

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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DANIEL ADAIR, et al.,  
Plaintiff,

FOR PUBLICATION  
July 3, 2008  
9:00 a.m.

v

No. 230858

STATE OF MICHIGAN,  
Defendant.

ON SECOND REMAND

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Before: Saad, C.J., and Talbot and Fort Hood, JJ.

TALBOT, J.

By prior order, we appointed a special master to hear the remaining claims in this school financing case brought under § 29 of the Headlee Amendment, Const 1963, art 9, §§ 25-34. We charged the special master with the task of determining whether the record-keeping obligations imposed on plaintiff school districts as a result of MCL 388.1752 and Executive Order No. 2000-9 constituted either a new activity or service or an increase in the level of state-mandated activity or service within the meaning of the Headlee Amendment’s prohibition of unfunded mandates. The special master has concluded that the state violated the second sentence of § 29, more commonly referred to as the “prohibition on unfunded mandates” or “POUM” clause, because the record-keeping obligations imposed by the state on the school districts require “the districts to actively participate in collecting, maintaining and reporting data that the state requires for (only) its own purposes.” We have reviewed the extensive evidentiary record created by the special master and the parties, the briefs and the report of the special master. We adopt the conclusions of law and factual findings of the special master, with the modifications detailed below. Accordingly, we enter a declaratory judgment in favor of plaintiffs. We deny the state’s motion for summary disposition in all but one regard.

**BURDEN OF PROOF**

To establish a violation of the POUM clause, a plaintiff “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 without state funding for the necessary increased costs.” *Adair v Michigan*, 470 Mich 105, 111; 680 NW2d 386 (2004). The state argues that plaintiff school districts must prove, as an essential element of their claim under the POUM clause, that the implementation of the mandates required the districts to actually incur specific costs, i.e., out-of-pocket expenses in a

quantified amount. We reject the state's position, as did the special master, albeit for reasons other than those advanced by the special master.

This Court has twice ruled, at different stages of the same action, that the plaintiff school districts in a Headlee challenge establish "a prima facie case by showing the actual costs to all the school districts for each of the mandated services." *Durant v Dep't of Education (After Remand, Third Remand)*, 213 Mich App 500, 503; 541 NW2d 278 (1995), aff'd in part 456 Mich 175 (1997), and 456 Mich 1219 (1997); *Durant v Dep't of Education (Third Remand)*, 203 Mich App 507, 514; 513 NW2d 195 (1994). Likewise, our Supreme Court has recognized the need to determine with specificity the amount of necessary costs incurred by a mandated activity, including whether such costs fall within the de minimus exclusion of MCL 21.232(4). *Oakland Co v Michigan*, 456 Mich 144, 165; 566 NW2d 616 (1997) (the costs of county foster care services at issue).

Unlike the present action, both the *Durant* and *Oakland County* actions presented as challenges brought pursuant to the first sentence of § 29 of the Headlee Amendment, which is also referred to as the maintenance-of-support or MOS clause. *Adair*, 470 Mich at 111; *Oakland County*, 456 Mich at 149; *Durant v State Bd of Education*, 424 Mich 364, 378-379; 381 NW2d 662 (1985). The MOS clause provides: "The state is hereby prohibited from reducing the state financed proportion of the necessary costs of any existing activity or service required of units of Local Government by state law." Const 1963, art 9, § 29. "[T]o establish a Headlee violation under the MOS clause, the plaintiff must show '(1) that there is a continuing state mandate, (2) that the state actually funded the mandated activity at a certain proportion of necessary costs in the base year of 1978-1979, and (3) that the state funding of necessary costs has dipped below that portion in a succeeding year.'" *Adair*, 470 Mich at 111.

Claims brought under the MOS clause involve determinations of specific "statewide-to-local district funding ratios." *Schmidt v Dep't of Education*, 441 Mich 236, 249-250; 490 NW2d 584 (1992); *Durant*, 213 Mich App at 505. Such ratios are determined in the following manner:

This approach requires an initial calculation of the proportion of statewide funding for a particular mandated activity to the total necessary costs of providing that activity. The necessary costs to each local unit in the funding year at issue are calculated. Next, the proportion of state financed funding for the activity or service in the base year is compared to the proportion of funding provided to the district in the year at issue. The state is obligated to afford each unit providing the activity or service the same portion of funding that the state provided on a statewide basis in the year that the Headlee Amendment was ratified. [*Schmidt*, 441 Mich App at 250.]

