IN THE SUPREME COURT OF OHIO

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

PLAINTIFFS-APPELLEES' MEMORANDUM OPPOSING STATE'S MOTION FOR RECONSIDERATION

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INTRODUCTION

On September 6, 2001, in a compromise decision that appeared to satisfy few, if any, of its members, the Court sought to end this litigation in a manner that fell far short of the rights and obligations declared in *DeRolph v. State* (1997), 78 Ohio St.3d 193 ("*DeRolph I*") and *DeRolph v. State* (2000), 89 Ohio St.3d 1 ("*DeRolph II*"). The State, however, has rejected the compromise and instead asked the Court to revise its recently-issued decision in a manner that would impose fewer costs on the State and result in even less progress for Ohio's school children. But the compromise fashioned by the Court has already drastically reduced the rights of those children, and Plaintiffs urge the Court to refrain from reducing those rights any further.

I. The Court's "Compromise" Leaves The Overarching Unconstitutionality Of The Funding System Intact And The Promise Of *DeRolph I* And *II* – And The Ohio Constitution – Unfulfilled; Further Compromise Is Unthinkable.

In *DeRolph I* and *II*, the Court recognized the pervasive constitutional defects in the State's school funding system and on both occasions ordered the State to undertake massive and fundamental reform in order to bring the system into compliance with the constitution. In *DeRolph I*, the Court concluded as follows:

> By our decision today, we send a clear message to lawmakers: the time has come to fix the system. Let there be no misunderstanding. Ohio's public school financing scheme must undergo a complete systematic overhaul. The factors which contribute to the unworkability of the system and which must

> be eliminated are (1) the operation of the School Foundation Program, (2) the emphasis of Ohio's school funding system on local property tax, (3) the requirement of school district borrowing through the spending reserve and emergency school assistance loan programs, and (4) the lack of sufficient funding in the General Assembly's biennium budget for the construction and maintenance of public school buildings. The funding laws reviewed today are inherently incapable of achieving their constitutional purpose.

DeRolph I at 212. In *DeRolph II*, the Court concluded that notwithstanding the efforts of the legislature, the system remained "almost identical to its predecessor " and the Court clearly refused to "retreat from our mandate in *DeRolph I*, requiring Ohio's public school financing scheme to undergo a 'complete systematic overhaul.'" *DeRolph II* at 17.

On September 6 of this year, acting in the belief that "no one is served by continued uncertainty and fractious debate" and in the hope that it had "created the consensus that should terminate the role of this court in the dispute," the Court stepped back substantially from the previously-stated and reiterated directives to the State. In particular, the following explicit and implicit mandates of *DeRolph I* and *II* find no expression in *DeRolph v. State* (Sept. 6, 2001) ("*DeRolph III*"):

- the mandate to eliminate overreliance on property tax
- the mandate that strict, statewide academic guidelines be developed and rigorously followed in every school
- the mandate to conduct a statewide facilities study
- the mandate that all school facilities be made safe and code-compliant
- the mandate to reconsider the local share requirement for school facilities funding
- the mandate to eliminate the problem of phantom revenue

- the mandate to eliminate school district borrowing for operating expenses in all but extreme emergencies
- the mandate to address and immediately fund the unfunded mandates of Sub.H.B. No. 412 ("H.B. 412") and Am.Sub.S.B. No. 55 ("S.B. 55")
- the mandate to address the need for computers for students above the fifth grade level
- the mandate to establish and fund the amount required per pupil to provide an adequate basic education
- the mandate to adequately provide for future growth in expenses
- the mandate to fund categorical costs

See *DeRolph I*, *DeRolph II*, and *DeRolph III* slip opinion at 58-60 (Resnick, J., dissenting).

Should the Court accept the State's invitation to reopen the compromise it fashioned on September 6, Plaintiffs ask that the Court do so in full. It is Plaintiffs' fervent hope that such reconsideration would yield a comprehensive return to the visionary mandates of our constitution as reflected in the Court's previous decisions and mark the abandonment of the retreat from those mandates reflected in *DeRolph III*.

II. **Plaintiffs Have Consistently Urged The Court To Reject The Unscientific And Irrational "Augenblick Methodology" In Its Entirety, And Plaintiffs Urge The Court To Do So Now.**

Plaintiffs have always asserted, and the trial court has concluded, that the inferential methodology prescribed by Dr. Augenblick and utilized by the legislature is wholly incapable of determining appropriate levels of school funding. See *DeRolph v. State* (1999), 98 Ohio Misc.2d 1, 91-104, 712 N.E.2d 125 ("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). See also Affidavit of Richard G. Salmon, ¶5-7, attached as Exh. A. Essentially, the Augenblick methodology begins by determining the expenditure levels under an unconstitutional funding system of an unrepresentative and largely homogeneous group of "model" districts selected on the basis of arbitrary and contrived criteria. The methodology then presumes that the *average* expenditure level of these districts is a sufficient base funding amount for *every* district in the State.

Setting aside, for the moment, the manner in which the State chose its "model" districts, it is clear that even if a principled and representative sample of successful school districts could be identified, it is nonetheless illogical to derive a generally-applicable base funding amount by *averaging* the expenditures of those districts. Any such group of districts is certain to reveal a range of expenditure levels, and, in fact, for the current group of 127 model districts, the LSC calculated adjusted base costs for FY99 ranging from a high of $6845 to a low of $3030. See State's Tab 5.

Yet, rather than inquiring into the reasons for the differences among districts, the State's one-size-fits-all methodology simply concludes that the average per pupil funding amount is sufficient for all districts. The methodology thus dictates that the district that previously achieved successful outcomes with the lowest expenditure level – $3030 per pupil – henceforth receive additional, presumably superfluous funds. And the

methodology likewise expects higher-spending districts to continue to achieve successful outcomes with significantly reduced revenues – despite the fact that Dr. Augenblick testified in 1998 that he could not predict whether such districts could be expected to continue to perform successfully. (Augenblick Tr. 879-80)

A funding system premised upon this methodology is neither thorough nor efficient and is inherently incapable of satisfying the requirements of the Ohio Constitution. Accordingly, Plaintiffs renew their request to the Court to condemn once and for all this irrational methodology and again require the State, as the Court did in *DeRolph I* and *II*, to develop a funding system that will assure all of Ohio's public school students the resources and educational opportunities they need to compete and succeed in the twenty-first century.

Pending any return to the dictates of *DeRolph I* and *II* or other comprehensive resolution of this case, however, Plaintiffs recognize that the State has been authorized by the Court, acting in the spirit of compromise, to proceed with the use of the Augenblick methodology with certain modifications. While Plaintiffs regard these modifications as relatively minor both in terms of the overall failings of the system and in view of the Court's previous declarations requiring wide-ranging reform, Plaintiffs also acknowledge that the compromise will yield significant additional funding for Ohio's schools. The State's current effort to retain for itself the

monumental benefit of the compromise – the Court's blessing of a system only modestly altered from that previously declared unconstitutional in its entirety – while significantly diminishing for Ohio's school children the marginal benefits of the compromise is contemptible. And so Plaintiffs implore the Court *not to withdraw from the children what little they attained on September 6 of this year*.

