IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

PEOPLE WHO CARE, et al.,	)	
	)	
Plaintiffs,	)	Civil Action No. 89 C 20168
	)	
v.	)	Judge Stanley J. Roszkowski
	)	
ROCKFORD BOARD OF EDUCATION SCHOOL DISTRICT #205,	)	Magistrate P. Michael Mahoney
	)	
Defendant.	)	

PLAINTIFFS' MOTION FOR AN ORDER DIRECTING DEFENDANT RSD TO ADOPT FY 99 CRO FUND 12 AND COPS LEVIES, EXTENDING THE STATE LAW DEADLINE FOR LEVY ADOPTION

Robert C. Howard
Kathleen Mangold-Spoto
Joan Matlack
FUTTERMAN & HOWARD, CHTD.
122 S. Michigan Ave.
Suite 1850
Chicago, IL 60603
(312) 427-3600

Of Counsel:

Venita Hervey
FUTTERMAN & HOWARD, CHTD.
P.O. Box 157
Rockford, IL 61105
(815) 969-8100

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INTRODUCTION

Plaintiffs hereby move for an order extending by four months the state law time limit for adoption of FY 99 CRO Fund 12 and COPS tort immunity tax levies, and an order directing Defendant RSD to adopt those levies by a specific deadline date.

Of these two requests, only the first involves an exercise of "Jenkins" authority to subordinate a state law provision. Once the time limit is extended, the order to levy involves an action permitted by state law.

A wide range of information and issues is relevant to the Court's consideration of this Motion. It is organized in the following sections:

I. Summary of FY 99 revenue status proceedings through December 1998.

II. Brief history of relevant CRO funding orders and stipulations, and Seventh Circuit orders re same, including Seventh Circuit prospective approval of the use of Jenkins authority in this case if and when necessary.[1]

III. The April 1999 Referendum.

IV. Except for the state law time limit for levy adoption, it is still permissible under state law and practicable in terms of the local tax administration process for RSD to levy for FY 99.

V. Consequences of failure to adopt FY 99 CRO levies.

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[1] "PWC 1997" refers to the Seventh Circuit's April 1997 opinion, 111 F.3d 528. "PWC 1999" refers to the Seventh Circuit's opinion issued March 19, 1999.

For the convenience of the Court we have attempted to provide the District Court docket numbers ("D___") for court orders and pleadings cited herein.

VI. The order(s) which the Court should adopt,

A. A Jenkins order extending the December 29, 1998 state law deadline for adoption of FY 99 CRO levies.

B. A non-Jenkins order directing RSD to adopt FY 99 CRO levies, to effectuate the October 28 and November 6, 1998 Orders. (D3145, D3154.)

C. A non-Jenkins order directing RSD to comply with state law budget amendment, and related notice and public hearing provisions, in relation to the levy addressed in (B).

D. An order establishing a 48-hour deadline within which RSD must adopt the levies required by (B).

VII. The requested order is proper for the following reasons, among others:

A. All other options for adopting the levies completely within state law have been exhausted.

B. It represents the least intrusive set of steps available to the Court to accomplish an FY 99 CRO levy. The exercise of Jenkins authority is minimal -- addressing only timelines for action, not the content of action to adopt the levies.

C. Rather than increasing the amount of funding permitting by state law, it restores available funding of which the Board deprived itself by its defiance of the October 28 and November 6, 1998 Orders directing adoption of FY 99 CRO levies.

I. SUMMARY OF FY 99 REVENUE PROCEEDINGS

A. The Revenue Hearing and Order to Levy.

1. The August 13, 1998 Order adopted the FY 99 CRO Fund 12 expenditure plan and directed RSD to present a revenue plan by September 1, 1998. (D3092.)

2. On September 1, 1998 RSD filed a "Statement" that because of the pending state court tax objection litigation, the Board would not adopt tort immunity levies to fund the CRO. RSD proposed no other FY 99 CRO funding source and concluded by stating that "RSD has been unable to develop a practicable funding plan to pay for the remedies ordered by this Court." (D3110, Statement p.7; D3129, 9/17/98 Stipulation §3.4.2.)

3. On September 17, 1998 the parties submitted "Plaintiffs' and Defendant's Stipulations Related to FY 99 CRO Revenue Generation," stating, among other things:

a. The Tort Immunity Fund is the only source of funds reasonably or practically available to the District to pay all or any significant portion of the FY 99 CRO Fund 12 and COPS expenditures. (D3129, 9/17/98 Stipulation §3.1.)

b. Any attempt to fund any portion of the FY 99 unfunded CRO costs from the Education Fund or from any of the other regular operating funds would be unrealistic and impracticable. (Id., §3.2.)

c. The Board has been unable to develop an alternative plan to simultaneously fund the FY 99 CRO expenditure plan and the regular operations of the school system. (Id., §3.4.)

d. Judge Rapp's state circuit court Opinion ("that the use of the Tort Immunity Fund to satisfy the desegregation remedies [in the PWC case] is not allowable under Illinois law") is not a final judgment order, and Judge Rapp entered no injunction prohibiting RSD from levying under the Tort Immunity Act. (Id., §4.4.)

e. The Rockford Board of Education will not voluntarily use the Tort Immunity levy to generate revenue for the FY 99 CRO expenditure plan or COPS debt service payment. (Id., §5.)

f. In the absence of some form of levy to raise revenues to pay for the FY 99 CRO expenditure plan as ordered by the Court, RSD would most likely be incapable of sustaining its operations through the second half of FY 99. In the best case scenario, RSD would become incapable of sustaining its operations some time during the Fall of 1999. (Id., §5.3.)

4. In the October 28, 1998 Order the Court made final determinations concerning FY 99 CRO expenditure amounts and necessary revenue amounts:

a. The FY 99 Fund 12 expenditure plan total is $21.856 million. (Id. p.3.)

b. Unfunded FY 99 COPS debt service payments total $3.238 million. (Id. at 4.)

c. Total unfunded CRO operating and COPS expenditures total $25.094 million. (Id. at 4.)

d. The only reasonable and practicable potential sources for FY 99 funding are the FY 98 carryover and the Tort Immunity Act. (Id. at 8.)

e. FY 98 unspent funds of $2.280 million may be used as a revenue credit against FY 99 Fund 12 revenue needs. (Id. at 11.)

f. After funding $2,279,980 of the FY 99 expenditure plan with carryover FY 98 funds, $19,576,224 of the FY 99 expenditure plan and $3,238,000 of the FY 99 COPS service payments remain unfunded. The court affirmed its earlier holding that Illinois law allows funding of these amounts by levy entered under § 9-107 of the Tort Immunity Act. The court ordered the District to fund the remaining unfunded FY 99 expenditures and COPS service payments by entering a levy under the Tort Immunity Act. (Id. at 11-12.)

g. Accordingly the Court directed the Rockford School District (and each of the seven Board members in his or her official capacity)

> "to take whatever actions are necessary to accomplish the following:
>
> > (1) Proper amendment of the FY 99 District budget, as provided in Section 17-1 of the Illinois School Code, if an FY 99 budget has been adopted that does not include sufficient levies pursuant to the Illinois Tort Immunity Act to fund the unfunded portions of the FY 99 CRO expenditure plan and COPS service payments; and
> >
> > (2) Adoption of levies pursuant to the Illinois Tort Immunity Act in amounts sufficient to fund the unfunded portions of (1) the FY 99 CRO expenditure plan, and (2) the FY 99 COPS service payments;
>
> on or before Wednesday, December 2, 1998." (D3145)

5. The November 6, 1998 Order amended the unfunded FY 99 COPS debt service amount to $2.957 million. (D3154) Therefore unfunded CRO Fund 12 and COPS expenditure obligations total $22.533 million.

6. Although RSD appealed other aspects of the October 28 and November 6, 1998 Orders, it did not appeal the aspect of the Order expressly directing the Board to adopt Tort Immunity levies by a deadline date of December 2 to fund FY 99 CRO revenue needs. Those aspects of the Order are final and no longer appealable.

B. Board Actions in Response to the October 28 and November 6, 1998 Orders.

7. Subsequent to the October 28, 1998 Order, Defendant prepared a revised tentative Amended Budget for FY 99 which contained the modifications directed in the October 28 and November 6 Orders. That tentative Amended Budget was made available for public inspection beginning on October 30, 1998. In addition, public notice of its availability for public inspection was published on October 30, 1998 along with public notice of the December 1, 1998 hearing on the tentative Amended Budget. (See Plaintiffs' December 7, 1998 Rule 70 Motion at ¶16.)

8. On November 24, 1998 the Board adopted all FY 99 School District real estate tax levies other than CRO levies. This included:

a. adoption of Tort Immunity levies for purposes other than CRO expenditures.

b. adoption of non-Tort levies for CRO purposes (e.g., lease levy generating approximately $900,000 for the COPS debt service payment.)

9. On December 1, 1998 the Board held its public hearing on the Amended Budget. and held a special meeting to consider the actions directed by the October 28, 1998 Order. At that meeting the Board:

a. voted down by 4-3 the proposed amendment of the budget to include the levies ordered by the Court;

b. failed to adopt the Fund 12 and COPS levies required by the Court's October 28 and November 6, 1998 Orders.

C. Plaintiffs' Rule 70 and Clarification Motions.

10. Plaintiffs Filed December 7, 1998 Their "Petition to Enforce the CRO and Related Orders by the Entry of Order Under Rule 70 and Otherwise to Effectuate the FY 99 CRO Funding Orders." That Motion requested, in substance, that the Superintendent be appointed to adopt the tax levy and other necessary actions in lieu of action by the seven-member Board of Education.

11. Plaintiffs also filed December 7, 1998 a "clarification motion" requesting a further order specifying the dollar amounts RSD is obligated to levy for FY 99. That Motion noted RSD was contending that the October 28, 1998 Order was ambiguous in ordering the Board to adopt levies "sufficient to fund the unfunded portions" of the Fund 12 expenditure plan and the COPS debt service payment, and therefore permitted the Board discretion in determining what portions of the CRO obligations were "unfunded". (Clarification Motion, pp. 8-9)

12. In response to Plaintiffs' clarification motion, RSD contended that:

a. no portion of the FY 99 expenditure plan remained unfunded, because CRO expenditure obligations were being covered with funds borrowed through the issuance of tax anticipation warrants ("TAWs") secured by the District's Education Fund real estate tax levy.

b. RSD accordingly denied that either amendment of its FY 99 budget or adoption of FY 99 CRO Tort Immunity tax levies were necessary to be in compliance with the October 28, 1998 Order. (Id. at p.5.)

