STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
(O'Connell, P.J. and Talbot and Owens, JJ)

DANIEL ADAIR, a Taxpayer of the FITZGERALD PUBLIC SCHOOLS, and FITZGERALD PUBLIC SCHOOLS, a Michigan municipal corporation, *et al*

Plaintiffs-Appellees

v

STATE OF MICHIGAN DEPARTMENT OF EDUCATION; JOHN NIXON, STATE BUDGET DIRECTOR; ANDY DILLON, TREASURER OF THE STATE OF MICHIGAN; and MICHAEL P. FLANAGAN, SUPERINTENDENT OF PUBLIC INSTRUCTION,

Defendants-Appellants /

Supreme Court No. 147794

Court of Appeals No. 302142

OCCC Case No. 2011-119092-PZ

REPLY BRIEF OF APPELLANTS

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Dated: May 27, 2014

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ARGUMENT

I. In a suit alleging underfunding of a legislative mandate under article 9, § 29 of the Michigan Constitution, a plaintiff must establish by clear and convincing evidence a quantifiable shortfall between its realized or anticipated necessary increased costs and the appropriated funding.

The Districts' brief on appeal highlights the primary defect in their case; they cannot decide what they should prove, so they don't prove anything. After 34 pages of claiming that the Districts need only show flaws in how the Legislature calculated the *State's* hypothetical costs, the Districts concede that their actual costs control. In their stated list of elements, they agree that they must prove an increase in mandated activities of local units of government, "which entail necessary costs being incurred *by those local units.*" (Appellees' Br, p 34 (emphasis added). They then concede that they must also prove that "[t]he necessary cost that *the local governments* are incurring" exceeds any appropriated amounts, and that "[t]he net costs which each *local unit* is incurring" exceed $300.00. (Appellees' Br, pp 34–35 (emphasis added).

The listed elements contrast starkly with the Districts' answer to their own second question presented, which erroneously asserts that "the costs incurred by the state" is the relevant standard of measure. The elements also contradict the position the Districts took in their opening argument and at the subsequent directed verdict hearing, where the Districts flouted any burden of proving any quantifiable amount of actual underfunding and, instead, argued that the relevant, statutory standard was the cost to the State. (See Appellants' App, pp 143a, 149a–

150a.)[1] They then acknowledged that "there is no way that we have . . . to prove what the state would be required to expend" and "there is no way to prove how they would meet these requirements . . . . That's why the responsibility, according to the [Supreme Court], is the state's." (Appellants' App, p 150a.) Applying the elements in the Districts' own brief on appeal, it is no wonder that the Special Master recommended dismissing the matter. Although the Districts' elements notably lack specificity regarding any deferential degree of proof, they do not differ materially from those proposed by the State Defendants and applied by the Special Master. Therefore, this Court should reverse the Court of Appeals on this issue and dismiss the matter as the Special Master recommended.

Attempting to salvage their case, the Districts wrote the Special Master two personal letters (see Appellees' App, pp 300b–305b), the first of which claimed that, after revisiting the issue with their expert, they could do what they once deemed impossible and estimate the State's costs (Appellees' App, p 300b)—an estimate that they now concede would be irrelevant and insufficient. (See Appellees' Br, p 34.) The Districts argue that the Special Master "ignored" these missives. (See Appellees' Br, p 29.) But in his report, the Special Master denounced the Districts' ex parte communications as "dubious." (Appellants' App, p 172a.) The Special

[1] Of course, the Districts' initial recitation of the "cost to the state" standard is inapplicable here. It stems from a misreading of MCL 21.233(6), which uses the "actual cost to the state" to measure a "[n]ecessary cost," "unless otherwise determined by the legislature when making a state requirement." There can be no doubt that the Legislature "otherwise determined" the "[n]ecessary cost" of following its CEPI-reporting mandates here, so the "cost to the state" standard simply does not apply to this case. MCL 21.233(6).

Master had sound reasons to reject such a procedurally deficient "offer of proof," so this Court should avoid granting any relief on these grounds.

Regarding the preservation of the separation-of-powers argument, the State Defendants refer the Court to the issue preservation portion of their application for leave to appeal and of their reply supporting the application. It bears noting that the Court of Appeals' standard runs so contrary to separation-of-powers principles that it would have taken extraordinary foresight to anticipate that an extensive argument was necessary to avert the Court of Appeals' unconstitutional conclusion. Even so, the issue was repeatedly raised as a cautionary measure below—and with good reason.

