

STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
[Saad, C.J., and Talbot and Fort Hood, JJ.]

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

Plaintiffs-Appellees,

Supreme Court No. 137453

v

Court of Appeals No. 230858

STATE OF MICHIGAN, DEPARTMENT OF
EDUCATION; DEPARTMENT OF MANAGEMENT
AND BUDGET; AND ROBERT J. KLEINE,
TREASURER OF THE STATE OF MICHIGAN,

Defendants-Appellants.

DEFENDANTS-APPELLANTS' REPLY BRIEF

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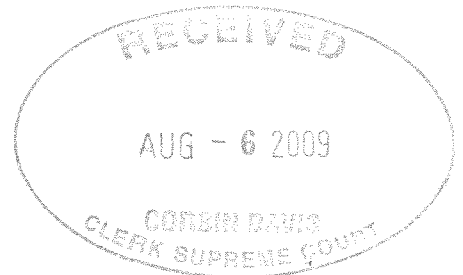


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QUESTION PRESENTED FOR REVIEW

- I. **This Court granted leave to appeal the July 3, 2008 judgment of the Court of Appeals limited to two issues. The sole issue in this appeal is "whether the prohibition of unfunded mandates in Const 1963, art 9, § 29 requires the plaintiffs to prove specific costs, either through the reallocation of funds or out of pocket expenses, in order to establish their entitlement to a declaratory judgment?"**

ARGUMENT

At issue in this appeal is the standard that the Court of Appeals announced for establishing a *Headlee* violation in a declaratory judgment action filed pursuant to the prohibition of unfunded mandates (POUM) in Const 1963, art 9, § 29:

To demonstrate the existence of such an off-loading of state funding responsibilities and to demonstrate actual or imminent injury, we conclude that the school districts must only establish (1) an increase in the level of activity or services mandated by the state, and (2) a complete failure on the part of the state to provide any funding to off-set the necessary costs to be incurred. (Appendix p. 206a, Court of Appeals Opinion on Second Remand, p.3.)

The POUM clause requires a State appropriation to local units of government for necessary increased costs when the State mandates an increased level of activities or services. A State appropriation is not required unless the changes in the mandated activities or services result in a specific net increase in cost to local units of government. The State does not contend that Plaintiffs have to prove damages specific to each of the plaintiff school districts in this action for declaratory judgment. But the plaintiffs are required to establish the specific amount of necessary increased costs incurred to perform a mandated activity as an essential element of any action under the POUM clause.

Plaintiffs contend that based on this Court's decision in *Durant I*¹ this Court envisioned that an action for declaratory judgment under the *Headlee Amendment* would not involve any proof of specific costs. For example, on page 14 of Apellees' Brief they allege:

Notwithstanding the way in which this case has unfolded, the fact remains that it was brought as an action for declaratory judgment which, had it proceeded as the

¹ *Durant v Michigan*, 456 Mich 175; 566 NW2d 272 (1997)(*Durant I*).

Court envisioned in *Durant*, 456 Mich at 205-06, would not have involved any discernable damages or "specific" dollar underfunding.

But this Court has never made such a broad statement.

In fact, on the same date that this Court decided *Durant I*, July 31, 1997, this Court also decided another *Headlee Amendment* case, *Oakland Co v Michigan*.² In *Oakland Co*, plaintiffs also filed a complaint for declaratory relief.³ In *Oakland County*, this Court stated that Const 1963, art 9, § 29 directs the State to reimburse only the necessary costs of a state requirement and explained the meaning of "necessary costs" as used in § 29:

The Headlee implementing act defines a "necessary cost" as "the net cost of an activity or service provided...." MCL 21.233(6); MSA 5.3194(603)(6). The net cost is the actual cost the state would incur if it provided the activity. Also, a cost incurred by a local unit because of a state mandate is not a necessary cost if less than "a *de minimus* cost." A *de minimus* cost is "a net cost to a local unit of government resulting from a state requirement which does not exceed \$300.00 per claim." MCL 21.232(4); MSA 5.3194(602)(4).⁴

Since the cases in *Oakland County* were decided by summary disposition, this Court noted that the parties did not have an opportunity to develop a record showing necessary costs of the state requirement; including proofs showing the "claims" for which the local units of government sought reimbursement. "These proofs are needed for a determination of what constitutes a 'claim' for purposes of MCL 21.234(4); MSA 5.3194(602)(4)"⁵ This Court stated that on remand, "the trial court must decide what costs are necessary county foster care costs, including whether any fall within the *de minimus* exclusion."⁶ Thus, the fact that a claim seeks a declaratory judgment under § 29 does not eliminate Plaintiffs' requirement to demonstrate the

² *Oakland Co v Michigan*, 456 Mich 144, 166; 566 NW2d 616(1997).

³ *Oakland Co*, 456 Mich at 147 fn 1.

⁴ *Oakland Co*, 456 Mich at 163 - 164.

⁵ *Oakland Co*, 456 Mich at 165.

