IN THE SUPREME COURT OF OHIO

DALE R. DEROLPH, *et al*.,	:	Case No. 95-2066
	:	
Plaintiffs-Appellants,	:	**On Appeal from the Court of**
	:	**Appeals for Perry County,**
vs.	:	**Fifth Appellate District,**
	:	***Case No. 94-CA-477***
STATE OF OHIO, *et al.,*	:	
	:	
Defendants-Appellees.	:	

PLAINTIFFS'/APPELLANTS' MERIT BRIEF TO OHIO SUPREME COURT

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INTRODUCTION

Public education in Ohio today is a vast enterprise, serving over 1.8 million public school pupils. The State of Ohio operates over 3,600 school buildings with over 180,000 employees, daily transports pupils a distance equivalent to 40 times around the earth, and annually spends over $9 billion in tax revenue. The impact of the educational experience is pervasive. Our children spend substantial portions of their formative years in the public school system. Public school education dictates the productivity and economic futures of Ohio's pupils. Graduation from high school, once considered the end of the educational process for most, now has become for many the foundation for progression to higher education. Today, a student's failure to graduate from high school not only marks an abrupt end to the educational experience but also carries severe lifetime economic consequences.

Ohio has mandated that public education be carried out as a function of state government. The Ohio Constitution requires the State to provide and fund a system of public education for the citizens of Ohio[1] and includes an explicit directive to the Legislature: "The General Assembly shall make such provisions, by taxation or otherwise, as . . .will secure a thorough and efficient system of common schools throughout the state."[2] The educational guarantees of our Constitution have been tragically neglected.

The consequences of Ohio's educational neglect are societal as well as individual. Ohio spends progressively larger portions of the state budget on social welfare programs and prisons, while public education--the system intended to minimize the need for these expenses--receives progressively less. The analysis that follows chronicles the operation

of an increasingly impoverished public education system caused by fatally flawed state school funding laws. A full understanding of that system will lead the Court to the unavoidable conclusion that educational opportunity in Ohio today is a direct function of the wealth of the school district in which a pupil resides, and that the level at which this system is funded is not adequate. Equally compelled is the conclusion that such a system cannot withstand any level of constitutional scrutiny.

Today, Ohio stands at a crossroad. This Court's decision ultimately will determine whether Ohio will give meaning to the constitutional entitlement of each child to a "thorough and efficient" system of public education or will turn its back on the future of its children and the well-being of our State. Rarely does a matter of such magnitude and long-term effect come before this Court. The Court's decision in this case will determine the future of our State.

STATEMENT OF FACTS

The undisputed facts in this case establish beyond question that the State has abdicated its constitutional duties.[3]

The Trial Court found:

Throughout this case this Court heard from school children, teachers, principals, superintendents, school board members, legislators and other state personnel. The sincerity and conviction to education from both the Plaintiff and Defense witnesses was evident. This Court saw grown men and women cry as they explained the conditions and situations in which some of the youth of this State are educated. They deserve better and the State as their bridge builders to the future are duty bound to provide them with better tools for a successful life. The law requires the same. Some students in the Plaintiff school districts lack equipment, supplies, textbooks, technology, proper handicap access and many of our special education students are not receiving an appropriate public education. ***

Can a system that has nearly 17,000 Seniors who have not as yet passed the ninth grade proficiency test consider itself thorough and efficient? The same questions can be asked of a system whose equality of funding ranks it the third worst in the country behind Missouri (declared unconstitutional) and Alaska. ***

Some of our students are being educated in former coal bins in Mt. Gilead. In Flushing the students have no rest room in the school building itself. In Brown County the only library is an abandoned library truck; the band practices in the kitchen and plays in the cafeteria during lunch. In Nelsonville the building is slipping down a hill. At Plaintiff Northern Local children are educated in modular units situated outside the school with no running water. At Plaintiff Southern Local students recently completed their entire school careers in buildings that for the most part were determined to be improper housing in 1981. ***

[Plaintiff] Southern Local's financial situation is evidenced by their request to have the SEOSERRC office save colored paper for them from their trash and Southern Local's policy that requires teachers to either pick up their checks in the summer months at the school or provide the school with a stamp. While some of the Plaintiff school districts must ration paper [and] paper clips and use out of date textbooks our wealthier districts are able to provide violin classes in the second grade and have contests through computer networking allowing their students to compete directly against children from Finland, Germany and other American cities.

(Findings at 474-75)

I. Overview of The Current System of Public School Funding

All funds for public elementary and secondary education are provided under state laws and are state funds.[4] However, the terms "state" funds and "local" funds have come into use because some of the state's funds for education are generated through "local" levies of taxes on real and personal property in each school district. The amount of revenue available to a school district is a combination of "state" revenue, most of which is provided through the State's school foundation program, and "local" revenue, which primarily consists of locally voted school district property tax levies.[5]

A. "Locally" Dependent Revenues

The wide disparity in value of taxable property among Ohio's school districts is the cause of the disparities in funding and educational opportunity among districts. Over the last decade, disparities between rich and poor districts have increased. (Tr. 1095; Findings at 71-72) Ohio is currently one of the *most poorly equalized* state funding systems *in the nation*. (Tr. 3728; Findings at 86-87) For example, while each child in Plaintiff Northern Local Schools received an average of only $3,205 for his education in 1990-91 (fiscal year 1991 (FY91)), each child in Beachwood received over $11,409 in that year.[6] (Stip. Exh. 6; Pl. Exh. 270)

Indeed, the uncontroverted testimony revealed that the wide disparities in educational opportunity in Ohio today are *not* the result of differing degrees of effort by school district residents to pass local levies, but rather are the result of the funding system's overreliance on the tax base of individual school districts. Tax effort is nearly identical between rich and poor school districts and in some instances, greater in poor districts. (Tr. 1105-06; Findings at 64-65) For example, one mill of property tax levied in the Plaintiff Dawson-Bryant School District in FY91 generated $29,083, while that same one mill generated $1,064,321 in the Beachwood City School District.[7] Thus, Dawson-Bryant would need to levy *318.6 mills* of local property tax to match the expenditure per pupil of the Beachwood Schools.[8] (Plaintiffs' Exh. 3; Supp. 356) Because the current system of funding is so dependent upon the value of property in each school district, today many districts could not possibly levy even enough millage to provide the state average expenditure per pupil, which was $4,585 in FY91.[9] (Pl. Exh. 381)

Over the decade from 1980 to 1990, the disparities became even worse as poor school districts got even poorer in two ways: (1) real (adjusted for inflation) income of residents was *lower* by 1990 *and* (2) the majority of business property had shifted to the rich districts.[10] The move of business property is critical, because in today's society businesses pay property taxes with money earned from customers who live outside of school district boundaries where the business is located.[11] This shift permits wealthy districts to pass a greater percentage of their tax burden to those outside their districts. (Tr. 1073; Supp. 369)

From 1976 to 1981, Ohio's school funding system--the "equal yield"[12] formula--contained a "power equalizing" tier by which additional state revenues were provided to districts to equalize the wide variation in amounts generated from each mill between 20 and 30. (Tr. 2822-23; Findings 33-34)[13] The equal yield formula with its "power equalizing" tier was never fully funded, however, and it was abandoned in 1981. *Id.* Today's formula provides no such equalizing of revenue realized from a mill. *Id.*

Further restricting local revenue today is Amended Substitute House Bill 920 ("H.B. 920"). That statute prevents growth in tax revenues when property values increase due to inflationary growth. (Stip. 14) Thus, school districts have experienced rising costs without corresponding increases in tax revenues.[14] As a direct result of H.B. 920, over 3,700 additional local tax levies have been proposed to local electors (Findings at 57), but the passage rate of school district operating levies has steadily declined (Stip. Exh. 9). Voters in wealthy districts are better able to pay additional school taxes and are more inclined to approve additional tax levies. *Id.* At the same time, school districts with high concentrations of poverty and low property values (which yield proportionately less revenue per mill of tax) find it increasingly difficult to pass additional tax levies. "[15] Importantly, *no other state has a tax rollback or limitation measure which is this extreme in its effects. Every other state allows inflationary growth in the property tax base beyond inside millage*." (Pl. Exh. 344, p. 25 (emphasis in original))[16]

B. State Funding Is Determined by State Budget "Leftovers," not by Pupil Needs

As noted above, "State" funding for education is provided primarily through the State's foundation formula program. The State foundation program includes a "basic aid" amount which is a minimum level of per-pupil funding determined by the legislature each biennium. Today, the basic aid amount bears *no resemblance to any amount determined necessary to provide an adequate educational program* for pupils in the state.[17] One of the many studies of the legislature regarding school funding recommended: "The foundation's per pupil level should have some *reasonable relationship* to the cost of a quality basic program efficiently provided and some objective method of determining it should be developed."[18] Neither the State nor any legislative committee has determined the cost of providing an educational program meeting today's minimum standards. State funding for public elementary and secondary education is simply a "budgetary residual"--the amount left over after all other state programs have been funded, divided by the number of pupils in the state.[19] Stanley Aronoff, President of the Ohio Senate, admitted: "When you have a healthy Ohio economy, education does significantly better than when the economy slows down or revenue doesn't come in as expected." (Tr. 4824-25) The State has also admitted that the state basic aid level is inadequate ($2817 per pupil in FY93) and that many Ohio school districts do not have enough money to cover ongoing operations.

The gap between the State's foundation level and the amounts necessary to educate students has been expanding[21] (Pl. Exh. 140 p. 19; Supp. 212):

> The level of basic aid provided through the school foundation program does not approach the average expenditure per pupil in Ohio. In 1980, basic aid represented 59% of the average expenditure, [and] in 1989, the gap had grown to 70%. The average expenditure per pupil is out-pacing the foundation level at an increasing rate.[22]

Additionally, the percent of the state's budget devoted to public elementary and secondary education has decreased steadily over the last 16 years.[23] The percent of the state budget directed to public and secondary education decreased from 30 percent in 1984 to 22 percent in 1994--more than a 25 percent decrease in education's share of the state budget. (See Tr. 4397) Although the State has admitted the relationship between the number of high school dropouts and the size of the prison population, prison spending

rose 33 percent[24] in the 1994-95 biennium budget over prior years, while the funding for education received only an 8.5 percent increase over the biennium period.[25]

II. Minimum Standards no Longer Assure Adequacy

The State Board of Education is required to "Formulate and prescribe minimum standards to be applied to all elementary and secondary schools in this state for the purpose of requiring a general education of high quality. " R.C. Section 3301.07(D). Prior to 1983, these minimum standards contained very specific, objective requirements.[26]

The minimum standards underwent complete revision and were replaced by an entirely new set of standards in 1983. The 1983 standards no longer contained specific requirements regarding school facilities, equipment and supplies and, instead, imposed more subjective "policy" requirements for Ohio's schools. (See Ohio Adm. Code 3301-35, in Appendix at 607) Superintendent Sanders criticized the 1983 standards as "factory model" standards unsuited to the educational needs of the 90's and ones which measured school districts more by the "eloquence of their policies" than by the quality of education provided students.[27] Until March of 1992 school districts were reviewed for "compliance" with the 1983 minimum standards on a five-year rotating schedule. That "evaluation" was simply a cursory checklist review and offered no assurance that any of the programs offered substantive educational benefit. (Findings at 284-88) A pupil could graduate from high school in a program complying with the "minimum" standards and lack the skills to move into the world of work or go on to higher education. (Russell Depo. 45-46; Findings at 288)

In March of 1992, faced with massive 9th grade proficiency test failures,[28] State Superintendent Sanders eliminated the compliance reviews and reassigned all of the staff formerly involved in that activity to assist school districts in improving proficiency test passage rates.[29] No school district has been subject to minimum standards compliance review since that time. (Tr. 399-401; Findings at 289; Stip. 98) Thus, Ohio's seniors graduating in 1996 have not had *any* compliance review of their schools or programs during their entire high school years, and one-fifth of those seniors have not had any such review since those seniors were in grade 3 or 4.

Efforts to again completely revise minimum standards to focus on defined outcomes rather than policies began in 1992 and are not yet completed. Although the 1983 minimum standards remain "on the books" as regulations of the State Board of Education, the lack of enforcement renders them essentially meaningless. See, Ohio Adm. Code 3301-35.[30] Months before trial in 1993 (and yet today), the State can give ***no assurance*** whether the Plaintiff school districts are currently in compliance with minimum standards. (Drummond Depo. 166)

The rapid growth in technology and its increasing importance in our society further demonstrates the failure of the 1983 minimum standards as any meaningful measure of educational quality. Our state's education leaders acknowledge: "The growth in technology has resulted in the need for an education system that supports an information age society, not a manufacturing society." (Tr. 292; Findings at 269) At the same time, under the 1983 minimum standards, a pupil can progress through grades K-12 in Ohio's public schools and never touch a computer. (Drummond Depo at 185; Findings at 287) For many pupils in some of the Plaintiff districts, that bleak prospect may well represent reality. (Tr. 1264; Findings at 276)[31]

Even if the 1983 standards were meaningful criteria for public education, Plaintiff school districts, and many others, lack sufficient funds to comply with those standards and do not meet them today.[32] Students in the Plaintiff school districts are subjected to inadequate, substandard educational programs that jeopardize their economic and political well-being for the remainder of their lives.

III. Increased Pupil Needs: Handicapped Pupils and Disadvantaged Pupils

During the past generation public schools have been required to respond to an ever-increasing mixture of pupil needs. Significant among these are the needs of handicapped and disadvantaged pupils.

