

IN THE CIRCUIT COURT OF SANGAMON COUNTY, ILLINOIS  
COUNTY DEPARTMENT, MISCELLANEOUS REMEDY DIVISION

PAUL CARR and RON NEWELL, )  
 )  
Plaintiffs, )  
 )  
 v. )  
 )  
DR. CHRISTOPHER KOCH, State )  
Superintendent of Education, the ILLINOIS )  
STATE BOARD OF EDUCATION, and )  
PATRICK J. QUINN, Governor of the State of )  
Illinois, )  
 )  
Defendants. )

Case No. 10 MR 000169

Honorable

**FILED**

JUL 15 2010 CIV-6

*Anthony P. Schaefer* Clerk of the  
Circuit Court

**PLAINTIFFS' RESPONSE TO DEFENDANTS'  
SECTION 2-619.1 COMBINED MOTION TO DISMISS**

**INTRODUCTION**

“In ruling on a motion to dismiss under either section 2-615 or section 2-619 of the Code, the court must accept all well-pled facts in the complaint as true and draw all reasonable inferences from those facts in favor of the Plaintiff.” *Storm & Assoc., Ltd. V. Cuculich*, 298 Ill. App. 3d 1040, 1047 (5th Dist. 1998). In doing so, courts are to construe pleadings liberally, with a view to doing substantial justice between the parties. *A.J. Maggio Co. v. Willis*, 316 Ill. App. 3d 1043, 1050 (1st Dist. 2000). A motion to dismiss should only be granted when it appears that no set of facts can be proved under the pleadings that would entitle the plaintiff to recover. *Dubinsky v. United Airlines Master Exec. Council*, 303 Ill. App. 3d 317, 322 (1st Dist. 1999).

Notwithstanding these familiar legal standards and the 16 page, 55 paragraph complaint of plaintiffs Paul Carr and Ron Newell (collectively “Plaintiffs”), defendants Dr. Christopher Koch , State Superintendent of Education, the Illinois State Board of Education, and Governor Patrick J. Quinn (collectively “Defendants” or “the State”) have moved to dismiss the complaint pursuant to 735 ILCS 5/2-619(a)(9) and 735 ILCS 5/2-615. In doing so, the State essentially advances two arguments for dismissal of the Complaint. First, the State argues that Plaintiffs lack standing. And second, the State argues that Plaintiffs have not even managed to plead a cause of action.

The State’s standing arguments are four-fold. The first one is that Plaintiffs are unable to fairly trace their injury – having to pay higher school property taxes than similarly situated taxpayers – to the actions of Defendants. This argument, however, simply ignores the reality that Plaintiffs’ school property tax rates are dictated by an education funding system administered by Defendants.

The State’s second standing argument is that the relief Plaintiffs seek – a declaration that the Illinois education funding system violates the Illinois Constitution’s Equal Protection Clause – is not likely to prevent or redress the alleged injury because the General Assembly may not be able to devise a better system. This argument is at odds with common sense, for if it were sound no citizen would ever have standing to challenge the constitutionality of a statute. The State’s third and fourth standing arguments are, respectively, the mischaracterization of this suit as a “taxpayer action,” which it plainly is not, and the mistaken assertion that the doctrine of sovereign immunity bars suit against the Illinois State Board of Education, which is clearly not the case where, as here, the only relief sought is a declaratory judgment.

To support its failure-to-plead-a-cause-of-action argument the State urges that taxpayers in different districts are not similarly situated because of various differences among districts; that there is a rational basis – local control – for the funding system; and that in any event Plaintiffs’ claim is non-justiciable. The first argument, which inappropriately relies on facts outside the Complaint, fails because the purported differences are not relevant to Plaintiffs’ claim as all taxpayers are equally subject to Illinois’ education funding system. The second argument fails because, although the State disputes Plaintiffs’ allegations that local control no longer supplies a rational basis for the education funding system’s unequal treatment of similarly situated taxpayers, the absence of a rational basis is well-pled in the Complaint and the factual material the State relies upon in this regard is improper at the motion-to-dismiss stage of litigation. Finally, the State’s non-justiciability contention is definitively answered by the Illinois Supreme Court’s *Edgar* decision.

## **BACKGROUND**

### **A. The Illinois Education Funding System**

Under Illinois’ education funding system local property taxpayers pay the majority of the cost of the State’s constitutional education obligation. (Compl. ¶ 18.) Since FY 1999, almost 60% of public education dollars have come from local sources of funding. (*Id.*) For the 2007-08 school year, local tax revenue accounted for 65% of Illinois education funding. (Compl. ¶ 18.)

The State provides General State Aid to each school district (Compl. ¶ 22), and determines the level of this aid through a formula established by statute. (Compl. ¶ 19.) Each fiscal year, by actions of the General Assembly and Governor, the State establishes a “Foundation Level” of financial support for each pupil in each district. (Compl. ¶ 3.) The Foundation Level is defined as “a figure established by the State representing the minimum level

of per-pupil financial support that should be available to provide for the basic education of each pupil in Average Daily Attendance.” 105 ILCS 5/18-8.05(B); Compl. ¶ 3. The State’s education funding system “is designed to assure that, through a combination of State financial aid and required local resources, the financial support provided each pupil” in each school district “equals or exceeds” the State-designated Foundation Level. 105 ILCS 5/18-8.05(A)(1); Compl. ¶ 3. The Foundation Level for the 2009-2010 school year was \$6,119 per pupil. (Compl. ¶ 20.)