III. The State Has Subjected Its Chosen Methodology To Unprincipled Manipulations Designed To Distort The Resulting Base Cost, Only Some Of Which Manipulations Were Addressed In *DeRolph III*.

In the compromise it imposed on September 6, the Court ordered a limited number of modifications to the State's funding system. Even as consequently enhanced, however, the system will not end educational deprivation for many of Ohio's school children.

While the Court's compromise eliminates some of the unprincipled manipulations of the State's chosen methodology, the compromise permits the most egregious of those manipulations to continue. That is, the Court has allowed the State, in applying its inferential methodology, to continue to infer base cost from districts chosen on the basis of a patently deficient level of performance. Nearly all of the districts consequently selected as models are ones that even the State considers *ineffective*. In fact, as Plaintiffs emphasized to the Court in the brief filed on June 18, 2001, the criteria by which the State selected the "model" districts are actually *lower* than those

used to establish the funding level previously declared unconstitutional in *DeRolph II*.

When the State at oral argument characterized the benchmark of 20 of 27 performance standards as the equivalent of a "passing grade," the State grossly misrepresented the nature of the standards, each one of which can be satisfied by a very low level of performance. The proficiency tests, which comprise the bulk of the standards, are inadequate indicators of successful districts for several critical reasons: they are administered in a very limited number of subject areas; each test only measures whether a given student has mastered *basic* information and skills at a very *minimal* level; and, an individual school district is considered successful as to a given proficiency test even if huge numbers of its students – 15 to 40%, depending on the test – fail to pass it. Thus, for example, a district is considered successful on the twelfth grade reading proficiency test even if an astounding 40% of the still-enrolled high school seniors fail this test of minimally-appropriate reading ability. R.C. 3317.012(B)(1)(w). Now consider that the district can *fail completely as many as seven of these tests (i.e., more than one-quarter of them), with no student passing any of them*, and yet the district *still* can be a model for the rest of Ohio, since a district need only satisfy, in the aggregate, any 20 of the State's 27 standards in order to be selected as a model.

School districts cannot be successful if their level of funding is based upon the expenditures of unsuccessful districts. The 20 of 27 benchmark is a formula for failure, and the State's use of it poisons, irredeemably, the entire funding system. Even the elimination of the other distortions of the State's methodology (i.e., the rounding procedure, wealth screens, and "echo effect") cannot correct for the effect of this benchmark, and unless the Court revisits this issue, failure must be expected to remain endemic throughout the State's school system. The whole premise underlying the State's methodology is that the rest of Ohio, funded at the level the State inferred from its "model" schools, will achieve like results. The methodology thus predicts that a minute handful of districts will perform effectively – at least temporarily – while the vast majority of Ohio's 611 districts remain in various states of failure, many worsening with time.

IV. In Its September 6 Decision, The Court Correctly Understood That Wealth Screens Must Be Eliminated *As A Matter Of Principle*.

While elimination of the three manipulations prohibited by the Court's September 6 compromise does not begin to fully remedy the school funding system, their elimination at least moves the State closer to a principled application of its chosen inferential methodology. Now, the State seeks reinstatement of one of these manipulations: the wealth screens. The Court has correctly apprehended, however, that by improperly excluding higher wealth districts, the screens bias the resulting average base cost

downward without any rational basis. See Salmon Affidavit ¶5, attached as Exh. A.

A. The Court Did Not Endorse The Use Of Wealth Screens In *DeRolph II*.

In support of its thinly disguised request to have this Court endorse residual budgeting, the State makes the bold and erroneous assertion that "[t]he Court, in *DeRolph II*, acknowledged the use of screens set at five percent." State's Motion at 7. What the Court actually did in that decision was question the validity of the Augenblick methodology and express grave reservations regarding the manner in which the State modified that methodology; it did not, however, rule upon the validity of any aspect of the Augenblick methodology.

It is a well established principle of jurisprudence that reviewing courts do not decide issues not essential to the resolution of the matter before them. See, for example, *Stewart v. Southard* (1848), 17 Ohio 402. In *DeRolph II*, what was squarely before the Court was the methodology enacted into law in H.B. 650 and H.B. 770. It was those statutes, which embodied the bulk of the State's response to *DeRolph I*, that were advanced by the State as its remedy, and it was the validity of those statutes that the Court evaluated and rejected, noting that the school foundation program embodied therein was "essentially the same" as that rejected in *DeRolph I*. *DeRolph II* at 17.

Because these statutes modified the recommendations of Dr. Augenblick in unprincipled ways that lowered the base cost, the Court in *DeRolph II* never needed to reach the question of whether the Augenblick methodology itself, unmodified, was capable of producing a reliable base cost of an adequate public education.

> We can only hope that Howard Fleeter, an Assistant Professor in the School of Public Policy and Management at the Ohio State University, was incorrect when he opined that the legislature made these changes in order to come up with a lower number because some legislators were concerned with cost and the "necessity of responding to the *DeRolph* decision at all because of the feeling that the state had already made significant progress since 1991 and that they didn't need to do anything else."

DeRolph II at 18. The Court concluded that it could not "totally discount evidence that the actual cost might have been the deciding factor in selecting the method used to determine the base cost of an adequate education." *DeRolph II* at 20. Having invalidated the State's funding system on a myriad of other grounds, the Court had no need to, and did not, determine the validity of the Augenblick methodology overall or any particular aspect of that methodology, including the use of wealth screens.

The Court's skepticism regarding the legislature's manipulations of Augenblick's methodology is hardly the same as an endorsement of an unadulterated Augenblick methodology. Indeed, if there is any implication to be drawn from the Court's analysis in *DeRolph II* regarding the Augenblick methodology, it is that such methodology is unlikely to produce

a constitutional funding level. The Court emphatically directed the State to give "additional scrutiny" to the remaining structural deficiencies in the basic aid formula which it concluded "[m]ay not in fact reflect the amount required per pupil to provide an adequate education." And the Court questioned the validity of the untested Augenblick methodology, citing the substantial body of expert testimony that sharply criticized that approach.

> [K]lein questioned whether the Augenblick methodology or the one adopted by the General Assembly would provide adequate funding for Ohio's public schools. *** Dr. Samuel Kern Alexander, the current president of Murray State University, a regional state university in Kentucky, criticized the formula for being unreliable and subject to manipulation. Alexander testified that "factors are just being added and subtracted to reach a dollar amount that is available, a predetermined, presumably, dollar amount that the Legislature can afford, and Dr. Augenblick is justifying it.

DeRolph II at 18-19.

In sum, the Court not only did not "tacitly endorse" the use of wealth screens in *DeRolph II*, but it rejected the entire methodology of which such screens were a part, at least insofar as they were integral to the legislation then before the Court.

B. Wealth Screens Are A Contrived Manipulation That Lacks Scientific Rationale And That Artificially Depresses Base Cost And Performance.