13. The December 16, 1998 Order denied Plaintiffs' clarification motion because:

a. RSD's contentions (summarized above) have no support in the record.

b. The October 28 and November 6 Orders unambiguously found, as findings of fact, that the "unfunded portions" of the FY 99 expenditure plan and FY 99 COPS debt service payment are $19.576 million and $2.957 million, respectively.

c. Neither the October 28 Order nor the November 6 Order allowed any possibility for RSD to unilaterally determine what amounts of the FY 99 expenditure plan and COPS debt service payment remain "unfunded". RSD's contentions to the contrary "directly contradict -- and are precluded by -- this Court's findings of fact in the October 28 and November 6 Orders and RSD's statements in the Stipulation" and in other documents.

d. If RSD sought to redefine or recalculate those unfunded portions, or to propose another funding source as an alternative to the Tort Immunity

Act, RSD should have moved to alter or amend the October 28 and November 6, 1998 Orders.

e. Those Orders are clear and unambiguous as written. Accordingly Plaintiffs' Motion for Entry of a Clarification Order is unnecessary, and therefore denied. (D3210)

14. RSD has not filed, since the December 16, 1998 Order, any motion to alter or amend the October 28 and November 6, 1998 Orders.

15. On December 17, 1998 the Court denied Plaintiffs' Motion for a Rule 70 appointment, stating the following reasons:

> It should come as no surprise that a school district that actively discriminated against minority students for over 25 years would disobey a direct federal court order, but the court is nonetheless surprised and disheartened that the Rockford Board of Education, School District No. 205, has failed to implement this court's financing orders of October 28, 1998 and November 26, 1998.
>
> When this court entered the Comprehensive Remedial Order in 1996, it provided a road map to the Board of Education for removing the vestiges of past discrimination and regaining local control of school affairs. "Complete success" in that endeavor, the court noted at the time, "is ultimately up to the community. If this community does not support the road map set down in this order, it risks losing its economic and social identity." Those risks now face both the school system and the entire city of Rockford.
>
> Unitary status can only be obtained with the cooperation of the Board of Education, which has resisted this court's financing orders for each of the last three fiscal years. A court order displacing the Board's authority would neither dissipate that resistance nor avert resistance in the future. The motion for a Rule 70 appointment is denied.

(D3212)

II. BRIEF HISTORY OF CRO FUNDING ORDERS, STIPULATIONS AND SEVENTH CIRCUIT HOLDINGS

16. The following brief review of CRO funding orders and stipulations clearly establishes several important propositions:

a. RSD has a duty to fund the CRO fully and promptly. Withholding of sufficient funding for CRO implementation is denial to the Plaintiff Class of the relief to which it is entitled.

b. Likewise, this Court is under an obligation or duty to see that the CRO is fully funded and that the funding method supports long-term desegregation.

c. The District should be given, and consistently has been, an opportunity to present a revenue plan when there is a CRO operating or capital expenditure to be funded.

d. Funding schemes are unacceptable that would fund the CRO partially, or that are not realistic and practicable.

e. Because of persistent annual and accumulated deficits in its regular operating funds, RSD cannot fund any portion of CRO costs from its regular operating funds.

f. The Tort Immunity Act levies are the only funding source available to RSD for CRO costs at this time.

g. The state court tax objection litigation does not prevent RSD from adopting Tort Immunity levies for the CRO, until and unless the Illinois

Supreme Court holds that the Tort Immunity Act may not be used for that purpose.

h. Per the Seventh Circuit, district court orders directing RSD to adopt Tort levies for CRO funding purposes are proper. (Indeed, all aspects of this Court's administration of CRO funding are proper.)

i. The district court should make all reasonable efforts to fund the CRO within the provisions of state law, and for that purpose it is proper to enter orders cutting off foot-dragging or resistance by the School Board.

j. However, the Seventh Circuit has made clear that, if necessary to fund the CRO, the district court may order RSD to levy taxes despite state law limitations on RSD's authority.

A. CRO Provisions.

17. CRO 210-214 and the companion August 8, 1996 reconsideration Order (at p.19) made clear that the District is responsible for fully funding all CRO remedies.

18. The CRO contemplated that CRO remedies would be funded primarily from Tort Immunity levies because "the RSD does not have surplus on-hand revenues to conduct meaningful remedial programs." (CRO 211.)

19. However, the CRO placed a cap on Tort levies for Fund 12 purposes beginning at $25 million and increasing to $29.5 million over four years. This cap was placed on the use of Tort levies, not on total CRO expenditures, because the CRO perceived a need to wean the District away from "dependence on outside sources of funding." (8/7/96 Order at 19.)

20. On appeal, PWC 1997 affirmed these provisions, except the Seventh Circuit reversed the cap on Tort use, particularly in view of the limitations placed on real estate tax levies by Illinois law (citing the tax cap statute, among others). (111 F.3d at 538.)

B. RSD's Repeated Opportunities to Present Revenue Plans for CRO Operating and Capital Expenditures.

21. The CRO (August 8, 1996 reconsideration Order at 19) provided that the District must develop in the first instance the necessary funding mechanisms for the CRO, and that the funding mechanisms are then submitted to the Court for approval and, if necessary, for any appropriate orders.

22. Since entry of the CRO the district court has always afforded RSD the first opportunity to present a revenue plan when any operating or capital expenditure obligation has been established.

23. On August 15 and September 25, 1996, the Court allowed and then ordered RSD to file a CRO capital funding plan. After receiving that plan and holding a hearing, the Court's December 6, 1996 Order determined that certificates of participation (or COPS) were a practicable method of funding the CRO capital remedies.

24. RSD has been given the opportunity to present Fund 12 revenue plans in each fiscal year:

a. September 16, 1996, RSD "alternative budget" for FY 97. (Proposed using Tort levies to generate approximately $18 million of $23.5 million needed; balance to come from unspecified budget cuts or new revenue in the Education Fund.) (D2377)

b. September 25, 1997, RSD revenue plan for FY 98. (Stated Tort levies the only available CRO funding source, because funding the CRO from the Education Fund would require massive and disruptive budget cuts in regular education programs.) (D2781)

c. September 1, 1998, RSD Statement concerning CRO revenue-generation for FY 99. ("RSD has no practicable funding plan to pay for the remedies.") (D3110)

C. FY 97 Funding Orders.

25. The district court's FY 97 funding orders specifically held that the CRO must be fully funded with reasonable and practicable revenue sources and that it was a violation of Plaintiffs' rights (denial of the remedy) for RSD to leave portions of the remedy unfunded.

a. September 18, 1996 Order. (Required Tort levy in the amount of 100% of the FY 97 expenditure plan. RSD's proposal to use the Education Fund for a portion of CRO costs "is unrealistic and impracticable,... given the District's continued deficit in the Education Fund.... The District has a responsibility to provide the harmed children in this School District with a remedy that is fully, and not partially, funded.") (D2387)

b. November 6, 1996 stay denial Order at pages 8-9:

> "The court wishes to emphasize that the District cannot choose which portions of the CRO it finds acceptable, fund these, and leave the rest to be funded when and if it becomes convenient. School desegregation orders require immediate implementation. The court is obligated to ensure that all steps needed for implementation are undertaken, including funding. Liddell v. Board of Education, 567 F. Supp. 1037, 1051-52 (E.D. Mo.

1983); Jenkins I, 807 F.2d 686 (8th Cir. 1986); Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256 (1979). Withholding of sufficient funding for CRO implementation is denial to the Plaintiff class of the relief of which it is entitled." (D2435)

c. December 6, 1996 Order. (Directed RSD to issue COPS to fund school construction required by the CRO.)

d. December 16, 1996 Order. (Directed RSD to adopt Fund 12 and COPS levies for FY 98 after the Board failed to do so.)

26. RSD appealed all FY 97 funding orders and some aspects of the Finance section of the CRO. The Seventh Circuit in PWC 1997 affirmed all financial aspects of the CRO and all FY 97 funding orders (except for the $25-million cap on use of Tort to fund the CRO). (111 F.3d at 540.) The Court held:

a. Court orders directing the Board to levy tort for the CRO are proper because "the district court was justified in ordering the School District to use a method of financing the building program that would avoid displacing the state's taxing authority into the federal court system."

b. RSD is obligated to pay for the CRO, so Seventh Circuit doesn't see what RSD has to gain by opposing an available source of funding.

c. The District court should be reluctant to be put in the position of exercising Jenkins authority by the school district's "foot dragging".

d. However, ultimately the district court has the power if necessary to order the CRO funded notwithstanding contrary provisions of state law. "... If it found itself stymied by state law the federal district court could as a

last resort command the state to come up with the money. Missouri v. Jenkins, 495 U.S. 33, 57, 110 S.Ct. 1651, 1666, 109 L.Ed.2d 31 (1990); In re Application of County Collector, supra, 96 F.3d at 904; United States v. Board of Education, 11 F.3d 668, 673-74 (7th Cir. 1993)."

e. "The district court has the power, as we have just noted, though it is a power to be exercised sparingly, to require the state to come up with the money to fund a valid federal decree, whatever state law may provide."[2]

D. FY 98 Funding Orders.

27. In the December 8, 1997 Order, relying on RSD's 9/25/97 revenue plan (D2781), the Court found that "RSD has consistently suffered significant deficits in its general operating

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[2]In re Application of County Collector, cited by PWC 1997, is the Seventh Circuit decision sending the tax protest litigation to state court. That decision also made clear that the district court in PWC has Jenkins authority to subordinate state law if necessary:

> While we can appreciate the district court's diligent efforts to remedy the vestiges of discrimination in the Rockford school system, [we do not have jurisdiction over the tax objections arising from the Second Interim Order.] We note, however, that the district court has retained jurisdiction over the PWC case and has entered the Comprehensive Remedial Order, which contains its own remedial measures and funding provisions. The district court has expressed its intention to adhere to Supreme Court precedent by formulating an order which both seeks to remedy the unconstitutional conditions and also endeavors to avoid unnecessary interference with the affairs of state and local authorities. See Missouri v. Jenkins, 115 S.Ct. 2038 (1995). The Supreme Court has found that, in certain circumstances, federal courts may order school districts to levy taxes, despite state law limitations on their authority, where the taxes are necessary to remedy constitutional violations. See Missouri v. Jenkins, 495 U.S. 33, 57 (1990). Federal law is supreme, and where a particular remedy is required to vindicate constitutional rights, a state cannot prevent a local government from implementing that remedy. Id. at 58. As of today, the district court has not ventured down this path, and we do not presume to guide it in this respect.

fund,... and clearly the RSD cannot reasonably fund the FY 98 CRO expenditure plan through its general operating fund." The Court made a parallel finding regarding the FY 98 COPS debt service levy. The Order reiterated that RSD had a duty to fully fund the remedies and that Tort levies were available for that purpose. The Order said the District should not have to be continuously spoon-fed by the Court, and that RSD should require decreasing court involvement rather than increasing involvement and continuous direction.