A. Handicapped Pupils

Since 1976, Ohio law has mandated a program of free appropriate public education and related services for all handicapped pupils. The number of *identified* school aged handicapped pupils (5-21 years of age) in Ohio receiving required special education and related services has steadily grown from 159,245 in FY77 to approximately 200,848 in FY93. (Stip. Exh. 30) Today, high concentrations of those pupils are in low-wealth rural and large urban school districts, such as the Plaintiff school districts. (Tr. 3675; Supp. 1328; Stip. Exh. 29)

Handicapped pupils have a substantially higher education cost than non-handicapped pupils because of State mandates of small class sizes and because of required related services such as transportation, occupational therapy, physical therapy, aides, and assistive devices. (Tr. 556-66; Findings at 325)[33] The types of programs and services required to be provided by school districts and the cost of those programs have increased substantially since 1976.[34]

State funds for special education, when available, are provided through a "unit funding" mechanism that allocates essentially a flat grant amount to serve a defined "unit" of handicapped pupils.[35] The amount of funds provided by a funded unit are significantly less than the costs of the program and poor school districts are less able to make up the difference. In addition, there are not enough units to serve the needs of all handicapped pupils. The number of *unfunded* units in operation grew from 614 in FY89 to *848* in FY93. (Stip. Exh. 31) Further, state funding does not follow pupils. If a handicapped pupil moves into a school district, there is no assurance that any State funding will be available to serve that pupil.[36] Plaintiff Youngstown City Schools has had increasing special education expenditures that are not reimbursed by the State, and in FY94 those expenditures totaled $5 million.[37] (McGee Depo. 35; Tr. 3204; Findings at 359) The Plaintiff school districts do not have units available to serve students as they progress through grade levels. (Tr. 518-19; R. Miller Depo. 44; Findings at 343-362). Low wealth and urban school districts such as Plaintiffs have disproportionately large percentages of handicapped pupils and thus have greater financial obligations and fewer resources to meet those obligations than high wealth districts. (Findings at 363-364) Perhaps the best indicia of the impact of special education on school funding is the ever-widening gap between the amounts requested by the State Board of Education for special education and the amounts actually appropriated by the General Assembly.[38] In short, handicapped students in Plaintiff districts are often not identified as handicapped or not provided with aides, proper services, or computers because of the lack of funding.[39]

B. Disadvantaged Pupils

School districts with high concentrations of poverty have students with greater educational needs.[40] The percent of pupils receiving Aid to Dependent Children (ADC)[41] has increased statewide, from 10 percent in 1980 to 16 percent in 1992. (Stip. Exh. 2) Each of the Plaintiff school districts' ADC rate has increased substantially in recent years, and Plaintiff Youngstown City School District's ADC rate grew from 30 percent in FY82 to 54 percent in FY92.[42] The vast majority of ADC pupils reside in large urban centers or poor rural school districts. Thus, again, the school districts with the lowest level of resources are required to provide for pupils with the greatest needs. (Tr. 3644-48; Pl. Exh. 301; Supp. 394-397; 408-415)[43]

High concentrations of poverty bring problems such as hunger, lack of self-esteem, high rates of student mobility,[44] and pupil pregnancy[45] into the Plaintiff Schools. Plaintiffs Youngstown and Lima City Schools have further problems of violence,[46] gang activity, drug abuse, and weapons in schools.[47] Personnel and programs to deal with these problems are lacking. The dropout rate at Plaintiff Lima Schools is 30 percent.[48] All-day, every-day kindergarten, guidance counseling at all levels, attendance programs and intervention for academic progress are simply inadequate in all of the Plaintiff School Districts.[49]

Many children in the Plaintiff school districts come to school with the language development typical of a two or three year old, without exposure to books, and without knowing the alphabet.[50] Large numbers of elementary students in the Plaintiff school districts are identified as requiring remedial services, based on nationally standardized tests and federal guidelines, in the areas of math, reading and language arts.[51] In the Plaintiff school districts, *65 to 92 percent of these identified needs of pupils go unmet*.[52] The Plaintiff School Districts do not have funds to provide students with materials and equipment to implement the State-mandated model curricula or to provide teacher training to implement State-mandated curricula.[53] Implementation of model curricula is essential for achievement on the 9th grade proficiency tests, because the curricula are directly related to the parts of the test.[54]

The State has determined that the ninth grade proficiency test "provides evidence that students have achieved a minimum level of education."[55] Yet, the Trial Court observed:

> At trial time 32 of 99 Seniors from Plaintiff Dawson-Bryant had not passed; 16 of 79 Seniors at Plaintiff Southern Local; 13 or 154 at Plaintiff Northern Local; 300 of 773 at Plaintiff Youngstown City Schools and 27% of Lima Seniors had not passed. *** Due to poor test scores Superintendent of Public Instruction Dr. Ted Sanders identified forty-eight school districts that qualified for intervention from the Department staff. Those school districts included some of the largest districts in the State including Columbus, Cleveland, Cincinnati and Dayton as well as Plaintiffs Youngstown and Southern Local. The total pupil population for those districts is over 380,000 pupils.

(Findings at 473-74)

The State Board of Education admitted, "minority students' scores [on the 9th grade proficiency tests] were shockingly low and totally unacceptable to us meaning that the system has failed these students and must make substantial changes." (Pl. Exh. 21)[56]

IV. The State's $10.2 Billion Facilities Problem

In testifying about the poor condition of school buildings in Plaintiff Southern Local School District, Louis Altier, President of the Southern Local Board of Education, stated:

> And we opened up classrooms that hadn't had classes for years. We went in and replastered some and painted and got them where that they were half decently safe in them, but the roof was -- the roof still leaked .... I told somebody the other day -- and this is the truth if I am sitting in this chair -- is that I got a farm up there and I got a few animals, cows and horses. My animals are housed better than our children was. I mean, at least they were dry and warm and we couldn't say that in Shawnee schoolhouse.

(Tr. 1293; Findings at 185)[57] Unfortunately, as shown by the uncontradicted evidence in this case, Southern Local's experience with deteriorating school buildings is not unique.[58]

The deplorable state of school facilities in Plaintiff and other public school districts was conclusively shown in the facilities study commissioned by the General Assembly and conducted by the State Department of Education. The 1990 Ohio Public Schools Facilities Survey identified $10.2 billion in facilities needs for public primary and secondary schools in Ohio.[59] This is the amount required to bring public school facilities, including Plaintiffs', up to minimum building code standards. (Findings at 158)[60] The unmet facilities needs expose children in Plaintiff and other school districts to a clear and present danger which the State knowingly has allowed to persist. Robert Franklin, Building Assistance Supervisor for the State Department of Education, testified as follows:

> My main concern is that I'm afraid that before we get the buildings that are in real bad shape fixed, that maybe one of our kids will get hurt or maimed. And I can foresee that, if we don't take some action and -- and get some newer school buildings in place. So how many $25 millions [of yearly appropriations by the General Assembly] will go by before we can get [school buildings] up to standard?

(Franklin Depo. 33, 239; Supp. 940, 975; Findings at 160)[61] Immediate health dangers to Plaintiffs and children in other school districts are caused by the presence of asbestos, coal dust, extreme heat and cold, and inadequate wiring, windows, and roofs. Further, Plaintiff Districts and all other school districts must comply with the mandates of the Americans with Disabilities Act (ADA).[62] Although these dangers and needs have been recognized by the State, and some meager funds were made available by the State to a few school districts in the past for asbestos abatement and removal of architectural barriers, no more such aid is forthcoming.[63] (Findings at 161-167) Further, the State has appropriated *no* funds for emergency building problems and *no* funds specifically for building maintenance.

Testimony in this case starkly contrasted the facilities of Plaintiff Districts with those of wealthy school districts. An elementary school building in Plaintiff Northern Local was ordered closed for fear that it was about to collapse on pupils,[64] arsenic has appeared in

the District's drinking water, raw sewage permeates its athletic fields, and its buildings are not handicapped accessible. Beachwood School District, on the other hand, enjoys elementary school classrooms, each with separate computer, science, art and reading centers, and facilities all of which are handicapped accessible. While the science labs at Northern Local do not have working gas jets, Hilliard City Schools have the latest in laboratory technology. Whereas Northern Local's locker rooms are deplorable and fungus grows on non-working showers, locker rooms at Granville School District are carpeted, with individual showers.[65] The stark contrast between rich and poor was made evident by Dr. Lee McMurrin, superintendent of Beachwood City Schools, who testified about his tour of facilities in Plaintiff Dawson-Bryant School District:

> I saw children that were basically healthy, well groomed.... [T]hey came to school, I think, with dignity and self-respect .... In the classrooms, the materials are old and worn out and dated, and the laboratory material, the materials are not there for the children or the teachers. The special education classes were in cubbyholes that don't meet my standards, and I think they're a disgrace to the State of Ohio and probably to all of us in America that you'd have special education children in this day and time in those types of classrooms.

(Tr. 2544-2545; Findings at 167)

Fifty percent of Ohio's school buildings were built before World War II.[66] The facilities needs of Ohio's schools have reached such immense proportions that *sixty percent* of Ohio's public school districts, if they had no other debt, could not raise sufficient funds to meet their individual facility needs even if voters approved the maximum level of debt permitted by law.[67]

V. State mandated school district borrowing

The combination of increasing levels of poverty in poor rural and urban districts combined with increased costs of mandated programs and increasing numbers of pupils in need of those services has come together to form the crisis now facing Ohio's public schools.

School districts are now by statute prohibited from closing their doors due to lack of funds (R.C. 3313.483),[68] and instead districts that anticipate a shortfall of operating revenue at the end of a fiscal year are required to seek the approval of the Superintendent of Public Instruction to borrow funds.[69] School districts forced to borrow funds to operate are required to reduce educational expenditures in order to be approved for an emergency school assistance loan. Most school districts in financial distress have attempted to reduce expenditures by all available means before applying for such a loan. The reductions create a direct, adverse impact upon the levels of program and services available to the pupils in those districts.[70] The majority of emergency assistance loan fund districts are those with low property valuation (Brown Depo. 221; Tavakolian Depo. 139; Findings at 143), which widens the educational differences between rich and poor districts in Ohio.[71]

Many districts are forced to incur repeated emergency assistance loans simply to keep their doors open and some are unlikely to ever get out of debt. (Brown Depo. 192, 216-

217; Findings at 143-144) Receivership districts are those that have had more than one emergency school assistance loan, with the current loan being for seven percent or more of the district's general fund. Districts under receivership are prohibited from entering into any new program, contract or expenditure without the written permission of the Superintendent of Public Instruction. For such school districts "local control" by any definition is meaningless. In FY 93, twenty-five school districts were subject to receivership. (Stip. Exh. 25; Findings at 148)

The magnitude of borrowing is shown by the chart below (Pl. Exh. 148; Findings at 76).

STATE AVERAGES: COMPARISON OF TOTAL REVENUE PER PUPIL AND TOTAL EXPENDITURES PER PUPIL			
	TOTAL REVENUE PER PUPIL GENERAL FUNDS	TOTAL EXPENDITURES PER PUPIL GENERAL FUNDS	DIFFERENCE
FY1983	$2,452.47	$2,289.41	+$163.06
FY1984	2,714.37	2,551.80	+162.57
FY1985	2,803.47	2,747.19	+56.28
FY1986	3,011.90	2,975.33	+36.57
FY1987	3,251.30	3,177.01	+74.29
FY1988	3,454.10	3,379.00	+75.10
FY1989	3,733.31	3,694.66	+38.65
FY1990	4,009.41	3,961.04	+48.37
FY1991	4,152.37	4,159.20	-6.83

The Legislature simply has not and does not raise the revenues to meet expenses. In short, on a *state-wide* basis the school funding system has become bankrupt.

The State has admitted that the funding system is inadequate, in need of reform, and "not morally right."[72] The substandard educational programs offered in the Plaintiff and other poor school districts mark these pupils for life by limiting the range of opportunities available to them as adults, and will cost the state in payments for social welfare and prisons many times over the funds by which their education was neglected.

Faced with this massive record of educational neglect, deprivation and disparity the Trial Court concluded that Ohio's school funding system fails the test of constitutional review. Consistent with the clear language of the Constitution and current rulings of this Court, the Trial Court specifically found that education is a fundamental right in Ohio and that the system of education provided by the General Assembly is neither thorough nor efficient. (Findings at 469, 475) The Trial Court also found that the statutorily enforced debt for school district operations violates the State's constitutional debt limitation provisions and that the State's failure to adequately fund the mandated programs for handicapped pupils violates both due process and equal protection of law. (Findings at 472, 476)

The majority of the Court of Appeals reversed each of the Trial Court's findings of constitutional violations and ignored the comprehensive, undisputed Findings of Fact.

Relying solely on *Bd. of Edn. v. Walter* (1979), 58 Ohio St.2d 368, 390 N.E.2d 813, the majority, in a decision strongly suggesting that Courts have neither the right nor the duty to review constitutional issues of great societal importance, held that education is not a fundamental right and that "local control" was sufficient to justify the disparities in educational opportunity. Only Judge Gwinn, in dissent, acknowledged the massive record of educational neglect and deprivation, the Court's duty to give deference to the trier of fact, and the constitutional significance of education today. Judge Gwinn properly recognized both the fundamentality of education and the fatal defects in the current system.

ARGUMENT

I. Proposition of Law No. I: This constitutional challenge to the current system of public school funding is distinct from that in *Bd. of Edn. v. Walter* (1979), 58 Ohio St.2d 368, 390 N.E.2d 813, because the challenged funding statutes, the operation of those statutes, and the educational needs of Ohio's public school pupils are significantly different from those before this Court in that case.

> "The issue is the world and the country has changed much more dramatically than schools have changed. And, therefore, what was good enough 30 years ago is not even close to being good enough now, but we haven't changed the system in public schools to make it much different than it was 30 years ago."
>
> Then-Deputy State Superintendent of Public Instruction, John M. Goff[73]

A. Walter does not determine the constitutionality of the current funding system.

The Trial Court correctly held that *Walter* has no application to the school funding system challenged in this case because all of the funding statutes there challenged have been substantially amended or repealed, and because the circumstances of public education in Ohio have changed radically. The Court of Appeals, on the other hand, relied exclusively on *Walter to uphold the constitutionality even of statutes not yet enacted when Walter* was decided. The State has argued from the inception of this suit that this challenge to the current system of school funding is subject to summary rejection on the basis of *Walter*. However, as the Trial Court recognized, this case presents distinct issues and has no material fact in common with *Walter*. No jurisprudential doctrine supports the State's effort to use *Walter* as a means of avoiding full judicial scrutiny of the current operation of school funding in Ohio.

1. The current funding system differs significantly from that challenged in *Walter*, and the nature of the challenges is distinct.

Walter solely considered the constitutionality of statutes that no longer exist, each since having been amended or repealed. The statutory scheme that now comprises the funding system differs in critical respects from the system approved in *Walter*.[74] (Tr. 1836, 2822-2823; Supp. at 238-239; Findings at 34) The newly enacted "equal yield" funding

system evaluated in *Walter* was characterized by the Court as follows: "Its objective is to equalize the property wealth base upon which the school districts raise operating revenue through the levy of voter-approved taxes so that school districts receive the same number of dollars per pupil in basic state aid."[75] *Bd. of Edn. v. Walter,* 58 Ohio St.2d at 371, 390 N.E.2d at 816. The Court found this system consistent with the limitations on legislative discretion announced in *Miller v. Korns* (1923), 107 Ohio St. 287, 304, 140 N.E. 773, 778. *Id.* at 386-87. *Miller* had approved a system that embodied "an effort to equalize education and raise its standard throughout the state." *Miller v. Korns,* 107 Ohio St. at 304, 140 N.E. at 778. *Walter*'s finding that the equal yield system, then in its infancy, was intended to address the problem of inequity was essential to the holding of that case. Regardless of the impact of the equal yield funding system during the short time that it was in effect, at the time of *Walter* the Court had every reason to believe that the legislative objectives of wealth equalization and funding stability would be accomplished.[76]

Ohio no longer has an equal yield system of distributing school foundation payments. The equal yield funding system never was fully funded by the General Assembly and was abandoned completely by 1981 when the State returned to the "foundation" formula for the distribution of state aid. *The system here challenged, in effect for more than fifteen years, is perpetuated by the State with the knowledge that it creates extreme and unacceptable disparities among Ohio's school districts*.