The State cynically claims a need for wealth screens in order to avoid "distortion" of the average base cost extracted from its "models." But the truth is that the screens themselves are a manipulative distortion of the unscientific methodology advanced by the State. See Salmon Affidavit ¶5,

attached at Exh. A. As this Memorandum makes clear, it is the State – certainly not the Plaintiffs – that believes in averaging as a methodology for establishing base funding. Yet the State demands for itself the right to bias that average right from the start by removing as "models" those districts that spend at relatively higher levels.[1]

1. The State's formula is not premised on statistical analysis and higher wealth districts cannot properly be excluded as "outliers."

The State's position concerning the wealth screens is as transparently result-oriented as are the endorsements of it by the State's purported experts. State's Tab 6, Monk at ¶5 ("The large magnitude of the difference in the cost estimate with and without the districts that are affected by the 5 percent exclusion rule is consistent with the logic that motivates the exclusion in the first place."); State's Tab 8, Notz at ¶8. These "experts" grossly misapply the science they claim to represent, asserting – without any statistical analysis of any kind – that the wealthier districts merit exclusion from the set of model districts because they are "outliers." State's Motion at 6-7. Dr. Augenblick was candid regarding the *lack of any statistical underpinning* for the screens.

> Q. Do you have an opinion, as one who has been in the field of school finance for 20 years now, as to whether eliminating these outliers is a reasonable approach?

[1] Given the State's manipulations of its methodology, it should come as no surprise that the average expenditure of the 127 "model" districts of H.B. 94 spent *less* per pupil for FY99 than the overall state average. (Phillis Affidavit, ¶12.)

> A. Well, there's two ways to do this. If we didn't eliminate them, *we could use a statistical model* and account for them that way. We wouldn't need to eliminate them because statistically we would do something to deal with that. *But since we're not using a statistical model here*, this is a very simple procedure that doesn't involve complex statistics, I felt that it was appropriate to do it this way, to get rid of the outliers. Because either you have to hold them constant or you have to get rid of them. That was my view.

(Augenblick Tr. 741-42) (emphasis added).

While the State has built its motion around its assertion that the wealthy districts must be excluded as outliers, the State and its "experts" fail to tell the Court that the identification of outliers that may be discarded from a data set is a complex and technical undertaking. The fact that data may fall at one end of a distribution is not in itself evidence that such data are irrelevant to the inquiry at hand. Affidavit of Greg M. Allenby at ¶4, attached as Exh. B. Data are properly removed when they are erroneous and provide "contaminated information about the substantive questions" (*id*. at ¶5) – for example, when there is "faulty measuring equipment, recording errors, aberrant values or a contamination of the process of interest" (*id*. at ¶4). But none of the foregoing has ever been suggested, let alone demonstrated, with respect to the districts excluded from consideration by the wealth screens. Rather, the State's "experts" simply skip the first step in the analysis – determining whether these districts provide information relevant to the inquiry – and instead jump to the conclusion that because they fall at one end of the distribution, they may be

excluded. While the State's "experts" failed to use them, they presumably know that there exist scientific techniques, backed by a considerable body of literature, that *must* accompany this process of exclusion (see *id*.).

But rather than using such techniques, the State's "experts" simply invoked the "outlier" label to support a predetermined goal: the exclusion of the high spenders. Like the State, these "experts" thus started with the outcome they wished to confirm and worked backward. Having failed to use any scientific process, their opinions in this matter merit no consideration from this Court.[2]

Tellingly, when cross-examined about the basis for the wealth screens, Dr. Augenblick provided the following testimony that says much about the system he created and was defending.

> Q. Yesterday you used the term "outlier" to describe the districts that you removed from your sample based on wealth. Doctor, did you conduct any statistical analysis to determine whether or not those districts were outliers in a statistical sense?

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[2] In similar circumstances, the New Jersey Supreme Court rejected what it disparagingly characterized as "putative" expert opinion.

> The State contends that experts were involved in formulating the amounts of DEPA [Demonstrably Effective Program Aid] and ECPA [Early Childhood Program Aid] and that the Court should defer to their determinations. Children in the special needs districts have been waiting more than two decades for a constitutionally sufficient educational opportunity. We are unwilling, therefore, to accede to putative expert opinion that does not disclose the reasons or bases for its conclusions.

Abbott v. Burke (1997), 149 NJ 145, 185, 693 A2d 417, 437. The "putative" label seems particularly apt with regard to Dr. Augenblick, who acknowledged that, at a number of critical decision points in the development of the State's system, he eschewed expert techniques in favor of simple ones easily comprehended by laymen. See, text of this Memorandum, *infra*.

A. I'm not sure yesterday whether I actually used the word -- did I use the word "outlier?"

Q. Yes, you did, Doctor.

A. I believe that in a report that I wrote, the July 17th report, I used the word -- I'm not sure. It certainly wasn't outlier. It was --

Q. Unusual, I believe is the word you used, Doctor.

A. Unusual, right. And what I did was to select districts that I felt were unusual. I did not select outliers per se.

Q. Okay. So you conducted no statistical analysis to tell you to eliminate 30 districts on the top and 30 from the bottom; did you?

A. I considered the graphical analysis a form of a statistical analysis.

Q. The graphical analysis. And I believe you testified to us yesterday, Doctor, that in connection with that graphical analysis, the way you selected districts was just to eyeball the graph. Is that your testimony?

A. Yes.

Q. Now, Doctor, you've held yourself out to be an expert in the area of school finance; is that correct?

A. Yes.

Q. That's why you're here. Are you aware, sir, of any technical literature in the field of school finance that says that you make decisions affecting 12.8 [*sic*] million people by simply eyeballing a chart? Can you cite me any literature, Doctor?

A. There is no literature that I know of that says that when you're talking about 1.8 million children in Ohio, that you can use that approach. That's correct.

(Augenblick Tr. 852-54). Dr. Augenblick similarly equivocated about the "outlier" label on direct examination (Augenblick Tr. 741-42), additionally explaining that while his recommended methodology could have been premised upon scientific procedures, *in fact it was not*.

> Q. Now, Dr. Augenblick, in looking at those graphs, I mean, I have to confess, this goes back to point of trying to get into your line of business. This seems like one thing I could do. You said it's just a function of eyeballing it to see where the break in the line is. I guess I'm wondering why it isn't more sophisticated than that in determining what districts and the outliers to eliminate.
>
> A. Well, you could make it sophisticated if you wanted to. There are choices about how to do this. You could -- some people would say, let's pick the districts that are two deviations away from the mean, plus or minus. That's a way that some people might do it. I felt in order to communicate what I was doing to people that it made sense to do it this way. However, even then, you have choices. Because, you know, one could pick 95, one could pick 90. You could argue that you could have picked the ninety-second percentile.
>
> Q. Why not do that? Someone might look at one of those graphs and say that it's really at 93.6, that the real break is. Why not do that?
>
> A. Well, I simply felt that we should focus on something that was easy. And frankly, what I wanted to do was to pick numbers that were the same everywhere. But you could do anything like that.