28. After the Board failed in two subsequent meetings to adopt the CRO Tort levies, the December 18, 1997 Order approved use of the Tort Fund on the merits (adopting Judge Reinhard's Opinion, 918 F.Supp. 235), and determined the Tort Fund can be used (notwithstanding the Rapp Opinion) until the Illinois Supreme Court rules otherwise. The Order also:

a. Determined that without the Tort levy the District would shut down some time between January and October 1998.

b. Found "that no Board Member has a credible plan to fund the CRO in the schools."

c. Directed the Board, and the individual members in their official capacities, to adopt the FY 98 CRO Fund 12 and COPS Tort levies. (D2862)

29. The Board complied with that December 18 Order, and did not appeal it. However, three Board members (Biondo, Delugas and Strommer) moved to intervene to challenge the Order and appealed the denial of that intervention.

30. The Court of Appeals rejected that attempted intervention in PWC 1999, stating:

> "The Magistrate Judge ordered the Board to approve the levy and gave the members until a specific date ***to carry out their duty in this regard, that is to vote for the levy***. All the members then voted for it.
>
> ... The Board did not appeal the order that it pay for compliance with the remedial decree out of the [tort] immunity fund." (Slip op. 3/19/99 at 8, 11.)

Thus, it was the Board's duty to vote for the levy in response to the Court Order, and the propriety of the Order (and essentially identical subsequent orders) is beyond challenge because the Board did not appeal the Order.

E. FY 99 Budget Orders.

31. The FY 99 Orders have been described in Part I above. Although the Board appealed various aspects of the October 28, 1998 Order, it did not appeal the portion directing the Board to adopt FY 99 CRO Fund 12 and COPS Tort Immunity levies. Accordingly that portion of the Order is final and unchallenged.

32. The Court of Appeals was informed during the appellate process of that Order -- and the Board's failure to comply with it -- and held that the district court's conduct of the budget and funding matters in this case in the past three years is both procedurally and substantively proper. (PWC 1999, slip op. at 4-8.)

33. The Court of Appeals made clear this Court has acted properly, and has broad discretion, in addressing CRO funding:

> "... [N]one of the Board's challenges to the Magistrate Judge's budget rulings has merit. The Board exaggerates the practical scope of judicial review of such rulings.... We can decide which provisions of the remedial decree are valid and which invalid, but when it comes to the design of specific programs for achieving the objectives of the valid provisions, ***and to the funding for***

> ***those programs, we have no practical alternative to deferring broadly to the judgment of the district court....*** The required determinations are quintessentially judgmental, and there is little that an appellate court can do to improve them, except in egregious cases, such as Missouri v. Jenkins, supra, which this one is not." (Slip op. at 5.)[3]

F. The District's Education Fund (and Other Regular Operating Funds) Continue to be Unavailable to Fund Any Portion of CRO Costs.

34. The following update information is from the February and April 1999 depositions of RSD's Superintendent Epps and Chief Financial Officer Hoffman, which are being submitted to the Court along with this Motion.

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[3]In between PWC 1997 and PWC 1999, the Court of Appeals addressed these issues one other time, in affirming dismissal of the claims against the State of Illinois. RBE v. ISBE, 150 F.3d 686, 688 (7th Cir. July 1998). The court stated:

> "Having the decree run against another organ of state government will give [PWC] nothing more -- at least so far as can be determined at this time. It is always possible that the decree will prove inadequate if it runs only against the local school board. Maybe the board, several of whose efforts to fund those portions of the decree that were not contested or have been upheld have foundered, will be unable to comply with the financial obligations imposed by the decree. Maybe it will turn defiant. Maybe the state will dissolve it. Who knows? But at present these dire possibilities are entirely speculative. Should they ever loom as real threats to PWC's ability to obtain the complete relief to which the law entitles it, it can seek supplementary relief in the desegregation suit."

Indeed, in FY 99 the Board progressed from "foot dragging" to "defiant" by refusing to comply with the October 28, 1998 Order and making necessary this exercise of Jenkins authority.

35. RSD has a history of chronic deficits in its Education Fund and other regular operating funds.[4] This pattern is independent of the CRO, which has been fully funded and does not run a deficit. The District's current cumulative (multi-year) regular operating deficit is approximately $38 million.

36. In order to access capital markets for issuance of the COPS in December 1996, RSD was required to adopt a 3-5 year Financial Plan addressing first the elimination of its annual operating deficit, and subsequently the elimination of its accrued operating deficit. (12/6/96 Order.) (D2480)

37. RSD has adopted budget reductions and pursued additional revenues for FY 98 and FY 99, in an effort to successfully carry out the December 1996 Financial Plan. (See generally, the depositions of CF0 Hoffman and Supt. Epps February and April 1999.)

a. RSD reduced its operating deficit in FY 97 and FY 98.

b. RSD even achieved a balanced budget for FY 98, due to some non-repetitive successes in deficit reduction efforts.

c. RSD still faces substantial and unresolved deficit reduction needs for FY 2000 and thereafter in the range of $8 million to $12 million, which staff

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[4]RSD's "regular operating funds" are as follows:

Education Fund
Grant Fund
Food Service
Tort Immunity (Fund 11)
Operations and Maintenance
Transportation
IMRF/FICA

February 26, 1999 deposition of RSD's CFO Hoffman, pp. 28-29.

has recommended be addressed through three annual deficit reduction increments of $4 million each in FY 2000 through FY 2002.

d. RSD staff presented potential reductions of $4.3 million to the Board of Education in February/March 1999. Of that amount the Board adopted only about $800,000 in reductions.

38. The Superintendent and CFO emphatically confirm the court orders and stipulations determining that the regular operating funds are not reasonably or practicably available to RSD as a funding source for all -- or any portion -- of CRO Fund 12 or COPS costs.

39. The Superintendent and CFO also emphatically confirm that, given the failure of the April 1999 referendum discussed below, Tort Immunity levies are the only available method for funding the CRO in FY 99, FY 2000, and subsequent years. (Epps 60-61, 63-64.)

III. APRIL 1999 UNSUCCESSFUL REFERENDUM

40. To the extent that submitting a tax-increase referendum to the electorate may be considered a prerequisite to issuance of a Jenkins order, that prerequisite has just been fulfilled in the Rockford School District.

41. After defying the Court's October 28, 1998 Order directing CRO levies to be adopted for FY 99, the Rockford Board of Education followed a two-prong strategy regarding CRO funding:

a. Pursuit of its appeals of the FY 98 and FY 99 CRO budgets, in an effort to secure a significant reduction by the appellate court of the CRO

annual expenditure level. This prong of the strategy failed in the PWC 1999 opinion.

b. Pursuing a referendum to cover the remaining CRO costs for a period of three years.

42. In January 1999, the Board of Education acted to put on the ballot for the April 13, 1999 election a referendum to increase the Education Fund tax rate by $0.64/$100 EAV. Under Illinois law, had the referendum passed, RSD could have amended its FY 99 budget and adopted the 64-cent levy for FY 99, in time to be included in the extension and collection of 1998 real estate taxes collectable in 1999.

43. The referendum would have generated approximately $12 million, offsetting to that extent the Board's failure to generate the $22.5 million CRO revenue required by the October 28 and November 6, 1998 Orders.

44. While not formally earmarked for CRO use, the referendum was depicted by RSD and by individual Board members as being either to fund the CRO or to replace (in part) the revenue lost due to absence of a CRO Tort levy.

45. The referendum was supported by leadership groups in the Rockford business community (the Chamber of Commerce, the Council of 100, and the Rockford Area Association of Realtors) because, as stated by those groups:

a. RSD has a critical need to replace the revenue lost by the Board's non-adoption of FY 99 CRO Tort levies. The cuts in educational programs that will be required in the absence of these revenues will severely damage both the school system and the city as a whole.

b. The absence of that revenue places the District in a fiscally unmanageable deficit posture which creates the probability of authority over the School District being lost to either the State of Illinois or the PWC federal court. (See, e.g., Chamber of Commerce and Council of 100 public statement, Attachment 1; Epps deposition 86-87.)

46. Board Members issued public statements supporting the referendum for similar reasons. (See, e.g., public statement of RSD Board finance chair Biondo, *Rock River Times*, 3/31/99, Attachment 2.)

47. The referendum was defeated by the electorate on April 13, 1999.

48. Accordingly, the dire financial and educational circumstances forecast by referendum proponents, were the referendum to fail, have indeed come to pass. Plaintiffs urge that this warrants entering the supplemental remedial funding order hereby requested.

IV. ADOPTION OF A LEVY FOR FY 99 IS STILL PRACTICABLE UNDER STATE LAW AND THE LOCAL TAX ADMINISTRATION PROCESS

A. State Law Levy Deadline.

49. As previously noted the Board has the authority to levy, without rate limit, taxes under the Tort Immunity Act to fund the CRO. (See ¶¶ 3-4, above.)

50. Real estate taxes in Illinois are levied on a calendar year basis, with the levy for one year being billed and collected in the next year in two installments (roughly, June and September).

51. A school district levy must be adopted and certified to the County Clerk prior to the last Tuesday in December. 105 ILCS 5/17-11. Under certain circumstances a district may amend a levy or adopt a new levy after that deadline date:

a. If a referendum is passed after the deadline date and before tax bills are issued. 105 ILCS 5/17-3.

b. When a district is required to levy a minimum rate for state aide purposes, and has done so, but subsequently EAV multiplier calculations caused the District's actual rate to be lower than required, the District may amend its levy back to the required minimum. 105 ILCS 5/17-11.1.