The State's history of deliberate indifference to the gross inequities inherent in today's system of public school funding clearly distinguishes this case from *Walter*. *The State argues that a system it acknowledges to be "not morally right" nevertheless is constitutionally adequate*. (Tr. 415, 4556; Pl. Exh. 40, p. 5; Supp. at 229; Findings at 26) This Court, however, never has endorsed so minimalist a view of the Ohio Constitution, and *Walter offers no support for the funding scheme now before this Court.*

In addition to its equalization objective, two significant aspects of the equal yield funding system before the Court in *Walter clearly distinguish that system from the one in place today*. *First, the Court had reason to believe that the level of funding* provided by the equal yield funding system was adequate. That system reflected a decision by the legislature to establish a minimum funding level of $960 per pupil (with state participation in funding extending to a potential maximum of $1,380 per pupil). *Walter,* 58 Ohio St.2d at 371-372, 390 N.E.2d at 817. *Walter* noted that this level of funding was based upon the recommendation of the Education Review Committee, a joint, nonpartisan legislative committee created to analyze Ohio's school funding system and consider alternative distribution schemes. *Id*. at 372, fn. 1, 390 N.E.2d at 817, fn. 1. The Committee had found that the cost for a district to operate at "the state minimum standards which define a general education of high quality was $715 per pupil." *Id*. at 372, 390 N.E.2d at 817. The equal yield funding system evaluated in Walter thus guaranteed minimum per pupil funding at $960, which was 134% of the level determined by the nonpartisan legislative committee to be sufficient to support a "high quality" education.

Today, neither the Ohio General Assembly, the Ohio Department of Education, nor the State Board of Education has determined the amount of money required to provide an educational program of high quality--or even one meeting *any* defined level of educational benefit.[78] Indeed, in shocking contrast to the State's understanding of its

obligations at the time of *Walter*, the State apparently no longer believes that it is constitutionally obligated to provide an education of "high quality." The State now insists that the Constitution requires only that the State provide a "modest" education to Ohio's children. State's Memorandum in Opposition to Jurisdiction at 7. Amounts now appropriated for the funding of public elementary and secondary education are a "budgetary residual," consisting of whatever funds remain after provision has been made for other programs.*[79]* *Id.* There no longer is any assurance that educational funds are adequate to ensure any level of quality, and the massive record of educational deprivation before this Court establishes beyond question that the funding system established by the State is inadequate and inequitable.

Second, the "minimum standards" relied upon by *Walter as assurance of at least a "floor" of educational opportunity have long since been substantially amended and now are abandoned.*[80] Today, the true standard by which public education in Ohio must be measured is the passage rate on the state-mandated proficiency tests. Measured by this standard, Ohio's educational system fails miserably.

Walter characterized the issue before it as one "more directly concerned with the way in which Ohio has decided to collect and spend state and local taxes than it [was] a challenge to the way in which Ohio educates its children." *Bd. of Edn. v. Walter*, 58 Ohio St.2d at 375-376, 390 N.E.2d at 819. Erroneously likening the instant case to *Walter*, the Court of Appeals concluded: "In the *Walter* case, as in the case *sub judice*, we are reviewing the method used by the state to collect and spend state and local taxes." Opinion at 7-8. Unfortunately, the claims in this case are far more significant and the potential consequences far more perilous than the Court of Appeals' characterization reflects.[81] The State's 1981 abandonment of the equal yield formula and its continued neglect of the guarantee that each public school child in Ohio receive an education of high quality clearly require that this suit be treated as the "challenge to the way in which Ohio educates its children" that the Court believed *Walter* was not. Because the guarantee of adequacy which undergirded the *Walter* decision no longer exists, and because the perpetuation of inequity is a direct consequence of the current funding system, the Court of Appeals' reliance upon *Walter* is misplaced. That case absolutely cannot be read to endorse the admitted inadequacies and disparities that pervade the current system.

2. The needs of Ohio's children and the significance of education are far greater today than they were at the time of Walter.

The foregoing comparison of the significant facts in this case and in *Walter* demonstrates that the two cases have little in common beyond the educational theme of the claims. In comparing the cases, it also is critical to note that the content and significance of the "high quality" education endorsed by *Walter* inevitably is different today compared to the time of *Walter*. As the United States Supreme Court recognized in *Brown v. Bd. of Edn. of Topeka* (1956), 347 U.S. 483, 492-493, 74 S.Ct. 686, 691, 98 L.Ed.873, 880:

> In approaching this problem, we cannot turn the clock back to 1868 when the [Fourteenth] Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written. We must consider public education in the light of its full development and its present place in American life throughout the

> Nation.*** Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

The importance of education, and the characteristics of a constitutionally-adequate education, were no more fixed for all time by *Walter than they were by Plessy v. Ferguson* (1896), 163 U.S. 537, 16 S.Ct. 256, 41 L.Ed. 256. Just as the Supreme Court in *Brown* reflected on the evolving significance of education, so it is appropriate that this Court recognize that a "high quality" education within the meaning of *Walter* must be measured in terms of contemporary needs.[82]

In short, the funding system must be evaluated as it now exists and in light of the needs of our children and of our society *today*. As noted by the Trial Court:

> Everyday education becomes more and more important and the connection between education and the rights guaranteed by Art. I § 1 becomes greater and greater. Today we live in a high tech world. A world that is becoming more technologically advanced at a rapid pace. The measure of education never has been viewed as a static measure.

(Findings at 468-69)[83] After thorough analysis, the Trial Court correctly held that *Walter's* review of a different funding system, as it existed almost two decades ago, does not compel a conclusion of constitutionality here. The Court of Appeals erred in failing to uphold the Trial Court's thoughtful and proper conclusions.

B. *Walter* cannot be construed to approve the current system of funding public education, and *stare decisis* does not require adherence to its archaic analysis.

The substantial differences between the circumstances of public education today and those before the court in *Walter negate any suggestion that Walter* can be read to endorse the pervasive educational neglect that is the inevitable consequence of today's inadequate funding system. To the extent that the State argues to the contrary, it is imperative that this Court expressly overrule *Walter*. At the conclusion of this case it must be unmistakably clear to the State that it cannot continue to deprive Ohio's schoolchildren of the education to which the Ohio Constitution entitles them. As this Court well understands, the doctrine of *stare decisis* does not require that this or any other court immortalize an understanding of the Constitution that may or may not have been correct at the time that it first was announced, but that clearly is inconsistent with a contemporary understanding of the Constitution.

The doctrine of *stare decisis* generally is viewed as primarily protecting private reliance interests in property and in contracts, and as having only marginal application to questions of constitutional interpretation. "While it is true that stare decisis is a rule that judges should observe with some reverence, it is also true that when constitutional issues are at stake, the rule is less compelling." *City of Rocky River v. SERB* (1989), 43 Ohio St.3d 1, 539 N.E.2d 103. See, also, *Payne v. Tennessee* (1991), 501 U.S. 808, 828, 111 S.Ct. 2597, 2609-2610, 115 L.Ed.2d 720, 737.[84] This Court reaffirmed in *Rocky River* the duty of *every* judge to reexamine constitutional precedent.

> A judge looking at a constitutional decision may have strong feelings to revere the past and accept what was once written. *** "
> ***Should we, for whatever reason, be denied the right to reexamine constitutional precedent which, after all, is a personal matter for each judge who assumes these responsibilities? If the answer to these questions is "yes," would we not then be letting persons, who may be long dead and gone and unaware of the problems of our age, do our thinking for us? Can we afford to live with such hidebound, slavish adherence to the past when, in fact, we live in an ever-evolving society that requires innovative thinking and even change to cope with problems of the present and future? Just to ask these questions answers them.

Id. at 6-7, 539 N.E.2d at 108.

As this Court recognized in *Miller v. Korns* (1923), 107 Ohio St. 287, 140 N.E. 773, and as the analysis in subsequent sections of this Brief will confirm, funding for education traditionally has been viewed as fundamental to our society, its fundamentality well reflected in the history and the language of our Constitution. *Walter* did not determine otherwise.[85] If the State were correct in its mistaken assertion that Walter denied the fundamentality of education, then *Walter* would be the aberration and overruling it would be both necessary and consistent with any view of *stare decisis.* See, *Zoppo v. Homestead Ins. Co. (1994), 71 Ohio St.3d 552, 555, 644 N.E.2d 397, 400.* We reject appellee's contention that under the doctrine of stare decisis, we must adhere to our decision in Said. The Said decision was an aberration that failed to follow clearly established precedent."). Accord, *Payne,* 501 U.S. at 835, 111 S.Ct. at 2614, 115 L.Ed.2d at 742.

II. Proposition of Law No. II: The current system of public school funding fails to satisfy the State's duty to provide a thorough and efficient system of common schools throughout Ohio as required by the Ohio Constitution, and additionally violates the Due Process and other clauses of the Constitution.

A. The Ohio Constitution assigns to the General Assembly the responsibility for the creation and funding of a system of common schools, and that body cannot divest itself of ultimate responsibility for that system.

> "[T]he General Assembly, not the local school district, bears full responsibility for providing an education system."

Appellee State Board of Education December 10, 1990[86]

There is but one system of public education in Ohio. It is a statewide system, expressly created by the state's highest governing document. Section 2, Article VI of the Ohio Constitution provides:

> *The general assembly* shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a *thorough and efficient system* of common schools throughout the state.

(Emphasis added.)[87] According to this Court: "This declaration calls for the upbuilding of a system of schools throughout the state, and the attainment of efficiency and thoroughness in that system is thus expressly made a purpose, not local, not municipal, but state-wide." *Miller v. Korns*, 107 Ohio St. at 297, 140 N.E. at 776. The duty to upbuild this system expressly is assigned to the General Assembly both by the constitutional provision quoted above, and by Section 7, Article I, Ohio Constitution, which provides: "Religion, morality, and knowledge, however, being essential to good government, it shall be *the duty of the general assembly* to pass suitable laws *** to encourage schools and the means of instruction." (emphasis added.)

As the massive record in this case and the Statement of Facts demonstrate, the State unquestionably has failed to perform its constitutional duty to "secure a thorough and efficient system of common schools throughout the state" and to ensure sufficient revenue to fund that system.[88] In much of the State, the education provided to Ohio's school children is qualitatively inadequate, and substantial portions of the system are bankrupt.[89] There can be no doubt that the State is responsible for these inefficiencies and inadequacies. Certainly, the State cannot legislatively divest itself of its constitutional duty merely through the interposition of local school districts between itself and the children it is mandated to serve. The State fundamentally misunderstands the nature of delegation if it believes that, having created local districts, it can relieve itself of ultimate responsibility for the school system by pointing a finger of blame at those districts.[77]

> The Ohio Constitution clearly places the responsibility for public education upon the State of Ohio. Because local school boards initiate school levies for local voters' consideration, expend funds locally, and generally exercise administrative control over local schools, many people may well believe that such local boards of education have primary responsibility for the maintenance and operation of the public schools in Ohio. In fact, the state remains primarily responsible. This mandate has been our law since the adoption of the 1851 Ohio Constitution

Penick v. Columbus Bd. of Edn. (S.D. Ohio 1977), 429 F.Supp. 229, 262, affirmed in part, remanded in part (C.A. 6, 1978), 583 F.2d 787, stay granted (1978), 99 S.Ct. 24, 439 U.S. 1348, 58 L.Ed.2d 55, stay vacated (1978), 99 S.Ct. 3107, 443 U.S. 916, 61 L.Ed.2d 879, certiorari granted 99 (1978), S.Ct. 831, 439 U.S. 1066, 59 L.Ed.2d 31, affirmed (1979), 99 S.Ct. 2941, 443 U.S. 449, 61 L.Ed.2d 666, rehearing denied (1979), 100 S.Ct. 186, 444 U.S. 887, 62 L.Ed.2d 121, on remand (S.D. Ohio 1981), 519 F.Supp. 925.[90] It is self-evident that the legislature cannot delegate authority it does not possess, and any

suggestion that the State can empower local districts to violate the constitutional entitlements of school children is without legal support.

Because local districts are agents of the State, and because the Constitution allocates to the State the responsibility for securing a thorough and efficient system of common schools, the outcome of this challenge to Ohio's funding system does not depend upon whether the State or local districts are the source of any faulty decisions regarding the use of resources. If significant resources are being mismanaged--for *any* reason--*the State* has failed to provide a thorough and efficient system.[91] Ultimate responsibility for the creation of a thorough and efficient system of common schools remains where the Constitution placed it: with the State of Ohio.

B. The system of public schools produced by the challenged funding system is neither thorough nor efficient.

The constitutional mandate that "[t]he general assembly shall make such provisions, by taxation, or otherwise, as, *** will secure a thorough and efficient system of common schools throughoutthe state" draws its origins from the historic belief that an educated citizenry is necessary both for the political and economic survival of the state. The delegates to Ohio's 1851 Constitutional Convention, at which the thorough and efficient clause was adopted, understood the clause to direct "the Legislature to make full and ample provision for securing a thorough and efficient system of common school education, free to all the children in the state. The language of this section is expressive of the liberality worthy a great State, and a great people."[92] The clause was intended to remedy what was widely perceived as legislative neglect of education. As one delegate to the 1851 Constitutional Convention observed: "Our system of common schools, instead of improving in legislative hands, has been degenerating and I think it is time that we should take the thing in hand ourselves."[93] Another stated: "We are warranted by public sentiment in requiring at the hands of the General Assembly a full, complete and efficient system of public education."[94] Having extensively reviewed the history of our Constitution (Findings at 28-31, 442-445), the Trial Court made the following observation (Findings at 464):

> In that the State is bound to provide a thorough and efficient education it is helpful to note how the delegates to the 1851 Constitutional Convention defined these terms. Statements made by delegates show that "thorough" was intended to mean "complete, absolute and exact" while "efficient" was intended to mean "effective and working well."

This Court in *Miller* acknowledged the critical importance of the thorough and efficient proclamation: "With this very state purpose in view, regarding the problem as a state-wide problem, the sovereign people made it mandatory upon the General Assembly to secure not merely a system of common schools, but a system thorough and efficient throughout the state." *Miller*, 107 Ohio St. at 297-98, 140 N.E. at 776. See, also, *Bd. of Edn. v. Walter, 58 Ohio St.2d at 386, 390 N.E. 2d at 825 (recognizing the Miller* test). Contrary to the clear command of Section 2, Article VI,< provide to discretion has it that argued State the Indeed, system." efficient and "thorough a duty than less considerably is obligation its asserts now>virtually any system of education short of total deprivation: "[T]he trial court in employing [the *Miller* test of thorough and efficient] failed to take into account the Supreme Court's admonition in *Walter* that the lack of teachers,

buildings, or equipment must be associated with the receipt of so little local and state revenue that there is an absolute deprivation of education." Appellants' Brief (State's) to Court of Appeals at 59.

The State's argument that this Court has so construed the plain language of the education clauses is outrageous, and rests upon a misreading of *Walter. Walter* stated that a funding system clearly would not be thorough and efficient if, "*for example*, *** a school district [were] receiving so little local and state revenue that the students were effectively being deprived of educational opportunity." *Walter*, 58 Ohio St.2d at 387, 390 N.E.2d at 825 (emphasis added). In the quoted passage, this Court was describing a worst- and clearest-case scenario -- not, as the State has claimed, establishing a constitutional standard for education. The footnote in *Walter* for this one extreme example cited to *San Antonio Indep. School Dist. v. Rodriguez* (1973), 411 U.S. 1, 25, 93 S.Ct. 1278, 1292, 36 L.Ed.2d 16, 38. *Rodriguez* discussed whether wealth could be a suspect classification so as to invoke strict scrutiny under the *Equal Protection Clause of the United States Constitution*, but that discussion had nothing whatever to do with the thorough and efficient clause found in the Ohio Constitution. The State's "total deprivation" argument is irreconcilable with all of the education provisions of the Ohio Constitution and represents a distortion of this Court's analysis in *Walter*.[95]

In contrast to its position in response to this suit--that it satisfies the Constitution so long as it does not totally deprive children of an education--the State in other contexts has stated:

> "A practical test for 'thorough and efficient system of common schools' is the question, 'Would I, as a parent, be willing to have my children educated in any of the 612 school districts in Ohio?' If the answer is 'no,' the system would appear to be suspect."
>
> Restructuring the Common School in Ohio: The Path to Educational Progress, Policy and Budget Recommendations of the State Board of Education to the Governor and 119th General Assembly, Plaintiff's Exhibit No. 140 at 2.