The amount of General State Aid each school district receives is based on the property tax base from which that school district draws tax revenues. (Compl. ¶ 22.) If the district’s property values are so low that the district cannot substantially reach the Foundation Level for each pupil in its schools by levying local school property taxes at a statutorily specified rate, then the State will provide to the district an amount of General State Aid designed to enable the district to reach the Foundation Level. (*Id.*)

In determining a school district’s General State Aid, the State Board of Education calculates a school district’s “Available Local Resources” per pupil. (Compl. ¶ 23.) The Board first determines a school district’s local property tax revenue by multiplying the equalized assessed value of its local property by 2.3% for school districts consisting solely of elementary and middle schools (K-8 districts), 1.05% for school districts consisting solely of High Schools (High School districts), and 3.0% for school districts consisting of all schools from kindergarten through 12 (Unified districts). (*Id.*) Revenue from Corporate Personal Property Replacement Taxes distributed to each school district is added to the local property tax revenue calculated as above, the sum of which is then divided by the district’s Average Daily Attendance to yield the “Available Local Resources” for each school district. 105 ILCS 5/18-8.05(D).

If a school district's Available Local Resources per pupil, calculated by this method, is less than 93% of the per-pupil Foundation Level, the district receives General State Aid for each pupil in the district's Average Daily Attendance in an amount equal to the difference between the per-pupil Available Local Resources and the per-pupil Foundation Level. 105 ILCS 5/18-8.05(E)(2). Such districts are referred to as "Foundation Level districts." (Compl. ¶ 24.) By definition, a Foundation Level district must, in order to achieve Foundation Level funding, tax its citizens at the statutorily specified rate (2.30% for K-8 districts, 1.05% for High School districts, and 3.00% for Unified districts). (Compl. ¶ 28.) If a Foundation Level district imposes taxes at any lower rate, its local property tax revenues will be insufficient, when combined with General State Aid, to reach the Foundation Level. (*Id.*)

If a district's Available Local Resources per pupil is between 93% and 175% of the Foundation Level, the district receives General State Aid determined on a sliding scale. (Compl. ¶ 25.) The scale provides for a linear decrease from General State Aid equal to 7% of the Foundation Level per pupil for districts with Available Local Resources at the low end of the range, and 5% of the Foundation Level per pupil for districts with Available Local Resources at the high end of the range. 105 ILCS 5/18-8.05(E)(3). Such districts are referred to as "Alternative Formula districts." (Compl. ¶ 25.)

If a district's Available Local Resources per pupil exceed 175% of the Foundation Level, the district receives a flat payment of \$218 per pupil in General State Aid. 105 ILCS 5/18-8.05(E)(4). Such districts are referred to as "Flat Grant districts." (Compl. ¶ 26.) A Flat Grant district need not tax itself at the statutorily specified rate to achieve Foundation Level funding for its students (Compl. ¶ 29); by definition, Flat Grant districts obtain more than 175% of the Foundation Level by imposing taxes at the statutorily specified rates. (*Id.*) Thus, a Flat Grant

district need apply a tax rate of no more than 57% of the statutorily specified rates to have available per-pupil funding that exceeds the Foundation Level, without any State contribution of General State Aid. (*Id.*) Nonetheless, the State provides an additional \$218 per pupil to such school districts—regardless of the tax rate they actually impose and regardless of whether or not revenue generated by such rate alone exceeds the Foundation Level. (*Id.*) In sum, General State Aid is provided to all school districts in some amount, whether or not the district is able to reach or exceed Foundation Level funding by taxing at the statutorily specified percentage. (Compl. ¶ 27.)

The result of the State’s education funding system is to require payment of higher school property tax rates by residents of property-poor Foundation Level districts than by residents of property-rich Flat Grant districts in order to reach the Foundation Level. (Compl. ¶ 31.) The dissimilarity in the treatment of similarly situated taxpayers is illustrated by the latest available education funding data.<sup>1</sup> In property-poor K-8 school districts, taxpayers paid a median school property tax rate that was 23% higher than that paid by similarly situated taxpayers in property-rich K-8 districts. (Compl. ¶ 32.) Yet, students in these property-poor districts received a median operating expenditure per pupil (OE/PP) that was 28% lower than that received by students in property-rich school districts.<sup>2</sup> (*Id.*) Thus, even though taxpayers in property-poor K-8 districts paid substantially higher school property tax rates than similarly situated taxpayers

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<sup>1</sup> The latest education funding data, available at <http://webprod1.isbe.net/ilearn/ASP/index.asp> (last visited Mar. 12, 2010), is published by the Illinois Local Education Agency Retrieval Network, an agency affiliated with the Illinois State Board of Education. The data, a portion of which is summarized here, shows (among other things) the 2007-2008 operating expenditures per pupil as well as the 2006 local school district tax rate for each Illinois public school district. (Compl. n.3.)

<sup>2</sup> Operating expenditures per pupil represent the gross operating cost of a school district (excluding summer school, adult education, bond principal retired, and capital expenditures) divided by the nine-month Average Daily Attendance for the regular school term. Illinois Local Education Agency Retrieval Network, <http://webprod1.isbe.net/ilearn/ASP/definitions.asp> (last visited Mar. 12, 2010). (Compl. n.4.)

in property-rich K-8 districts, their students received \$3,167 less in per pupil operating support than did students in property-poor K-8 districts. (*Id.*)

Such dissimilarity is present in Illinois High School districts as well. (Compl. ¶ 33.) Taxpayers in property-poor High School districts paid a median school property tax rate that was 36% higher than that paid by similarly situated taxpayers in property-rich High School districts. (*Id.*) Yet high school students in property-poor districts received a median operating expenditure per pupil that was 36% lower than that received by students in property-rich High School districts. (*Id.*) Similarly, while property-poor Unified district taxpayers paid a median school property tax rate that was 3% higher than that paid by taxpayers in property-rich Unified districts, their students were supported by a median operating expenditure per pupil that was 14% lower than that received by students in property-rich Unified districts. (Compl. ¶ 34.)