Thus, by its very nature, the determination of ratios involves the quantifying of the necessary costs incurred by the school districts in specific dollar amounts.

Claims brought under the POUM clause, as is the case here, by contrast, do not involve determinations of statewide-to-local district funding ratios, but instead address future services or activities and seek funding for the future implementation of newly mandated services or activities. *Wayne Co Chief Executive v Governor*, 230 Mich App 258, 266; 583 NW2d 512 (1998). The remedy required in such actions is not an award of damages, but instead "comprises

a resolution of the parties' prospective rights and obligations by declaratory judgment." *Id.* at 264. Because awards of money damages are not generally at issue, *id.* at 267, and because this Court lacks authority to order the Legislature to appropriate funds, *Musselman v Governor (On Rehearing)*, 450 Mich 574, 577 (Brickley, C.J.), 582 (Boyle, J.); 545 NW2d 346 (1996); *Musselman v Governor*, 448 Mich 503, 524; 533 NW2d 237 (1995), the goal of a declaratory judgment issued in a POUM Headlee action is only to provide sufficient notice so that "the state will be aware of the financial adjustment necessary to allow for future compliance." *Oakland County*, 456 Mich at 166. Such notice may be provided without requiring the school districts to demonstrate out-of-pocket expenses in a specifically quantified amount. Indeed, as the evidence adduced before the special master clearly demonstrated, our Legislature possesses the ability to respond to its obligations under the Headlee Amendment without first requiring the school districts to demonstrate actual costs to be incurred, as reflected by its 2002 appropriation of \$2 per pupil (\$3.4 million) in categorical funding to off-set some of the costs incurred by the districts in implementing the reporting requirements to the Single Record Student Database ["SRSD"], one of the databases maintained by the Center for Educational Performance and Information ["CEPI"].<sup>1</sup>

Furthermore, the plaintiff in a declaratory judgment action bears "the burden of establishing the existence of an actual controversy, as well as the burden of showing that . . . it has actually been injured or that the threat of imminent injury exists." 22A Am Jur 2d, Declaratory Judgments, § 239, p 788. To demonstrate that the school districts have actually been injured or are confronted with an imminent injury, plaintiffs must only demonstrate that the "mandated local role was increased without state funding for the necessary increased costs." *Adair*, 470 Mich at 111. In the case at bar, plaintiffs have alleged

"that the state is not merely requiring different data from the school districts, but also requiring the districts to actively participate in maintaining data that the state requires for its own purposes. An off-loading of state funding responsibilities onto local units of government without the provisions of funds presents a colorable claim under Headlee." [*Adair v Michigan*, 474 Mich 1073; 712 NW2d 702 (2006).]

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 by the districts in the provision of the increased level of services or activities.

### **NEW OR INCREASED ACTIVITIES OR SERVICES**

The state's assertion to the contrary, there is evidentiary support for the special master's findings that, "[t]hrough the implementation of the databases, the state is requiring districts to

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<sup>1</sup> 7/10/07 Transcript, 194-201; 7/11/08 Transcript, 606-607; 7/17/07 Transcript, 984, 1069; 7/18/07 Transcript, 1185-1186; 7/25/07 Transcript, 1753; 7/24/07 Transcript, 1700.

actively participate in collecting, maintaining and reporting data the state requires for (only) its own purposes,” and that the data collection and reporting requirements effectuated through the CEPI resulted in “an increase in the level of activity beyond that required prior to the conclusion of Durant I and . . . to the existing law as of December 23, 1978”.