(Augenblick Tr. 738-39) Significantly, Dr. Augenblick also testified that four districts were eliminated from the data set even *before* the application of the wealth screens – because *they* were "truly odd." (Augenblick Tr.739-40 ("Well, I think we want to make it clear to people that we start out with 611, but we – everybody has agreed from the time of the panel of the experts that there were four districts that would be excluded, that are truly odd.

And so I've never found anybody that disagreed with that. So there really were 607 that we started with."))[3] Not surprisingly, the trial court, in a section of its decision entitled "Arbitrarily Screening Out Districts Due to Wealth" rejected in full the use of wealth screens. *DeRolph v. State* (1999), 98 Ohio Misc.2d 1, 94-98, 712 N.E.2d 125.

The State's bald assertion that wealthier districts would "distort" the base cost is scientifically untenable. Dr. Greg M. Allenby, Helen C. Kurtz Chair and Professor of Marketing at the Max M. Fisher College of Business and Professor of Statistics at the College of Mathematical and Physical Sciences, The Ohio State University, has stated as follows:

> The school districts in the top and bottom five percent of the income and property wealth distribution are *representative* of the substantive question and should not be removed from the analysis. The recorded amount of expenditures by these districts, and associated test scores, are <u>not</u> due to faulty measuring equipment, recording errors, or aberrations due to random fluctuations. These districts provide valid evidence of the relationship between expenditures and test scores.
>
> In performing analysis of data based on school district base cost expenditures, which is collected in a uniform manner and compiled in a similar fashion for all school districts, there is no statistical basis for the elimination of the top and bottom five percent of the districts based on property wealth and income. The use of the "trimmed mean" is inappropriate in this circumstance and will have the effect of artificially lowering the average per pupil level of base expenditures.

Allenby Affidavit at ¶6-7 (emphasis *sic*), attached as Exh. B.

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[3] See also Salmon Affidavit at ¶6, attached as Exh. A. Dr. Salmon agrees that a few extremely small districts should be excluded and states that Dr. Kern Alexander and analysts at the Ohio Department of Education also generally exclude the same few districts from analysis.

2. The spending patterns of the wealthier districts are highly relevant.

The State's claim that "inclusion of data from the top and bottom five percent of districts has a dramatic effect and distorts the base cost calculation *** because *these districts are spending either well beyond or well below the constitutional level of adequacy*," (State's Motion at 6 (emphasis *sic*, citations omitted)), is utter nonsense, on multiple levels. First, the State is disingenuous in suggesting that the wealth screens cut any districts from the bottom of the distribution. As the State – and the Court – well know, no district at the bottom of the wealth scale was excluded by the wealth screens, since none of these districts met the State's performance criteria.[4] Therefore, the wealth screens had the *sole* effect of eliminating *higher* spending districts.[5]

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[4] "[W]e agree with plaintiffs' argument that the income and property wealth screens were implemented 'solely to eliminate high wealth districts, since no district at the bottom of the wealth spectrum satisfied the 20 out of 27 performance standards, while most of the districts on the high end of the wealth spectrum easily surpassed the 20 of 27 benchmark.'" *DeRolph III* at 35 (Douglas, J., concurring).

[5] All of the State's experts' discussion of "trimming" and elimination of "tails" at both ends of the distribution is thus misleading. There is no tail that was eliminated at the low end of the wealth distribution – only at the high end. See, also, Klein Tr. Depo. 31-33 ("[Use of the screens] biases the computation of the base figure. It biases it downwards, because the districts that are eliminated at the top, almost all of them have met the 17 of 18 [success screen] criterion. But the districts at the bottom in terms of income and wealth, hardly any of them met it. *** It biases the sample in terms of coming up with an average basic expenditure value. It biases it downward rather significantly of several hundred dollars.... It's cherry picking in the sense that the presumption of evenhandedness is really not there, because they are not -- you're not really eliminating anything at the bottom that has any impact. Because it's only looking at those districts that have 17 and 18 goals. And so the 5 percent at the bottom is really irrelevant.").

Second, the State's assertion that the wealthier districts spent "well beyond" the level of adequacy is contradicted by the State's own expert. Dr. Augenblick made it clear that he could *not* conclude that these districts were overspending. Indeed, Dr. Augenblick testified that he neither knew nor knew how to find out whether districts excluded by the wealth screens were spending below, at, or above the appropriate amount.

> Q. Doctor, am I correct in understanding that you made no study and no analysis of any kind to determine whether or not any of the districts that were removed based on either valuation or income spent too much, too little, or just the right amount; did you?
>
> A. I wouldn't even have any idea how to conduct such a study.

Id. at 852.[6]

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[6] It defies reason that the State's "expert" could recommend, and the legislature could adopt, such an unscientific, nonsensical, inadequate, and inefficient approach to school funding. Another court has expressly and unequivocally rejected the argument that higher spending districts were somehow inefficient and therefore unsuitable as funding models for poorer districts.

> [The State] contends, however, that such expenditures are inefficient and therefore unnecessary in achieving a thorough and efficient education, as defined by the statute's content standards. For that reason, according to the State, such excess spending by the wealthier districts is immaterial to the inquiry into whether students in the special needs districts are receiving a thorough and efficient education.
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> * * *
>
> Neither [the school funding legislation] itself, the record in this case, empirical evidence, common experience, nor intuition supports the State's position that inefficiencies explain why successful districts' spending levels exceed what the State asserts is the amount needed to provide a thorough and efficient education.
>
> * * *
>
> ...There simply is no evidence to support the State's assertion that all amounts spent by Livingston, Princeton, Millburn, and the other successful districts in excess of the T & E amount constitute educational inefficiency.

Abbott v. Burke (1997). 149 NJ 145, 165-171, 693 A2d 417, 427-430.

Finally, the wealthier districts, which the State claims "distort" the base cost, are actually a far more suitable group from which to infer base cost than are the "model" districts selected for this purpose by the State. This is so because the districts at the high end of the wealth distribution, not surprisingly, tend to be the most effective districts in the State. Salmon Affidavit ¶ 5, attached as Exh. A. In the year in question, only 30 of the more than 600 districts in Ohio were deemed effective by the State, and an overwhelming *twenty-one* of these were excluded by the wealth screens. When the goal of the analysis is to identify a base level of school funding that supports an adequate education, it is clearly the inclusion of *ineffective* districts that distorts the result – not the inclusion of those that spend more and, consequently, perform at a level deemed effective by the State. Because the wealth screens drive out the majority of effective districts, leaving only 9 such districts in a sample of 120 (127 with rounding), it is obvious that the use of the screens not only lowers the average inferred base cost, but it also lowers expected performance levels. While the State professes a belief in a methodology premised upon averaging, the wealth screens enable the State to cherry-pick districts, removing those that spend more and perform better.