Indeed, this Court has described a scenario where a school funding system would not satisfy the thorough and efficient clause:

> [A] thorough system cannot mean one in which part or any number of the school districts of the state were starved for funds. An efficient system cannot be one in which part or any number of the school districts of the state lacked teachers, buildings or equipment.

Miller v. Korns, 107 Ohio St. at 298, 140 N.E. at 776. The record of this action is replete with evidence that the Plaintiff school districts are starve for funds and lack teachers, buildings, and equipment.[96]

Judged by these--or by any other reasonable standard--the system of education administered by the State clearly is not thorough and efficient. No responsible parent would choose to send a child to a school where students are exposed to the risks of friable asbestos (Findings at 164); carbon monoxide (*id*. at 149); coal dust (*id*. at 169); raw

sewage (*id*. at 182); collapsing floors (*id*. at 149); poor lighting (*id.* at 181); leaking roofs and windows (*id).;* excesses of heat and cold (*id*. at 195); a building sliding down a hillside (*id*. at 150); or collapsing walls (*id*. at 174). A parent likewise would not choose to send a child to a school that suffers from deficient curricula (*id*. at 226, 228, 233-35, 237-38, 241, 243-44); overcrowded classrooms and unacceptable student/teacher ratios (*id*. at 192, 196, 204, 206-213); inadequate and outdated books (*id*. at 257-67);[97] antiquated laboratories lacking educational and safety equipment (*id*. at 271, 276, 281-82); lack of art and other supplies;[98] and lack of access to computer technology (*id* at 272-82). No parent would select an elementary school that lacks indoor plumbing (*id*. at 149), and no parent of a child with a state and federally-created entitlement to special education services would knowingly permit that child to be underserved or unserved.[99]
The manner in which a state provides funds for its school facilities is an essential consideration in determining whether that state has met its educational obligations. In Ohio, the State has identified over $10 billion in school facilities needs, yet provides funding for less than one percent of these needs. (Findings at 158, 160) The State additionally imposes debt limits that prohibit over sixty percent of school districts from raising enough local funds to satisfy their own facilities needs. (Tr. 1706; Findings at 155) Similarly, the State has identified millions of dollars in emergency school facilities needs and costs associated with asbestos abatement and removal of architectural barriers, but provides *no* funds to respond to those needs.[100] (Findings at 161-167)
While asserting that the system of public education is both "thorough and efficient," the State, in its legal arguments *and* in practice, neglects the real-life deprivations that afflict Plaintiffs. For example, Plaintiff Northern Local School District's facilities problems are immediate and, in some cases, life-threatening:

- Upon recommendation from the State, the District was forced to close its Somerset Elementary School Building due to unsafe, bulging structural walls, the constantly leaking roof and windows leaking so badly that sand particles from deteriorating masonry blew onto students' desks. .
- After closing Somerset, modular classrooms had to be leased at a cost of $13,000 each month, paid for out of the District's general funds.
- The total cost to the District due to the building closing was $120,000, all of which was paid from the District's general funds.
- Arsenic was found in the District's water supply. Potable water had to be trucked into the schools, and a new well dug. The total cost to the District for the arsenic problem was $20,000. Again, this was paid out of the District's general funds.

(Findings at 175-83) In each of these instances the District sought assistance from the State. In each instance the State refused, and failed to offer any financial assistance; it was left to the District to allocate precious dollars to address these problems, at the expense of other student needs. *Id*. Once again, State inaction invites the question of whether any system that places such a burden on local school districts, at the risk of physical harm to students, can be either "thorough or efficient."

As has been found by the highest courts of Arizona and Wyoming, facilities deficiencies *alone* are sufficient to invalidate a state's system of funding education. *Roosevelt*

Elementary School Dist. No. 66 v. Bishop (Ariz. 1994), 179 Ariz. 233, 877 P.2d 806 holding that facilities disparities among the state's school districts violated Section 1, Art. XI of the Arizona Constitution, guaranteeing a "general and uniform" public school system); *Campbell v. Wyoming* (1995), 907 P.2d 1238, 1275 ("Safe and efficient physical facilities with which to carry on the process of education are a necessary element of the total educational process. *** We hold deficient physical facilities deprive students of an equal educational opportunity and any financing system that allows such deficient facilities to exist is unconstitutional.")

Beyond the massive neglect of Ohio's school facilities, the inefficiencies that pervade the system established and maintained by the State are innumerable, and the consequent harm to students is incalculable. The following list presents only the tip of the State's destructive iceberg:

- The State provides "equity funds" purportedly to enhance educational programming in poor school districts and then requires that those funds be used to repay loans from private lenders, *so that the districts derive no net benefit*.[101]
- The State mandates the identification of gifted pupils, but provides *no gifted services* to over 60 percent of the pupils so identified.[102]
- The State mandates the provision of special education services to handicapped pupils aged 3 through 5, but provides *no funds to some districts for those services*.[103]
- The State mandates the identification of pupils at risk for school failure, but provides inadequate funding to serve the needs of those pupils.[104]
- The State prohibits receivership school districts from spending any money without the prior approval of the State Superintendent of Public Instruction, and yet requires those school districts to engage in collective bargaining with employee unions.[105]
- The State mandates that school districts implement model curricula that require teacher training, and additional textbooks and technology, but provides no additional funding to provide these services and materials.[106]
- The State permits the largest school district in the state to become so inefficient that the State is ordered by the federal district court to "take over" and directly manage that school district. [107]

Judged by any standard, the State's system fails to fulfill the constitutional promise of thoroughness and efficiency. Years of legislative neglect have left us today with a bankrupt system that would appall the framers of the Ohio Constitution. Clearly, the system found to exist by the Trial Court and accurately characterized by the State Superintendent as "not morally right" is inconsistent with the intent of the framers and with the express language of our Constitution.

C. The system of schools produced by the challenged funding system violates the liberty and property interests of students, and neglects the heightened statutory entitlements of handicapped students

Courts consistently have held that constitutionally protected property rights are created not only by constitutions but also by the nature and extent of legislative and regulatory

recognition of those rights.[108] Section 2, Article VI of the Ohio Constitution unequivocally states that the Ohio General Assembly *shall* provide a thorough and efficient school system for the children of the State. The General Assembly has chosen to carry out its constitutional duty by empowering the State Board of Education to "[f]ormulate and prescribe minimum standards to be applied to all elementary and secondary schools in this state for the purpose of requiring a general education of high quality." R.C. 3301.07(D). Ohio requires that all school-aged pupils, under penalty of law, attend either a public school or a school meeting minimum standards prescribed by the State Board of Education. R.C. 3321.03. Taken together, these laws create on behalf of the children of this state an absolute property and liberty interest in education, and an affirmative duty on the part of the State to provide such education in a through and efficient manner. The rights thus created are common to all of Ohio's children, regardless of where they may happen to reside.

When, as in the instant case, mandatory property and liberty interests are granted by statute, the substantive component of the Due Process Clause prohibits the impairment of that interest in a fashion that is inconsistent with the statutory grant. *Nicoletti v. Brown* (N.D.Ohio 1987), 740 F.Supp. 1268, 1286-1287. Several courts have recognized that school children have substantive due process property and liberty interests with respect to public education, which interests emanate from state constitutional provisions obligating state legislatures to establish public school systems and from state compulsory school attendance laws. *See, e.g., Goss v. Lopez* (1975), 419 U.S. 565, 573-574, 95 S.Ct. 729, 735-736, 42 L.Ed.2d 725, 734; A*labama Coalition for Equity, Inc. v. Hunt* (1993), 19 IDELR 810, 839; *Debra P. v. Turlington* (C.A. 5, 1981), 644 F.2d 397, 404. A succinct explanation of such protectable property interest was provided by the Fifth Circuit Court of Appeals:

> [O]nce a state establishes a system of education and requires school attendance, an "understanding" is created between the state and the student "that secures certain benefits and that supports claims of entitlement to those benefits."

Debra P. v. Turlington, 644 F.2d at 404. (citations omitted).

As both the Trial Court's extensive findings of fact and the analysis in the foregoing section of this brief demonstrate, the record is replete with examples of how Ohio's school funding system fails to satisfy the constitutional obligation to provide a high quality education for the children of this State. (Findings at 454-58) The Trial Court correctly determined that the State's failure adversely affects students' future economic well being and unconstitutionally deprives them of their substantive property and liberty interests arising under Section 16, Article I, Ohio Constitution. (Findings at 476)
The State also has violated the substantive due process rights of handicapped students by neglecting the significant statutory entitlements of these students.[109] Pursuant to federal law (20 U.S.C. 1401 *et seq.)* and state law (R.C. Chapter 3323 asrevised), the State is obligated to "[a]ssure that all handicapped children three to twenty-one years of age in this state shall be provided with an appropriate public education." R.C. 3323.02.[110] The State of Ohio, in conjunction with its request for and receipt of federal funds for the

education of pupils with disabilities, is required to submit a plan for special education to the United States Department of Education every three years. (Stip. 55; Supp. 15; Findings at 320) The State's plan includes representations to the United States Department of Education that the State will ensure that:

> a. all handicapped children entitled to receive special education are provided with an appropriate public education, and
>
> b. each public school district provides an appropriate program of special education and related services to each eligible pupil enrolled in the school district.

(Stip. 57)[111]

The State has further strengthened the entitlements of handicapped pupils through the extensive regulations found at Ohio Adm. Code 3301-51. These regulations require smaller classes, specially trained teachers and specialized educational materials and supplies, in order to implement the individualized education programs required for each handicapped pupil. Notwithstanding the State's statutory and regulatory assurances of educational entitlement for eligible handicapped pupils, the evidence before the Trial Court demonstrated the stark reality of neglect and deprivation of these pupils in the Plaintiff school districts and the surrounding areas.[112] For example, pupils are transported by school bus for as much as three hours per day because no special education programs are available locally (Herner Depo. 119-120; Findings 322); orthopedically handicapped pupils are carried up and down stairs because their school buildings are not handicapped accessible (Tr. 2355; Findings at 343);[113] pupils purposely are not identified as handicapped until they have failed one or more grades, because earlier identification would required the school districts to provide programs for which no funds are available (Tr. 2684; Supp. 1336; Findings at 339); special education pupils are educated in trailers and in basements (Tr. 2726; Findings at 342); classes limited by regulation to twelve pupils balloon to as large as twenty-one (Ohio Adm. Code 3301-51-04(G)(3); Tr. 1952; Findings at 352); educational materials, required to be "current" and related to the needs of the handicapped pupils, are out-of-date, if present at all. (Supp. 1353-1355)

Three circumstances have combined to cause the extensive deprivation of the rights of handicapped pupils. First, although public school enrollment generally has declined over the last decade, the number of handicapped pupils attending public schools has steadily increased. The more severely handicapped (who also tend to be more costly to educate) increasingly tend to be located in urban and poor rural school districts.[114] At the same time, the admittedly flawed "unit funding" method by which the State provides funds for special education operates to increase the extent of deprivation because the amount of money provided by a "funded unit" falls far short of actual program costs. Moreover, the lack of adequate numbers of State "funded units" increasingly casts the entire burden of special education programming on the school district. Poor school districts, such as the Plaintiffs, have a more difficult time generating the funds to "make up the difference" than their wealthy counterparts.[115]

The Trial Court's undisputed findings of fact demonstrate that handicapped children in the Plaintiff school districts are being denied appropriate special education programs and related services because of a lack of funds. The denial of programs and services mandated by both Ohio and federal law abrogates these students' entitlement to a "free, appropriate public education," and violates the Constitution's Equal Protection, Uniform Operation Of Law, and Due Process Clauses.[116] The Court of Appeals' offhandedly dismissed these claims, stating: "Handicapped students who receive the same state funding as non-handicapped students cannot logically be deprived of a constitutional right based on that finding." Opinion at 12. The Court of Appeals' summary dismissal reveals a fundamental misunderstanding of the nature of the deprivation and the significance of the constitutional protections.

The State has created a legislated entitlement to public education on behalf of all of its pupils. For some, the entitlement is a reality; for others, it is a sham. The difference is geography: the wealth of the school district in which a pupil resides determines the education that pupil receives. While the legislation may have uniform application, the realization does not. Substantive due process prohibits the State from impairing the rights of its citizens in an arbitrary fashion. By creating and maintaining a funding system that allocates educational benefits based solely on the wealth of the school district in which a pupils resides, the State has violated the due process rights of the Plaintiff pupils and parents.

III. Proposition of Law No. III: Public education is a fundamental right guaranteed by the Ohio Constitution, and the rights of public school children to equal protection of law are violated by Ohio's system of funding public education because this system arbitrarily discriminates in the quality of education that it provides to children; even if public education were not a fundamental right, the wealth-based discrimination in which the State engages violates the Constitution because such discrimination is not rationally related to any legitimate state objective.

A. Public education is a fundamental right of unique societal and individual importance, expressly protected by the Ohio Constitution.

The Trial Court found that Ohio ranks as one of the most disparate states in the nation in its allocation of educational resources. (Findings at 468) The level of educational opportunity provided is a function of the wealth of the school district in which a child resides. This inequitable distribution of educational resources does not withstand equal protection analysis. [117]

It is well established in Ohio that "[i]n determining whether a statute violates equal protection, we examine the class distinction drawn to decide if a suspect class or fundamental right is involved in order to determine what level of scrutiny to apply." *Adamsky v. Buckeye Local School Dist.* (1995), 73 Ohio St.3d 360, 362, 653 N.E.2d 212, 214. A statutory classification that does not implicate a fundamental right is evaluated according to the "rational basis" test, and will be upheld unless it treats "similarly situated people in a different manner based upon an illogical and arbitrary basis." *Id.* A governmental action that implicates a fundamental right is "subject to the highest level of

judicial scrutiny," and will be upheld only if it is "necessary to promote a compelling governmental interest." *Sorrell v. Thevenir* (1994), 69 Ohio St.3d 415, 423, 633 N.E.2d 504, 510.

The State's school funding scheme fails to pass constitutional muster under both rational basis and strict scrutiny analyses. Accordingly, and contrary to the opinion of the Court of Appeals, the outcome of this controversy does not hinge upon the characterization of the right to education as fundamental. Nevertheless, it is clear that education is entitled in Ohio to protection as a fundamental right, as demonstrated by each of the two considerations determinative of fundamentality: (1) the historic understanding of the right, as reflected in the explicit language of our state Constitution, and (2) the contemporary importance of the right.