The evidence adduced before the special master establishes that the state is requiring districts to actively participate in collecting, maintaining and reporting data the state requires for its own purposes. The federal government requires the states to report data on a dis-aggregated student-by-student, teacher-by-teacher or building-by-building basis to receive federal funds under the No Child Left Behind Act.<sup>2</sup> With future federal requirements in mind, the state employs the CEPI and its databases as a warehouse and holds within that warehouse such quantities of discrete information that the state is in a position to “more flexibly answer” the ever-changing questions posed by the federal government, “without going back to the districts time and time again and re-asking for them to aggregate the data differently, group it differently, that is really the impetus of why the thought came up for creating more discrete data sets.”<sup>3</sup> One of the consequences of this approach to data gathering has been, for example, that the school districts are being required to collect and report to the Financial Information Database [“FID”] detailed financial information that is of no use to the districts and that they might not otherwise record but for the FID reporting requirements.<sup>4</sup> If the state was not requiring the school districts to report such data to the CEPI, the state would have to send personnel to each district to gather the data.<sup>5</sup>

Furthermore, although the CEPI was intended, in part, to allow the school districts to use the data as an analytical tool to answer questions about student and teacher performance and to generate reports targeted to improve student achievement, the districts have been unable to access the databases in any meaningful manner.<sup>6</sup> Although the school districts can obtain a limited number of reports from the CEPI based on the data they supply, the CEPI lacks the requisite staff to provide any custom data reports that might be requested by a school administrator for use by a district.<sup>7</sup>

The record also establishes that the data collection and reporting implemented through the CEPI resulted in the state offloading some of its responsibilities onto the districts and,

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<sup>2</sup> 7/24/07 Transcript, 1575-1578; 7/25/07 Transcript, 1808-1810; 7/31/07 Transcript, 1952-1953, 1984, 2023; Stipulation in lieu of testimony of defendants’ witnesses, Ex 3(D) 9; Ex 5(D), 37-40; Ex 12(D), 16-17, 29.

<sup>3</sup> 7/31/08 Transcript, 1985; see also 7/31/07 Transcript, 2001, 2027, 2057; Stipulation in lieu of testimony of defendants’ witnesses, Ex 11(D), 93, 123.

<sup>4</sup> 7/10/07 Transcript, 316; 7/11/07 Transcript, 570-571; 7/17/07 Transcript, 932-933, 987-988; 7/18/07 Transcript, 1150; 7/31/07 Transcript, 1940.

<sup>5</sup> 7/24/07 Transcript, 1693-1694.

<sup>6</sup> 7/18/07 Transcript, 1267-1272; 7/25/07 Transcript, 1833-1834, 1850-1853.

<sup>7</sup> 7/24/07 Transcript, 1524-1525; 7/25/07 Transcript, 1766, 1799-1800, 1854-1856.

therefore, imposing upon the districts obligations to undertake several new activities and to engage in an increased level of activities within the meaning of the POUM clause. The state made a conscious decision to offload onto the districts the new activity of designing and updating the software necessary to perform some of the data collection, storage and reporting obligations in an attempt to avoid a Headlee funding obligation and as an acknowledgment of the CEPI's lack of funding necessary to develop the software itself.<sup>8</sup> Additionally, the data collection and reporting obligations resulted in the districts reporting to the state new types of data and significantly greater amounts of data, at a more discrete level. This information is no longer reported to the state in aggregate form, but instead is reported on a student-by-student, employee-by-employee and building-by-building basis.<sup>9</sup> The burdens associated with these requirements were particularly acute at the time each database was brought online and the districts had to gather and format the data and report that data to each new database for the first time. These burdens are also especially acute during the periods the districts devote to preparation for the submission of each new report. With the exception of the FID, for which there is evidence that maintenance of the data required to be reported remains labor intensive through the year, maintenance of the data for the SRSD, Registry of Educational Personnel and School Infrastructure Database requires minimal levels of staff time.<sup>10</sup>

The state correctly observes, by way of a defense, that any increase in the data reporting burden imposed upon the districts is not the consequence of any obligation imposed by Executive Order No. 2000-9, which only created the CEPI, or by MCL 388.1752 [now MCL 388.1694a], which confers authority on the CEPI to act, but rather, is the consequence of other state and federal laws, such as Michigan's School Safety Initiative and the federal government's No Child Left Behind Act.<sup>11</sup> The fact that the increases in state-mandated activities required of

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<sup>8</sup> 7/25/07 Transcript, 1729-1731, 1755, 1778, 1780-1781.