52. If the December deadline is extended by this Court to (for example) May 10, 1999, RSD would then have the authority under existing state law to adopt the CRO Tort levies which it failed to adopt in December 1998.

53. The Illinois tax cap statute also does not prevent the adoption in April 1999 of the CRO tax levies required by the October 28 and November 6, 1998 Orders. (Property Tax Extension Limitation Law, 35 ILCS 200/18-185.) If the December 1998 levy deadline is extended, then the FY 99 CRO levy requested by this Motion would be part of the District's calendar 1998 levies. The total of the "regular" 1998 levies adopted by the District in November 1998, plus the CRO Fund 12 and COPS levies of $22.5 million not adopted in December 1998, is within the maximum levy and extension amounts which the tax cap legislation authorized RSD to levy and extend for 1998.[5]

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[5]The Court is also advised that the tax cap statute does not present an obstacle to adoption of CRO Tort levies later this year for FY 2000 CRO costs. 35 ILCS 200/18-185, in defining "limiting rate" makes clear that if a district reduces its total tax extension in a particular year,

B. The Notice of Budget Amendment Requirement.

54. As discussed in the October 28 Order (p.7, fact findings 25-29), RSD's budget must be amended to include a CRO Tort levy before the levy may be entered. (D3145) The steps necessary for amendment require at least 30 days. (See 105 ILCS 5/17-1, and statement of Robert Ellch in the 9/17/98 revenue hearing transcript at pp. 30-31.)

55. RSD initially fulfilled these requirements in response to the October 28 Order by issuing a Notice of Budget Amendment and holding a public hearing on such amendment on December 1, 1998. Arguably this initial notice and public hearing satisfies the requirements of 105 ILCS 5/17-1 with respect to adoption of the identical budget amendment and levy at a later time during the same fiscal year.

56. An alternative method of fulfilling that requirement consistent with Illinois Supreme Court case law is for RSD to issue the notice, hold the hearing, and adopt the budget amendment subsequent to adopting the levy in question. Stanfield v. Pennsylvania Railroad Company, 121 N.E.2d 748, 751 (1954).

57. Accordingly, the Court should address this public notice and budget amendment process by a non-Jenkins order directing RSD to go through the notice, hearing and budget

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its extension base for the next year is the highest of the three preceding annual extension amounts. In other words, if RSD's extension were reduced for calendar 1998, then in 1999 its extension base for tax cap purposes is the highest of the extensions in 1996 through 1998.

A contrary implication was presented to the Court in the September 17, 1998 revenue hearing. In reliance on that information, the Court included the following incorrect sentence in the October 28, 1998 Order at page 11: "Because of those [tax cap] limits, a 10% reduction in the FY 99 levy could only be partially recaptured in an FY 00 levy, if necessary."

The interpretation of the tax cap statute set forth in this footnote is concurred in by RSD counsel Mr. Lester and by Mr. Ellch.

amendment process subsequent to adopting the FY 99 CRO Tort levies requested by this Motion.

C. Local Tax Administration Process.

58. After RSD adopted its regular 1998 levies, additional steps in the local tax administration process include:

a. Determination of RSD's equalized assessed violation ("EAV") for 1998 by the County Assessor.

b. Determination of RSD's 1998 tax rate, by dividing RSD's 1998 total levy amount by RSD's 1998 EAV. (In performing this step the County Clerk verifies that RSD has not exceeded in each of its funds the tax rates allowable under state law.)

c. Extension of the 1998 tax rate against the EAV of each taxpayer within RSD's boundaries, resulting in a tax bill for the amount payable by that taxpayer. From the time taxing rates for all taxing bodies are finally determined and "extended", preparation of tax bills takes about two weeks. Tax bills are issued with a first and second installment of 50% each.

d. The first installment is due 30 days after the tax bill is issued, but under state law the first installment may not be due prior to June 1, 1999. Accordingly there is no practical reason for tax bills to be issued prior to May 1, 1999.

59. The County Clerk of Winnebago County contemplates for 1998 taxes payable in 1999:

a. Making tax extensions some time during the second half of April.

b. Issuing tax bills some time during the first half of May.

60. The County Clerk, while the referendum was pending, advised RSD that if the referendum passed he would provide time for RSD to amend its budget and adopt the FY 99 levy authorized by the referendum.

61. For all the foregoing reasons, there is ample time for the Court to enter an Order as requested by this Motion, enabling and directing RSD to adopt FY 99 CRO Tort levies, in sufficient time for those levies to be incorporated by the County Clerk into the extension of 1998 taxes and the issuance of 1998 tax bills payable in June and September 1999.

D. The State Court Tax Objection Litigation is No Impediment to the Requested Order

62. As noted above, this Court's December 18, 1997 Order determined that (notwithstanding the Opinions by State Circuit Judge Rapp) RSD may continue to adopt tort levies to fund the CRO, until and unless the Illinois Supreme Court rules otherwise.

63. RSD had the opportunity to, but did not, appeal the December 18, 1997 Order.

64. As noted above in ¶3(d), RSD's September 17, 1998 revenue Stipulation for FY 99 confirms the availability of the Tort Immunity levy for FY 99 CRO funding, despite Judge Rapp's Opinions.

65. There has been no relevant change in the status of the state court tax objection litigation since the December 18, 1997 Order:

a. After the RSD Board refused to seek interlocutory appeal of Judge Rapp's Opinions, this Court directed Plaintiffs to intervene in the tax objection litigation to pursue such appeals.

b. The Illinois Appellate Court, Second District, initially denied the PWC Plaintiffs' petition for interlocutory appeal.

c. Subsequently on October 6, 1998 the Illinois Supreme Court denied the PWC Plaintiffs' petition for leave to appeal directly to the Supreme Court, but entered a supervisory order directing the Appellate Court to allow the interlocutory appeal.

d. On November 6, 1998, the Appellate Court entered an order allowing interlocutory appeal of the Rapp opinions pursuant to Illinois Supreme Court Rule 308.

e. Briefing in the Illinois Appellate Court was completed on approximately February 5, 1999, but oral argument has not yet been scheduled and no decision has been rendered.

66. In summary, there has been no change in the status of the state court tax objection litigation since December 18, 1997 which would alter the proposition that RSD retains the authority under state law to adopt Tort Immunity Act levies to fund CRO costs.

V. CONSEQUENCES OF FAILURE TO ADOPT FY 99 CRO FUND 12 AND COPS LEVIES

The following facts concerning the financial and educational consequences of failure to fund the CRO are drawn from the depositions of RSD Superintendent Epps and Chief

Financial Officer Hoffman, taken on February 26 and April 1, 1999. Those depositions are being filed simultaneously with this Motion, accompanied by preliminary factual findings.

This section discusses CRO finances from the Court's perspective -- that CRO costs for a given fiscal year are fully funded through a tax levy adopted during that fiscal year. (If needed, references to RSD's slightly different accounting system will be specified as such.)[6]

In this section, the Court must bear in mind the distinction between actions RSD will be legally authorized to take at certain points in time, and the probability or practicability of the financial markets allowing RSD to actually carry out those measures.

The Court must also bear in mind the distinction between the District's financial condition as depicted in its financial statements, and the District's cash flow situation. Obviously the two are related -- deficits on the books lead to lack of cash -- but in reckoning the consequences of RSD's failure to fund the CRO for FY 99, there are distinct consequences in terms of the financial statements and the cash flow situation.

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[6]For this discussion, a brief review of terminology is necessary:

a. The schools operate on a fiscal year basis. FY 99 is July '98 through June '99.
b. Tax levies are adopted on a calendar year basis. The levy adopted in 1998 is collected in June and September 1999. (Hoffman 12)
c. From the Court's perspective, CRO costs for a given fiscal year are funded by the levy adopted during that year. Thus, the October 28, 1998 Order determined the FY 99 unfunded CRO expense and ordered a 1998 levy in that amount.
d. The District's accounting perspective is the same with one exception: The District attributes tax revenue to the fiscal year in which it is collected. (Hoffman 12-13) Thus, the District attributes a 1998 levy half to FY 99 (the June 1999 payment), and half to FY 2000 (the September 1999 payment). (Hoffman 12-13)
e. Illinois school districts frequently handle this delay in tax collections by borrowing against a levy once it is adopted. Such "tax anticipation warrants" or "TAWs" must be repaid immediately when the levied taxes are collected. (Hoffman 84-85, Epps 80)

A. How RSD Has Handled FY 99 CRO Costs.

67. As noted in ¶¶ 4-5, the FY 99 unfunded CRO Fund 12 and COPS expenditure obligations total $22.5 million. (Hoffman 23-25) For purposes of this section only that aggregate total is relevant, and references to "FY 99 CRO levy" are to a levy for that amount.

68. RSD is making FY 99 CRO expenditures by borrowing the necessary monies from the Education Fund.

69. On RSD's books this is reflected as a deficit in the CRO funds. (Fund 12, operations, and Fund 35, COPS.) (Hoffman 25)

70. The CRO funds have an obligation to repay the amount that was borrowed from the Education Fund. (Epps 82.) (Hoffman 84-85, Epps 81-82)

B. RSD's TAW Borrowing.

71. RSD generated the cash to lend to the CRO funds by issuing TAWs in January 1999, secured by the 1998 Education Fund levy. Those TAWs (totalling $50 million) must be repaid from the June and September 1999 collections of that 1998 levy. (Hoffman 12-13, 84-85, Epps 80)

72. The CRO funds have no TAW borrowing capacity because they have no FY 99 revenue. (Hoffman 84) Even with a Tort levy, the tax objection litigation prevents borrowing on CRO Tort levies.

73. In simple terms, RSD has funded FY 99 CRO costs by short-term borrowing against FY 2000 Education Fund revenue. (Hoffman 72-73, 84)

74. RSD made no corresponding reductions in either FY 99 or FY 2000 Education Fund expenses -- nor was it feasible to do so. Because RSD has been in a deficit reduction

mode for several years, virtually all reasonably available deficit reduction measures have already been adopted.

a. As RSD correctly stated in its FY 98 revenue plan filed September 25, 1997, "it is inconceivable that RSD could fund the [FY 98 CRO costs] out of its general operating funds without significantly reducing the delivery of educational services to all of its students, minority and majority."

b. This Court similarly determined at CRO 211 that funding the CRO remedies from RSD's existing education budget would be "a massive interference" in the core educational system and could possibly lead to violation of RSD contractual obligations.

c. Since the CRO is a set of supplemental remedies which is premised on the maintenance by RSD of an educationally and fiscally sound core education system, massive reductions in the core would destroy the effectiveness of the CRO. (Epps 40-41, 81.)

d. In any event, no significant reductions are possible for either FY 99 (which is virtually over), or for FY 2000 (for which the RIF date for reducing certified personnel has now passed).