1. Historical background[118]

> "Shall we *** constitute a class who will become the inmates of our poor houses, and the tenants of our jails? I think it must be clear to every reflecting mind that the true policy of the statesman is to provide the means of education, and consequent moral improvement, to every child in the State, the offspring of the black man equally with that of the white man, the children of the poor equally with the rich."
>
> Mr. Taylor, delegate to Ohio's 1850 Constitutional Convention[119]

Mr. Taylor's concerns are equally valid today. The two fastest growing portions of the Ohio budget are those devoted to Medicaid and the prisons, each increasing at a rate approximating 33% over the last biennium. (Findings at 35; Supp. 269; Tr. at 4395) While funding one of the fastest growing building programs in the State--prisons--the State ignores the fact that many inmates in the Ohio penal system do not have high school diplomas. (Findings at 446) Yet no State aid is available to any of the Plaintiff school districts to help students at risk for failure to graduate.[120]

Ohio's constitutions unfailingly have recognized the critical importance of a publicly-provided education.[121] The state's first constitution, adopted in 1802, included a Bill of Rights which contained a provision declaring that "schools and the means of instruction shall forever be encouraged by legislative provision." When Ohio's second constitutional convention assembled in 1850, the delegates responded to nearly a half century of legislative inaction by strengthening the constitutional provisions related to education.[122] The result was the creation of the mandatory constitutional duty now imposed upon the legislature by Section 2, Article VI: "The General Assembly shall make such provisions, by taxation, or otherwise, as ... will secure a thorough and efficient system of common schools throughout the state." The third constitutional convention in Ohio, which convened in 1912, added yet another section to the education article: "[p]rovision shall be made for the organization, administration and control of the public school system of the state supported by state funds." Section 3, Article VI. This addition was intended to reinforce the constitutional requirement of a single, unified state system.[123] The 1912 convention also replaced the state commissioner of common schools, a position created by *statute*, with a *constitutionally* required superintendent of

public instruction to supervise the statewide system of public schools. Section 4, Article VI.

The words of our Constitution were not randomly selected. As previously discussed, the phrase "thorough and efficient" intentionally was used by the drafters to connote a "full, complete and efficient system of public education" for which the legislature makes "full and ample provision." Similarly, "common school" was a term of art invoked to convey a precise meaning.

The Common School movement originated in Massachusetts through the work of Horace Mann, and was so-called because the basic idea was to give all citizens a common foundation of literacy, morality, and patriotism, regardless of their origins, through free public schools supported by taxes, with compulsory school attendance and supervision at the state level. ***

*** Conservatives saw the common schools as a civilizing influence, and liberals viewed them as the way for the poor to climb the ladder of society. By 1851 the objectives of the Common School movement had wide support in Ohio, leading to the inclusion of Article VI in the 1851 Constitution.[124]

Inherent in the Ohio Constitution's use of the phrase "system of common schools" is the requirement that the public schools of Ohio educate all students, rich or poor, at similar levels, and provide them with similar opportunities.[125]

This Court has defined fundamental rights as "those rights which are explicitly or implicitly embraced by our Constitution," and has stated that the Court's goal "should be to preserve the existence of these sacred rights." *Arnold v. Cleveland* (1993), 67 Ohio St.3d 35, 44 616 N.E.2d 163, 170. Our Constitution unequivocally imposes upon the General Assembly the mandatory obligation to secure and fund, on an equal basis to children throughout the state, an education that will enable them to participate in and thereby perpetuate a society based upon ideals of equality and democracy. The plain meaning of the words used in the education clauses, coupled with the history of these clauses, testifies to the paramount importance ascribed to education by our founding fathers and establishes education as a fundamental right in Ohio.[126] This fundamental entitlement--the constitutional inheritance of every Ohioan--has been grievously impaired by the State in a manner offensive to any understanding of equal protection.

2. Contemporary importance

In addition to engaging in constitutional exegesis, courts traditionally look to the importance of an asserted right, both historically and in the context of contemporary society, in order to determine whether the right is fundamental.[127] There can be no doubt that, so examined, education qualifies for protection as a fundamental right.

The United States Supreme Court expressly predicated its decision in *Brown v. Bd of Edn.* on the great contemporary importance of education: "Today, education is perhaps the most important function of state and local governments." *Brown v. Bd of Edn.* (1953), 347 U.S. 483, 493, 74 S.Ct. 686, 691, 98 L.Ed. 873, 880.[128]

This Court, too, has recognized education as a preeminent function of the State of Ohio:

> [T]he sovereign people have not considered the giving of education to be a private purpose. The existence of an intelligent and enlightened people is the basis of national prosperity and political integrity, and the system by which we endeavor to educate and enlighten the coming generations is rightly made by law a matter of supreme public concern.

Miller v. Korns, 107 Ohio State at 306. More recently the long-held convictions of this Court have been mirrored in legislative findings regarding the fundamentality of education expressed by the Congress of the United States.[129] The education rights now recognized by Congress as fundamental have long been guaranteed to every Ohioan by our State Constitution.[130]

Without apparent consideration of either the historical basis or current significance of the Plaintiffs' constitutional claims, the Court of Appeals denied the enforceability of the constitutional guarantees relating to education. The decision was predicated upon a single, aberrant and fundamentally inapposite authority: *Walter*. *Contrary to the belief of the Court of Appeals, Walter* did not determine that education is not a fundamental right, but found instead that the concept of fundamentality was "too abstract to be legally useful" in resolving that controversy, suggesting that the fundamentality of education was not before the Court. *Id*. at 375-376, 390 N.E.2d at 819.[131] *Walter* stands virtually alone among equal protection cases considered by this Court, either before or since, as the only instance in which the Court ever has declined to exercise the traditional two-tier analysis of fundamentality. *Walter* is an anomaly of Ohio jurisprudence.

Recently, this Court reaffirmed the propriety of evaluating fundamentality according to the language of the Constitution. See *Arnold v. Cleveland* (1993), 67 Ohio St.3d at 44, 616 N.E.2d at 170 fn.11. Significantly, *Walter had stated that education is a fundamental right when tested by that standard*. *Bd. of Edn. v.Walter* (1979), 58 Ohio St.2d at 374, 390 N.E.2d at 818.[132] Moreover, there can be no serious argument that education fails the test of importance which the right to bear arms passed in *Arnold*.

In sum, it is absolutely clear that, whether judged by historical or contemporary standards, education is a fundamental right in Ohio. It is equally clear that the State has failed to honor its obligation to give meaning to that right. At a time when education is more essential to economic, social and political survival than at any time in our history, increasingly vast numbers of our youth are undereducated. This Court must act decisively so that the right to an education no longer is denied.

B. The disparities in educational opportunity that result from Ohio's school funding system do not serve any compelling state interest and are not rationally related to any legitimate state objective, including the asserted interest in furthering local control of the schools, and accordingly violate the Ohio Constitution.

> "And when the state gives three shares of knowledge to a child in a wealthy part of the state and one share to a child in another part of the state, it owes a special reason to the people of Ohio. When the legislature malapportions its resources in order to deny knowledge, deny educational opportunity, then it owes a special reason."

The State's system of funding public education offends equal protection by allocating significantly fewer educational resources to students who reside in poor school districts than it allocates to those who reside in wealthy districts. A comparison of Beachwood City Schools with Plaintiff Dawson-Bryant Local Schools is illustrative of the disparities perpetuated by the State. In Beachwood, a student attends all day, every day kindergarten in a classroom with 20 other pupils. In kindergarten, specialists in music, art, and physical education work with the children along with a guidance counselor and a reading specialist. French and Spanish are introduced. In the elementary grades, programs are individualized for each child according to his or her needs, including enrichment for gifted pupils. Students have a reading center, computer center, arts center, publishing center, and a center for hands-on science. Violins are provided by the district for instruction in grade 2. Cultural field trips provide a variety of experiences as do the efforts of 65 area businesses that volunteer to be partners. Hands-on science materials, supplies and workbooks are replenished every year. By the 6th grade, students have the opportunity to study 3 foreign languages, swimming, and photography, and have access to a broadcasting studio and a variety of clubs and sports. In high school, students have access to advanced placement courses in every subject area except Hebrew. Five foreign languages are offered, and science classes include laboratory work 3 days per week in addition to classroom instruction. Two counselors at the high school assist with three college and university tours for sophomores and juniors and with college placement. In 1993, all 100 seniors, except one learning disabled student, had passed all parts of the ninth grade proficiency test. Nearly all pupils go on to four-year college programs. (Tr. 2501-37; Pl. Exh. 268, 269)

By contrast, at Plaintiff Dawson-Bryant, kindergarten students (with developmental abilities ranging from age 2 to 9) attend school all day, every-other day, with 33 students in the classroom. Some students spend one hour 45 minutes on a bus getting to school. Facilities are dismal. A technology plan exists, but lack of adequate wiring and a lack of finances prevent implementation. Necessary resources for the State-mandated model mathematics and language arts curricula have not been implemented because of a lack of funds for teacher training, instructional materials, and textbooks. Instructional materials are worn out and other items such as maps and globes are outdated. No library purchases have been made for the year and libraries are not open during some school hours. Materials are outdated. Students working on an interdistrict competition find no materials on the topic (Haiti) in the library. Elementary and middle school students have no foreign language courses. While Beachwood students have soccer, golf, wrestling, tennis, swimming, baseball, and softball, elementary and middle school students at Dawson-Bryant have none of these activities. The one foreign language (Spanish) offered at the high school includes no electronic assistance such as language laboratories or tape recorders. Guidance counseling is limited to class scheduling, and individual assistance or intervention for students with academic problems is not available. Science laboratories are not available at any grade level, and materials are inadequate. No business partnerships exist because the district has *no industry.* Ohio Studies is not offered as required in grade 8 because the staff member who would otherwise teach it is needed to assist pupils who fail the ninth grade citizenship proficiency test. Thirty-two seniors out

of 99 have not passed the ninth grade proficiency test. (Tr. 2395-96, 2412-18, 2431-44, 2427, 2492, 2616; Pl. Exh. 268, 269; Jackson Depo. at 30)

The State has no legitimate interest in subjecting its children to inadequate and underfunded educational programs like that at Dawson-Bryant, delivered in antiquated facilities that often are physically dangerous. The foregoing comparison does not suggest that all schools need to have the same programs as Beachwood or that the students at Beachwood should have any lesser programs than they now enjoy. It does suggest that the State advances no legitimate interests by depriving the pupils of Dawson-Bryant in such an egregious fashion.[134] By treating "similarly situated people in a different manner based upon an illogical and arbitrary basis," the State's funding scheme fails even the rational basis test. See *Adamsky v. Buckeye Local School Dist.* (1995), 73 Ohio St.3d 360, 362, 653 N.E.2d 212, 214. Indeed, this Court has declared what common sense dictates: the most reasonable allocation of educational resources would discriminate *in favor* of those who have the greatest need and the least personal wealth.

> In the attainment of the purpose of establishing an efficient and thorough system of schools throughout the state it was easily conceivable that the greatest expense might arise in the poorest districts; that portions of great cities, teeming with life, would be able to contribute relatively little in taxes for the support of schools, which are the main hope for enlightening these districts.

Miller v. Korns, 107 Ohio St. at 298, 140 N.E. at 776.

> Could there be a more reasonable classification than that provided for in this act--that school districts should receive aid in varying proportions according to their needs; that city and exempted village school districts, which experience has shown are crippled for lack of school funds, should be preferred; and that all other school districts should then share in the balance of the fund ***?

Id. at 303, 140 N.E. at 777-778. The State has turned the logic of this Court on its head, allocating the most to those with the least needs, and inflicting deprivation upon those whose needs are greatest. In the process, the State would have the courts contribute to the polarization that threatens the fabric of our society.

The Court of Appeals and the State appear to believe that this egregiously flawed system can be justified by the State's invocation of the phrase "local control." Local control, however, is not a magic incantation that can excuse the State's disregard of its constitutional duty. The concept is nowhere to be found, either in the Constitution or in the reality of our system of schools. It is unabashedly disingenuous of the State to assert that it "places part of the responsibility for funding school systems upon the local community, *which is then empowered to make all of the significant decisions regarding the management of its schools*." States' Memorandum in Opposition to Jurisdiction at 10 (emphasis added). The State has promulgated and authorized statutes and regulations of encyclopedic dimensions that together have virtually eliminated the possibility that local school districts can exercise any meaningful degree of discretion.[135] While at one time

local districts may accurately have been characterized as exercising local control over education, today local control no longer exists. Indeed, as the sufficiency of funding for education has decreased, state mandates regarding education have increased.[136] (Findings at 455) The net result is an erosion of local ability to make choices regarding curricula, staffing, facilities, services, equipment, and other fundamental educational issues.[137] In 1993, twenty-five school districts were subject to State receivership; these districts were prohibited by the State from making *any* expenditure of funds without the prior approval of the Superintendent of Public Instruction. (Findings at 147-148) R.C. Sections 3313.488, 3313.4810.Today, Ohio's largest school district, Cleveland, is directly managed and controlled by the State. Clearly, the local control alleged by the State is a sham.

The unfortunate truth is that the State's system utterly fails to advance local control. Rather than empowering districts to choose programs and services to implement, the funding system devised by the State limits the discretion of Plaintiffs and other Boards of Education to the choice of what to cut.[139] The Trial Court was moved to comment on the plight of the Plaintiff Districts:

> Plaintiff Northern Local School District has primarily engaged in 'crisis management' during the 1990's and has been forced to forego building repairs, textbook renewal, advanced placement options and full handicapped access. (Pl. Exh. 129) Plaintiff Lima City Schools has spent over $10 million dollars since 1980 to comply with unfunded state mandates and has been unable to purchase necessary educational equipment and supplies, expand elementary guidance services or offer all-day everyday kindergarten. (Pl. Exh. 284) Plaintiff DawsonBryant School District has been unable to implement advanced placement courses, allday everyday kindergarten, textbook replacement and full handicapped access to its building. (Pl. Exh. 276) Plaintiff Southern Local School District is simply reacting to state mandated regulations and deciding what programs and services to cut. They further have been unable to implement any textbook replacement schedule, advanced placement courses or cultural enrichment programs for their students. (Pl. Exh. 89) Plaintiff Youngstown City School District no longer makes proactive decisions about what programs to add and policies to implement based upon the best interest of the students. Instead, due to such mandated programs as EMIS, model curricula and proficiency testing the boards' decisions mainly regard the cutting of programs. (Taylor Depo. 150151; Goff Depo. 116, Kolitsos Depo. 76).

(Findings at 469-470) Plaintiff districts cannot "develop programs to meet perceived local needs," as *Walter* envisioned, and the Trial Court correctly concluded that in Ohio local control of education is a "cruel illusion." (Findings at 469-470) *Bd. of Edn. v. Walter,* 58 Ohio St.2d at 380, 390 N.E.2d at 821; *Dupree v. Alma School Dist. No. 30* (Ark.1983), 279 Ark. 340, 346, 651 S.W.2d 90, 93.

The bottom line is that local control is not advanced by a policy of underfunding the educational needs of poor school districts. Although the Court of Appeals appears to

understand *Walter to have defined local control as consisting of nothing more than the ability of local taxpayers to approve or disapprove school district tax levies ("It is this local control that creates the disparity throughout Ohio's school districts" (Opinion at 8))* *Walter* in fact recognized that the true hallmark of local control is the ability to establish *educational policy* at the local level.[140] Moreover, as the Trial Court noted with respect to the ability of poor districts to raise revenue:

> Due to the Plaintiff school districts being some of the poorestin the State this is not a viable option. The fact that school districts have the "ability" to determine how dollars are spent in some circumstances is a hollow argument when there are not sufficient funds to provide for the educational and facility needs of their particular school district. It should further be noted that some of the Plaintiffs in this action are minors. The State has an obligation to provide them with a thorough and efficient education. The vast majority of students in this State who have not reached the voting age are completely disenfranchised and have no ability to raise additional funds nor decide how to expend funds received by their school districts. *** As the Plaintiffs have argued in this case local control without discretionary funds is a myth and does not justify the vast disparities in educational funding and educational opportunity throughout this State.