<sup>9</sup> 7/10/07 Transcript, 158-159, 169-170, 179, 224-225, 227-231, 244, 246-249, 272, 284-285; 7/11/07 Transcript, 385-386, 417-418, 421, 620, 650, 656; 7/12/07 Transcript, 795-796, 806, 817-818, 893-894; 7/17/07 Transcript, 939, 950, 955-956, 961-962, 1029-1032, 1035; 7/18/07 Transcript, 1111, 1148-1149, 1158-1159, 1215-1217, 1225-1227, 1250-1254, 1257; 7/19/07 Transcript, 1412; 7/24/07 Transcript, 1597; 7/25/07 Transcript, 1752; 7/31/07 Transcript, 1940; Stipulation in lieu of testimony of plaintiffs' witnesses, Ex 9(P), 18; Ex 14(P) 13-14; Ex 17(P), 20; Ex 18(P), 41.

<sup>10</sup> 7/10/07 Transcript, 170-171, 197, 349-350, 360; 7/11/07 Transcript, 529, 542-543, 549-552, 624-625, 628-631; 7/12/07 Transcript, 689-690, 720, 778, 797-800, 804, 806-809, 832, 850, 864-865, 870-872, 889, 903-904, 907, 1066-1067; 7/17/07 Transcript, 978, 980, 983, 1035-1037; 7/18/07 Transcript, 1166, 1230-1232, 1240-1241, 1247; Stipulation in lieu of testimony of plaintiffs' witnesses, Ex 4(D), 20-21; Ex 4(D), 20-21; Ex 6(D), 29; Ex 7(P), 15-16, 41-42; Ex 7(D), 43-44; Ex 11(P), 12, 34; Ex 12(P), 22-23; Ex 14(P), 39-40; Ex 15(P), 18; Ex 18(D), 46; Ex 19(P), 11, 14, 30, 33.

<sup>11</sup> 7/10/07 Transcript, 153, 157, 244; 7/11/07 Transcript, 441, 673; 7/19/07 Transcript, 1356, 1359-1360; 7/24/07 Transcript, 1589-1590, 1648, 1652, 1659-1661; 7/25/07 Transcript, 1752-1753, 1754-1756, 1788, 1807-1809, 1845-1847, 1849; 7/31/07 Transcript, 1985, 2001, 2003, 2027, 2056-2057.

the school districts is the product of other state statutes is no defense shielding the state. Headlee prohibits the imposition of unfunded mandates no matter what particular state statute imposes such mandates. Furthermore, the position of the state that federal mandates do not constitute “state requirements” implicating Headlee contradicts the pronouncement of our Supreme Court that there is no exception in § 29 for federal mandates enforced by the state. *Durant*, 456 Mich at 190-196.

Nevertheless, all is not lost for the state. The state’s position that the special master erroneously concluded that the state had offloaded error-checking functions onto the districts has record support. The evidence demonstrates that most of the error-checking functions are performed by computers employing error-checking software provided by the CEPI. Moreover, the evidence demonstrates that the districts have always held a concomitant duty to ensure the accuracy of data reported to the state, even before the CEPI came into existence, and, hence, played a role in ensuring the accuracy of data reported.

### **FUNDING OF THE MANDATE**

We agree with the special master that the state has failed to fund the necessary costs associated with the data collection and reporting mandates associated with the CEPI. Again, we reach our conclusion for reasons other than those relied upon by the special master.

With the ratification of Proposal A and the passage of its enacting legislation, the method of financing Michigan’s public schools changed radically, moving from a funding system primarily financed by the levying of a local millage on real property to a system financed by an increase in the state sales tax and various use taxes. *Durant v Michigan (On Remand)*, 238 Mich App 185, 195-197; 605 NW2d 66 (1999). This change in the funding system shifted the responsibility for generating school funding from the local school districts to the state. As the evidence adduced before the special master demonstrated, seventy-five percent of the funding received by local school districts for the 2007 fiscal year came from the state. The remaining twenty-five percent came from local revenues, including revenue generated by a levy of 18 mils on local non-homestead property.<sup>12</sup> By contrast, in the 1989-1990 school year, locally-generated revenues funded sixty-three percent of the costs of school operations, with state-generated revenues funding the remaining thirty-seven percent of those costs.<sup>13</sup>

The state supplies a significant portion of its funding to school districts based on per pupil funds commonly referred to as the “foundation allowance”. *Durant*, 238 Mich App at 197. According to one witness, “the total revenue that a district is going to get for the lion’s share of its activities is based on the number of kids that you have in the system times this foundation number.”<sup>14</sup> The foundation allowance is composed of unrestricted funds that school districts may use for any school-related operational purpose authorized by law, e.g., to pay salaries, to

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<sup>12</sup> 7/25/07 Transcript, 1744-1745, 1759.