At the hearing before the Special Master, the Districts paid lip service to the power of the political process, stating that "the Headle[e] Amendment assumes that the state will exercise good faith and make a good-faith effort to fully fund the things that it's mandating." (Appellants' App, pp 151a–152a.) Although it calls into question the validity of this entire case, this inherent deference to the Legislature's political pressures was further referenced on page 8 of the Districts' brief on appeal. But the Districts later abandon any notion of deference and leave the issue of the Legislature's "good faith" to "fully fund" (Appellants' App, pp 151a–152a) to a court's review of "the bases relied upon by the Legislature . . . . " (Appellees' Br, p 48.) In other words, the Districts want this Court to establish a standard that would allow them to plead, perpetually, "still not enough." Far from trampling the flowerbeds of *stare decisis*, a rejection of this ilk of political second-guessing conforms perfectly to

this Court's established precedent—that in litigation to compel funding from the Legislature, local units must prove by clear and convincing evidence that the requested funding is both reasonable and necessary. See *46th Circuit Trial Court v Crawford County*, 476 Mich 131, 149; 719 NW2d 553 (2006).

II. The Districts waived any challenge to the amount of funding by accepting the conditional appropriation in § 22b, and in any event the Legislature may allocate amounts appropriated in excess of the Proposal A guarantees to fund Headlee Amendment obligations.

The School Districts fail to address or distinguish the cited authorities, which recognize that a receiving unit of government must abide by permissible conditions placed upon the acceptance of appropriated state funds. It is well established that the Legislature may place reasonable constitutional conditions on its appropriation of state funds, and even constitutionally independent universities must abide by permissible funding conditions. *Regents of University of Michigan v State*, 395 Mich 52, 65; 235 NW2d 1 (1975); see also *State Board of Agriculture v Auditor General*, 226 Mich 417, 428–429; 197 NW 160 (1924). The plain language in § 22b conditions the receipt of funds on the Districts providing information to CEPI.[2]

As discussed in Appellants' Brief, longstanding policy and jurisprudence demonstrate that acceptance of a conditional appropriation binds the recipient to comply with the conditions placed on the funds and waives any other challenge to

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[2] The conditional funding provision in § 22b and the State's waiver/conditional funding argument predate this Court's July 14, 2010 decision. See *Adair v Michigan*, 279 Mich App 507, 521; 760 NW2d 544 (2008); *Adair v Michigan*, 486 Mich 468, 491, n 42; 785 NW2d 119 (2010). Thus, contrary to the Districts' assertion, the § 22b conditional funding was not a response to this Court's 2010 *Adair I* decision.

the Legislature's ability to directly impose the conditions. (See Appellants' Brief, pp 28-41.) The plain language of § 22b(3)(c) unambiguously provides that "to receive an allocation" a school district "shall" provide required information to CEPI. 2011 PA 62, § 22b(3)(c). A school district therefore accepts the funding provided in § 22b fully aware that its voluntary acceptance binds it to comply with the stated condition. The Districts waived their right to challenge the sufficiency of the funding under article 9, § 29 of the 1963 Constitution by accepting (and using) the conditional appropriation that plainly required them to furnish CEPI with data and other information.

Instead of attempting to distinguish the longstanding state policy and jurisprudence, the Districts reassert their previously rejected arguments about the Legislature's funding methods. They argue that the Legislature may not fund mandates by reallocating state funds from a non-mandated, discretionary money stream because it does not provide an increase to their overall funding. The Districts made the same argument when the Legislature added § 152a to the 2010–2011 School Aid Act, MCL 388.1752a, for the express purpose of funding the *Adair* Headlee Amendment obligation. But the Court of Appeals has already rejected this argument several times. As this Court observed, the Court of Appeals found this system constitutional, and this Court denied leave in *Durant v Michigan,* 467 Mich 900, 654 NW2d 329 (2002). See also *Adair v Michigan,* 470 Mich 105, 114–115; 680 NW2d 386 (2004). The Districts now make the same argument they raised in their cross-application for leave to appeal. (Plaintiffs-Appellees and Cross-Applicants'

Application for Leave to Appeal, November 19, 2013, pp 6-23.) This Court denied leave on this issue. (Order, February 5, 2014 ("The application for leave to appeal as cross-appellants is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.").)

As demonstrated in the State Defendants' brief in opposition to the cross-application, the School Aid Act funding mechanism complies with the Headlee Amendment. (Defendant-Appellants and Cross-Appellees' Brief in Opposition, November 19, 2013, pp 15-27.) The Legislature may allocate amounts appropriated in excess of the amounts that Proposal A guarantees to fund Headlee Amendment obligations. The Legislature is not required to provide the Districts with any of the funding allocated in § 22b. Nor is the Legislature prohibited from placing conditions on or reducing amounts allocated in § 22b.

