for educational purposes by the State, and the State cannot evade its constitutional duty by alleging fiscal constraints. The Ohio Constitution does not direct the General Assembly to provide for a thorough and efficient system of common schools "unless the General Assembly thinks the cost is too high," or "unless the General

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filed in the Ohio Supreme Court August 2, 1999, at 17 ("The new law added an additional \$125 million in State [special education] funding in the first year alone").

<sup>8</sup> Many districts will have the same set aside requirements under Sub. S.B. 345 as under H.B. 412. See, Sub. S.B. 345 at 5, Sec. 3315.19 (allowing districts to elect to maintain the set asides as required under prior law).

Assembly decides to spend the money on something else," or "unless the General Assembly prefers, for political purposes, to return the money to the taxpayers."

Since this Court's first directive to the State to undertake a "complete systematic overhaul" of school funding, the State has returned to taxpayers, in the form of State income tax reductions, "unneeded" funds in the amount of approximately \$1.812 billion. Currently, the State maintains a "rainy day" fund with approximately \$1 billion.<sup>9</sup> As the amount of that rainy day fund increases, additional tax reductions will take place by operation of law. Given these circumstances, any claim of poverty by the State must be rejected out-of-hand. The State clearly has – or is capable of generating – the funds necessary for it to comply with its constitutional obligations, and it is past time for the State to do so.

**II. The State Should Be Compelled To Submit To The Court A Master Plan Indicating How The State Will Achieve Compliance With The Directives Of The Court By June 15, 2001, And To Submit Subsequent Monthly Progress Reports.**

In 1997, in *DeRolph I*, this Court found that the State's system for funding public schools "fell well short" of the requirements of the Ohio Constitution. *DeRolph II* at 4. More than three years later, in May of this year, the Court determined that the State had failed in virtually every respect to comply with *DeRolph I*, instead enacting a funding formula "almost identical" to its unconstitutional predecessor. *Id.* at 17.

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<sup>9</sup> Technically titled the "budget stabilization fund." R.C. 131.44.

Among other failings, the Court found in *DeRolph II* that the State had retained one of the critical structural flaws of the system previously declared to be unconstitutional – the primary reliance upon locally-generated property taxes. "[O]verreliance on local property taxes was one of the factors that rendered the school-funding scheme deficient, yet this aspect of the former system persists in the state's current funding plan, *wholly unchanged*." *Id.* at 26 (Emphasis *sic*).<sup>10</sup> The Court expressed continuing concern for the condition of school facilities as well as for the requirement that districts pass new levies as a condition of receiving State funds to remediate aging and dilapidated school buildings. *Id.* at 22-23. The Court also expressed concerns regarding the exacerbated effects of phantom revenue and the State's continued reliance on borrowing as a method of school finance. *Id.* at 24-26,

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<sup>10</sup> See, also, *DeRolph II* at 28 (Emphasis added):

The state's failure to specifically address the school-funding system's overreliance on local property taxes is of paramount concern as we evaluate the state's attempts to craft a thorough and efficient system of funding. The state's argument that it can minimize this problem by addressing the other aspects identified in *DeRolph I* as contributing to the unworkability of the system in place at that time, see 78 Ohio St.3d at 212, 677 N.E.2d at 747, is unconvincing. We see no indication that anything significant has been done to remove this primary impediment, which was the major factor in the previous funding system found unconstitutional in *DeRolph I*. No further effort at specifically addressing this overreliance on property taxes has been made since the voters of the state rejected the one-cent sales tax increase on the May 5, 1998 ballot. *The problem of overreliance on local property taxes must be independently addressed, and all potential solutions to this problem must be explored. The inequities inherent in a system that relies too heavily on local property taxes will remain until this problem is resolved by the General Assembly.*

28-31. In short, while the Court gave due regard for the *efforts* of the State, the Court found those efforts inadequate in every regard.

Once again, the Court granted the State additional time, until June 15, 2001, to remedy the defective system. *Yet today, with more than half of the additional time elapsed, there is no remedy nor is there any evidence of a plan to achieve a remedy by the second deadline.* As a result, many of Ohio's nearly 1.8 million public school children continue to suffer the harms inflicted by the State's unconstitutional school system, with no relief in sight.

As this Court has recognized, a right without a remedy is no right at all. The passage of time since this Court first declared the rights of the school children in this case serves only to perpetuate and compound the harms inflicted upon them by the State. The State's lack of response to *DeRolph I*, its lack of response to the *DeRolph II* order to immediately fund the mandates, and its continued lack of progress toward an ultimate comprehensive remedy, all indicate that additional, firm direction from the Court is necessary in order for school funding reform to become a reality by June 15, 2001. For this reason, Plaintiffs request that the State be required to submit to this Court, within thirty days, a master plan detailing a process and timetable by which the State will accomplish *in toto* the reforms that will yield a thorough and efficient system of school funding throughout all parts of Ohio and for every public school student in the state. Plaintiffs further request that the State be required to provide monthly progress reports to the

Court directly, or to a Special Master appointed by the Court for this purpose, and to the Plaintiffs. The critical elements of the plan, and of the ultimate remedy, are described below.