75. Accordingly, RSD's expenditure obligations for FY 99 and FY 2000 include $22.5 million for which there is no possible source of genuine revenue.

a. Money borrowed short-term on TAWs is not genuine revenue because it must be promptly repaid in full. (Hoffman 84-85, Epps 80, 88-89.)

76. As a result of non-funding of the FY 99 CRO costs, the District's cumulative deficit will increase from approximately $32 million to $55 million.

77. For the foregoing reasons, the CRO for FY 99 has not been fully and promptly funded with realistic and practicable revenue sources, as required by prior court orders discussed in Part II, and therefore the Plaintiff Class is being denied the relief to which it is entitled.

C. Cash Flow Funding Consequences in FY 2000.

78. From a cash flow perspective, if the FY 99 CRO levies had been adopted:

a. The CRO would have been fully funded FY 99.

b. The $50-million Education Fund TAWs would have been repaid by September 1999, and the District would then have had enough cash to operate until approximately January 2000. At that point it could have repeated the Education Fund TAW cycle in an economically sustainable manner (assuming ongoing CRO Tort levies).

79. However, the $22.5-million cash shortfall, caused by failure to fund FY 99 CRO costs, will have the following immediate adverse consequences:

a. The amount RSD must borrow FY 2000 for cash flow purposes will increase from $50 to approximately $75 million. (Hoffman 90-91, 99)

b. RSD will run out of cash in approximately September 1999. To sustain itself from a cash perspective, RSD must issue TAWs in September -- if the financial markets will accept them. (Hoffman 123, 132-134) This

means borrowing four to five months earlier than was necessary in FY 99.

c. However, the maximum TAW amount RSD can issue September 1999 is only about $54 million of TAW borrowing. (Hoffman 91) (That amount is derived from a formula applied to the maximum Education Fund levy RSD is authorized to adopt for FY 2000.) Accordingly, even if RSD could successfully issue the September '99 TAWs, that will not get RSD through the FY 2000 fiscal year. The District will be about $21 million short and run out of money in approximately May 2000. (Hoffman 91)

80. To survive from a cash perspective in the Spring of FY 2000, the District would have to issue what are known as "second-year warrants." (Hoffman 83-84, 91-94) This means RSD would have to adopt its FY 2001 budget and tax levies before the end of FY 2000, and borrow in FY 2000 against FY 2001 levies collectable in the summer of 2001.[7] (Hoffman 92-94)

81. Because of these dubious financial arrangements, there will be increased interest rates on the entire TAW borrowing, in the amount of approximately one-half percentage point.

[7]Second-year warrants are regarded by both RSD staff and Illinois law as a financially irresponsible practice. Under the State Board of Education's financial supervision system, the issuance of second-year warrants is a major criterion for placing a District on the financial watch list and for possible remedial action by the State.

82. Solely from the perspective of increased interest cost, this effort to fund operating expenses through increasing the District's TAW burden will cost about $2 million in FY 2000 alone (Epps 77-79):

a. That is the additional cost of borrowing more, borrowing it earlier, and paying a higher rate.

b. More important, this $2 million can only be paid from operating funds, not bond and interest levies. Accordingly it translates into a direct $2-million cut in regular "core education" programs.

c. As noted above, this reduction in core education would directly undermine and impede the implementation and success of the supplemental CRO remedies. (Epps 40-41)

83. From the point of view of acceptance by the financial markets which must buy these TAWs, there is uncertainty whether RSD can issue the September 1999 TAWs and a high degree of risk that it will not be able to issue the May 2000 TAWs. (Epps 37, 64-65, 72; Hoffman 104, 133-134).

84. Of course the law of this case is that RSD will indeed shut down in September 1999. RSD so stipulated in the September 17, 1998 Stipulation, and the Court so found in the October 28, 1998 Order. (See ¶3 above.)

a. As pointed out in this Court's December 16, 1998 Order (¶13 above), these stipulations and factual findings are final and binding because RSD did not move to alter or amend them.

D. Variations Depending Upon FY 2000 CRO Funding.

85. At this point there is a divergence in consequences depending on whether there is a CRO Tort levy adopted for FY 2000. In other words, is the absence of Tort funding for the CRO a one-time FY 99 event, or an ongoing condition?[8]

86. If there is no CRO Tort levy for FY 2000, the following consequences will ensue from a financial-statement perspective:

a. RSD would have approximately $25 million of unfunded CRO expenditure obligations (assuming in light of PWC 1999 that CRO costs remain about the same for FY 2000).

b. RSD's annual operating deficit for FY 2000 would be $30 million to $35 million ($25 million CRO plus $5-10 million regular operating funds deficit).

c. RSD's accumulated operating deficit would rise to about $85-90 million.

87. From a cash flow perspective, these financial circumstances are likely to be severe and terminal (Epps 64-72):

a. Supt. Epps testified in his deposition that if the District faced two successive years without CRO Tort levies, then from the perspective of RSD's independent auditors, RSD will cease to be "a going concern" in approximately May of 2000. (Epps 64-65)

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[8]As noted earlier, Illinois law permits the restoration of CRO Tort levies for FY 2000. The tax cap statute has a three-year retrospective window, so that RSD's FY 2000 levy extensions can total as much as its levy for FY 98 (adopted in December 1997), plus a CPI increase of about 2%. 35 ILCS 200/18-185.

b. The Supt. testified that the auditors, in preparing the FY 99 audit for the year ended June 1999, look ahead 12 months in determining whether the District should receive an unqualified audit or whether there should be any "qualifications".

c. Because RSD would cease to be a "going concern" in about May 2000, the FY 99 audit would contain a qualification to that effect.

d. The absence of an unqualified audit statement, according to Supt. Epps, will make it quite improbable that the District will be able to issue TAWs even in September 1999, much less the second-year TAWs in May 2000.

88. In summary, the testimony of RSD's Superintendent and CFO essentially confirm RSD's September 1998 Stipulation. If there are no CRO Tort levies in either FY 99 or FY 2000, the District will most likely shut down in September 1999, and in any event not long thereafter. (Hoffman 134, Epps 72)

E. Consequences if CRO Tort Levies Restored for FY 2000 and Thereafter.

89. If the CRO is fully funded with a Tort levy for FY 2000 (assume $25 million), the first installment of that levy will be collected before the end of the fiscal year in June 2000.

90. Accordingly, from a financial statement perspective, RSD's FY 2000 annual operating deficit would consist only of the $5- to $10-million regular operating funds deficit. The cumulative deficit would remain in the range of $60-65 million.

91. From a cash flow perspective, RSD would still be in extremely precarious condition. It would need about $75 million of cash financing for FY 2000, only $54 million

of which could be issued in September 1999. (Hoffman 90-91, 99) Second-year warrants in the amount of about $21 million would still have to be issued in about May of 2000.

92. While RSD has the legal authority to make these TAW issuances, there is no assurance at all that the market would accept these TAWs, and there is still a significant likelihood that RSD would shut down either in September 1999 or May 2000.

93. Even under the best of circumstances, stretching RSD's cash financing capability to its outer limits would leave the District in extremely precarious condition, relying on second-year TAWs as its ongoing financial device. Furthermore, it would impose upon the Education Fund a cost of about $2 million a year in increased interest, as detailed above.

F. Compliance with RSD's 1996 Financial Plan.

94. To enable the issuance of COPS, the Court's December 1996 Order required RSD to adopt a three- to five-year financial plan having two main objectives:

a. Eliminate the annual deficit in the regular operating funds.

b. Then, eliminate the accumulated multi-year deficit in the regular operating funds.

95. The District's December 1996 financial plan sought to achieve the first objective -- balancing the annual budget -- within a three- to five-year period, while adhering to the requirements of the CRO, state and federal legal requirements, and contractual obligations. (Epps 14)

96. If the CRO had continued to be fully funded, the District would have been generally accomplishing the objectives of its financial plan. (Epps 28) Prior to FY 99, the District was on schedule in eliminating the annual operating deficit. (Epps 24-25)

97. Leaving the CRO totally unfunded for even one year would completely destroy the District's progress in deficit-elimination and achieving fiscal health. The District would not recover from this impairment of its finances for many years into the future. (Epps 75-84)

G. Access to Capital Markets for Long-term Borrowing.

98. According to Supt. Epps, if the District completely abandons its 1996 financial plan, and incurs even a one-time huge increase in its annual operating deficit and accumulated operating deficit, that would make it extremely unlikely that the capital markets would accept any effort by RSD to issue long-term debt. (Epps 82.)

99. RSD presently plans to issue long-term debt in the near future for life-safety repairs to buildings. The amount of that bond issuance has not yet been determined. (Epps 83.)

100. In the absence of the funding order hereby requested, it is unlikely that this bond issue could be made.

H. State Takeover Consequences.

101. According to Superintendent Epps, under present circumstances the District is on the path to potential assumption of financial control by the State. (Epps 45)

102. Board finance chair Biondo has publicly acknowledged that non-passage of the referendum will likely result in a state takeover of the District's finances. (See Attachment 2.)

103. The Rockford Area Chamber of Commerce and the Council of 100 have similarly predicted that in the event of failure of the April 13 referendum, state oversight and takeover will be a certain consequence. (Attachment 1.)

I. Neither RSD Nor the Board of Education Has Any Financial Plan to Address these Consequences.

104. When given the opportunity to file an FY 99 CRO revenue plan on September 1, 1998, RSD stated that it "has been unable to develop a practicable plan to pay for the remedies ordered by this Court." (See ¶2 above.)

105. Since that time RSD has not presented to the Court any financial plan to address the circumstances created by its refusal to adopt FY 99 CRO Tort levies.

106. As noted in ¶41 above, the Board of Education did seek reductions of CRO remedy costs from the Court of Appeals and put a $12-million referendum on the April 1999 ballot. If this were a "plan," it was never presented to the Court. In any event it has wholly failed.

