DeRolph v. State of Ohio, et al.

Thirteen Years of School Funding Litigation: Some Recollections and Comments

"School funding litigation is like a classic Russian novel; long, boring and in the end, everyone dies."

The Beginning:

The *DeRolph* case began in Appalachia, Southeastern Ohio where poor country school districts, tired of asking for support from unresponsive legislators hired Dr. Kern Alexander to conduct a study of school funding in Ohio. Dr. Alexander had conducted similar studies in other states and had played a key role in some major school funding litigation. His study concluded that the inequities in Ohio at the time were worse than those in states that had successfully challenged school funding laws.

Emboldened by Dr. Alexander's study, the Coalition of Rural and Appalachian Schools, the group that had commissioned the study, expanded its scope to become a statewide effort called the Ohio Coalition for Equity and Adequacy of School Funding (the Coalition). Soon thereafter the Coalition hired Bill Phillis, who had served as Assistant Superintendent of Public Instruction for a number of years and whose passion for school funding reform provided the spark for the Coalition's efforts. Bill's passion and tireless efforts made the litigation possible. His zeal for adequate funding for public education continues today. After hiring Bill, the group expanded to include over 500 Ohio public school districts as members, with a goal to support litigation to bring about school funding reform.

The Coalition then interviewed a number of law firms to serve as counsel for its litigation project. The sheer scope of the project demanded a firm with sufficient resources to staff a major litigation project. Bricker & Eckler LLP could offer school law and school finance background as well as trial litigation and appellate support. Our core team ultimately included Sue Yount, a school law expert, John Birath, a seasoned litigator, Susan Greenberger, an appellate expert and myself. Others joined the effort for specific tasks as needed.

The Litigation:

Our first complaint was styled *Thompson v. State of Ohio* and was filed in the Perry County Common Pleas Court. The complaint included numerous school districts and individual plaintiffs, including parents, pupils, teachers, school administrators and board members. The claims included violation of IDEA as well as violation of both federal and state constitutional rights by the school funding system. The State defendants, noting the federal claims in the case, removed it to federal court. We were unable to convince the federal court to remand the case back to state court for trial. In order to try to get to trial as quickly as possible we dismissed the federal claims, and most of the plaintiffs, handing the remainder of the case over to an advocacy group seeking a venue to assert IDEA claims in federal court. We then re-filed, on December 19, 1991, a state-claims only case in the same court. It is interesting to note that today, over 27 years later, the remnants of the original *Thompson* case are still pending in the federal court.

The second case was styled DeRolph, et al. v State of Ohio, et al. The DeRolph was a teenager, Nathan DeRolph whose father, Dale DeRolph was rightly upset about the fact that there was no chair for his son

in class, and not enough textbooks for all of the students. Little did he know that his name would become part of history. Today, Nathan is grown and has children in school in Columbus.

The fact that both cases were filed in the Perry County Court of Common Pleas raised allegations that the plaintiffs were "forum shopping" by filing the case in a poor, rural Appalachian county with a single judge. In fact, we did extensive research to find a jurisdiction that could process cases quickly, in an appellate district that also handled cases quickly. The goal was to get the case to the Ohio Supreme Court as quickly as possible, and Perry County was a good fit. The schools there also had made remarkable local tax effort to support their school, an additional factor in their favor. So we were, in fact, forum shopping, but not in the traditional sense. As it turned out, we couldn't have had a much better forum than the one we chose, though we didn't know it at the time.

In lieu of a class action, we opted to join a variety of school districts and related individuals as plaintiffs. Youngstown City Schools and Lima City Schools were good examples of the "rust belt" decay of urban education while Northern and Southern Local Schools in Perry County local schools were prime examples of the operation of Ohio's funding system on rural school districts.

Pre-Trial:

One of the more successful strategies that we followed was to get the trial judge, Judge Linton Lewis, to undertake a "view of the scene" prior to trial. On the record, we toured lavish new school facilities in Worthington and Pickerington, as well as some of the plaintiff school buildings as well. The contrast was stark and the judge quickly got the picture. On one of those tours we were walking down the hall in a middle school building and observed a large wading pool in the middle of the floor. Looking up, one could see fallen plaster and daylight through the deteriorated ceiling. Similarly, looking at encyclopedias published 30 or more years ago, chemistry labs with no chemicals and non-working lab equipment and world maps years out-of-date brought home the disparities to all of us, including the judge. I believed we had won the case before the trial ever started.