**A. Standardized Opportunities: The State must establish statewide standards of educational opportunity and identify the component resources necessary to enable every student to participate successfully in such opportunities.**

This Court has expressed the need to "ensure that educational opportunities are available to all children in this great state, not just those residing in affluent suburbs or in well-to-do neighborhoods." *DeRolph II* at 11. The challenge now before the State is captured in the mission statement of its Board of Education, from which the Court quoted in 1997:

"The mission of education is to prepare students of all ages to meet, to the best of their abilities, the academic, social, civic, and employment needs of the twenty-first century, by providing high-quality programs that emphasize the lifelong skills necessary to continue learning, communicate clearly, solve problems, use information and technology effectively, and enjoy productive employment."

*DeRolph I* at 197.

Ohio's lack of clearly defined educational opportunity standards is one of the hallmarks of the current inadequate system. The State must include in its plan provisions to ensure that, at the end, "each and every school district in the state has an ample number of teachers, sound buildings that are in compliance with state building and fire codes, and equipment sufficient

for all students to be afforded an educational opportunity." *DeRolph II*, paragraph three of the syllabus.

Rather than employing the "junk science" of Dr. Augenblick's 1997 methodology to legitimize a predetermined funding level which has no relationship to educational needs or resources – a strategy that will inevitably produce further litigation – the State should now be urgently marshaling the best talents available locally and throughout the nation to identify the educational opportunities that must be available to *all* public school children throughout Ohio. A description of the standardized opportunities to which all such students are entitled is the logical first step in the State's construction of a true remedy.

But global descriptions of standardized opportunities are only a beginning. Opportunity standards alone, without the resources to translate them into educational reality for Ohio's pupils, are meaningless. Unless the State undertakes further analysis to determine the resource components necessary to deliver the opportunities – and then calculates and funds the costs of those components – a description of opportunities will remain aspirational only.

It is absolutely essential that the State comprehensively identify the *resources* that are needed to enable children with diverse needs and circumstances to meaningfully partake of these educational opportunities

and emerge prepared to be "productive members of our society, with the skills and knowledge necessary to compete in the modern world." *DeRolph I* at 197.

This Court repeatedly has emphasized that it is the *State's* obligation to fund education and that education requires appropriate resources: teachers, buildings, equipment, and supplies. The Court further cited computers, computer labs, hands-on computer training and software, appropriate teacher-to-pupil ratios, and curricula with such things as foreign language courses, computer courses, music and art included at the elementary level, and honors programs and advanced placement courses at the secondary level. *DeRolph I* at 205, 208, 209, 210. The *Miller* test applied by this Court emphasized that the State must make these component resources available to the districts. Time and time again, this Court has directed the State that resources are the key. "A system without basic instructional materials and supplies can hardly constitute a thorough and efficient system of common schools throughout the state as mandated by our Constitution." *Id.* at 208. The State's continued refusal to cost out and fund these component resources defies this Court's decisions. <sup>11</sup>

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<sup>11</sup> The Court has specifically reiterated how the State has failed to provide adequate component resources:

In addition to deteriorating buildings and related conditions, it is clear from the record that many of the school districts through the state cannot provide the basic resources necessary to educate our youth. For instance, many of the appellant school districts have insufficient funds to purchase textbooks and must rely on old, outdated books. For some classes, there were no textbooks at all. \*\*\*

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The accessibility of everyday supplies is also a problem, forcing schools to ration such necessities as paper, chalk, art supplies, paper clips, and even toilet paper. A system without basic instruction materials and supplies can hardly constitute a thorough and efficient system of common schools throughout the state as mandated by our Constitution.

Additionally, many districts lack sufficient funds to comply with the state law requiring a district-wide average of no more than twenty-five students for each classroom teacher. Ohio Adm.Code 3301-35-03(A)(3). Indeed, some schools have more than thirty students per classroom teacher, with one school having as many as thirty-nine students in one sixth grade class. As the testimony of educators established, it is virtually impossible for students to receive an adequate education with a student-teacher ratio of this magnitude.