3. Wealth screens are *not* "standard practice."

The State's bold assertion that five percent wealth screens are "standard practice throughout school finance" is simply not true. Salmon

Affidavit ¶4, attached as Exh. A. In fact, a review of the Ohio studies of nationally recognized school funding expert, Dr. Kern Alexander show that ignoring or cutting off wealthy and poor districts makes no sense. Dr. Alexander studied the equity of Ohio's school funding system in 1993 by *focusing on* the curricula of 117 of the richest and poorest school districts in the state. (Pl. Exh. 449; Alexander Testimony at 1593) Dr. Alexander's focus was necessarily upon the wealthiest and poorest districts to determine the progress of the state with respect to wealth-based disparities. These districts are not unusual or rare, but were the basis of Dr. Alexander's inquiry into the quality of education offered in Ohio.

Dr. Alexander later studied Ohio's wealth-based disparities in 1998, again focusing upon essentially the same districts the State wants to exclude from consideration. Dr. Alexander examined the richest five percent and poorest five percent of school districts based on property wealth and income in Ohio and compared per pupil spending in those district for 1991 and 1999. He found little improvement in wealth-based disparities between those years under H.B. 650. (Alexander Tr. 1666, 1671; Pl. Exh. 477, Chart 21)

The fact that the Panel of Experts' report included wealth screens does not provide any evidence that wealth screens are widely accepted in

school finance.[7] Dr. Alexander objected to the entire output-based approach of the Panel of Experts, stating that the Panel "was going to use the Augenblick procedure, a procedure that I was not familiar with. No other state had used it, to my knowledge. It was novel. It was the kind of thing that you would see in a Master's dissertation thesis." (Alexander Tr. 1605)[8]

Dr. Alexander reviewed Dr. Augenblick's decision to exclude five percent of the wealthy districts and termed that decision "an arbitrary determination." When asked why he would not use the wealth screens, Dr. Alexander stated, "it was found, that wealth determined the quality of a child's education in Ohio. *** Wealth is the factor. It is the determinant. And when someone simply says, we're going to cut off 90,000 children on one end or a percentage because they are in wealthy districts, then you are

[7] The State further cites to a publication of the Ohio Coalition for Equity & Adequacy of School Funding that included exclusion of five percent of districts at the extremes of instructional spending, but that document was an interim proposal that included an inputs approach. The proposal was for an interim method until the Ohio Department of Education established a process to objectively determine the actual student cost foundation level. The interim method was included in Coalition materials without the advice of Dr. Alexander or Dr. Salmon.

[8] Dr. Alexander further testified that with the Panel of Experts "[t]here was an immediate concern about the cost of the program." (Alexander Tr. 1604) Dr. Alexander described the arbitrariness of the Augenblick approach by listing all of the base cost amounts that were considered: "The first base cost figure was $4,857. And the second base cost figure, based on another set of assumptions, was $4,350. The memorandum went on to say that this $4,350 would require 4.8 billion new dollars, new revenues, by the State of Ohio." At one point, Dr. Augenblick agreed to a base cost of $4,184, but the ultimate Panel of Experts Report recommended a base cost figure of $3,928. (Alexander 1610) The Panel of Experts' base cost recommendation of $3,928, when updated with 1996 information, was $5,051 for FY99. (Rogers Depo. Exh. 3; Rogers Depo. 126, 130)

attacking the main variable that created the discrimination." (Alexander Tr. 1623-24) (emphasis added).

In sum, there is simply no principled ground upon which the wealth screens can be tolerated, as the Court rightly recognized on September 6.

C. The Magnitude Of The Effect Of The Wealth Screens Is Not Relevant To Their Constitutionality.

Incredibly, the State argues that because the wealth screens have a *larger* impact than Plaintiffs previously understood, the screens are valid. It is astounding that after two decisions of this Court unequivocally instructing the State otherwise, the State now openly claims a right to engage in residual budgeting. According to the State, if a principled application of its inferential methodology yields a base that is politically unpalatable, then a manipulation that lowers the base is justified. Wealth screens, the State contends, are constitutional because without them, the base cost is higher than the amount the State is willing to spend. Residual budgeting rises like a phoenix – except that now, the State asks *the Court* to engage in it.

1. Constitutional compliance is a legal imperative ***regardless of cost.***

It is well-established and should need no reiteration here that a constitutional entitlement cannot be abridged for reasons of cost. "Inadequate resources can never be an adequate justification for the state's depriving any person of his constitutional rights." *Bradley v. Milliken*

(1976), 540 F.2d 229, 245, affirmed (1977) *Milliken v. Bradley,* 433 U.S. 267, 97 S.Ct. 2749, 53 L.Ed.2d 745. "'Politically motivated pleas of public poverty cannot be used to brush aside the fundamental duties of government to the maintenance of civilization.'" *Shaw v. Allen* (S.D. W.V. 1990), 771 F.Supp. 760, 763 (quoting *Moore v. Starcher* (1981), 167 W.Va. 848, 852, 280 S.E.2d 693, 696).[9] As stated by the Wyoming Supreme Court, "'lack of financial resources will not be an acceptable reason for failure * * * We have reached the point where we can no longer allow the youth of Wyoming to be denied their constitutional right to an education 'appropriate for our times.'" *State of Wyoming v. Campbell County School Dist.,* 19 P.3d 518, 566, 151 Ed. Law Rep. 634.

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[9] See also *Harris v. Champion* (C.A.10, 1994), 15 F.3d 1538, 1562. ("The only reasons offered by the State were the lack of funding and possibly the mismanagement of resources by the Public Defender. *** Neither of these reasons constitutes an acceptable excuse for the delay."); *Todaro v. Ward* (C.A.2, 1977), 565 F.2d 48, 54 fn. 8 ("Inadequate resources no longer can excuse the denial of constitutional rights. See also, *Abbott v. Burke*, 164 N.J. 84, 89, 751 A.2d 1032, 1035 (2000) (holding that the State was "required to fund *all the costs of necessary facilities remediation and construction* in the Abbott districts." (Emphasis added.)).

In *Invisible Empire Knights of KKK v. City of W. Haven* (D. Conn. 1985), 600 F.Supp. 1427, 1434, the court reasoned as follows:

> The Ordinance in question, which imposes a cost on expression, treats the First Amendment as a privilege to be bought rather than a right to be enjoyed. It is society that benefits by the free exchange of ideas, not only the person whose ideas are being shared. In order to fully preserve and protect the people's right to be informed, it is society that should bear the expense, however great, of guaranteeing that every idea, no matter how offensive, has an opportunity to present itself in the marketplace of ideas.

If, on the theory that society is the ultimate beneficiary, cost is no impediment to ensuring the ability of the Ku Klux Klan to freely disseminate its ideas, the State has no less an obligation to fund an education of the quality mandated by the Ohio Constitution.

This principle was also reflected by this Court in *DeRolph II* when it declared that "budgetary and political concerns must yield, however, when compliance with a constitutional mandate is at issue." *DeRolph II* at 9.