We also deposed a large number of Ohio Department of Education employees, many of whom were people we had worked closely with over the years in unrelated matters. Though they were all "good soldiers" in trying to follow the advice of their counsel, we knew that their sympathies lay with our side of the case and, given the opportunity, many of them gave us very favorable testimony.

Trial:

The trial lasted 7 weeks and included over 70 witnesses and 500 exhibits. It sorely tested us all. The Judge was insistent that he would wait for no witness, and that counsel should be prepared to move on immediately after the conclusion of the previous witness. In order to accommodate that demand we "platooned" witness presentation, with one of us preparing the next witness while another presented to current witness. To the credit of all counsel, he never had to wait. During the nearly 3 years prior to trial a massive amount of discovery had been undertaken, and a great number of witnesses were presented by deposition. But for that, the trial would have been at least twice as long.

Three days before the trial was set to begin we received a telefax order from a common pleas court judge in Cleveland directing counsel on both sides, as well as the Perry County trial judge to not proceed to trial. The Cleveland court, having a case pending that was styled as a class action, believed that its jurisdiction was exclusive and sought to bar us from proceeding. The next morning we filed a complaint

for a Writ of Prohibition in the Ohio Supreme Court to bar the Cleveland judge from enforcing his order. The Writ was granted 3 days later and the trial proceeded.

The Perry County courthouse is located in New Lexington Ohio. There are no hotels in Lexington Ohio, so we were forced to find lodging elsewhere and travel to court each morning. It being the fall in Appalachia, we saw deer/car incidents most mornings. Every day at lunch time we would walk past pickup trucks laden with deer carcasses outside the Sheriff's Office waiting to be registered. New Lexington was not for the faint of heart.

The Perry County Educational Service Center, a "county school district" offered to serve as our home base during the trial. With telephone, copier and office space, as well as much-needed coffee and sometimes even food, it was a welcome base of operations. Our eternal thanks to Dick Fischer, the superintendent, for his generosity.

We opened the trial with strong witnesses who could explain in clear, understandable terms, the operation and deficiencies of Ohio's school funding system. High among our priorities was the facilities problem, documented by a massive study that Bill Phillis had commissioned during his time at the Department of Education, and which concluded that Ohio had a $10 billion school facilities need. But anecdotal testimony helped to sharply define that need. For example, one witness testified about the asbestos that flaked from the gymnasium ceiling when the kids played basketball in the gym. Others told of arsenic in the school water, the raw sewage fouling the playgrounds and the school building sliding down a hill. One board member testified that his farm animals were better housed that the school children attending the schools in his district. Makeshift classrooms, lack of restroom facilities, and dangerous, deteriorated school buildings made a strong case that, if the state had responsibility for these conditions, it had badly shirked that responsibility. The trial concluded on, Dec. 8, 1993

The Trial Court Decision:

The Trial Court announced its decision on July 12 1994.[1] The decision was remarkable both in length and breadth. In the all the decision consisted of 958 pages setting forth the Court's findings of fact and conclusions of law. We were delighted that the Court had ruled in favor of the Plaintiffs on every key issue in the case, including ruling that the right to a "thorough and efficient" public education, as defined in the Ohio Constitution, was a fundamental right, thus shifting the burden to justify future disparities to the state. The big-city media took exception to the "country judge" ruling on statewide issues and holding the state accountable. Cartoons and editorials, many of which were virtually identical, were widely published around the state. The Attorney General sought to remedy this obvious miscarriage of justice in the court of appeals. But, he had a problem: the State Board of Education, one the defendants in the case voted *not to appeal* the decision and the General Assembly, had taken no formal action authorizing an appeal within the filing time limit. Faced with no client formally requesting him to appeal the decision the Attorney General did what many politicians do, he rose above it and filed a notice of appeal anyway.

The Ohio Supreme Court:

[1] DeRolph v. State of Ohio, Case No. 22043 (Perry Co. CP, July 1, 1994); See, http://www.bricker.com/documents/resources/schoolfund/070194cp.pdf.