Plaintiffs' situations provide examples of this dissimilarity. Plaintiff Paul Carr is a property owner in Homewood-Flossmoor CHSD 233, a Foundation Level High School district located in Cook County with a 2006 equalized assessed property value per pupil (EAV/PP) of just under \$286,000. (Compl. ¶ 36.) As a resident of Homewood-Flossmoor CHSD 233, Carr paid a school property tax rate of 4.10% in 2006 in order to generate instructional expenditures per pupil of \$7,292 in the 2007-08 school year.<sup>3</sup> (*Id.*) A similarly situated property owner (that is, one owning property of the same assessed value) in New Trier Twp. HSD 203, a Flat Grant High School district located in Cook County with a 2006 equalized assessed property value per pupil of nearly \$1.2 million, was taxed at a rate of almost two and one-half times less (1.66%) in 2006. (Compl. ¶ 37.) Yet in 2007-08 students in New Trier HSD 203 received \$3,349 more in

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<sup>3</sup> Instructional expenditures per pupil represent the direct cost a district devotes to teaching pupils (e.g., academic programs, teacher salaries, etc.) divided by the nine month Average Daily Attendance for the regular school term. Center for Tax and Budget Accountability, *Money Matters: How the Illinois School Funding System Creates Significant Educational Inequities that Impact Most Students in the State* (2008). (Compl. n.5.)

instructional expenditures per pupil (\$10,641) than students in Homewood-Flossmoor CHSD 233. (*Id.*) In spite of these dissimilarities, under the current funding system in Illinois New Trier HSD 203 continues to receive a \$218 per student grant from the State. (*Id.*)

Plaintiff Ron Newell is a property owner in Cairo USD 1, a Foundation Level Unified district located in Alexander County with a 2006 EAV/PP of \$27,265. (Compl. ¶ 38.) As a resident of Cairo USD 1, Newell paid a school property tax rate of 6.95% in 2006 in order to generate instructional expenditures per student of \$6,192 in the 2007-08 school year. (*Id.*) A similarly situated property owner (that is, one owning property of the same assessed value) in Scales Mound CUSD 211, a Flat Grant Unified district located in Jo Daviess County with a 2006 equalized assessed property value per pupil of over half-a-million dollars, was taxed at a rate (3.33%), less than half that paid by Newell in 2006. (Compl. ¶ 39.) Yet in 2007-08, students in Scales Mound CUSD 211 received over \$2,400 more in instructional expenditures per pupil than did students in Cairo USD 1. (*Id.*)

The Illinois education funding system thus in effect requires taxpayers in property-poor (Foundation Level) districts to pay higher school property tax rates to fund their local public schools at the Foundation level than similarly situated taxpayers in property-rich districts. (Compl. ¶ 35.) Despite these higher tax rates, property-poor districts receive less per pupil funding than do property-rich districts. (*Id.*) Yet the State grants an additional \$218 per pupil to property-rich Flat Grant districts (which already have lower tax rates and higher per-pupil funding than property-poor Foundation Level districts). (*Id.*)

**B. State and Federal Learning Standards**

In 1997, the Illinois State Board of Education (“ISBE”) promulgated the Illinois Learning Standards (“ILS”). (Compl. ¶ 42.) The ILS “define what all students in all Illinois public

schools should know and be able to do in the seven core areas as a result of their elementary and secondary schooling.” Illinois State Board of Education, <http://www.isbe.state.il.us/ils/> (last visited Mar. 12, 2010).

In particular, the ILS specify what students are expected to learn across seven learning areas, including precise descriptions of the content students in five grade-level groupings must learn in English Language Arts, Mathematics, Science, Social Science, Fine Arts, Foreign Languages, and Physical Development and Health. (Compl. ¶ 43.) For example, to meet State history standards by late elementary school, a student must be able to “[i]dentify major causes of the American Revolution and describe the consequences of the Revolution through the early national period, including the roles of George Washington, Thomas Jefferson and Benjamin Franklin.” (Compl. ¶ 44.) To meet State science standards, a junior high student must be able to “[i]dentify and classify biotic and abiotic factors in an environment that affect population density, habitat and placement of organisms in an energy pyramid.” (*Id.*) To meet State social sciences standards, a late high school student must be able to “[a]nalyze ways in which federalism protects individual rights and promotes the common good and how at times has made it possible for states to protect and deny rights for certain groups.” (*Id.*)

Students are subjected to statewide testing to measure their progress with the ILS. (Compl. ¶ 45.) The State mandates that students complete standardized tests – the Illinois Standard Achievement Test (“ISAT”) for elementary schools, and the Prairie State Achievement Exam (“PSAE”) for high schools. (Compl. ¶ 45.) These tests were specifically created to align directly with the ILS and to hold students and schools accountable to them. (*Id.*) The ISAT and the PSAE were created and implemented around the turn of the millennium. (Compl. ¶ 46.) Before that time, the State employed the Illinois Goal Assessment Program test or IGAP. (*Id.*)

The IGAP was not coupled with a set of detailed standards and its scores were simply used to estimate whether students met State goals, which, unlike the ILS, were broadly defined. (*Id.*) As opposed to the IGAP, the ISAT and the PSAE are aligned directly to the ILS—an arrangement that has imposed profound changes on the learning curricula set by Illinois schools and school districts. (*Id.*) Under a new law signed by Governor Quinn in early 2010, the Performance Evaluation Reform Act of 2010, the ILS and the statewide mandatory tests will assume even more prominence by requiring every Illinois school district to incorporate student performance on mandatory statewide testing as a significant factor in teacher and principal evaluations. (Compl. ¶ 47.)