Findings at 469-70.[141]

The funding system in place today bears no resemblance to that reviewed in *Walter*. The "'healthy competition for educational excellence'" envisioned by *Walter* as a concomitant of local control has been precluded by the State's unequal allocation of educational resources and by its progressive impoverishment of Ohio's school districts. See *Bd. of Edn. v. Walter*, 58 Ohio St.2d at 381, 390 N.E.2d at 822.[142] The simple truth is that local control has nothing to do with the funding of public education. Adequate funding of education and local control are not mutually exclusive concepts; it is entirely within the power of the State to devise a system that provides adequate funding for all pupils *and* affords local control of policy.

IV. Proposition of Law No. IV: The current system of public school funding violates limitations on deficit spending expressed in Sections 1 and 3, Article VIII, and Section 4, Article XII of the Ohio Constitution by legislatively requiring school districts to engage in borrowing on a massive scale in order to finance the provision of educational services for which the State is responsible.

As the analysis in connection with Plaintiffs' second proposition of law demonstrates, it is *the State* that is constitutionally mandated to establish *and fund* thorough and efficient common schools throughout Ohio. Although the State has chosen to perform this duty through a system of local school districts, the mere creation of these districts does not relieve the State of its constitutional duty; the State remains ultimately liable both for the quality and for the funding of its system. Additional provisions of the Constitution constrain the manner of funding by requiring that expenses of the State be paid from

current revenue rather than through the creation of debt *by or on behalf of* the State. Section 1 and 3, Article VIII Ohio Constitution; Section 4, Article XII, Ohio Constitution.[143]

Instead of raising revenue to support schools as required by the Constitution, the State has shifted its obligation to school districts and then imposed mandated borrowing programs pursuant to which districts are *required by the State* to incur staggering amounts of debt in order to maintain even minimal school operations.[20] See R.C. 133.301 and 3313.483.[144] The State's increasing dependence on these forced borrowing programs is devastating our schools. In fiscal year 1992, one hundred fifty one school districts were approved by the Superintendent of Public Instruction for spending reserve loans totaling in excess of $152 million. (Stip. Exh. 20; Findings at 142) The significance of these debts is twofold: first, it means that nearly one-fourth of the school districts in the State have been determined to be unable to pay committed expenses with available revenue, and second, it means that these districts are funding the current year's operations with next year's revenue. Also in fiscal year 1992, the Controlling Board approved emergency school assistance loans for sixty-four school districts totaling in excess of $121 million. (Stip. Exh. 24) The progressive impoverishment of our schools caused by the current funding system is causing growth in both the number of school districts forced to incur these debts and the size of the aggregate debt. (Stip. Exh. 23, 53; Findings at 145) Even more significant than the amount of the debt is the devastation of educational programs that accompanies entry into the State-mandated emergency assistance loan programs.[145]

There can be no question but that the immense debts of our schools are debts of the State: school districts are required by the State to incur them, they are approved by State agencies, and they are repaid by diverting State school foundation funds to private lenders. The loan proceeds are used to carry out the responsibility assigned to the State by the Ohio Constitution. The Trial Court correctly found this funding system violative of the state debt limitation provisions of Articles VIII and XII of the Ohio Constitution.

The State's attempt to evade responsibility for Ohio's educational debts by mischaracterizing the debts as "local" in nature cannot insulate the State from the unconstitutional system it has created. "This court must examine a transaction not only for what it purports to be, but what it actually is." *State ex rel. Ohio Funds Management Bd. v. Walker* (1990), 55 Ohio St.3d 1, 7, 561 N.E.2d 927, 932, rehearing denied, 55 Ohio St.3d 722, 564 N.E.2d 507. See also, *State ex rel. Kitchen v. Christman* (1972), 31 Ohio St.2d 64, 285 N.E.2d 362; *State ex rel. Shkurti v. Withrow* (1987), 32 Ohio St.3d 424, 513 N.E.2d 1332. In *Ohio Funds Mgt.*, the Court struck down provisions of Ohio law authorizing the State to issue tax anticipation notes despite a statutory requirement that the notes indicate on their face that "'they do not *** represent or constitute a debt or bonded indebtedness of the state within the meaning of any provision of the Ohio Constitution,'" or contain the statement that "'[t]he holders or owners of notes shall not be given the right, and have no right, to have excises or taxes levied by the state for the purpose of paying note service charges.'" *Id*. at 8, 561 N.E.2d at 933. The statutes at issue were held to be "unconstitutional in that they authorize state debt contrary to Sections 1 and 2 of Article VIII." *Id*. at 7, 561 N.E.2d at 932. The Court found it significant that the notes were to be repaid from general tax revenues of the state. Similarly, the borrowing statutes upon which the State's funding system relies purport to deny that they create state

debt, but at the same time these statutes require that emergency school assistance loans be repaid "only from and to the extent of money appropriated by the general assembly." R.C. 3313.483(E)(3).[146]

The Court of Appeals held that the Trial Court's consideration of Article VIII was improper because that article was not specifically pleaded in the complaint.[147] As this Court clearly has stated, however,

> Civ.R. 8(A) requires only that a pleading contain a short and plain statement of the circumstances entitling the party to relief. A party is not required to plead the legal theory of recovery or the consequences which naturally flow by operation of law from the legal relationship of the parties.

Illinois Controls, Inc. v. Langham (1994), 70 Ohio St.3d 512, paragraph six of the syllabus, 639 N.E.2d 771, 774 . The school loan programs, as integral components of the larger school funding system, always have been central to the claims litigated in this suit and have been clearly disclosed from the outset.[148] Accordingly, Plaintiffs are entitled to prevail on any legal theory supportive of their claims.

In understanding the relationship between Articles VIII and XII, this Court's description, with approval, of *State v. Medbery* (1857), 7 Ohio St. 522, in *Ohio Funds Mgt. Bd.*, is instructive:

> [T]he court, in an opinion by Judge Swan, held that present obligations to pay money at a future time, without revenue and appropriations provided therefor, are debts of the state in contravention of Sections 1 and 3 of Article VIII of the Ohio Constitution.
>
> In reaching this conclusion, Judge Swan analyzed Section 4 Article XII of the Ohio Constitution, which provides for raising sufficient revenue to defray the expenses of the state for each year[.]***According to Judge Swan, the General Assembly is free in its discretion to expend funds as it deems appropriate; however, the Constitution requires that the General Assembly also provide revenue to pay all expenses and claims within the biennium.

Ohio Funds Mgt. Bd.(1990), 55 Ohio St.3d 1, 5, 561 N.E.2d 927, 930-931 (citing State v. Medbury, 7 Ohio St. at 540)[149]

The school borrowing statutes are nothing more than state debt legislatively shifted to state instrumentalities in order to carry out a state function mandated by the Ohio Constitution.[150] Significantly, of the hundreds of millions of dollars in school debt incurred by reason of State mandated borrowing, not one cent ever has been the subject of popular vote. No school district elector has ever been given the opportunity to pass on the question of whether any of these debts should be incurred. Appellate Judge Gwin, in dissent, correctly concluded that "the state has impermissibly shifted the burden of funding basic education from the state level to the local level." (Opinion at 11) The Trial Court correctly held that the statutes that authorize and require loans for the purpose of

funding the State's system violate the prohibition of state debt contained in Sections 1 and 3, Article VIII, and Section 4, Article XII of the Ohio Constitution. (Findings at 458-459)

V. Proposition of Law No. V: When the State deprives economically and politically unempowered children of their constitutional entitlement to a thorough, efficient and equitable public education, it is appropriate and necessary that (1) the judiciary retain continuing jurisdiction to ensure implementation of a constitutional system of public education; and (2) Plaintiff-Appellants be awarded attorney fees to compensate them for the costs of bringing suit to compel the State to do that which the Ohio Constitution commands.

A. It is the role of the judiciary to declare the unconstitutionality of the current system of public school funding; it is then the obligation of the legislature to devise a system that comports with the mandates of the Ohio Constitution.

It is well established that the judiciary is the final arbiter of the Ohio Constitution and that judicial review of legislation is a necessary component of our system of government. *Bd. of Edn. v. Walter,* 58 Ohio St.2d at 383, 390 N.E.2d at 823. The Trial Court's order requiring the State to comply with its constitutional duty to secure a thorough and efficient system of common schools is fully consistent with our most basic principles of law, including those related to separation of powers.[151] "If the members of a legislative body can ignore, with impunity, the mandates of a constitution or a city charter, then it is certain that the faith of the people in constitutional government will be undermined and eventually eroded completely." *City of Cleveland ex rel. Neelon v. Locher* (1971), 25 Ohio St.2d 49, 52, 266 N.E.2d 831, 834.

In contrast to the Trial Court's proper affirmation of the role of the judiciary, the Court of Appeals in effect chose to renounce its obligation to review the challenged school funding system: "It would appear the issue for the General Assembly to decide is whether insufficient funds exist or whether the existing funds are inefficiently used in the operation of the schools." Opinion at 9. The Court of Appeals' deference to the legislature on the essential claims of this suit constituted an abdication of the judiciary's duty and authority.

Nearly a century ago, referring to a case then already a century old (*Marbury v. Madison* (1803), 5 U.S. (1 Cranch) 137, 2 L.Ed. 60), this Court issued the following exhortation:

> The struggle for legislative supremacy over constitutional limitations should have ended a century ago. Formerly, there was openly asserted a doctrine *** [t]hat constitutional limitations upon the exercise of legislative power are but admonitions to the legislative department, without efficacy to annul enactments inconsistent with them. In 1803 that doctrine was completely overthrown by an authority which no one has challenged from that day to this, and upon reasoning so conclusive that it has evoked the universal approval and admiration of generations of students of constitutional law.

City of Cincinnati v. Trustees of Cincinnati Hospital (1902), 66 Ohio St. 440, 450, 64 N.E. 420, 423. This Court eloquently inveighed against the sort of deference to the legislature exemplified by the opinion of the Court of Appeals in the instant case.

> Those who are charged with the exercise of judicial power in a constitutional government cannot too often advert to Marbury v. Madison[.]*** [W]ith respect to the adjudication of questions of this character, that which is sometimes urged and regarded as mere compromise or concession is in fact a dereliction of duty. Since the soundness of that doctrine is universally admitted, its effect should not be evaded.

Id. at 452-3, 64 N.E. at 424. The consequences of the instant case are great, the political attention engendered is substantial, and the appeal of "compromise or concession" is apparent. Far from justifying deference to the political process, however, these are the very reasons why it is imperative that the judiciary intervene to protect the constitutional entitlements of those who are without a voice in that process: the unenfranchised children of Ohio.[152]

Significantly, the Trial Court did not dictate a remedy; it declared solely that the State was not in compliance with the Constitution and ordered the State to comply. The Trial Court's order thus was consistent with the scope of judicial review recognized as proper by this Court:

> Where a constitution or city charter imposes a mandatory duty upon a legislative body to enact legislation to give life to a particular provision of such constitution or charter, a court may compel the legislative body to act, but it can not direct the course of action.

City of Cleveland ex rel. Neelon v. Locher (1971), 25 Ohio St.2d 49, paragraph one of the syllabus, 266 N.E.2d 831,832.[153] The State has a constitutional duty that it no longer can be permitted to neglect--a duty to provide the children of Ohio with an education that will enable them, and all of Ohio, to move productively into the next millennium.

B. Continuing judicial oversight is appropriate in order to facilitate the timely creation and implementation of a constitutional system for funding public education in Ohio

Recognizing that it is not the role of the judiciary to devise a constitutionally adequate and equitable funding system, the Trial Court properly left the design of such a system to the State, temporarily retaining jurisdiction so as to facilitate a timely and effective reform process. The Court's order was both proper and consistent with long-established precedent.

> Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. *** While giving weight to these public and private considerations, the courts will require that the defendants make a prompt and reasonable start toward full compliance. *** They also will consider

> the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system. During this period of transition, the courts will retain jurisdiction of these cases.

Brown v. Board of Education (1955), 349 U.S. 294, 300-301, 74 S.Ct. 693, 756-757, 99 L.Ed. 884, 1106. [154]

Absent continuing judicial oversight, there exists a real possibility that corrective legislative action will never occur. The General Assembly has studied and perpetuated the current inequities for fifteen years. Legislative reluctance to change is the most basic reason why ongoing judicial review is essential.

Three considerations underscore the need for continued jurisdiction. First, it is well-established that a constitutional entitlement cannot be abridged for reasons of cost. "Inadequate resources can never be an adequate justification for the state's depriving any person of his constitutional rights." *Bradley v. Milliken* (1976), 540 F.2d 229, 245, affirmed (1977) *Milliken v. Bradley*, 433 U.S. 267, 97 S.Ct. 2749, 53 L.Ed.2d 745. "'Politically motivated pleas of public poverty cannot be used to brush aside the fundamental duties of government to the maintenance of civilization.'" *Shaw v. Allen* (S.D. W.V. 1990), 771 F.Supp. 760, 763 (quoting *Moore v. Starcher* (1981), 167 W.Va. 848, 852, 280 S.E.2d 693, 696). Second, until the State complies with the constitutional requirement that it establish a thorough and efficient system of public schools, there is no way to put a price tag on that system, especially in view of the State's assertion that educational resources currently are inefficiently managed. Certainly, the current system, with its run-away debt, cannot be in the long-term interests of this state. Finally, it is essential to understand that ultimately the cost to the taxpayers of Ohio--both in terms of squandered human potential as well as in actual dollars--is dramatically increased by the State's decision to undereducate so many of our students.[156] When the State withholds the dollars needed to educate a child, the State does not solely doom that child, but it also commits the people of this state to greater future expenses for relief of all of the ills associated with educational neglect: a deficient work force, growing reliance on welfare, increased crime rates, and the need for remediation in the workplace and at the college level. Apparently and inexplicably, the State has answered in the negative the question asked by the Commissioners of Ohio's Common Schools earlier in this century: "What man among us would not sooner pay tax for the purpose of educating the poor, in the ways of knowledge and virtue, than, in the penitentiary, be preparing them for doing more and more mischief to society." (Findings at 29) Simply put, education is a good investment.

The needs of Ohio's students are urgent. The legislature has had ample time to remedy the problems described in this brief but has failed, choosing instead to study them time and time again. (See, *e.g.*, Supp. 538-590) The time has come to move ahead. As a State, we cannot afford to lose another day, lest we lose another generation through educational neglect. Continuing jurisdiction will facilitate the State's ability to establish a system that provides the education mandated by the Ohio Constitution.[157]

C. Having declared that the State wrongfully violated multiple provisions of the Ohio Constitution, as a consequence of which

countless students throughout the state have been deprived of their constitutional right to an adequate and equitable education, the Trial Court properly awarded attorney fees and such award did not represent an abuse of diiscretion.