107. According to Supt. Epps and CFO Hoffman, to their knowledge neither the Board of Education nor any individual Board Member has any plan for fully funding the CRO with genuine revenue, or for alleviating the financial crisis described in this Part V, created by the Board's refusal to adopt FY 99 CRO Tort levies. (Epps 35, Hoffman 36-37)

108. According to Supt. Epps and CFO Hoffman, the RSD staff has no financial plan for these purposes, other than the adoption of FY 99 CRO Tort levies pursuant to an order of the Court. Supt. Epps and CFO Hoffman testified that a court order enabling and requiring adoption of the FY 99 CRO Tort levies is necessary to preserve both the financial and educational health of the Rockford school system. (Epps 84.)

VI. THE ORDER(S) WHICH THE COURT SHOULD ADOPT

The orders which the Court should adopt, and the reasons why the requested orders are proper, are discussed both here and in the companion "Plaintiffs' Brief in Support...", filed herewith.

A. A Jenkins Order Extending the December 29, 1998 State Law Deadline for Adoption of Such Levies.

109. RSD's duty to fully fund the CRO has been finally established by the CRO, the FY 97 and FY 98 funding Orders, and the Court of Appeals. The amount and revenue source for fulfilling that duty in FY 99 were finally established by the October 28 and November 6, 1998 Orders. When the Board refused to comply with the October 28 Order before the end of December 1998, a state law obstacle arose to adoption of those FY 99 (calendar 1998) levies.

110. The only state law obstacle is the last-Tuesday-in-December deadline for adoption and certification of real estate tax levies. (See ¶51 above.) The Court should enter an order deferring that deadline date to (for example) May 10, 1999.

111. This is an exercise of Jenkins authority necessary to remove a state law obstacle to full funding of the CRO for FY 99 and to prompt, effective and fiscally responsible compliance with the CRO.

B. A Non-Jenkins Order Directing RSD to Adopt FY 99 CRO Levies, to Effectuate the October 28 and November 6, 1998 Orders.

112. The Court should direct the Board, and each Board Member in his or her official capacity, to adopt the FY 99 Tort levies delineated in the October 28 and November 6, 1998 Orders. (D3145, D3154)

113. This is a non-Jenkins order. It is the equivalent of the October 28 Order, the levy-direction aspect of which was not appealed and is final. It is also the equivalent of the December 18, 1997 direction to levy (D2862), which the Board did not appeal, and the FY 97 directions to levy (¶25, above) which the Board appealed and which the Seventh Circuit approved in PWC 1997.

C. A Non-Jenkins Order Directing RSD to Comply with State Law Budget Amendment, and Related Notice and Public Hearing Provisions, in Relation to the Levy to be Adopted.

114. The notice of budget amendment requirement has been fully discussed in Part IV.B hereof (¶¶ 54-57). The Court should enter the orders suggested there, directing RSD to go through the notice, hearing and budget amendment process subsequent to adopting the FY 99 CRO Tort levies requested by this Motion.

D. An Order Establishing a 48-Hour Deadline Within which RSD Must Adopt the Levies Required by (B).

115. The Court should issue a deadline because, as a matter of comity with the local tax administration process, it is desirable that both the Court's decision on this Motion and the effectuation of that decision be completed by approximately May 1, 1999.

116. Furthermore, no significant time for compliance is required because all of the issues concerning FY 99 funding, and the issuance by the Court of orders directing adoption of CRO Tort levies, have previously been fully developed and litigated by the parties.

VII. THE REQUESTED ORDER IS PROPER FOR THE FOLLOWING REASONS, AMONG OTHERS

A. All Other Options for Adopting the Levies Completely Within State Law have been Exhausted.

117. RSD's ability to adopt FY 99 CRO Tort levies completely within state law was eliminated by RSD's defiance of the October 28 Order and the consequent expiration of the December 29, 1998 levy adoption deadline.

118. To the extent that the April 13, 1999 referendum represented an alternative within state law for funding a portion of FY 99 CRO costs, that alternative was exhausted with the defeat of the referendum.

119. As demonstrated by the testimony of Superintendent Epps and RSD's stipulations, there is no other alternative source of funding for FY 99 CRO costs.

B. The Jenkins Order Represents the Least Intrusive Set of Steps Available to the Court to Accomplish an FY 99 CRO Levy.

120. The order is least intrusive because it only defers a state law time line for levy adoption.

121. The requested order does not alter state law with respect to the District's legal authority to adopt Tort levies for CRO costs, nor with respect to the amount of taxes which the District is authorized under state law to levy.

122. In addition, the entire set of requested orders does not even significantly, much less completely, circumvent local taxing authority, as would a direct judicial order adopting a tax. Here, the requested order only directs RSD (the taxing body) to adopt tax levies which are routine in all but the timing aspect. Furthermore, the order in no way impinges on the operations of any other state or local officials involved in the real estate taxation process.

C. Rather than Increasing the Amount of Funding Permitted by State Law, it Restores Available Funding of Which the Board Deprived Itself by its Defiance of the October 28 and November 6, 1998 Orders Directing Adoption of FY 99 CRO Levies.

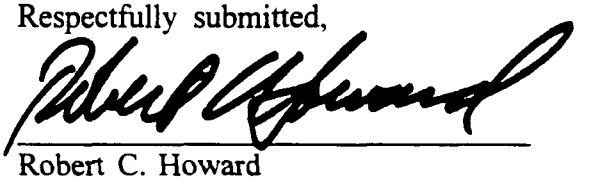
123. As this Court held in its November 6, 1996 Order, a failure by RSD to fully and promptly fund the remedy is a denial of the remedy to the Plaintiff Class. (D2435)

124. The RSD Board has generated such a remedy denial for FY 99 by defying the October 28 and November 6, 1998 Orders, and thereby depriving itself of the capacity to fulfill its CRO funding obligation for this year.

125. This Court should reject the Board's effort at fiscal self-disablement, and the consequent severe injuries thus visited upon the educational and financial viability of both the CRO and the District's core education system.

WHEREFORE, Plaintiffs respectfully request that the Court enter an order in the form described in Parts IV and VI of this Motion, for the reasons stated herein and in the companion Plaintiffs' Brief in Support. If the Court permits, Plaintiffs will tender a suggested draft order for the Court's consideration.

Respectfully submitted,



Robert C. Howard
One of Plaintiffs' Attorneys

DATED: April 15, 1999

Robert C. Howard
Kathleen Mangold-Spoto
Joan Matlack
FUTTERMAN & HOWARD, CHTD.
122 S. Michigan Ave.
Suite 1850
Chicago, IL 60603
(312) 427-3600

Of Counsel:

Venita Hervey
FUTTERMAN & HOWARD, CHTD.
P.O. Box 157
Rockford, IL 61105
(815) 969-8100

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Rockford Register Star
Friday, March 26, 1999

OK school referendum, but get details

(Editor's note: Following is a statement of support by the Rockford Area Chamber of Commerce and Council of 100 for the April 13 school tax referendum.)

By HENRY BROOKS
and PAUL CALLIGHAN
Special to the Rockford Register Star

We have consistently supported the Rockford Public Schools. As the largest school system in the area, the Rockford schools are a critical regional resource. Through the years, we have urged successive school boards and administrations to adopt and follow long-term financial plans, report financial matters to the public in an understandable manner and be accountable to the public for financial as well as operational performances. These recommendations have largely been ignored.

In a series of resolutions passed in September 1996, the boards of the Rockford Area Chamber of Commerce and Council of 100 urged the school board to make a full faith effort toward implementation of the Comprehensive Remedial Order (CRO). We also called for the board to communicate its plans for both implementation of the order and effective operations of the schools, describing to the public the tax impacts of its plans over five years.

Henry Brooks

Another resolution urged the board to use all legal sources of revenue, including the use of the tort fund, for the 1996-97 school year, to avoid plunging the school district deeper into financial crisis while a financial plan could be developed.

Now, three years later, the community finds itself confronted with a $22 million shortfall due to the current board's decision not to levy the tort fund. There appears to be no workable financial plan that supports the requirements of the CRO and other desired educational outcomes. This decision has placed the district in further financial jeopardy, with no guaranteed replacement of the funds. Even a successful referendum for the $12 million the board now seeks is only a stopgap measure; further budget cuts will still be needed.

If the April 13 tax referendum fails, state oversight and takeover of our schools will almost surely follow, bringing no relief from our financial obligations. Under state law, following a failed referendum, no additional referendum vote can be held for another 18 months to relieve what is sure to be great financial stress. To avoid losing

Paul Callighan

local control and devaluing the quality of our educational system, we must support the referendum.

As supporters of the referendum, we would like to be effective advocates. However, we find ourselves severely handicapped by the absence of operational plans tied to financial plans on the part of this school board and its predecessor boards. In broad terms, we believe this referendum, as a stopgap measure, is badly needed but we are troubled because we have no indication of the school board's priorities for budgetary cuts and expenditures.

Our advice to citizens is to press for details from the school board in the days ahead. Even in the absence of a full financial plan, insight from school board members as to their intent for specific budget cuts, expenditures and timing would be helpful. Because the time for citizen analysis is short, voters will have to make their own judgments in the final hours.

We recognize a successful referendum will not bring closure to our public education crisis. We regret that the community has been put in this position. The fact remains that a "yes" vote is necessary to avoid irreparable damage to our public schools and Rockford's youth — the community's future.

Following the election, we urge citizens to work with and support the school board in committing to operational and financial plans that complete the implementation of the CRO and move us forward to the education system our community needs to compete and develop in the 21st century. There are four absolutely essential objectives that should inspire us to move beyond the turmoil of our segregated history. They are:

- Equal opportunity for all students.
- High levels of student achievement that prepare our citizens for success in global competition.
- Lower costs with sound financial management.
- A return to local control, with strong and competent leadership.

With the recent ruling by the 7th Circuit Court of Appeals behind us, let's unite behind our schools and a positive agenda for the future of our community. Your vote for the referendum on April 13 can be at least a small first step on the long walk to schools that serve all of us, as they should.

Henry Brooks is board chairman of Rockford Area Chamber of Commerce. Paul Callighan is board chairman of the Rockford Area Council of 100.