<sup>13</sup> 7/25/07 Transcript, 1743-1745.

<sup>14</sup> 7/18/07 Transcript, 1176.

provide transportation, to pay utilities and to purchase textbooks and supplies. *Durant*, 238 Mich App at 197-198.

The state fulfills its constitutional obligations imposed by both Proposal A and Headlee by employing a “tripartite funding scheme”, which has been referred to as the “‘three bucket’ or the ‘three pot’ approach.” *Durant v Michigan*, 251 Mich App 297, 299-302; 650 NW2d 380 (2002). The Legislature divides the foundation allowance amongst two of the three buckets. It allocates to the first bucket a per pupil amount sufficient to satisfy the base level of per pupil funding guaranteed by Proposal A, which consists of the level of per pupil funding provided in 1994-1995 (just over \$4,000<sup>15</sup>). *Id.*, 299-302, 308. The Legislature then pours into the second bucket that portion of the foundation allowance that consists of the difference between the base level of per pupil funding allocated to the first bucket and the total per pupil foundation allowance provided by the state. The Legislature conditions a school district’s receipt of the unrestricted funds in this second bucket, in part, on a district’s supplying “data and other information required by state and federal law to the [CEPI] and the department [of education] in the form and manner specified by the center or the department.” MCL 388.1622b(3)(c). Only state-provided funds fill this second bucket. The Legislature allocates to the third bucket those funds necessary to satisfy its Headlee obligation under the MOS clause, as determined by the *Durant* cases. *Durant*, 251 Mich App at 300.

The state asserts that it has satisfied its obligation under Headlee to reimburse the districts for any increase in the necessary costs associated with the reporting requirements because the state has supplied the school districts with \$3.5 billion in discretionary funds, contingent upon the districts agreeing to comply with the CEPI’s reporting requirements, from which the districts are expected to satisfy any costs associated with their reporting requirements. The special master rejected the state’s position. She concluded, instead, that the state had off-loaded onto the districts the funding responsibilities associated with the data collecting, storage and reporting obligations. Although acknowledging that the districts must pay for any CEPI-related costs and expenses from its general operating budget which is funded by unrestricted funds from the state, the special master opined that the fact that the state provides a percentage of school district funding does not mean that the state can impose additional mandates upon the districts without appropriating the necessary costs to perform those mandates. We agree.

In *Durant III*, this Court ruled that the Legislature may allocate that portion of the foundation allowance over and above the base level required by Proposal A to the “Headlee allocation bucket” and, thereby, use those additional funds to satisfy the state’s Headlee obligation under the MOS clause without violating the constitution. *Durant*, 251 Mich App at 307-310. The *Durant III* panel also ruled that that portion of the foundation allowance over and above the base level could be allocated to the “discretionary use bucket.” *Durant*, 251 Mich App at 308-309. The panel did not address whether the Legislature could require the school districts to dip into the “discretionary use budget” to satisfy the state’s Headlee obligation. To answer this question, the language of the POUM clause must be examined.

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<sup>15</sup> 7/18/07 Transcript, 1178-1180; 7/25/07 Transcript, 1735, 1740.

The POUM clause provides:

. . . A new activity or service or an increase in the [level] of any activity or service beyond that required by existing law shall not be required by the legislature or any state agency or units of Local Government, unless a state appropriation is made and disbursed to pay the unit of Local Government for any necessary increased costs. . . . [Const 1963, art 9, § 29.]

When construing the language of the Headlee Amendment, the courts apply the rule of “common understanding,” *Durant*, 251 Mich App at 306, the parameters of which are as follows:

“A constitution is made for the people and by the people. The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves, would give it. “For as the Constitution does not derive its force from the convention which framed it, the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark and abstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding and ratified the instrument in the belief that that was the sense designed to be conveyed.”” [ *Durant*, 456 Mich at 192, quoting 1 Cooley, *Constitutional Limitations* (8<sup>th</sup> ed), p 143.]