In all, the case came before the Ohio Supreme Court on five separate occasions. The first was, for me the most difficult. Though I had argued cases before the Supreme Court on numerous other occasions, this one, by far, was the most significant. We conducted numerous "moot court" exercises to prepare and had a wonderful team including a number of litigators, appellate experts and one former Ohio Supreme Court Justice. One of the points that came from those exercises was "The State of Ohio couldn't house convicted felons in the buildings it condemns its public school children to occupy on a daily basis." Another was, in response to anticipated separation of powers questions, "We're not asking you to do the Legislature's job, we're asking you to do your job." We were able to weave both into the oral argument and one of the Justices echoed that line in his decision, so I guess we hit the mark.

The significance of the case was marked at the outset of the oral argument by the Court essentially waiving the 15 minute per side time limits and permitting counsel to argue until the Court had heard enough – a period lasting nearly 2 hours. Oral argument took place on Sept. 10, 1996 and the Court's decision was released on March 24, 1997.

The Court announced that its decision would be released on March 24 a day or two in advance and the State's chief counsel, Joel Taylor called me at home the night before to reminisce a little and wish us well. He was prophetic in observing that, however it came out, "things wouldn't be the same" after the decision.

The next morning the entire trial team, along with hundreds of other interested folks lined up in from of the Supreme Court's media counter. There were 5 huge piles of paper lined up on the counter which, we soon learned, respectively represented the Court's majority decision, the dissent, and 3 concurring opinions. Each was quite lengthy. The decision was 4 to 3 and I've always believed that the 4 in the majority agreed among themselves that each would write a separate opinion to prevent any last-minute defections to the other side. That view has never been confirmed or denied. In the end, we won, and it was a momentous day for Ohio's public school children.[2] Little did we know that it was just the beginning of another round in the fight.

The Supreme Court directed the legislature to develop a school funding system compliant with the Ohio Constitution and gave them a year in which to do it. The remedial legislation was to be ruled on by the trial court, and then was subject to direct review (bypassing the court of appeals) by the Supreme Court. That review began on August 24, 1998 and in effect represented an additional 10 day trial back in Perry County, at the end of which the trial court ruled that the remedial legislation failed to meet the Supreme Court's directives as set forth in the March 24, 1997 decision.

The trial court's second decision was then appealed to the Ohio Supreme Court which held, on May 11, 2000, that school funding system remained unconstitutional.[3] The legislature was given additional time for the crafting of remedial legislation. This time evidence was to be filed directly with the Supreme Court -- a really bad idea as, without the agility to cross-examine, distortion and misrepresentation often rules the day – as became manifest as the third round of appeals went forward.

[2] DeRolph v. State (1997) 78 Ohio St.3d 193.
[3] DeRolph v. State (2000) 89 Ohio St.3d 1.

The third Ohio Supreme Court's decision was announced on September 6, 2001.[4] This time, the Court's frustration was obvious. Abandoning any separation of powers pretense, the Court ruled that the legislative formula advanced by the legislature remained deficient, but "would be" acceptable if a few of the criteria were changed. In effect, the Court sought to re-write the legislative "fix" advanced by the General Assembly. The opponents quickly filed a Motion to Reconsider, arguing that the "fix" would cost the State millions more than the legislation had anticipated and claiming that a data error had been made in one of our expert's reports and mistakenly relied on by the Court. In fact, there was no data error. But, in an effort to avoid the appearance of having made a mistake, the Court granted the Motion and directed the parties to Mediation in an effort to resolve the impasse.

Mediation was a complete waste of time, and the Mediator, Howard Bellman, ultimately reported to the Court on March 21, 2002 that there was no hope of a mediated settlement. The Supreme Court returned the case to the active docket for final resolution.

On December 11, 2002 the Supreme Court issued its 4th DeRolph decision, vacating the third, (compromise) decision, reinstating the 1st and 2nd decisions and directing the General Assembly to "enact a school funding scheme that is thorough and efficient, as explained in *DeRolph I, DeRolph II*, and the accompanying concurrences."[5] The Court's decision was as good as one could possibly have hoped for. It was also timely, as the membership, and balance, of the Court would soon change, with 2 new justices taking the bench after the first of the year.