2. The larger the effect of the wealth screens, the *more* critical it is that they be eliminated.

Remarkably, the State expressly contends that the greater the impact of the wealth screens (in terms of base cost), the more justified the State is in using them. The State's claim is patently backward and hard to fathom. If an unprincipled, unscientific, and irrational step in the calculation of base cost has little effect, it could perhaps be regarded as a harmless error needing no correction. But if such a manipulation has a significant effect in depressing base cost, then, as the Court correctly concluded, it must be remedied. And if the magnitude of that effect is even *larger* than the Court or the parties realized, then there is even greater reason to require that it be eliminated without delay.

3. Even with the elimination of the wealth screens, Ohio still lags behind.

This Court has recognized that "the problems associated with school funding being faced by recent and current sessions of the General Assembly are not of recent vintage. * * * Many factors have contributed in recent years to make what had been a problematical system into one that has reached crisis proportions throughout the state." *DeRolph II* at 8. Indeed, all involved in this case have long known that the problem of adequacy in

school funding has been long-standing and could not be "caught up" without a significant influx of funding. Evidence presented to this Court on June 15, 2001 showed that Ohio fell below its neighboring states in expenditures per pupil by the following amounts in FY99:

Rank	State	Expend. Per Pupil	Amt. More than Ohio
1	Michigan	$7,488	$1,265
2	Wisconsin	$7,264	$1,041
3	Pennsylvania	$7,152	$ 929
4	West Virginia	$6,887	$ 664
5	Indiana	$6,643	$ 420
6	Ohio	$6,223	$ 0

Phillis Affidavit, p. 12. The Panel of Experts' recommendation, updated by the State's inflation factor of 2.8%, would yield a foundation level of $5,487 for FY02--*$685 more than the State's proposed level for FY02 contained in H.B. 94*. (See fn. 8 herein)

The magnitude of the difference between the State's proposal and this Court's order shows that it was imperative that this Court be involved and order change--change that would not have occurred without Court intervention. See, *DeRolph II*, at 44, Douglas, J., concurring, "But where would the kids and school system of this state be today if the dissenters in *DeRolph I* had prevailed?" Still, this case "is about the proper education and future of Ohio's 1,800,000 public school children and those generations of children who will follow." *DeRolph III*, at 28 Douglas, J. concurring. Under the State's proposal in H.B. 94, Ohio school districts would have been funded at a per pupil level of 76% that of Michigan for FY02. ($4814

compared to $6300) *Id*. at 45. Even with this Court's order, Ohio's per pupil level would, according to the State's calculations, still fall only at 87% of Michigan's FY02 level. ($5479 compared to $6300)[10] Further, if this Court's order had been effective for FY99 (increasing expenditures per pupil by $665), Ohio would only have improved its expenditure per pupil ranking relative to its neighbors so as to be on a par with West Virginia – and it would *still* be far outpaced by three other neighboring states. See state comparison chart, *supra*.

Some have speculated that the House Plan (a potential agreement between the Coalition and the Speaker), attached as Exh. C, would have been a bargain for the State compared to this Court's order. The House Plan, however, contained much more by way of a complete overhaul than just increasing the foundation level. It included creation of standards of opportunity for all school children, a complete assessment of all school facilities, priority facilities funding for health and safety needs, waiving local share requirements for facilities exceeding the nine percent debt limit, changes to the charge-off provision, reducing phantom revenue, and improvements to special education, DPIA, and gifted funding. These structural changes were not included in the Court's order.

[10] See Zahn affidavit, State's Tab 3, at paragraph 7, calculating the cost of removing the wealth screens at $444 per pupil. The State has not yet disputed the estimate of removing the "rounding provisions" at $40 per pupil and the cost of removing the "echo effect provisions" estimated at $181 per pupil.

D. Errors In The Calculation Of The Effect Of The Wealth Screens Are Directly Attributable To The State's Own Misconduct – Specifically, Its Repeated Refusal To Produce Data That Would Have Permitted More Accurate Independent Calculations.

The first branch of the State's motion is premised on the erroneous assertion that the Court was "misled" by inaccurate data provided by the Plaintiffs' Expert, Russell Harris. Not only is such a contention wholly unwarranted, but under the circumstances of this case, it is outrageous. In anticipation of the June 15, 2001 evidence filing date, Plaintiffs submitted, on April 19, discovery requests asking the State to produce all simulations and data related thereto used in the development of H.B. 94.[11] The State refused, and on May 2, 2001, the Plaintiffs filed with this Court a motion for expedited order compelling the State to comply with that request. The Court granted the motion and, beginning on May 17, the State produced 58 boxes of unorganized documents, none of which were identified as being related to any of the specific categories of documents that had been requested. In particular, none of the documents produced were ever specifically identified by the State, nor were they identified by the Plaintiffs, as being responsive to the request for data, procedures, and simulations

[11] Lindsmith Affidavit, attached as Exh. D.

utilized in the development of the base cost funding level in H.B. 94. Affidavit of Quintin Lindsmith, attached as Exh. D. Further, the State objected to Plaintiffs' discovery, admittedly withheld information under a claim of "privilege," and refused to provide data or information about how the base cost of H.B. 94 was calculated. The State should not be permitted to claim harm from its own secrecy.

Faced with the approaching deadline for filing briefs and the State's intransigence, Plaintiffs had no choice but to attempt to simulate, from the data that was available, the development of the H.B. 94 base cost. A detailed account of the process by which Mr. Harris undertook that process is provided in his supplemental affidavit, attached hereto as Exh. E. The crux of the problem was that all of the State's calculations related to the "127 database" (i.e., database concerning the State's 127 model districts) could be replicated. However, in order to simulate the effect of the wealth screens and determine the base costs of only the effective districts, it was necessary to utilize a different data set containing base cost information for all school districts. That data set was provided by the Department of Education. Nothing in or accompanying that data set described the fact that the base expenditures for FY 99 reported in that data set had been "deflated" on a cost of doing business scale of 1.0 to 1.18%. As a result of this unnoted deflation, the top two rows on Exhibit I of Mr. Harris' affidavit were understated.

In any event, Mr. Harris' chart was a representation of base costs, submitted solely for the purpose of demonstrating the extent of "residual budgeting" manipulations undertaken by the State in the development of H.B. 94. Had Plaintiffs then understood the full effect of that manipulation, Plaintiffs most certainly would have called the full effect to the attention of the Court as it would have demonstrated the point even more dramatically. For example, using correct data, a base cost derived from the expenditures of the "effective" districts would have been substantially higher than the $6,178 figure included in that chart, and this would have only made stronger Plaintiffs' argument concerning the impact of the State's manipulations.

E. The State's Request That The Wealth Screens Be Reinstated In Order To Reduce The Cost Of The Remedy Is A Blatant Appeal To The Court To Engage In Residual Budgeting.

Ironically, the State, having refused to provide the data requested by Plaintiffs, now asks the Court to reconsider its *DeRolph III* decision on the assumption that the Court was "understandably misled" by the erroneous portion of the Harris chart. State's Motion at 3. In other words, the State assumes that the Court's decision was premised on the same sort of residual budgeting used by the State to develop the legislation in the first place. Now, in the belief that the end result costs more that it assumes the Court anticipated, it asks the Court to modify its decision to attain a result more to the State's liking.