The federal government now exercises its own degree of control over education of Illinois school children through the No Child Left Behind Act (“NCLB”). (Compl. ¶ 48.) Effective January 8, 2002, in order to qualify for federal funding NCLB requires states to establish and enforce statewide learning standards and to achieve Adequate Yearly Progress (“AYP”) towards these standards, as measured by federally-approved standardized tests. *See* 20 U.S.C. § 6311. Illinois’ system of standards and standardized tests, and its calculation of AYP have been approved by the federal government as complying with NCLB. (Compl. ¶ 48.)

Under the NCLB-approved system of standards and tests, Illinois schools face serious penalties for failure to meet State-prescribed student performance targets on the ISAT and PSAE. (Compl. ¶ 49.) If a school’s students do not meet such State performance targets, the State may impose a series of penalties, including limiting a school’s or district’s control over its budget and spending, requiring the use of State-designed tutoring programs, and, in cases of multi-year failure to meet targets, assuming control over and imposing forced restructuring upon the school or district. 105 ILCS 5/2-3.25d-f. As a result of this centralized regime, Illinois school districts

are in effect compelled to fund schools at a level that will enable them to meet State-prescribed mandates and avoid State-prescribed penalties. (Compl. ¶ 50.)

### ARGUMENT

To reiterate, the above pleaded facts, and reasonable inferences from them favorable to Plaintiffs, are to be taken as true. At this stage of a case, the merits are not to be considered. *Dubinsky*, 303 Ill. App. 3d at 322. Plaintiffs are not required to prove their case; rather, Plaintiffs need only allege sufficient facts to state a cause of action. *Id.* As shown below, Plaintiffs plainly have standing to have their claims adjudicated by this Court. And they just as plainly have managed to state a colorable cause of action.

**I. THE STATE’S 2-619 MOTION TO DISMISS SHOULD BE DENIED BECAUSE PLAINTIFFS HAVE PROPERLY PLED STANDING; THIS IS NOT A “TAXPAYER ACTION,” AND THE DOCTRINE OF SOVEREIGN IMMUNITY IS INAPPLICABLE TO THIS CASE.**

**A. Plaintiffs Have Standing to Challenge the Education Funding System.**

“[I]t is the burden of the defendant to plead and prove a lack of standing,” *P & S Grain, LLC v. County of Williamson*, 926 N.E.2d 466, 474 (5th Dist. 2010). Defendants here have failed to meet that burden. “Where standing is challenged by way of a motion to dismiss, a court must accept as true all well-pleaded facts in the plaintiff’s complaint and all inferences that can reasonably be drawn in the plaintiff’s favor.” *International Union of Operating Engineers, Local 148, AFL-CIO v. Ill. Dept. of Employment Sec.*, 215 Ill. 2d 37, 45 (2005). Here Plaintiffs’ well-pled facts and the inferences to be drawn from them unquestionably satisfy standing requirements.

To have standing to challenge the constitutionality of a statute, “one must have sustained or be in immediate danger of sustaining a direct injury as a result of the enforcement of the challenged statute.” *Wexler v. Wirtz Corp.*, 211 Ill.2d 18, 23 (2004). This injury must be

distinct and palpable, fairly traceable to Defendants' actions, and substantially likely to be prevented or redressed by the relief requested. *Id.* Further, in a declaratory judgment action, "there must be an actual controversy between adverse parties, with the party requesting the declaration possessing some personal claim, status, or right which is capable of being affected by the grant of such relief." *Village of Chatham v. County of Sangamon*, 216 Ill.2d 402, 420 (2005), quoting *Greer v. Illinois Housing Development Authority*, 122 Ill.2d 462, 493 (1988).

Here, Plaintiffs claim standing on the ground that they have been injured by having to pay school property taxes at higher rates than similarly situated taxpayers. This injury is distinct and palpable "in that it is based upon the imposition of a particular tax and is not vague or undefined." *P & S Grain*, 926 N.E.2d at 474. It results from an education funding system that is administered by Defendants and is thus "fairly traceable" to their actions. An actual controversy obviously exists between Plaintiffs and Defendants – Plaintiffs are actually paying higher school property taxes than similarly situated taxpayers – that can be redressed by relief that changes the system that produces this unequal treatment.

Defendants argue that taxing decisions lie not with the State but with local taxing districts. However, this argument ignores the core of Plaintiffs' contention – that in order to reach the Foundation Level of per pupil funding and thereby avoid the penalties imposed for failing to meet State learning standards, a property-poor district is effectively required by operation of the State funding system to tax at the statutorily specified tax rate. This effective requirement is fairly traceable to Defendants since they are responsible for administering both the State's educational funding system and its public educational policies and standards.

Defendants also impose and enforce sanctions on districts whose students fail to achieve the performance targets established by the State – limiting a school's or district's control over its

budget and spending, requiring the use of State-designed tutoring programs, and (in cases of multi-year failure) the draconian remedy of assuming control over and imposing forced restructuring upon the school or district. *See* 105 ILCS 5/2-3.25d-f.

As a remedy for their injury, Plaintiffs seek a declaration that this funding system violates the Equal Protection Clause of the Illinois Constitution. If granted, this relief is likely to redress the alleged injury, for such a declaration would force the Illinois legislature, at court direction, to develop an education funding system that remedies the equal protection defect of the present system.

Defendants contend that such relief does not meet standing requirements because the legislature might not be able to devise such a system. The argument proves too much, for were it to prevail no plaintiff – unable to predict with certainty what a legislature will do – could ever establish standing to challenge a statute’s constitutionality.