Attorney fees are awardable in declaratory judgment actions pursuant to R.C. Chap. 2721. "[T]he only limitation placed on the trial court is that the relief must be 'necessary or proper.'" *Motorists Mut. Ins. Co. v. Brandenburg* (1995), 72 Ohio St.3d 157,160, 648 N.E.2d 488, 490. "The trial court's determination to grant or deny a request for fees will not be disturbed, absent an abuse of discretion." *Id*.

In an attempt to extricate itself from the plain meaning of *Brandenburg*, the State simply denies that it is subject to the law applied in that case. Without citation to any authority, the State argues that R.C. 2335.39 (concerning cases in which the State has initiated the matter in controversy) and R.C. 2743.19 (concerning cases brought in the Court of Claims) are the exclusive statutory sections authorizing an award of attorney fees against the State. The State's contention is patently without merit.[158]

It is indisputable that the State is subject to all of the provisions of Chapter 2721, governing declaratory judgments, including those provisions authorizing an award of attorney fees.[159] See, *Racing Guild of Ohio v. Ohio State Racing Commission* (1986), 28 Ohio St.3d 317, 503 N.E. 2d 1025. The State's assertion to the contrary is irreconcilable not only with the plain meaning of Chapter 2721 but also with the decision of this Court in *Ohio State Chiropractic Assn. v. Ohio Bur. of Workers' Comp.* (1995), 72 Ohio St.3d 485, 650 N.E.2d 1359. In that case--involving a state defendant--this Court reversed a judgment of the court of appeals affirming a trial court's denial of the plaintiff's request for attorney fees. Implicitly finding that both the trial court and the court of appeals had construed the authority to award attorney fees too narrowly, this Court remanded the cause to the trial court with the direction that it apply *Brandenburg*. *Brandenburg* had described the trial court's broad discretion to award attorney fees in declaratory judgment actions as follows:

> Nowhere in R.C. Chapter 2721 is there any provision which narrows the broad authority conferred by R.C. 2721.09. Moreover, R.C. 2721.09 does not place any legal significance on the insurer's conduct nor is the operation of the section conditioned on which party actually prevails in the underlying action. Rather, the only limitation placed on the trial court is that the relief must be "necessary or proper."

Motorists Mut. Ins. Co. v. Brandenburg, 72 Ohio St.3d at 160, 648 N.E.2d at 490.[160]

In the instant case, the State has admitted that many of the children it is constitutionally charged with educating receive inadequate and outdated education in facilities that expose them to risks that range from asbestos to collapsing buildings. **(**See, generally, Hunter Depo. at 76-89, 191; Buroker Tr. at 2877-78; Franklin Depo. at 129-32; Johnson Tr. at 1400-02; Findings at 148-200) At the same time, the State's system provides a state-of-the-art education to other children who have the good fortune to live in wealthier communities. The State persists in maintaining this system, at the same time acknowledging the system's immorality.[161] What this Court has stated elsewhere in connection with a request for attorney fees is equally true here: "[W]e view their reasons

as contrived attempts to justify an untenable position." *State ex rel. Fairfield Leader v. Ricketts* (1990), 56 Ohio St.3d 97, 104, 564 N.E.2d 486, 493. The State's steadfast refusal to respond to the educational needs of all of Ohio's children, as it constitutionally is required to do, impelled Plaintiffs to commence this litigation. The outcome sought by Plaintiffs, as this Court recognized in *Miller v. Korns*, will enrich *all* of the citizens of this state. *Miller v. Korns* (1923), 107 Ohio St. 287, 140 N.E. 773. In these circumstances, the Trial Court's award of attorney fees cannot be characterized as an abuse of discretion and clearly was necessary and proper.[162]

CONCLUSION

The massive inadequacies and inequities inherent in the system by which Ohio funds the provision of public elementary and secondary education are readily acknowledged by the State, which seeks to avoid responsibility for its monumental failures by invoking *Walter, a case that fundamentally is inapposite. The consequences of today's failed system are far reaching, diminishing for all Ohioans the eminence of our society, and the role Ohio plays in our country and in our world. There can be no doubt that every* Ohioan pays the price for the State's refusal to fulfill its constitutional obligations. Our communities are increasingly polarized, and even those who possess the wealth and have received the benefits of a quality education are impoverished by the ignorance, violence, and poverty that too often plague those who have been denied educational opportunity.

The State is charged with protecting the public weal and specifically is assigned by the Ohio Constitution the responsibility of providing to *all* of Ohio's children the educational opportunities that will enable these children to become full economic, political and social participants in our communities. Sadly, and in direct contravention of the express language of our Constitution, the State denies that it can be held to *any* degree of accountability. Thus, while acknowledging the disastrous conditions in many of the schools under their authority, our state officers disclaim all responsibility. While limiting the ability of districts to raise local funds and requiring them to incur staggering debts that never can be repaid, our state officers shrug their collective shoulders. To whom, then, are the children of Ohio to turn for the provision of their constitutionally established right to education? They must look to this Court. For all of our sakes, this Court must not fail them. *Our children have no other recourse.*

Respectfully submitted,

_____

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CERTIFICATE OF SERVICE

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Footnotes

1. Sections 2 and 3 of Article VI and Section 7 of Article I establish the duty of the State to provide for a thorough and efficient system of public education; Section 4 of Article XII and Sections 1 and 3 of Article VII also require the State to fund that system and Sections 2 and 7 of Article I and Section 26 of Article II establish the Plaintiffs' rights to relief based on the State's failure to fulfill its constitutional obligation.

2. Section 2, Article VI of the Ohio Constitution (emphasis added).

3. The Trial Court's "Findings of Fact, Conclusions of Law, Memorandum and Order" is included in volume I of the Appendix to Appellants' Brief (referenced hereafter as "Findings"). The State does not dispute the Findings of Fact issued by the Trial Court and cited herein. In fact, the State has admitted time and again that the current funding system is obsolete and in need of reform. (Tr. 348-349; Findings at 27).

The Supplement is organized in the same sequence as the Findings and uses the same major headings as the Findings. In this Statement of Facts, Plaintiffs can only begin to summarize the extensive facts supporting their claims. The Supplement (cited as "Supp."), however, contains overwhelming evidence of Plaintiffs' rights to relief, and Plaintiffs urge the Court to refer to the Supplement and/or the record.

Plaintiff-Appellants are referred to as "Plaintiffs", and the Defendant-Appellees State Board of Education, Ohio Department of Education (ODE), the Superintendent of Public Instruction, and the State are referred to in their individual capacities or collectively as the "State," where appropriate.

4. Section 5 of Article XII of the Ohio Constitution prohibits taxation except as permitted by state law. All school district tax revenues are levied pursuant to state law and thus are "state" revenues.

5. The operation of the school foundation program is described in Pl. Exh. 399; Supp. 312-327. Local school district property taxes are levied in mills per dollar of taxable property valuation; thus, the greater the value of taxable property within a school district, the greater the amount of revenue per mill of tax. References herein to "rich" school districts refer to those having relatively greater valuation of taxable property per pupil than their "poor" counterparts. A more detailed description of the operation of the school funding system is found in the Plaintiff-Appellees' Brief to the Court of Appeals at pages 6-27 as well as the Supplement at tab V and Pl. Exh. 344.

6. Thus, for FY91 alone, a classroom of 25 students at Beachwood would have $205,100 more than a classroom of 25 students at Northern Local. With this level of disparity, a child residing in the Beachwood Schools would receive 13 years of public education at an approximate cost of $148,317, while a child residing in the Plaintiff Northern Local Schools would receive 12.5 years of public education at an approximate cost of $40,063. (Beachwood provides all-day kindergarten (Tr. 2503; Findings at 435), but Northern provides only every other day kindergarten (Tr. 1471; Findings at 376).)

7. (Pl. Exh. 3; Stip. Exh. 4; Pl. Exh. 270) The two districts have about the same number of pupils.

8. A tax levy in excess of ten mills has very little chance of passing, except in dire circumstances. (Findings at 62)

9. More than 275 school districts would need to levy over 10 mills, nearly 100 districts would need to levy over 20 mills, and Plaintiff Dawson-Bryant Local Schools would need to levy 33.65 mills just to bring per pupil expenditures up to the state average. (Pl. Exh. 381)

10. Specifically, in 1980, the bottom 200 school districts--ranked by income of residents--had more non-residential (business) property value than did the top 200 school districts, but by 1990, the location of business property shifted and the wealthy 200 districts had more business property. (Tr. 1073; Pl. Exh. 100; Supp. 369, 389)

11. As explained by Dr. Tod Porter, an economist at Youngstown State University, the decade saw a shift in the types of commercial value away from heavy industry and toward commercial value such as shopping malls which tend to be located in areas proximate to high income residents. (Tr. 1070-73; Supp. 367-369)

12. The equal yield system was challenged in Bd. of Edn. v. Walter (1979), 58 Ohio St.2d. 368, 390 N.E.2d 813.

13. Former Senator Oliver Ocasek, one of the drafters of the equal yield formula, testified that the 1976 legislation was intended not only to provide a greater degree of equity in school funding but also to reduce the instability that results from the biennial budget process. The potential benefits of the equal yield system were never realized. (Tr. 2822-23; Findings at 34)

14. Though initially effective on October 11, 1976, H.B. 920 has been amended numerous times since its initial passage. Significant here is the addition of a twenty mill "floor" of tax reductions in 1977 and the change from one to two classes of property for tax reduction purposes in 1981. At the time of trial, more than 200 of Ohio's 611 school districts had reached the 20 mill floor of tax reductions with respect to one or both classes of real property. (Findings at 83) Many of the school districts levying local school taxes at the

20 mill floor are among the more wealthy school districts in Ohio. For FY90 alone, the amount of reduction in taxes that would have been levied is $1.176 billion. (Tr. 81; Findings at 55) In FY92, Ohio school districts lost a total of $1.472 billion due to the application of tax reduction factors. (Tr. 321; Findings at 56)

15. An in-depth analysis of the operation of H.B. 920 as communicated from then State Superintendent Sanders to Governor Voinovich is included at Supp. 446. The interaction of tax rate reductions resulting from H.B. 920 and the operation of the school foundation formula produce results that defy logic. One example, characterized as "phantom revenue" is a situation in which a school district receives an increase in the valuation of its taxable real property, realizes little or no increase in "local" revenues from the increase, and yet, experiences a loss in school foundation payments. (Tr. 98-99; Findings at 44, 58) Similarly, the operation of the "20 mill floor" of reductions operates to benefit some school districts (primarily wealthy districts) by permitting those school districts that have reached the "floor" of reductions to benefit from inflationary growth in the value of taxable real property, while those that are not at the "floor" receive no growth in revenue and may, as noted above, actually lose revenue as the result of growth in value. (Id.; Tr. 75-76; Findings at 58) These inexplicable results of the operation of the State's funding system caused the Trial Court to observe, "The combination of the 20 mill floor and the effects of the 'phantom revenue' result in an arbitrary distribution of the State's wealth and does not serve a 'legitimate state interest.'" (Findings at 475)

16. Dr. Howard Fleeter, a professor at The Ohio State University, was commissioned by the Governor's Education Management Council to study Ohio's system of school funding. His extensive report is Pl. Exh. 344, Supp. 498-520.

17. (Russell Depo. at 90; Tavakolian Depo. at 142; Tr. 1725-26, 4161, 4525-26)

18. Final Report of the Joint Select Committee to study Ohio's school foundation program and the distribution of state funds to school districts, Jan. 1991(emphasis added). (Pl. Exh. 182, p. 6; Supp. 567)

19. (Tr. 4525-26; Findings at 27)

20. Defendant State Superintendent of Public Instruction, following the release of the FY94 and FY95 budget from the legislature, wrote: "We were not able to secure a level of funding sufficient to cover even the ongoing cost of current operations for all of our school districts." (Pl. Exh. 31)

21. This fact is labeled as a "weakness" in the funding system by the Defendant State Board of Education. The other 5 weaknesses in the funding system admitted by the State Board include:

> Weakness 2--Categorical program allocations are not equalized. Districts get the same allocation for the same number of units regardless of local property wealth. The rationale is that if we equalize basic aid, why shouldn't we equalize categorical aid also. [Discussed below.] Weakness 3--The guarantees diminish the equalization effects of the formula by giving more basic aid to districts than they would get with the formula calculation. [Note: The guarantee has primarily benefited the high wealth districts. (Payton Depo. 156; Russell Depo. 118) In FY92, 360 of the state's 611 school districts received funding based on a guarantee provision rather than the State's formula, showing that the formula is not working. (Stip. Exh. 13; Supp. 87)] Weakness 4--Present charge-off does not accurately measure the ability of districts to pay the local share of the basic program.
> Weakness 5--Only small effort is given to the funding of capital improvements from the state level. B. Weakness in Local Property Tax Law
> Weakness 1--Application of tax reduction factors pursuant to Section 319.301 of the Ohio Revised Code, limits growth in local property tax revenues to inside millage, new construction, and increased value of tangible personal property. This forces many school districts to have to

repeatedly go to the voters to approve levies to keep pace with inflation. [Discussed above.] (Pl. Exh. 140, p.19; Supp. 301)

22. Dr. Howard Fleeter stated "increases in state assistance and changes in state distribution formulas have not kept pace with increases in property wealth inequities across the districts of most states. Ohio's recent history is a good example of this phenomenon." (Pl. Exh. 344, p. 11; Supp. 502)

23. (Russell Depo. 52; Tavakolian Depo. 50; Tr. 138, 4174-75; Pl. Exh. 182, p. 6; Findings at 36)

24. Medicaid grew at about the same rate. (Tr. 4377; Findings at 35) Medicaid has grown from 19% of the state's budget to nearly 33% of the state's budget in the last 12 years. (Tr. 4377)

25. (Tr. 4392-96; Supp. 4392) The foundation formula's basic aid increased only 1.9% (from $2817 to $2871) from FY93 to FY94. (Stip. Exh. 11)

26. (Schiraldi Depo. 65-66; Findings at 284) These requirements included such things as quality of lighting, facilities for science with adequate and safe chemical storage, numbers of books in libraries based on enrollment, and dates of textbooks and encyclopedias. Textbooks with copyright dates of over 5 years required attention. (See Pl. Exh. 411 (elementary standards); Pl. Exh. 410 (junior high standards); and Pl. Exh. 409 (high school standards)). These standards were in effect at the time of Walter.