The State's position is untenable for two reasons. First, the three changes mandated in the compromise decision – elimination of the "rounding" procedure, the "echo effect," and the wealth screens – are intended to redress obvious manipulations that successively reduce the base cost without justification. The Court needed no data regarding the magnitude of the reductions to know that the manipulations improperly distorted the base cost, and the magnitude is irrelevant to the Court's conclusion that the manipulations were inappropriate.

Second, the Court did not order a particular funding level. It ordered changes to a process.

> We find that, having so elected, it must, in order to meet the requirements of *DeRolph I* and *DeRolph II*, formulate the base cost of providing an adequate education by using all school districts meeting twenty of twenty-seven performance standards as set forth by the General Assembly in R.C. 3317.012(B)(1)(a) through (aa), without adjustments to exclude districts based on wealth screens, without rounding adjustments to include additional lower-spending districts, and without use of the "echo effect" adjustment, beginning effective July 1, 2001.

DeRolph III at 23 (slip opinion).

While it may be that some members of the Court had in mind some idea of the results that would flow from the Court's order, to the extent that the effect of the wealth screens was larger than anticipated, there is even *greater* need to eliminate them. The Court prescribed a process and that process must now be followed, regardless of cost. Any other result would

further compromise the education of Ohio's pupils – this time, by "residual budgeting" from the Court.

V. The State's Motion As It Pertains To The Wealth Screens Is Not Properly Reviewable Under The Court's Reconsideration Procedures.

Motions for reconsideration of decisions of the Ohio Supreme Court are governed by S.Ct. R. Prac. XII (2). That rule requires such motions to be "confined strictly to the grounds urged for reconsideration." Motions for reconsideration are expressly not to be used to "reargue the case". Instead of asserting that the Court's decision is legally incorrect, the State simply asserts that the cost to implement the changes mandated by the Court are more than the State wants to spend. While the State asks the Court in this motion to reduce, for no reason other than state budgetary considerations, the cost of complying with the Court's *DeRolph III* order, the State's political leadership is publicly proclaiming that there will be "no new taxes" and that "Ohio does not have the money for extra spending on schools, no matter what the Ohio Supreme Court orders" with respect to the State's pending motion. See Exhibit F, attached hereto. The State's refusal to comply with *DeRolph I* or *DeRolph II,* and its desire to reduce the cost of *DeRolph III,* do not make this Court's decision erroneous and must not become a pretense to further lower the bar of constitutionality.

The State has simply failed to demonstrate that this Court's decision was erroneous in any way. In fact, while the State notes that two lines in

Mr. Harris' chart contained erroneous data, the State fails to cite to any portion of the majority decision that refers to or necessarily relied upon that data. As noted above, no resort to data was necessary for the Court to discern that the use of wealth screens, rounding and "echo effect" were manipulations of data for no purpose other than the reduction in the foundation base cost. The State's motion fails to set forth any grounds that would merit or require reconsideration of this Court's decision.

The State not only is attempting to reargue the case, but also to use its motion as an excuse for the submission of new evidence -- long after the deadline for the submission of evidence in the case. The State's assertion that its Motion for Reconsideration is analogous to a Civil Rule 60(B) motion, and thus a permissible vehicle for the introduction of new evidence into this case, is patently groundless. The Court has defined the scope of a Motion to Reconsider and that definition necessarily precludes the application of Rule 60(B) in the consideration of such a motion. See, S.Ct. R. Prac.X(2). This Court's Rules of Practice are the exclusive guidelines for reconsideration of the Court's decisions. S.Ct.Prac.R. XI(2).

The State's "new evidence" has no purpose other than to bolster the same arguments it made before, and thus the introduction of that evidence is simply not permissible. Accordingly, the Court should strike the State's "evidence" attached to its motion and deny the State's Motion as it pertains to the wealth screens.

VI. The Court's Order That Funding Changes Be Implemented As Of July 1, 2001, Is A Valid Exercise Of The Court's Remedial Authority.

The State's claim that the Court should reconsider and eliminate the order that the changes to the foundation formula be made effective as of July 1, 2001 is devoid of legal reasoning and is tantamount to a flat rejection of the Court's remedial authority. Further, the State's attempt to justify its request as based on the tragic events of September 11 is an affront to all supporters of education in this decade-long pursuit of justice.

A. The State Has Had Ample Time To Respond To The Court's Orders And Has Failed To Do So.

The State's request to be relieved of the requirement that changes in the foundation formula be made effective as of July 1, 2001 should be considered in light of the history of this case. In *DeRolph I*, March 24, 1997 Court gave the State a year to respond the mandate for a "complete, systematic overhaul" of Ohio's school funding system. The year actually turned out to be much more, as the case did not again come before this Court for decision until May 11, 2000, over three years later. Rather than accomplishing the mandated "overhaul" directed by the Court, the foundation formula addressed by the Court in *DeRolph II* was characterized as "almost identical" to its predecessor. *DeRolph I* at 17. The State did little more than "[p]olish up the existing formula, declare victory, and call in their legal team without attempting the climb." *DeRolph II* at 46 (Pfeiffer, J.

concurring). The Court rejected, wholesale, the remedial legislation advanced by the State in *DeRolph II* and gave the state yet another year to (to June 15, 2001) to again address and complete the task of school funding reform.

Now, well over four years after the Court's *DeRolph I* mandates, the State asks to be relieved of any timeline for implementing the compromise remedy directed by the Court. With no deadline, the State may well argue it has no clear duty to ever respond. Such a conclusion is underscored by the State's rationale that the State and school districts have budgets in place and thus the State should not be required to change its funding responsibilities with respect to those budgets. The reality is that school districts, and the State will *always* have budgets in place. Thus, by the State's rationale, it can never be required to make any changes to the school funding system that would alter those budgets.

The State's attempt to justify its request based on "economic pressures" and the "tragic events of last week" demonstrate that the State has yet to understand that this case in about the enforcement of Constitutional rights and not about the economy or state budget.[12] Three times now, this Court has concluded that Ohio does not have a school funding system that satisfies the requirements of the Thorough and

[12] Indeed, for the State to believe that it's position is in any way enhanced by the tragic events of September 11 is as outrageous as it is false. More, now than ever, we should redouble our commitment to the education of Ohio's children -- our only true link to the future.

Efficient clause of the Constitution and three times the Court has directed the State to take action in response to those orders. Elsewhere in this Memorandum the Plaintiffs have again noted that the enforcement of constitutional rights cannot be conditional and is not an issue of budgetary discretion. This Court has made it clear that "[b]udgetary and political concerns must yield, however, when compliance with a constitutional mandate is at issue. The task is difficult enough in prosperous times, when the state's coffers are full. However, the funding system that is devised must be solid enough that it can also function in an economic downturn[.]" *DeRolph II* at 9. Thus, considerations of the State's budget are irrelevant to the issues at hand and the State's effort to make them so will not only further trivialize the meaning of Section 2 of Article VI, but it may also call into question the role of the Court in enforcing other constitutional rights. If we are willing to diminish our children's' educational opportunities out of fiscal concerns, what other Constitutional guarantees will we next choose to diminish? As so aptly observed by Justice Resnick, "A remedy that is not enforced is truly not a remedy." *DeRolph II* at 12. Removing the compliance incentive from the Court's *DeRolph III* order would strip away any clear enforceability and deprive Ohio's children of the benefits of even the compromise decision.