Editorial

School referendum vital for local control

By Ted Blondo
Vice President, Rockford Board of Education, Chairman of Finance Committee

On April 13, school district voters will go to the polls with one last opportunity to maintain local control of our public schools. A YES vote will give this community that opportunity! It will give the school board three years' time to reduce the district's deficit spending. A NO vote will give the *Rockford Register Star* and others what they, in fact, want—judicial takeover of our schools, state control of the district's finances, and the eventual elimination of yet another democratic process in Rockford—an elected school board.

The district's current $31 million debt is the direct result of a school administration that continues to present the board with one deficit budget after another. I was a member of Richard Rundquist's committee studying school finances in 1996, referred to in the *Register Star*'s editorial, which told the district they were broke. The district administration didn't implement one recommendation that committee proposed!

School boards have requested a balanced budget from this administration for at least four years. A balanced budget has never been placed before any board for a vote! Even with an annual $20 million-plus dollars in tort taxes, the school district has again been placed on the state's Financial Technical Assistance list for a second consecutive year. District administrators will finally be held accountable!

If the referendum fails, the court will order the board to raise taxes within days of its failure, even if the court has to enjoin state laws governing levy and budget deadlines, or tax caps to do it. The current tax reduction, due to the board not levying tort taxes, will disappear before the tax bills even get to the mailbox. The already undervalued home prices will decrease much more than the perceived savings obtained by voting against the referendum. Rockford will continue to lose local ownership of businesses because of their inability to attract skilled employees to the area. Future jobs will be lost if companies refuse to locate in Rockford because of our schools, and increased business bond rates.

The Rockford School Board majority voted last December not to use tort taxes, and restore the people's right to vote through referendum. The board's decision resulted in a reduction in revenue of about $22 million in court-ordered taxes, even though surplus tort funds exceeded $4 million last year. The referendum is needed to temporarily replace $12 million for a period of three years to give the board time to reduce the spending while continuing to fund the court-ordered remedies.

Most of the deficit is in the Education Fund. Over 91% of that fund's spending has been controlled by the three-year REA contract that could not be reviewed until this spring! The referendum money will be placed in the Education Fund to lessen the amount of ductions that will still be required, with or ithout tort taxes, due to past and current ificit spending.

The *Register Star*'s editorial board obvisly doesn't trust any elected official who ves the people the right to vote on taxes. The ters do not always conform to what the

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editorial board feels is best for the community. Consequently, now that the present school board is planning to reduce spending and is moving forward with plans to revamp the administration, while negotiating contracts that reduce the deficit, the *Register Star* wants us replaced with a school board appointed by the Rockford mayor and the Winnebago County Board chairman!

Where was the *Register Star* while the debt was piling up, and tort spending increased from $6 million to over $20 million per year? This is not about finances or court-ordered remedies. It is about control!

What qualifies the Rockford mayor or the county board chairman to choose board members for the voters? What would happen if I were elected mayor of Rockford, and Patti Delugas were elected county board chairman? Would the *Register Star* then call for *those* positions to be appointed, possibly by the state legislature? Where would this circumvention of the democratic process end? Maybe the *Register Star* should appoint all elected positions in Winnebago County! Maybe Rockford should have an appointed editorial board!

Your elected school board has many tough decisions to make in the next few years to restore confidence in the public school system. The referendum is needed to allow us time to make those decisions, and to keep local control alive in Rockford. It's the voters' turn to make the tough decisions. Vote YES!

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

PEOPLE WHO CARE, et al.,	)	
	)	
Plaintiffs,	)	Civil Action No. 89 C 20168
	)	
v.	)	Judge Stanley J. Roszkowski
	)	
ROCKFORD BOARD OF EDUCATION SCHOOL DISTRICT #205,	)	Magistrate P. Michael Mahoney
	)	
	)	
Defendant.	)	

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR AN ORDER DIRECTING DEFENDANT RSD TO ADOPT FY99 CRO FUND 12 AND COPS LEVIES, EXTENDING THE STATE LAW DEADLINE FOR LEVY ADOPTION

I. INTRODUCTION

By their Motion, Plaintiffs request that this Court direct the Rockford Board of Education to adopt FY99 CRO Fund 12 and COPS tort immunity tax levies by a specific deadline date and extend by four months the state law time limit for adoption of those levies.

The requested order follows in the footsteps of this Court's cautious and deferential approach to the funding of the remedies. To date, this Court has carried out the Supreme Court admonition that, while in the last resort it may order a tax which "circumvent[s] altogether" local taxing authority, it must first assure itself that "no permissible alternative exists". Missouri v. Jenkins, 110 S.Ct. 1651, 1663 (1990). The Court has given RSD and its Board ample opportunity to fund the remedies and has shown great restraint in the face of the Board's refusals and delays.

The form of the relief now requested is no less cautious. The relief now requested gives RSD and its Board a renewed opportunity to levy the tort immunity taxes within the constraints of state law – except for deferring a limitation which does no more than regulate the timing of tort levies. The Court's authority to make this limited deferral of state law is beyond dispute:

> [I]f [the court] found itself stymied by state law the federal district court could as a last resort command the state to come up with the money. ... The court has the power... though it is a power to be used sparingly, to require the state to come up with the money to fund a valid federal decree, whatever state law may provide.

People Who Care v. Rockford Bd. of Educ., 111 F.3d 528, 540 (7th Cir. 1997).

As will be discussed, the Board's failure to date to take-up the only practicable and feasible course for funding the CRO—a tort tax levy-- amounts to a failure (and refusal) on its part to fulfill its affirmative duty to desegregate the school district. Green v. Cty. School Board of New Kent Cty., 391 U.S. 430, 437-38 (1968). This Court has shown all the deference that is due to the local authorities to come up with a realistic funding plan that promises to work. Id. at 438. The TAW funding scheme is not such a plan, and it is in the context of this default by the Board that the appropriateness of the requested deferral of state law timing limitations must be evaluated. Jenkins, 110 S.Ct. at 1663, 1666.

II. The Requested Relief is Fully Within the Court's Remedial Authority under *Griffin* and *Jenkins*

A. Legal Principles

The order requested by Plaintiffs' Motion fits squarely within the requirements for the exercise of judicial authority set forth by the Supreme Court in its cases from Swann to Griffin to Jenkins.

In that line of cases, the Supreme Court has made clear seven things:

1) that once a school district is adjudged responsible for carrying out desegregation remedies, state policy which "operates to inhibit or obstruct the operation of a unitary school system or impede the disestablishing of a dual school system" must "give way" to the "vindication of federal constitutional guarantees." Swann, as cited in Jenkins, 110 S.Ct at 1666;
2) that a district court may, therefore, require local authorities "to exercise the power that is theirs to levy taxes to raise funds adequate" to implement desegregation remedies (Griffin v. Prince Edward Cty. School Board, 84 S.Ct. 1226, 1234 (1964));
3) that this power to ensure that the vindication of federal constitutional rights is not impeded by state or local policy includes the power to set aside state law which limits the authority of the school district to levy taxes, even including the setting aside of state law limitations on the amount of taxes to be levied (Jenkins, 110 S.Ct. at 1666);

4) that this power ultimately allows a district court to "circumvent[...] altogether" local taxing authority and "assume for itself the fundamental and delicate power of taxation" (Jenkins, 110 S.Ct. at 1663);

5) that in the first instance, the district court should allow "local officials [to]... have the opportunity to devise their own solutions to these problems" (Jenkins, 100 S.Ct. at 1663), but where these solutions fail, or where the local authorities are unwilling, the district court may exercise the full extent of its remedial authority (Jenkins, 110 S.Ct. at 1663, 1666);

6) that before it exercises the full extent of its remedial authority (ie, .e., before it assumes "the fundamental... power of taxation"), the district court should "assure itself that no permissible alternative" exists (Jenkins, 110 S.Ct. at 1663); and

7) that at any point along this progression, the court should choose the "least possible power adequate to the end proposed." Spallone v. United States, 110 S.Ct. 625, 635 (1990).

The Supreme Court's decision in Jenkins is a culmination of these concepts. In that case, the Court reversed the district court's imposition of a direct tax (the district court had set the tax rate itself). Jenkins, 110 S.Ct. at 1663. In reversing, the Court did not hold that the judiciary is without power to order such a tax. Id. Rather, the Court held that a district court indeed may "assume for itself the fundamental and delicate power of taxation" (Id.), but only after it has "assure[d] itself that no permissible alternative would have accomplished the required task." (Id.). On the facts before it, the Court found that the district court's direct

imposition of a tax was reversible error because the court had available to it a less intrusive permissible alternative: i.e., to authorize or require the school district to levy property taxes at a rate adequate to fund the desegregation remedy and enjoin the operation of state law taxing limitations which would have prevented the school district from doing so. Id.

In ruling that a district court may assume for itself the power of taxation, and less intrusively, may require the school district to levy taxes and simultaneously suspend operation of state law so that this may be accomplished, the Court reaffirmed the supremacy principles of Swann and Griffin. Quoting Swann, the Court emphasized that state-law limitations "must give way" if they "hinder" the process of constitutional remediation. Jenkins, 110 S.Ct. at 1666. Further, the principle of federal supremacy provides the authority for a district court to enter an "order directing a local government body to levy its own taxes" within state law provisions. Id. at 1665, citing Griffin, 84 S.Ct. at 1234.

The Court in Jenkins emphasized that a court's exercise of its supremacy power must be accompanied by an exercise of due deference to the local authorities to solve the problem in the first instance. Jenkins, 110 S.Ct. at 1663, citing Brown II.

What deference is "due" was given contours by the Court. First, the Court noted two important functions of judicial deference in the context of desegregation. Initial deference to local authorities, the Court noted, "protects the function of those institutions" and "to the extent possible, also places the responsibility for solutions to the problems of segregation upon those who have themselves created the problems."

Id. at 1663. Secondly, however, the Court emphasized that due deference has its limits, for "[b]y no means should a district court grant local government carte blanche" in solving "the problems of financing desegregation". Id.

In giving meaning to the notion of judicial deference to local authorities in the specific matter of financing desegregation remedies, the Jenkins Court freely drew upon general desegregation principles regarding school district responsibility and judicial deference as laid out in Brown II and Swann. Jenkins, 110 S.Ct. at 1663. The Court in Jenkins clearly considered the matter of remedial funding to be a sub-issue of overall remediation in which the same interplay of school district "duty" and judicial "deference" takes place. Given this re-confirmation of fundamental principles in the funding context, the Court's earlier pronouncements in Green regarding duty and deference are especially instructive in the matter of remedy financing.