At its foundation, the standing doctrine is meant to assure that only parties who have a real interest in a controversy may present their case to the courts. *Chicago Teachers Union, Local 1 v. Bd. of Education of the City of Chicago*, 189 Ill.2d 200, 206 (2000). As Illinois property-owners and taxpayers, Plaintiffs are precisely the right persons to challenge the constitutionality of the State’s education funding system. “Although the requirement of standing is meant to preclude *uninterested* persons from suing, it is not meant to preclude a valid controversy from being litigated.” *Messenger v. Edgar*, 157 Ill.2d 162, 171 (1993) (emphasis added). As “interested” persons, currently being required to pay school taxes at higher rates than similarly situated taxpayers, Plaintiffs are exactly the right persons to bring this challenge.

**B. This is not a “Taxpayer Action”**

Plaintiffs have asserted only one cause of action against the State – an equal protection claim. The State’s mischaracterization of this suit as a “taxpayer action” does not make it one.

Nowhere in their complaint do Plaintiffs mention “taxpayer action” or cite to section 735 ILCS 5/11-301, nor do they rely on that statute for jurisdictional purposes. “A ‘taxpayer action’ is brought by private persons in their capacity as taxpayers . . . for the purpose of seeking relief from illegal or unauthorized acts of public bodies or public officials, which acts are injurious to their common interests as such taxpayers.” *Scachitti v. UBS Financial Services, et al.*, 831 N.E.2d 544, 550 (Ill. 2005). Plaintiffs have not alleged that Defendants have committed “illegal or unauthorized acts,” or that the State has misused public funds. What Plaintiffs *have* alleged is that the unequal treatment of taxpayers, in effect required by Illinois’ education funding system, violates the Equal Protection Clause of the Illinois Constitution.

The cases relied upon by the State only highlight the distinction between this lawsuit and a taxpayer action. In *Caro v. Whitaker* the plaintiff filed a taxpayer complaint against the director of the department of public health seeking to enjoin the disbursement of funds for stem cell research. 386 Ill. App. 3d 485 (1st Dist. 2009). In *Scachitti v. UBS Financial Services, et al.* the plaintiffs brought a taxpayer action against a lead underwriter and accounting firm to recover overcharges on behalf of the state. 215 Ill.2d 484 (2005). And in *City of Carbondale v. Bower* the plaintiffs brought a taxpayer action against various state agencies to enjoin the disbursement of public funds. 332 Ill. App. 3d 928 (5th Dist. 2002). As made clear by these cases, section 11-301 properly applies when a plaintiff wants to restrain the disbursement of or recover public funds. Plaintiffs have neither asked for such relief nor made other allegations that justify a

characterization of this lawsuit as a “taxpayer action.” The standing requirements dictated by section 11-301 are inapplicable here.

**C. Sovereign Immunity Does Not Bar Suit Against the ISBE Because an Action for Declaratory Judgment Is Not a “Present Claim”**

The argument that Plaintiffs are barred from suing the ISBE under the Illinois Lawsuit Immunity Act, 745 ILCS 5/1, flies in the face of authority that renders the doctrine of sovereign immunity inapplicable to cases that do not involve “present claims” against arms of the State.

Illinois courts have routinely held that sovereign immunity does not prevent suit against a State agency, department, or board. *See, e.g., Landfill, Inc. v. The Pollution Control Bd.*, 74 Ill.2d 541, 552 (1978); *C.J. v. Dep’t of Human Services*, 331 Ill.App.3d 871, 877 (1st Dist. 2002); and *City of Chicago v. Bd. of Trustees of the Univ. of Illinois*, 293 Ill.App.3d 897, 903 (1st Dist. 1997). Rather, it is well established that sovereign immunity applies only if a plaintiff’s action constitutes a “present claim” against the State. *City of Chicago*, 293 Ill.App.3d at 900 (citing to numerous decisions). Moreover, whether sovereign immunity applies in a given case is not determined “solely by an identification of the formal parties to the record. The determination has rather depended upon the particular issues involved *and the relief sought.*” *City of Springfield v. Allphin*, 74 Ill.2d 117, 123 (1978) (quoting *Moline Tool Co. v. Dep’t of Revenue*, 410 Ill. 35, 37 (1951)) (emphasis added).

Several decisions of the Supreme and Appellate Courts have elucidated “present claim.” It is clear from these decisions that actions for declaratory judgment, as opposed to actions for monetary damages, do not constitute “present claims,” even when brought against a department or “arm” of the State. Under these decisions, actions that seek only declaratory relief are not barred by sovereign immunity. For example, in *Landfill, Inc.*, the Court stated, “[Plaintiff] is not seeking to enforce a present claim against the State, but, rather, seeks a declaration that the

[Pollution Control] Board is taking actions in excess of its delegated authority. Such an action does not contravene principles of sovereign immunity.” 74 Ill.2d at 552.

Numerous Illinois Appellate Court decisions are in accord with *Landfill, Inc.* See, *Madigan v. Excavating and Lowboy Services*, 388 Ill.App.3d 554, 558 (1st Dist. 2009) (finding that “present claims are distinguished from those claims seeking injunctive or declaratory relief, specifically prospective injunctive relief”); *C.J. v. Department of Human Services*, 331 Ill.App.3d at 877 (ruling that sovereign immunity did not bar a plaintiff’s suit against the Illinois Department of Human Services, and stating that, like declaratory relief, injunctive relief does not constitute a “present claim”); *City of Chicago*, 293 Ill.App.3d at 900-01 (citing *Senn Park Nursing Ctr. v. Miller*, 104 Ill.2d 169, 188-89 (1984) and *Allphin*, 74 Ill.2d at 124) (holding that “a claim for declaratory relief is not a present claim”); *Rockford Memor’l Hosp. v. Dep’t of Human Rights*, 272 Ill.App.3d 751, 757 (2d Dist. 1995) (holding that the sovereign immunity doctrine was inapplicable in action seeking declaratory relief against department of the State that allegedly exceeded its authority).