The Headlee Amendment only guarantees the local government its proportionate share of the cost of mandated activities; it does not guarantee an overall net increase in state funding. As this Court determined in *Schmidt v Department of Education*, 441 Mich 236, 242; 490 NW2d 584 (1992), "the voters intended neither to freeze legislative discretion nor to permit state government full discretion in its allocation of support for mandated activities or services . . . ." The constitution does not address, or in any way limit, the revenue sources from which the Legislature may draw money to finance school aid appropriations to satisfy funding imposed by article 9, § 29. *Durant v Michigan*, 238 Mich App 185, 208–209; 605 NW2d 66 (1999); *Durant v Michigan*, 251 Mich App 297, 308; 650 NW2d 380

(2002); leave denied *Durant v Michigan,* 467 Mich 900, 654 NW2d 329 (2002); see also *Adair v Michigan,* 470 Mich at 114–115.

The Headlee Amendment limited taxes and placed a ceiling on state revenues. Const 1963, art 9, § 26. The Headlee Amendment also prohibited the State from incurring expenses in excess of the revenue limit set in § 26. Const 1963, art 9, § 28. This Court explained that the intent of the Headlee Amendment is to prevent the State from shifting the tax burden for mandated activities onto local government. *Schmidt v Dep't of Ed,* 441 Mich at 250, quoting *Durant v State Bd of Ed,* 424 Mich 364, 379; 381 NW2d 662 (1985).

The Districts essentially argue that any appropriation that does not provide an overall increase in State funds to school districts to fund a new Headlee obligation is unconstitutional, regardless of the amount of State funds already provided and irrespective of whether the State is otherwise complying with constitutional requirements. (See Appellees' Br, pp 40–43; Cross-Application, pp 22–23). But as in *Durant,* the Districts' argument that the State must provide additional net revenue from the State's treasury "is manifestly inconsistent with the ceiling placed on taxes and state revenues by this same constitutional provision and with the state's obligation to maintain a balanced budget, a fact of which the voters were well aware in 1978." *Durant,* 424 Mich at 385, citing Const 1963, art 5, § 18, & art 9, § 28. Thus, the Districts' "additional funding" argument is inconsistent with the Headlee Amendment's intent to limit taxation and spending. Moreover, there is no shift of the tax burden onto local taxpayers because, since the

ratification of Proposal A, statewide revenues, not local tax revenues, fund public schools and the cost of these activities. See *Adair v Michigan,* 279 Mich App 507, 519; 760 NW2d 544 (2008), citing *Durant,* 238 Mich App at 195–197. To the extent that the Districts perceive there are inequities in the School Aid Act funding mechanism, they may seek relief through the political process. *Judicial Attys Ass'n v State,* 460 Mich 590, 604; 597 NW2d 113 (1999).

The Districts erroneously imply that State revenues appropriated in the School Aid Act somehow constitute revenues of local government, and that the State used local revenues to pay for the *Adair* Headlee obligation (Appellees' Br, pp 40, 43.) But the Districts acknowledge that, since the ratification of Proposal A in 1994, the School Aid Act is funded from State revenue sources. (Appellees' Br, p 37.) As a result, locally generated revenues are not affected by the School Aid Act funding mechanism. Thus, the Districts cannot credibly argue that the State is shifting any tax burden to local taxpayers. The Headlee Amendment does not envision the Districts' drastic limitation on the Legislature's exercise of discretion to determine how to allocate funds in order to comply with its provisions. See *Durant,* 251 Mich App at 308 (Courts may not construe a constitutional provision to impose limitations on the Legislature not intended by the ratifiers of the constitutional provision.). There is nothing in the plain language of article 9, § 29 that requires the Legislature to continue to fund a local unit of government at an amount in excess of constitutional requirements or from placing conditions on or reducing non-mandated funding. As this Court concluded in *Judicial Attorneys Association,* the

State is free to supplement that minimum funding imposed by the Headlee Amendment on the basis of its perception of need, but the Headlee Amendment only guarantees the local government its proportionate share of the cost of mandated activities. *Judicial Attys Ass'n*, 460 Mich at 596.

CONCLUSION AND RELIEF REQUESTED

To sustain a claim alleging underfunding of a legislative mandate under article 9, § 29 of the 1963 Constitution, a plaintiff must prove a quantifiable shortfall between specific costs to local government, realized or anticipated, and the amount of funding appropriated. Here the Districts conceded that they would not present any evidence of a quantifiable shortfall between their specific costs, realized or anticipated, and the amount of funding appropriated. Moreover, the State met its funding responsibility. Section 22b funding is an appropriation that is made and disbursed to pay local school districts for costs associated with collecting, maintaining, and reporting data to the State. Thus, in addition to § 152a, "a state appropriation [was] made and disbursed to pay the unit of Local Government for any necessary increased costs" in § 22b as required in article 9, § 29. And by accepting the conditional appropriation in § 22b, the Districts also accepted the responsibility attached to those funds and waived any Headlee challenge to the level of funding provided.

This Court should reverse the Court of Appeals decision on these issues, apply the appropriate burden of proof, and reinstate the Special Master's dismissal of the Districts' claims.

Respectfully submitted,

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