In Green, the Court rejected the school district's "freedom-of-choice" plan as being insufficient to the task of desegregation. 391 U.S. at 441. The Court noted that the judiciary must give the school district first shot at devising an adequate plan. Id. The Court emphasized, however, as it later did in Jenkins, that the deference to be shown to local authorities in devising remedial solutions is not only a protective measure against unnecessary judicial interference, but also is intended to put the onus on the school district to fulfill its "affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." Id. at 437-38.

A failure to devise a plan that "promises realistically to work" represents a failure by the school district to carry out its affirmative desegregation duty. Id. at 439. Likewise, the obligation of the district court is not to accede thoughtlessly to the school district's plan, but rather, to evaluate whether the school district's proposal "promises meaningful and immediate progress" toward the ultimate task of desegregation. Id. Stated the Court in Green:

> The obligation of the district courts, as it always has been, is to assess the effectiveness of a proposed plan in achieving desegregation. There is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circumstances present and the options available in each instance. It is incumbent upon the school board to establish that its proposed plan promises meaningful and immediate progress toward disestablishing state-imposed segregation. It is incumbent upon the district court to weigh that claim in light of the facts at hand and in light of any alternatives which may be shown as feasible and more promising in their effectiveness.

Id. (emphasis added).

Green's principles regarding 1) a school district's obligation to formulate workable plans that meaningfully support the long-term goal of desegregation and 2) the limited nature of district court deference to a school district's proposed plans, govern the current funding proceeding in this case. As noted, Jenkins supports the application of fundamental remedial principles in the funding context. Further, a break from these traditional principles at the funding stage makes no sense. The funding stage is a moment of truth in the long remedial process; it is a point at which the remedies are given life or left to die. Accordingly, a school district must, at the funding stage, be under no less compulsion than in the remedy formulation stage to come forward with a workable plan that supports the long-term goal of desegregation.

This Court fully concurs in this assessment of the RSD's duty, for in its December 8 Order, quoting from the CRO, it stated "unequivocally that 'it is the responsibility of the [Rockford School] District to fully fund all CRO remedies.'" (Dec.8, 1998 Order at p.3).

In addition, as this Court has already acknowledged, this Court is under a duty to secure appropriate and practicable funding for the remedies. In its own words, it is "obligated to ensure that all steps needed for implementation are undertaken including funding. Lidell v. Board of Education, 567 F.Supp. 1037, 1051-52 (E.D. Mo. 1983); Jenkins I, 807 F.2d 686 (8th Cir. 1986)..." (Nov. 6, 1996 Order at pp. 8-9).

B. RSD Has Defaulted in its Duty to Formulate a Meaningful Funding Plan that Supports the Long-term Goal of Desegregation

In light of the above-outlined principles, this Court properly allowed the Rockford Board of Education in the August 13, 1998 Order, to try its hand at formulating a meaningful funding plan. However, this Court must not accede to a financing scheme which is insufficient to support the long-term goal of disestablishing the dual system. RSD and the Board have failed to establish, and simply cannot establish, that the TAW funding scheme represents "meaningful and immediate progress toward disestablishing... segregation", especially "in light of [the] alternative" funding route of a tort tax levy.

As explained in more factual detail in Plaintiffs' Motion, RSD on September 1, 1998 represented to the Court that it has no "practicable funding plan to pay for the remedies." (Pl. Mo. ¶I.A.2) Further, on September 17, 1998, RSD stipulated

that the Tort Immunity Fund is the only source of funds reasonably or practically available to the District to pay all or any significant portion of the FY 99 CRO Fund 12 and COPS expenditures. (Pl. Mo. ¶I.A.3(a)). RSD further stipulated that the Board was unable to develop an alternative plan to simultaneously fund the FY99 CRO expenditure plan and the regular operations of the school system. (Id. at 3(c)). Finally, RSD stipulated that the state court decision regarding use of the Tort Immunity Fund is not a final, binding judgment which would prohibit is from levying from the tort fund. (Id. at 3(d)).

One month later, this Court made final determinations concerning FY99 CRO expenditure amounts and necessary revenue amounts. Among those determinations was the finding that the only reasonable and practicable potential sources for FY99 funding are the FY98 carryover and the Tort Immunity Act. (Pl. Mo. ¶I.A.4). The Court, therefore, ordered the Board to adopt the tort levies for the funding of the remedies. Id.

Despite its earlier concessions, and despite this Court's findings and direct order to levy taxes, RSD has embarked instead on a funding scheme which relies in no way on the tort immunity fund. Rather, the District's so-called plan relies on the issuance of tax anticipation warrants (TAW's).[1] This funding scheme is a house of

[1] The entirety of RSD's funding plan included using TAW's, securing from the appellate court a reduction in CRO expenditures, and securing the balance of the funds through a referendum. RSD's failure to fulfill its funding duty is highlighted by the fact that at no time after the appellate court rejected RSD's CRO reduction scheme did RSD come forward with an alternative plan, and, likewise by the fact that after the failure of the referendum, RSD still has failed to come forward with an alternative. Indeed, RSD's default of its funding duty was complete from the inception of its plan because RSD failed from the beginning to have a backup plan in the event that the two features of its plan over which it had little or no control (ie, the appellate court and the citizen vote) didn't pan-out.

cards which threatens generally the financial soundness of the District as a whole, and specifically, threatens CRO funding by creating, and thereafter escalating, a $23 million deficit in Fund 12. The District's scheme fails to support the long-term goal of desegregation because it is a short-term "fix" with serious and substantial consequences and costs for the near future.

Importantly, the Court has already specifically rejected the TAW funding scheme, holding in its December 16, 1998 order that RSD's late presentation of this "plan" in response to Plaintiffs' December 7 Clarification Motion was too little too late. (D3210). To challenge the factual findings in the October 28, 1998 Order, RSD was obligated to move to alter or amend that order, which it did not. (Id.).

Recent deposition testimony from top District personnel support this Court's prior rejection of the Board's TAW funding scheme. Those top personnel testified that the scheme is markedly unsound, and would precipitate the collapse of the District. See Pl. Motion, Part V.

C. The Relief Requested is the Least Intrusive Means Necessary to Accomplish a Tort Tax Levy

As discussed immediately above, it is undisputed that a tort tax levy is the only feasible and practicable plan for the support of the long-term goal of desegregation, and that the Board's TAW scheme is an insufficient plan to support the long-term goal of desegregation. Accordingly, the question facing the Court is whether the relief requested by Plaintiffs' Motion is the least intrusive means necessary to accomplish the task of financing the CRO through a tort levy. As will be shown, not only is the relief requested facially the least intrusive means, but in

the fuller context of the Court's pattern of deference and the Board's pattern of default and defiance, the relief requested is most appropriate.

First, on its face alone, the relief sought by Plaintiffs is minimally intrusive. The first aspect of the relief is direction to the Board to adopt a tort levy. This is nothing more than what the Court ordered the Board to do last fall; it is judicial action which the Board did not challenge on appeal. Further, direction to adopt a tort levy is authorized by the Supreme Court's decision in Griffin, wherein the Court held that district courts may require local authorities "to exercise the power that is theirs to levy taxes to raise [adequate] funds." Griffin, 84 S.Ct. at 1234.

The second aspect of the requested relief—suspend operation of the state law timing limitation—is likewise facially minimally intrusive. It does not interfere with or enjoin state law regarding the source or amount of taxes RSD is authorized to levy,[2] which would more deeply and substantively impact state policy. Because such substantive suspension of state law limits on the amount of taxes is permissible (Jenkins, 110 S.Ct. at 1663), the non-substantive intrusion on state law in the present case is both minimal by comparison and fully within this Court's remedial authority.

Further, the measures requested by Plaintiffs are not only facially minimal, they are in fact, extraordinarily minimal when viewed in the context of the Board's pattern of delays and defiance. Specifically, as discussed in more detail in Plaintiffs' Motion, the Board has engaged in a series of actions designed to undermine or reduce the CRO remedy. Those actions have included failure to formulate a

[2] RSD is authorized under state law to adopt a levy for the CRO without a rate limitation. Specifically, while the tax cap generally places an amount limitation on such a levy, that cap poses no impediment to fully funding the CRO through a tort levy.

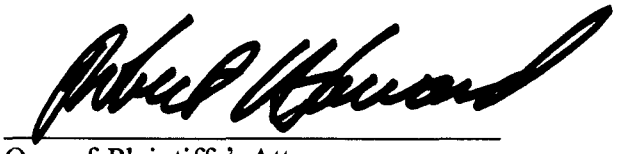
workable and meaningful funding plan, direct defiance of this Court's December order to levy a tort immunity fund tax, and continued defiance of that order over the course of four months, including after issuance by the appellate court of a stinging reprisal to the Board's delay and obstruct strategies.

In the face of the Board's tactics, this Court has shown a remarkable degree of restraint, not the least of which was denial of Plaintiffs' motion for a Rule 70 order which would have accomplished the tort levy after the Board's noncompliance with the Court's December directive.

In the context, then, of persistent Board defiance and remarkable Court deference, the measures sought by Plaintiffs' Motion are themselves remarkably restrained. The relief would remove the state law timing obstacle to a tort fund levy, thus placing the Board in the position it was in back in December. The relief merely requires of the District that it carry out the identical duty imposed on it by the December order. Given that the Court is authorized to go as far as adopting Rule 70 measures, or ultimately, to directly order the tax itself (Jenkins, 110 S.Ct. at 1663), the requested relief is indeed the least intrusive means necessary.

III. Conclusion

For the reasons set forth above, this Court should grant Plaintiffs' request for a limited Jenkins deferral of state law, combined with a renewed Griffin direction to the Board to levy the tort tax.



One of Plaintiffs' Attorneys

DATED: April 14, 1999

Robert C. Howard
Kathleen Mangold-Spoto
Joan Matlack
FUTTERMAN & HOWARD, CHTD.
122 S. Michigan Ave.
Suite 1850
Chicago, IL 60603
(312) 427-3600

Of Counsel:

Venita Hervey
FUTTERMAN & HOWARD, CHTD.
P.O. Box 157
Rockford, IL 61105
(815) 969-8100