The sovereign immunity cases cited by the State are inapposite. *Blase v. State of Illinois* involved a suit against the “State of Illinois,” rather than an arm or department of it. 55 Ill.2d 94 (1973). *Smith v. Jones* involved claims for money damages for breach of contract. 113 Ill.2d 126, 130-31 (1986). Both before and after *Smith* the Supreme Court has upheld complaints against State agencies in the face of sovereign immunity challenges. See, *Vill. of Maywood Bd. of Fire and Police Commissioners v. Dep’t of Human Rights of the State of Illinois*, 296 Ill.App.3d 570, 579 (1st Dist. 1998) (noting Illinois Supreme Court precedent in refusing to apply sovereign immunity doctrine to action seeking injunctive relief against department of the State).

Here, of course, there is no “present claim” for monetary damages; rather, as in *Landfill, Inc.* and *City of Chicago*, Plaintiffs seek a declaration only; a declaration that the state education funding system is unconstitutional and, consequently, that the State is enforcing an unconstitutional law. Since such a request for relief is not a “present claim,” Plaintiffs’ complaint against the ISBE is not barred by sovereign immunity.

II. **THE STATE’S SECTION 2-615 MOTION TO DISMISS SHOULD BE DENIED BECAUSE PLAINTIFFS HAVE ADEQUATELY PLED THE JUSTICIABLE CLAIM OF UNEQUAL TREATMENT OF SIMILARLY SITUATED TAXPAYERS AND THE ABSENCE OF A RATIONAL BASIS FOR SUCH TREATMENT.**

A. **The Complaint Adequately Alleges the State’s Unequal Treatment of Similarly Situated Taxpayers.**

“A section 2-615 motion to dismiss challenges the legal sufficiency of a complaint based on defects apparent *on its face*.” *Tedrick v. Cmty. Res. Ctr.*, 235 Ill.2d 155, 160-161 (2009) (emphasis added). The proper inquiry is whether (taking all well-pled facts and reasonable inferences, construed in the light most favorable to the plaintiff, as true) “it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to relief.” *Id.* at 161.

In a case alleging a violation of the Equal Protection Clause, the inquiry is whether the complaint pleads that the government treats similarly situated persons unequally without a rational basis for doing so. *See Comm. for Educational Rights v. Edgar*, 174 Ill.2d 1, 32-33 (1996). As the following discussion shows, that is exactly what is pled here.

1. **Plaintiffs have adequately pled that they have been treated unequally from others similarly situated.**

The Complaint clearly alleges that the State’s education funding system in effect forces local districts in which some taxpayers reside – property-poor districts – to set school property tax rates at a higher level than those in property-rich districts in order to obtain Foundation Level

funding. (Compl. ¶¶ 3, 23-50.) Property-wealthy districts can, because of the State’s funding formula, tax residents at lower rates than can property-poor districts, yet still receive State aid sufficient to exceed the Foundation Level. (Compl. ¶¶ 29-39.) Because all property taxpayers in Illinois are thus subject to locally imposed school property tax rates that are in effect caused to be higher or lower by the State’s treatment of local districts under the General State Aid formula, all property taxpayers in Illinois are similarly situated in this regard. *See Reynolds v. Sims*, 377 U.S. 533, 565 (1964) (equal protection “requir[es] the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged”).<sup>4</sup>

The host of “dissimilarities” between counties and school districts in which plaintiffs live and others has no relevance here. (Motion to Dismiss at 15-16.) For example, that Plaintiffs live in local districts and counties that do or do not have property tax caps is inconsequential. Individuals need not be identical on every imaginable metric to be similarly situated for purposes of equal protection analysis. *See, e.g., Maddux v. Blagojevich*, 233 Ill. 2d 508, 525 (2009) (seventy-five-year-old individuals who were former judges were similarly situated to seventy-five-year-old individuals who were not former judges); *Jacobson v. Department of Public Aid*, 269 Ill. App. 3d 359, 365 (2d Dist. 1994) (“We cannot say that the parents of 18- to 21-year-old AFDC recipients who live at home are not ‘similarly situated’ with those whose children live separately for purposes of equal protection.”). They need, of course, be similarly situated only as

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<sup>4</sup> Defendants suggest that there is no inequality in the State’s decision to subsidize Flat Grant districts’ choice to tax themselves at a lower rate because residents of Flat Grant districts are “taxpayers,” and the State can fairly provide “all taxpayers ... at least some benefit locally for the tax dollars they contribute.” (Motion to Dismiss at 26.) Plaintiffs do not suggest that no constitutionally permissible system can include grants of educational funding to property-wealthy districts. It is settled law, however, that the State may not favor certain similarly situated taxpayers at the expense of others. *See Kocsis v. Chicago Park Dist.*, 362 Ill. 24, 32-33 (1935) (equal protection requirements are satisfied if a statutory scheme “operates uniformly upon all persons similarly situated, both in the privileges conferred and the liabilities imposed”). Under the current education funding system, taxpayers in property-wealthy districts obtain greater benefits and face lesser burdens than taxpayers in property-poor districts.

to *relevant* criteria. The relevant criterion here is ownership of property that is in effect taxed at a higher or lower rate because of the State's education funding system. *See, e.g., Brazas v. Property Tax Appeal Bd.*, 339 Ill. App. 3d 978, 985 (2d Dist. 2003) (in equal protection challenge to property taxation, requisite similarity could be shown by demonstrating property was comparable in relevant respects). Because, regarding the State's education funding system, Plaintiffs are similarly situated to other taxpayers as to this relevant criterion, they are similarly situated for purposes of equal protection analysis.