B. The Court's Order That Changes In The School Funding Formula Be Made Effective As Of July 1, 2001 Is Within Its Remedial Authority.

The compromise decision stated, " We make no determination regarding the time in which the state must calculate and implement actual changes in the amount of funds distributed to each district pursuant to today's order, but the new calculations must be applied retroactive to July 1, 2001, and to the subsequent years designated in R.C. 3317.012**.** *DeRolph III* at 22. The State now contends that the Court's order somehow constitutes "retroactive legislation" and is prohibited by Section II, Article 28 of the Ohio Constitution. That Article provides, in part, "The *General Assembly* shall have no power to pass retroactive laws." (Emphasis added.) It should be obvious, even to the State, that this provision is a limitation on the legislative power of the General Assembly and not a limitation on the authority of the Court to issue remedial orders. [13] What the State seems to really be saying is the Court lacks authority to make the *DeRolph III* remedial order requiring the State to *distribute funds* required under the State's school funding formula as revised to comply with *DeRolph III*

[13] It should also be noted that even if the Court's *DeRolph III* remedial order were comparable an act of the General Assembly, which it is not, the application of remedial payments to a prior date, as remedial legislation is not a violation of Article 28 of Section II. "It has been established that the proscription against retroactivity applies to laws affecting substantive rights but not to the procedural or remedial aspects of such laws. *French v. Dwiggins* (1984), 9 Ohio St.3d 32, 9 OBR 123, 458 N.E.2d 827; *Kilbreath v. Rudy* (1968), 16 Ohio St.2d 70, 45 O.O.2d 370, 242 N.E.2d 658; *State, ex rel. Slaughter, v. Indus. Comm.* (1937), 132 Ohio St. 537, 542, 8 O.O. 531, 534, 9 N.E.2d 505, 508." *Kunkler v. Goodyear Tire & Rubber Co.,* 36 Ohio St.3d 135, 137 522 N.E.2d 477, 480.

modifications. At issue then, is not any question of legislation (none has yet been passed) but the authority of the Court to order a payment beginning as of a date prior to the Court's decision.

The jurisdiction of the Ohio Supreme Court is defined by Section 2 of Article IV of the Ohio Constitution. That provision, among others, vests in the Court the jurisdiction over, "[a]ny cause on review as may be necessary to its complete determination;" Clearly, the Court has jurisdiction over this case and equally clearly the Court has the authority, within the scope of its remedial powers, to order the payment of funds retroactive to a date certain. To suggest otherwise would be to call in questions numerous well-established principles of jurisprudence. What's different, for example, between the Court's *DeRolph III* order and an order for the payment of pre-judgment interest, or, for that matter, any *nunc pro tunc* entry of any Court? The foregoing demonstrates the extent of the State's "made up" arguments to continue avoiding compliance with the duty to provide Ohio's children with a constitutional school funding system. The State is under a continuing obligation to provide a Constitutional school funding system for Ohio's children and has been aware of its failure to do so for a long time. The Trial Court's decision in this case was issued on July 1, 1994. This Court could well have made any order for constitutional compliance effective as of that date, rather than July 1, 2001.

CONCLUSION

The Court's *DeRolph III* decision was clearly a compromise intended to end this litigation. It permitted the State to discharge its constitutional responsibility to Ohio's current and future generations of public school pupils by complying with specified, and in the grand scheme, relatively insignificant, changes in the school foundation base cost formula. Rather than accepting the "way out," the State has come back asking to do less, reducing still further the State's current and future contributions to Ohio's school children. No Constitutional reason has been advanced for such a change, nor has the State even sought to offer any other legal justification. While the State assumes that the Court may have relied on erroneous data, much of the data was provided by the State – and it should have been, because the State had the burden of proof. Yet, the Court's order was directed to a process, not to a foundation number. No resort to any "data" was necessary for the Court to identify the blatant manipulations inherent in the State's wealth screens, its rounding or its "echo effect."

The State then attempts to bamboozle the Court into believing that there is some sort of science involved here, and that wealth screens are an essential part of that science. Wrong again. Even Dr. Augenblick, the author of the methodology, concedes that it is not a statistical process, but rather a subjective one. Since it is not a statistical process by design, the issue of statistical practice has no application. Yet, the State then asserts

that that the top and bottom five percent of school districts in wealth and property valuation represent some sort of "outlier" and must therefore be eliminated as a matter of practice. Professors Allenby and Salmon, leaders in the fields of statistics and educational finance soundly debunk these ideas. What's left is the conclusion, as the Court concluded, that the use of wealth screens, rounding and "echo effect" have no place in this formula.

For these reasons, the Plaintiffs believe that the State's Motion should be denied. However, if the Court determines to reconsider this case, then that reconsideration should include all aspects of the case. Plaintiffs recognize that the *DeRolph III* compromise was a retreat from the enforcement of the reforms mandated by the Court in *DeRolph I* and *DeRolph II*. Had it been Plaintiffs' choice, such a retreat would never have happened because fixing the structural flaws in the system is, in the end, far more important than the funding level for the remainder of the year, or even the near future.

What the State fails to recognize is that ultimately, the cost to the taxpayers of Ohio--both in terms of squandered human potential as well as in actual dollars – is dramatically increased by the State's decision to undereducate so many of our students. When the State withholds the dollars needed to educate a child, the State not only dooms that child, but it also commits the people of this state to greater future expenses for relief of all of the ills associated with educational neglect: a deficient work force,

growing reliance on welfare, increased crime rates, and the need for remediation in the workplace and at the post-secondary level. The State continues to fail to recognize that education is a good investment.

Plaintiffs do not believe that the constitutional mandate for a "thorough and efficient" system of public education can or will ever be attained by the system tentatively endorsed by the Court. Thus, if reconsideration is appropriate, the Court should again return to the vision of educational reform embodied in *DeRolph I* and *DeRolph II*. The Constitutional imperative of a thorough and efficient system of public education for Ohio's children is no less important today that it was on March 24, 1997 or on May 11, 2001. That imperative will not diminish over time but will continue with increasing urgency.

Generally, decisions are made by Courts and compromises by the parties. The *DeRolph III* compromise clearly satisfied the adage that a "good compromise is one with which no one is happy". The Court's well-intended effort to give the State a way out of this case has now been rejected by the State and the Court should compromise no further. If the Court believes that a compromise is better than taking head-on the task of fashioning a remedy, then it should leave the parties where they are, and enforce the decision as written.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that a true copy of the foregoing brief was served upon the following counsel via hand delivery, this 24th day of September, 2001, addressed as follows:

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