The language of the POUM clause is clear and uncomplicated. It prohibits the Legislature from increasing the level of an activity or service beyond that required by existing law “unless a state appropriation is made and disbursed to pay the unit of Local Government for any necessary increased costs.” According each term and phrase employed in the POUM clause its respective plain meaning, the language employed in the POUM clause reflects the voters’ intent that the clause serve as a directive to the Legislature to appropriate and disburse the funds required to cover the necessary costs associated with implementing a new legislative mandate. At the heart of this directive lies the command to appropriate and disburse the funds to carry out new legislative mandates. The term “appropriation” commonly means a legislative body’s act of prescribing a particular, special or distinct use for particular money authorized to be paid from a public treasury. Webster’s New Twentieth Century Dictionary (Unabridged, 2<sup>nd</sup> ed), p 91; Random House Webster’s College Dictionary (2<sup>nd</sup> ed, 1997), p 66; Black’s Law Dictionary (5<sup>th</sup> ed), p 93. The presence of the term “appropriation” in the POUM clause reflects the intent of the voters that the Legislature actually determine the necessary costs associated with the implementation of new legislative mandates and then appropriate that amount for the express purpose of funding the new mandate. The language of the POUM clause does not reflect any intent to allow the Legislature to appropriate a certain level of “discretionary” funds to the districts and then remove some of the “discretion” afforded the districts by mandating how some of those funds must be used. Indeed, “[s]uch a result is inconsistent with the historic ability of school districts to use funds as they see fit; a system of local control and local accountability is in keeping with the clear desire of voters in passing the Headlee Amendment.” *Durant*, 424 Mich at 386.

Our review of the evidentiary record reveals that the Legislature provided a one-time appropriation in the amount of \$2 per pupil in 2002 (\$3.4 million) to be disbursed to the districts to off-set some of the initial costs incurred by the districts in implementing the reporting

requirements to the SRSD. The evidence also established that the Legislature appropriated no other categorical funding for any of the costs associated with the districts' implementation of the reporting requirements to the REP, SID or FID or their ongoing duty to comply with the reporting requirements to all four databases. Rather, the evidence established that the school districts are expected to shift funds from the discretionary funds bucket to cover any of the costs associated with their data collecting and reporting obligations. Indeed, none of the parties dispute, and the evidence unquestionably established, that each school district shifted its existing resources funded by the discretionary moneys appropriated by the Legislature to comply with the data collecting and reporting requirements.<sup>16</sup> On this factual predicate, with the exception with the costs associated with implementing the SRSD, the state has not funded the necessary costs associated with the data collection and reporting mandates associated with the CEPI, as required by the POUM clause.

### ATTORNEY FEES

Finally, plaintiffs request that this Court award plaintiffs their costs incurred in prosecuting this Headlee action, including an award of a reasonable attorney fee. Const 1963, art 9, § 32 governs the awarding of costs and provides:

Any taxpayer of the state shall have standing to bring suit in the Michigan State Court of Appeals to enforce the provisions of Sections 25 through 31, inclusive, of this Article and, if the suit is sustained, shall receive from the applicable unit of local government his costs incurred in maintaining such suit.

Although plaintiffs have sustained their claim with regard to the data collection and reporting requirements, it must be noted that this claim is but one of many plaintiffs initially raised in this action. All of plaintiffs' other claims were rejected by this Court. *Adair*, 250 Mich App 691. This Court's decision with regard to those claims was sustained by our Supreme Court. *Adair*, 470 Mich 105. Under these circumstances, plaintiffs' suit cannot be characterized as having been "sustained" within the meaning of § 32. Accordingly, we decline plaintiffs' request for attorney fees.

A declaratory judgment is granted in favor of plaintiffs consistent with this opinion. Summary disposition in favor of the state is denied. No costs are awarded.

/s/ Michael J. Talbot  
/s/ Henry William Saad  
/s/ Karen M. Fort Hood

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<sup>16</sup> See e.g., 7/18/07 Transcript, 1276.