The curricula in the appellant school districts are severely limited compared to other school district and compared to what might be expected of a system designed to educate Ohio's youth and to prepare them for a bright and prosperous future. For example, elementary students at Dawson-Bryant have no opportunity to take foreign language courses, computer course, or music or art classes other than band. Junior high students in this district have no science lab. In addition, Dawson-Bryant offers no honors program and no advanced placement courses, which disqualifies some of the student form even being considered for a scholarship or admittance to some universities. Dawson-Bryant is not alone--similar problems were being experience by each of the appellant school districts.

*DeRolph I* at 208-09.

The absence of standards is particularly troublesome because virtually all participants in Ohio education reform activities agree that clear standards should be the basis for pre-service training for teachers, the curriculum, student assessments, classroom materials, and ongoing professional development.

*DeRolph II* at 34.

We are still a long way from the goal of providing sufficient computers to allow a high quality education in this computer age. Moreover,

In establishing standards of educational opportunity and identifying the resources needed to achieve those standards, the State must bear in mind the unique needs of Ohio's diverse school communities and individual students. Any remedy conceived by the State must provide for the additional needs of Ohio's special education pupils, vocational pupils, gifted pupils and pupils in conditions of poverty, and such remedy must fully provide for the costs of such essential educational resources as transportation and up-to-date technology. A system that does not fully provide for all of the foregoing cannot achieve the ultimate goal of a thorough and efficient system of schools.

**B. Funding: The State must provide sufficient funding to assure that every student has access to a high quality education.**

The absence of clear linkage between educational needs and fiscal resources is the essential flaw in the current system, and compliance with the Court's directives depends upon the creation of such a link. Absent such a link, any formula amount "will have no real relation to what it actually costs to educate a pupil," *DeRolph I* at 199. Thus, the logical second step is to develop a funding system designed to provide sufficient funds to ensure that necessary *resources* are available to provide every Ohio public school pupil

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there is no specific program in place to provide computers for students above the fifth-grade level.

*Id.* at 35.

with *meaningful access* to the standards-defined high quality educational opportunities.

This Court has twice struck down the current system and twice directed a "complete systematic overhaul" of school funding. Yet each of the structural defects condemned by the Court – over-reliance on property tax, phantom revenue, a structurally flawed basic aid formula, and insufficient funding to meet the facilities needs of many school districts – all remain in place today, unconstitutionally diminishing the educational resources and opportunities provided to public school children throughout Ohio.

To the extent that any new funding system created by the State continues to draw on the proceeds of real property taxes as a source of revenue for education, the system must also eliminate the systemic flaws that have now twice been identified by this Court. Over-reliance on property tax as a source of revenue, a flawed foundation formula, phantom revenue, lack of growth to meet rising expenses, and lack of funding for facilities needs are among the more significant aspects of the problem.

## **CONCLUSION**

The relief sought in this Motion will no doubt be challenged as an invitation to judicial legislation and criticized by some as a request for unwarranted intrusion into the province of the legislature. Those challenges and criticisms are not new to this case, which has spanned nearly an entire decade. But as Plaintiffs have stated before, we ask only that the Court do *its*

job. *DeRolph I* at 216 (Douglas, J. concurring). Having declared that constitutional harms are being inflicted on Ohio's school children, it is imperative that the Court take further steps to ensure that a remedy is attained and the Court's directives are followed rather than ignored. The extraordinary intransigence of the State in its refusal to obey this Court's directives warrants extraordinary diligence by the Court to ensure the vitality of the rule of law in Ohio.

Far from either legislation or unwarranted intrusion, we ask the Court today to issue an order that will compel the State to honor its obligation, already declared by this Court, to fund the mandates of H.B. 412 and S.B. 55. Plaintiffs' further requests regarding submission of a master plan and monthly progress reports are necessary to ensure that progress is made in a timely fashion.

The challenge to the State would have been substantial had the General Assembly begun its work on May 12, 2000, giving these matters the "undivided attention" ordered by the Court, *DeRolph II* at 6. Now, with little more than six months until the June 15, 2001 deadline, the State's task grows larger each day. Rather than an intrusion on the legislature, we ask only for orders that ensure that that body acts in a manner reasonably calculated to bring about timely compliance with this Court's orders.

If, contrary to Plaintiffs' impression, the State is well on its way to a remedy, submission of a master plan and periodic progress reports should be

no burden. If, on the other hand, the perceived lack of response is real, a master plan and subsequent progress reports are critically necessary.

Plaintiffs believe that the State has repeatedly demonstrated that the assistance of the Court, in the manner Plaintiffs today request, is needed if compliance with the Court's previous orders is to be attained by June 15, 2001. Accordingly, Plaintiffs respectfully request that the Court issue the order described herein.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I do hereby certify that a true copy of the foregoing document was served upon the following counsel by regular United States mail, postage prepaid, this 8th day of December, 2000, addressed as follows:

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