Now, having a clear mandate for the enactment of a new school funding system, we waited for some sign that the Supreme Court's directive to the legislature would soon be followed; and waited, and waited… Finally, we sought to motivate the State to begin the process by filing a Motion in the trial court asking for a status conference for the State to advise the court, and the Plaintiffs as to its timetable for compliance. The State responded by filing a Motion for Writ of Prohibition in the Ohio Supreme Court asking for an order prohibiting the trial court from taking any further action in the case. The State argued that, since the Supreme Court's decision had neither been retained by the Supreme Court nor remanded to the trial court, the trial court lacked jurisdiction to take any further action in the case. The "new" Supreme Court quickly granted the Motion, thus leaving the Plaintiffs with little choice but to attempt to start the entire process over again by filing a new case.[6] There was little will to do that, especially since it was clear that the "new" Supreme Court was unwilling to enforce the mandate of its predecessor.

Our last hope was to seek review from the United States Supreme Court, which we did in August of 2003. Like most certiorari petitions, ours was denied. Thus ending, in October of 2003, the litigation begun in 1990. We had a mandate from the Ohio Supreme Court and no way to enforce it. Thus, today Ohio's remains without a school funding formula that satisfies the Ohio Constitution and continues to deprive many of its children of the "thorough and efficient" system of public education to which they are entitled.

What was gained:

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[4] DeRolph v. State (2001) 93 Ohio St.3d 309

[5] DeRolph v. State, 97 Ohio St.3d 434, 2002-Ohio-6750

[6] State ex rel. State v. Lewis 99 Ohio St.3d 97, 2003-Ohio-2476

As a result of the *DeRolph* litigation the legislature created a funding structure that channeled $11.5 billion in state funding to the construction or renovation of 1180 school buildings in Ohio. These were desperately needed improvements and, though the litigation was never formally credited by the politicians as the reason for the funding, we all understood why it came to pass.

The second thing that was gained was a judicial declaration from the State's highest court that the ultimate responsibility for public education in Ohio lies with the legislature.

What was not gained:

Ohio still lacks a school funding formula that meets the requirements set forth in the *DeRolph* decisions and it is unlikely that we will achieve that goal anytime in the near future. There are two fundamental reasons: first, because we had a constitutional crisis in Ohio and the court blinked, thus ceding the issue to the legislature. Early on, some of the Supreme Court justices had telegraphed the fact that they would not exercise judicial authority to enforce their decisions in the case. On justice noted in a concurring opinion to the effect that "the court lacks an army with which to enforce its decisions…" Others were more subtle, but the message was clear that aggressive enforcement would not be forthcoming. Having no consequences to fear, the legislature was free to ignore the Court's *DeRolph* orders, and it did.

The second reason that we have been unable to bring about meaningful reform is the "T" word. School funding reform in the traditional sense cannot be done within the confines of existing revenue, and additional revenue would be required. The prevailing political agenda in Ohio, as in many other states, has been to do everything possible to cut taxes, or at least shift the tax burden from the state to local government, so that school funding reform in the political climate that has, and still prevails in Ohio is unlikely.

As a final observation, I would note that the public has been fed a regular diet of negative publicity, not all of it undeserved, about public education for years. As an institution of government, many public schools, especially those in large urban, high poverty areas have been characterized as "money pits" that consume large amounts of cash and return few positive results. While most parents have high praise for the school their children attend, they are doubtful about the efficacy of public education in general. Against this background, mandates such as those issued by the Ohio Supreme Court are met with general skepticism on the part of the public, and without a groundswell of sentiment for the enforcement of those mandates, the response has not been unexpected. As one observer noted, "no politician has been voted out of office because of school funding." Until that circumstance changes, we may well expect a continuation of the status quo.

We had some heroes:

In addition to the tireless efforts of Bill Phillis, the Coalition also had the steady hand of Larry Miller, a Muskingum County superintendent as Chair of its governing board for much of the time the litigation was pending. Larry stood as a lighthouse for the Ohio education community and he attracted hard work from a great many of his colleagues, too numerous to mention here. Also, the trial team, Sue Yount, John Birath and Susan Greenberger represented the finest collection of brilliant, dedicated and hardworking lawyers ever, in my experience, assembled in one effort.