The "dissimilarities" argument also relies on factual assertions not pled in the Complaint and thus not properly considered at this early stage of the litigation. *See id.* ("Alexander County, where one plaintiffs [sic] lives, does not have property tax caps; Cook County, where the other plaintiff lives, does have caps, as does Jo Daviess County.") For this reason also Defendants' argument fails. *See Tedrick*, 235 Ill. 2d at 160-161 ("A section 2-615 motion to dismiss challenges the legal sufficiency of a complaint based on defects apparent *on its face*." ) (emphasis added).

More fundamentally, the State's argument misconprehends Plaintiffs' claim. Plaintiffs are not "challenging the very idea that Illinois can have different property tax districts because different districts will never generate identical tax revenues." (Motion to Dismiss at 17.) Rather, Plaintiffs allege an equal protection violation by Defendants, who administer the State's system of education funding and mandatory learning standards. It is their administration of this system, which has the effect of treating similarly situated taxpayers unequally (an inequality of treatment that, as the next subsection shows, no longer has a rational basis), that causes Plaintiffs' injury. Since Plaintiffs and other unequally treated taxpayers "stand in the same relation to the

governmental action questioned or challenged,” *Reynolds*, 377 U.S. at 565, Plaintiffs have plainly alleged an equal protection violation traceable to Defendants.

Defendants also misstate the nature of the unequal treatment that Plaintiffs challenge, repeatedly suggesting that Plaintiffs challenge classifications in a statutory tax scheme. (Motion to Dismiss at 18-19 (“Illinois cases repeatedly provide that tax classifications carry a strong presumption of validity . . . .”).) Plaintiffs do not allege that Defendants have imposed a discriminatory tax on Plaintiffs, but instead challenge the education funding system implemented by the State that in effect forces property-poor districts to impose higher school property tax rates than property-rich districts. That is, Plaintiffs challenge the State’s distribution of state aid to school districts in a manner that —coupled with the State’s mandatory educational standards — in effect forces residents of property-poor districts to pay higher school property tax rates than similarly situated residents of property-wealthy districts. Unequal treatment of similarly situated taxpayers is obviously not a “tax classification.”

Finally, Defendants contend that the Constitution’s uniformity clause somehow impacts Plaintiffs’ claim. Plaintiffs have not asserted that the State’s education funding system violates the uniformity clause but only that it violates the equal protection clause. In all the cases relied upon by Defendants, the uniformity clause was central. *Kankakee Cty. Bd. of Review v. Property Tax Appeal Board*, 131 Ill. 2d 1 (1989); *Walsh v. State of Illinois Property Tax Appeal Board*, 286 Ill. App. 3d 895 (3d Dist. 1997); *Du Page Cty. Bd. of Review v. Property Tax Appeal Board*, 284 Ill. App. 3d (2d Dist. 1996); *Rodgers v. Whitley*, 282 Ill. App. 3d 741 (1st Dist. 1996). Defendants cite no case in which the uniformity clause provides a basis for dismissing an equal protection claim. The uniformity clause and Defendants’ argument with respect to it thus have no relevance to this lawsuit.

2. **Plaintiffs have adequately pled that there is no longer a rational basis for the unequal treatment alleged.**

Defendants point to one governmental interest that is purportedly served by the State's education funding system: local control of education. (Motion to Dismiss at 20-23.) The key case, of course, is *Committee for Educational Rights v. Edgar*, 174 Ill. 2d 1 (1996), where the Illinois Supreme Court considered an equal protection challenge brought by an association of school districts, school board members, and students and parents. 174 Ill. 2d at 4.<sup>5</sup> The plaintiffs in *Edgar* asserted that the Illinois education funding system created unconstitutional disparities among school districts. *Id.* at 32. Although the Supreme Court recognized that "reliance on local wealth to fund public education produces variations in resources which do not necessarily correspond to differences in educational needs," *id.* at 39, the Court held that the State's system was rationally related to the legitimate governmental interest in maintaining local control over education. *Id.* at 38-39.

At the time *Edgar* upheld Illinois' education funding system, local school districts made virtually all decisions: the teaching curriculum, the level of spending, how to monitor student performance, when poor student performance required changes in the way schools were run, and the like. (See Compl. ¶¶ 41, 46.) Since *Edgar*, however, the landscape has changed dramatically. With the post-*Edgar* adoption of mandatory statewide learning standards, mandatory testing aligned to the standards, and the imposition of severe penalties by the State on local districts that fail to meet the standards, it is the State that now controls the core functions of

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<sup>5</sup> Defendants also purport to rely on *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973). In that case, the United States Supreme Court held that there is no federal constitutional right to an adequate education, and that local control of education could accordingly constitute a legitimate governmental interest sufficient to uphold Texas's school funding system against a federal constitutional challenge. *Id.* at 51-52. *Rodriguez* offers no support for the notion that a school funding system like the one Plaintiffs have alleged currently exists in Illinois — a system that bears no relation, rational or otherwise, to local control of education — satisfies the requirements of the Illinois constitution.

education and learning in Illinois. (Compl. ¶¶ 8, 42-49.) Today, it is no longer accurate to portray the Illinois education system as one of local control. The State’s responsibility and authority over key education decisions and functions has been firmly established; fundamental control has shifted to the State. (Compl. ¶ 49-50.) Under these changed circumstances, “local control” can no longer justify unequal taxpayer treatment.