⁶ *Oakland Co*, 456 Mich at 165.

specific necessary cost to perform the required activity, not just in categorical terms, but in monetary terms. Plaintiffs fail to address this Court's *Oakland County* decision in their Brief on Appeal.

Plaintiffs also argue that "this Court had the opportunity to consider this precise issue now raised by the State" in *Durant II* (Brief on Appeal – Appellees, p. 15).⁷ But in *Durant II* this Court merely reversed the Court of Appeals' order dismissing plaintiffs' case on procedural grounds for "failure to pursue the case in conformity with the rules, MCR 7.216(A)(10)" (Appellees' Appendix, p. 403b). MCR 7.216(A)(10) allows the Court of Appeals to dismiss an original proceeding for lack of jurisdiction or failure to pursue the case in conformity with the rules. Thus, the Court of Appeals dismissed the appeal on technical grounds. This Court reversed because the Court of Appeals had "jurisdiction to determine the issue under Const 1963, art 9, § 32 (Appellees' Appendix, p. 404b).⁸ But, contrary to Plaintiffs' assertion, this Court never made a determination whether the prohibition of unfunded mandates in Const 1963, art 9, § 29 requires the plaintiffs to prove specific costs, either through the reallocation of funds or out of pocket expenses, in order to establish their entitlement to a declaratory judgment. At most, the *Durant II* decision dealt only with the Court of Appeals' determination regarding the sufficiency of the complaint, not the necessary proofs.

This Court addressed the special pleading requirements necessary for claims brought under Const 1963, art 9, § 29:

[P]laintiffs must allege the type and extent of the harm so that the court may determine if a § 29 violation occurred for purposes of making a declaratory

⁷ *Durant v Michigan*, 459 Mich 876; 585 NW2d 302 (1998)(*Durant II*).

⁸ *Durant II*, 459 Mich at 876.

judgment. In that way, the state will be aware of the financial adjustment necessary to allow for future compliance.⁹

This Court added that to establish the "extent of the harm," Plaintiffs must show that the State-mandated local activity was originated without sufficient State funding after the *Headlee Amendment* was adopted, or, if properly funded initially, that the mandated local role was increased by the State without State funding for the necessary increased costs.¹⁰

Moreover, there is no dispute that school districts have been under a general obligation to report any and all information the State requires for a long time.¹¹ At the time Plaintiffs filed their complaint on December 15, 2000, while Executive Order 2000-9 had been signed by the Governor, the Executive Order itself contained no new mandated activities. As Plaintiffs concede in their Brief on Appeal, p. 13, the required data base submissions at issue and alleged financial impact on schools did not occur until two years later (Appellees' Appendix pp. 46b-47b).

In order to determine whether the school districts will incur necessary increased costs, section 3(6) of the *Headlee* Implementing Act, MCL 21.233(6), which defines "necessary costs", requires that the specific cost of reporting data before the change of the State requirement be compared with the specific cost of reporting data after the change. This comparison must take into account any offsetting savings that are incurred due to advances in technology and other efficiencies.

⁹ *Adair v Michigan*, 470 Mich 105 ,119-120; 680 NW2d 386 (2004) (*Adair I*), quoting from *Oakland Co v Michigan*, 456 Mich 144, 166; 566 NW2d 616(1997) While *Oakland County* dealt with MOS claims, the Supreme Court has held that the requirements of the POUM clause are similar. See *Adair I*, 470 Mich at 120, n 13.

¹⁰ *Adair I*, 470 Mich at 111.

¹¹ *Adair I*, 470 Mich at 129.

CONCLUSION

Const 1963, art 9, § 29 requires the State to appropriate money to local units of government for any "necessary increased costs" that result from a new activity or service or an increase in the level of any activity or service beyond that required by existing law. Since Plaintiffs offered no proof of specific costs, there was no evidence comparing the specific cost of reporting data before the creation of CEPI with the specific cost of reporting data afterward. In fact, the special master that examined the issue of increased costs found that there was "little evidence" that the local school districts had incurred any additional costs as a result of the CEPI implementation. Thus, there was no proof that any alleged increased costs were necessary, unnecessary, or *de minimis*. The statute defining "necessary costs" requires that the new mandate result in an increase in cost. Without this threshold showing, there is no basis on which to conclude that there was a new or increased cost imposed on the local government. In other words, there is no showing that the State violated the POUM clause.

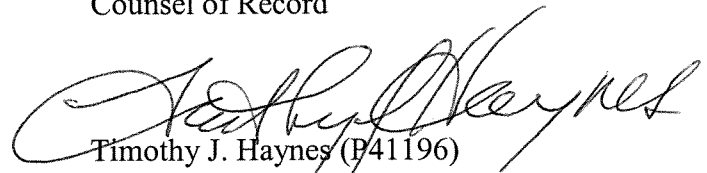
RELIEF SOUGHT

For the reasons set forth above, Defendants/Appellants respectfully request that this Honorable Court issue an order reversing the Court of Appeals judgment and ordering judgment in favor of Defendants/Appellants.

Respectfully submitted,

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