It is apparent from the face of the Complaint that Plaintiffs have adequately alleged that a rational basis no longer exists for the unequal treatment of taxpayers dictated by the Illinois education funding system. Indeed, some four pages of the Complaint are devoted solely to these factual allegations. (Compl. ¶¶ 40-50.) Nothing in the Motion to Dismiss calls them into question. *See* (Compl. ¶ 42-44) (stating that the Illinois Learning Standards [“ILS”] were implemented after the decision in *Edgar* and describing the highly-detailed standards prescribed by the ILS); (Compl. ¶ 45-46) (describing the post-*Edgar* implementation of the Illinois Standard Achievement Test and the Prairie State Achievement Exam, stating that both tests are aligned to the “highly-detailed” ILS, and alleging that the alignment of the statewide mandatory tests has produced “profound changes on the learning curricula set by Illinois schools and school districts”); (Compl. ¶ 47) (alleging that the ILS and statewide mandatory tests will assume a greater role under the Performance Evaluation Reform Act of 2010); (Compl. ¶¶ 48-49) (describing the No Child Left Behind Act, its requirements, and the severe penalties schools and school districts face for failure to meet performance targets, as partly measured by the statewide mandatory exams); (Compl. ¶ 50) (alleging that, under the current system of statewide mandatory exams, aligned learning standards, and severe State-mandated penalties, school districts in Illinois no longer exercise “local control” over the core education functions of schools and, moreover, as a result of the centralized regime, property-poor districts “do not have a choice

when it comes to tax rates...”). Taking these well-pled facts as true, it cannot be said that “it is clearly apparent that no set of facts can be proved that would entitle the plaintiff[s] to relief.” *Tedrick*, Ill.2d at 161.

Defendants would have the Court look beyond the face of the Complaint and, on a section 2-615 motion, sift through the Illinois Learning Standards and the Illinois School Code to determine whether sufficient local control of schools still exists to serve as a rational basis for treating taxpayers unequally. Such a fact-finding mission is improper on a section 2-615 motion to dismiss; defects must be found *on the face* of the complaint and well-pled facts *must* be taken as true. *Id.*<sup>6</sup> There is no doubt that Plaintiffs have alleged that sufficient local control to justify such unequal treatment no longer exists in Illinois, have provided detailed allegations in support of that proposition, and have thus adequately alleged that no rational basis supports the education funding system’s unequal treatment of similarly situated taxpayers. Plaintiffs have therefore stated a valid cause of action under section 2-615. Whether these well-pled allegations are in fact true is a question of fact that cannot properly be resolved at the motion-to-dismiss stage of litigation.<sup>7</sup>

**B. A Claim Asserting a Violation of the Equal Protection Clause Presents a Justiciable Question**

The State argues that *Edgar* “rejected the plaintiffs’ argument that the quality of education is capable of or properly subject to measurement by the courts.” (Motion to Dismiss at

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<sup>6</sup> The State would even have this Court look beyond the Complaint to the laws and learning standards of Arizona to decide whether local control still exists in Illinois schools. The case cited by the State, *Savage v. Glendale Union High School*, 343 F.3d 1036 (9th Cir. 2003), did not involve a challenge to a state’s system of school funding. Rather, it involved a terminated employee’s discrimination claims against a school district under two federal statutes, the Americans with Disabilities Act and the Rehabilitation Act. *Id.* at 1039. Since its discussion of “local control” is limited to Arizona law and Arizona learning standards, *Savage* is irrelevant to a claim involving the laws and learning standards of Illinois. *Id.* at 1045.

<sup>7</sup> The State’s citation to an ISBE document (outside the purview of a Section 2-615 motion) about whether some local control still remains (Def. Memo. p. 26) simply highlights the factual nature of this inquiry.

29.) In *Edgar*, however, plaintiffs’ had brought two distinct claims—one under the Education Clause of the Illinois Constitution, which requires that the state provide a “high quality” system of education, and one under the Constitution’s Equal Protection Clause. *See Edgar*, 174 Ill.2d at 9. The Education Clause claim was dismissed because, among other things, the Court concluded that the separation of powers doctrine precluded judicial resolution of the meaning of the term “high quality” system of education. *Id.* at 32.

In arguing that this case presents a non-justiciable question, the State cites *only* to this *Edgar* discussion of the Education Clause claim—a claim entirely distinct from the separate claim alleging violation of the Equal Protection Clause. The State here sidesteps *Edgar*’s treatment of the latter claim for in discussing the *equal protection claim* *Edgar* does not mention or rely upon separation of powers or lack of judicially manageable standards; rather the Court addressed the equal protection claim head on and dismissed it only upon finding a rational basis for the unequal treatment. *Id.* at 40.<sup>8</sup>

In this case, Plaintiffs are not advancing a quality of education argument, where judicially manageable standards would be relevant. Nor are Plaintiffs arguing about how much money need be raised to provide quality education. Plaintiffs have simply and solely brought an equal protection claim. Deciding whether or not a statute violates equal protection is a quintessential judicial task, as *Edgar* itself makes plain.

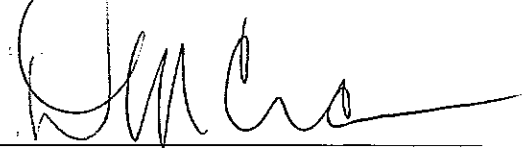
### Conclusion

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<sup>8</sup> Another case cited by the State, *McInnis v. Shapiro*, 293 F.Supp. 327 (N.D. Ill. 1968), decided under the Federal Constitution, is clearly distinguishable. The main thrust of the *McInnis* complaint was that the Illinois school funding system violated the Fourteenth Amendment because it did not apportion funds according to “educational needs,” rendering the case akin to those dealing with requirements for a quality education. *Id.* at 335-36.

Plaintiffs have adequately pled their standing to assert a clearly justiciable equal protection claim. The State's arguments to the contrary either lack merit or are improper at the motion to dismiss stage of litigation. The Motion to Dismiss must therefore be denied.

Respectfully submitted,



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