27. (Tr. 288-90; Findings at 289; Supp. 289-92) Both Superintendent Sanders and the State Board of Education have declared that the 1983 minimum standards and evaluation process are "antiquated." Dr. Sanders wrote to Governor Voinovich: "You know from our earlier conversations that I share your concerns about the potential 'fall out' from large numbers of the Class of 1994 not passing the ninth grade proficiency test. This was one reason I chose to abandon the antiquated school evaluation process and deploy staff to assist districts with large numbers of students failing the proficiency tests. You should know that we are showing improvements, but they are not coming fast enough to avoid a crisis in 1994." (Emphasis added.) (Pl. Exh. 29)

28. In 1987, Ohio Law required development of proficiency tests for the 9th and 12th grades. The statutory purpose of the 9th grade proficiency test is to ensure "that students who receive a high school diploma demonstrate at least ninth grade levels of literacy and basic competency in reading, writing, mathematics, science and citizenship." R.C. 3301.0710 (emphasis added). Effective for the 1993-94 school year, a student who passed all curricula requirements but not the 9th grade proficiency test would not receive a diploma. (Stip. 111) At time of trial (October 1993), approximately 17,000 Ohio high school seniors had not yet passed all four parts of the 9th grade proficiency test (the science part had not yet been added) after at least six opportunities to take the test. (Tr. 394-95; Findings at 300) The rate of high school drop outs was expected to increase as students continued to fail the 9th grade proficiency test. (Findings at 300) Not only do pupils in poor school districts tend to do poorly on the 9th grade proficiency test, they lag behind in other measures such as graduation rates, increased drop out rates, and participation in higher education. (Findings at 310-320)

29. Dr. Sanders' news release stated: "'We can no longer allow a situation where schools can meet all of the state's minimum standards but have students failing to meet academic requirements that society expects,' said Sanders. 'This is a turning point for education in Ohio.' 'Rather than focus on whether schools are meeting the state's minimum standards, we will turn our attention to establishing standards that determine what students should know and be able to do upon graduation,' Sanders added." (Pl. Exh. 24; Supp. 1156, Tab X. Minimum Standards))

30. Plaintiff school districts were last reviewed for "compliance" with the 1983 minimum standards prior to December 1988 for Northern Local, February 1989 for Lima City, June 1989 for Southern Local, February 1990 for Youngstown City, and June 1991 for Dawson-Bryant. Though advised of "compliance" as of each of those dates, the actual reviews occurred much earlier. Thus, children in the Plaintiff school districts have

progressed through substantial portions of their public school careers without the benefit of even a cursory review for minimum standards compliance. (Stip. 99; Findings at 290)

31. A 1993 statewide technology study, commissioned by the General Assembly, concluded that poor school districts have less access to virtually all aspects of technology than the more wealthy. (Findings at 271-272; Pl. Exh. 34) Not only do the Plaintiffs and other poor school districts have less technology to begin with, what they do have is often obsolete. The stark contrast in access to technology between Ohio's poor and rich school districts demonstrates the extent of deprivation that flows directly from the State's flawed funding system. While pupils in wealthy school districts use state of the art computers to access worldwide information services, pupils in the Plaintiff school districts are limited to antiquated computers, disk drives corrupted by the coal dust in the air, lack of replacement parts, no funds for repairs and one box of paper per year. (Tr. at 753-56; Jackson Depo. at 22; Findings at 275, 277 and 278) At the same time, the State acknowledges that the newly-mandated model math curricula will require access to more technology than is presently available. When queried about what school districts are expected to do if no funds are available to provide that technology it tells them: "Whatever technology is needed to implement the approved program must become a priority." (Pl. Exh. 55, p. 2; Supp. IX, Tab J)

32. (Findings at 290-297) Examples of the Plaintiff Dawson-Bryant School District's lack of compliance with the 1983 minimum standards include: intervention is not provided according to pupil needs; Ohio Studies is not offered to students; art instruction is not provided for 7th or 8th grade students; required science laboratory courses are not provided for students at the high school level; two staff members do not have certification for the subject area they are teaching; there is no professional library for staff; instructional materials and equipment are not current; some examples of out-of-date textbooks include: World Geography, 1980, World History, 1980; Economics, 1978; libraries are not available throughout the school day; in FY93, the district did not spend one-half of one percent of its budget on libraries; no library purchases were budgeted in FY94; district libraries do not have facilities to accommodate the enrollment and education goals of the school; none of the buildings meet the requirement that school buildings have first-aid facilities and space for placement or isolation of ill students; school guidance services are not provided for pupils in K-12 grade in accordance with the boards' written guidance plan; and physical education programs cannot be provided at the elementary levels because the district does not have the facilities. (Tr. 2376, 2400-2420; see also Supp. 1198-1217)

33. At the time the State enacted Revised Code Chapter 3323 (Special Education) the federal government was authorized to provide 40% of the funds for the education of handicapped pupils, but in FY89 federal funding was at 5%. (Pl. Exh. 235; Findings at 323) Since 1976, the burden of funding special education programs and services has been increasingly cast upon the State which has, in turn, required the school districts to make up the difference between the actual cost of the program and the combined State and dwindling federal funds provided.

34. Examples include pre-school services for handicapped pupils ages 3-5 (required as of July 1991), extended school year services, residential placements, assistive technology, transition services, and the addition of new types of handicapping conditions. (Findings at 330-333)

35. The Trial Court described the operation of the State's unit funding system. (Findings at 324-28) Although the State Board of Education has recommended equalization of unit funding, the method of calculation is the same for all districts regardless of district wealth. (Tr. 5565; Stip. 58) The unit funding formula includes teacher compensation based on the state minimum teacher's salary schedule, which the Legislature has not increased since July 1991. (R.C. 3307.53; Tr. 5564; Findings at 324)

36. Many handicapped children who were served in MRDD programs have moved into public school programs. Most of these children are multi-handicapped, have severe needs, and are more costly. (Herner Depo. 98-99; Tr. 5530; Findings at 327) If a child's needs are so severe that residential placement is required, no state funding is available. (Herner Depo. 130; Findings at 332) Plaintiff Dawson-Bryant Schools was billed over $15,000 for one student in FY90. (Pl. Exh. 258; Findings at 343)

37. Although the state provides basic aid, those funds do not begin to cover the cost of regular education, much less special education. Plaintiff Youngstown has been required to hire 55 educational assistants with no direct state reimbursement at a cost of $1 million per year and to purchase equipment such as computers, visual techs for visually impaired students at $3,000 each and touch talkers at $5,000 each. (McGee Depo. 34; 59-60; Findings at 359-60) Plaintiff Northern Local incurs excess costs of over $20,000 per year for two hearing impaired students and spent $20,000 defending a special education due process hearing. (Tr. 1462-64; Findings at 351)

38. Stip. Exh. 36 describes the widening gap between funds requested and those appropriated, which for FY93 was over $30 million.

39. (Tr. 2433-35; McGee Depo. 43-47; 93-94; K. Blankenship Depo. 12-20; Findings at 342-63)

40. The extent of educational need increases with the concentration of poverty. Above the 20 percent poverty rate, educational needs increase on a non-linear basis--that is, at a faster rate than additional increases in the poverty level. (Tr. 357-8; Findings at 384)

41. The school foundation program measures poverty in numbers of ADC pupils. R.C. § 3317.023.

42. (Stip. Exh. 2) In FY93, 9 of 19 elementary buildings in Plaintiff Youngstown City Schools had 90% of students eligible for free and reduced-price lunches. (Tr. 3212-15; Findings at 386)

43. Because of the conditions of poverty, inner city schools incur burdensome expenses that suburban schools do not. Plaintiff Youngstown Schools must expend funds for security systems in every school building because of equipment lost to theft, for weapons search machines, and for security patrol for schools. (Tr. 3271-74; Findings at 391) Similarly, rural school districts embrace additional costs because of poverty and must also spend increasing amounts to transport students to school. From 1973 to 1991 the percentage of transportation costs reimbursed by the State decreased from 62.75 percent to 36.91 percent. (Supp. 1446; Findings at 393-94) These sums would otherwise be spent on educational programs.

44. In Youngstown, for example, some children are in four different schools in one year and in some cases every child in a classroom changes completely--starting out with 25 pupils, and at the end of the year having 25 different pupils. (Tr. 3239; Supp. 1426) Problems such as high student mobility rates require additional guidance services and small class sizes to enhance self-esteem and to create and maintain a positive attitude toward learning. (Tr. 3227)

45. This incidence of student pregnancy has moved into grade levels as low as 6th grade in the Plaintiff Youngstown Schools. (Tr. 3246) As Dr. Carol Marino testified, "it is important for [teenage males] to go around and brag about the number of babies that they have produced. There should be significant work done with those young men *** but we don't have the money to do it." (Tr. 3275; Supp. 1435)

46. One Youngstown school playground "[d]oubles as a parking lot for staff and a shooting gallery for the neighborhood." (Hiscox Depo. at 132; Findings at 195) Because of a shooting, fights, and a student who was killed, and because the stadiums are in ill-repair, Plaintiff Youngstown City Schools' high school football games are played at Youngstown State University during daylight. (Tr. 3305; Supp. 1436)

<47. Many of the students of Youngstown City Schools come from single-parent families. There is much mobility of students throughout the district, and many students live in low-income housing or federal housing projects. The projects are very dangerous places to live. There is much drug trafficking, weapons, and killing in the projects, and anyone who can get out does. (Tr. 3212-15; Findings at 390)

48. Currently, only about 20% go on to four-year colleges and 15% to two-year colleges. The percentage of college attendance has decreased over time. (Tr. 2875; see also Supp. 1301-1312 and tab XI. Educational Outputs; Findings at 310-11)

49. (Findings at 374-77; 248-52; 290-97 and citations to record therein; Supp. 1424-1427)

50. (Tr. 2395; 440; 3218; Supp. 1423-24) Kindergarten screening at Plaintiff Dawson-Bryant Local Schools from 1989 to 1993 showed that students entering kindergarten have been less well prepared developmentally each year. (Tr. 2389-95; Pl. Exh. 271; Findings at 375)

51. (See Tr. 3248; Pl. Exh. 50) These guidelines are generally referred to as "Chapter 1" guidelines and are a part of the federal law now known as "Improving America's Schools Act," reauthorization of Elementary and Secondary Schools Act of 1964, 20 U.S.C. 6301. A student may be eligible for service in more than one subject area.

52. (Pl. Exh. 50) 92% of identified elementary student needs at Plaintiff Northern Local are not served, while that percentage is 65 for Plaintiff Lima City Schools, 74 for Plaintiff Youngstown Schools, and 81 for Plaintiffs Dawson-Bryant and Southern Local Schools. <P< name="PA53" 53. (Findings at 227-242 and citations to record therein) State-mandated model curricula include composition, mathematics, science, citizenship and reading. R.C. 3301.0716. Seven program areas will have state curricula. (Findings at 227) Model curriculum requirements are imposed at each grade level K to 12. Districts may do more but may not do less than the state models. (Tr. 1905-06; Goff Depo. 79; Findings at 229)

54. (Tr. 1960, 5096; Findings at 231-32) Yet, no specific state funds are available for implementation of State-mandated model curricula. (Tr. 1247; Findings at 232)

55. (Pl. Exh. 36, "The Ninth Grade Proficiency Test: Is It Fair and Appropriate Measure of A Statewide Standard?" Legislative Office of Education Oversight, July, 1993, p. 26)

56. 65% of Plaintiff Youngstown City Schools' pupils are minorities. (Pl. Exh. 287)

57. Ted Sanders, State Superintendent of Public Instruction, has stated that some public school students were "making do in a decayed carcass from an era long passed," and others were educated in "dirty and depressing places." He further commented that the State of Ohio is not doing enough to meet the facilities needs of public schools. (Pl. Exh. 32, p. 5)

58. The Trial Court devoted 55 pages of its Findings of Fact to the deplorable state of Plaintiffs' facilities, as well as many other school districts in Ohio, and the State's utter failure to respond to the demonstrated facilities needs of Plaintiffs and other poor schools. (Findings at 148-203)

59. (Pl. Exh. 14; Supp. 741-800; see also Supp. tab VIII. Facilities)

60. According to the State Board of Education's Building Assistance Supervisor and Supervisor of School Facilities, the 1990 Facilities Survey was very professionally accomplished, was well done, and the costs to bring school buildings up to minimum standards was very realistic. (Franklin Depo. 220, 228-229, 236-237; Hunter Depo. 65-66; Findings at 159-61) Pl. Exh. 451 is a video produced by the State Department of Education documenting the results of the 1990 Facilities Survey.

61. Appropriations by the General Assembly for loans for school construction under the Classroom Facilities Act, R.C. Chapter 3318, have decreased from $25 million for years 1990 and 1991, to $10 million in 1992. The State has approved applications for school construction for 27 school districts in which students have been determined by the State to be "improperly housed"; however, it will be at least 7 to 9 years before those districts' buildings will be constructed, assuming the General Assembly will continue to

appropriate moneys for the Classroom Facilities Act at the present rate. Although Plaintiff Northern Local has applied for building assistance funds, it is not on the approved list but rather is on a waiting list of school districts that have also sought building assistance. (Franklin Depo. 54; Tr. 1141-42; Findings at 153, 178)

62. The Facilities Study concluded that the cost of asbestos abatement in Plaintiff and other districts is $328 million, and the cost of compliance with the handicapped accessibility, but not all requirements of the ADA (42 U.S.C. § 12101 et seq.) is $153 million. (Pl. Exh. 14; Stip. 137; Franklin Depo. 203-04; Hunter Depo. 166; Findings at 161, 164)

63. Whereas the General Assembly appropriated $18 million for asbestos abatement for public schools in 1990, and $6 million in 1991, no funds have been appropriated since 1991. Similarly, whereas $3.38 million was appropriated in 1990 and 1991 for architectural barrier abatement (handicap accessibility), no further funds have been made available by the State to school districts for ADA compliance. (Franklin Depo. 171-173, 182; Hunter Depo. 53-54, 81; Stip. 139; Findings at 162, 165-166)

64. Robert Franklin, State Building Assistance Supervisor testified: "I told them, I said, the bricks are going to come down, I don't know when, though, but it's not safe. And my recommendation was to get those kids out of the school." (Franklin Depo. 131; Supp. 956)

65. (Findings at 175-183; 197-200 and citations to record therein).

66. 1990 Ohio Public School Facilities Survey (Pl. Exh. 14, p. 3; Supp. 747) 67. (Phillis Tr. 1706; Findings at 155) For example, the cost for Plaintiff Northern Local to construct an elementary facility is $14-15 million. Yet, the district is restricted by law to a maximum indebtedness of 9% of its assessed valuation, which would only generate $8 million. (Findings at 182) Pl. Exh. 3, p. 56; Supp. 807 shows the inability of the Plaintiff School Districts to remedy identified facility needs. The Trial Court described the facilities needs of Ohio's schools. (See Findings at 151-203) See also Supp. at tab VIII. Facilities and Pl. Exh. 450 (facilities video) included in Supplement.

68. The State's mandated loan fund programs were the State's response to widespread school closings for lack of funds in the late 1970s. (Tr. 1744; Findings at 127-28) These programs now serve only to create the illusion that the schoolhouse doors are open, while leaving a legacy of educational impoverishment to our children and sounding the death knell for any vestige of "local control" of education.

69. The operation of Ohio's mandated borrowing provisions was described in detail by the Trial Court. (Findings at 137-148) A detailed discussion of the different provisions requiring school districts to borrow funds is set forth in the Appellee's Brief to the Court of Appeals at 20-25.

70. (Findings at 137-138 and 143 and citations to record therein) The Trial Court described in detail the operation of the State loan statutes. (Findings at 127-473; see also Supp. 664-741)

71. Ironically, the State requires "equity funds" which are intended to provide poor school districts with increased educational opportunities to first be spent on the repayment of any outstanding emergency school assistance loans. (Tr. 5512; Findings at 139) "Equity funds" were first distributed in FY93 to the "poorest school districts" in Ohio pursuant to a formula that considers both district property valuation and income of residents. The amount of equity funds distributed in FY93 represented less than 1% of the total foundation program expenditure. (Maxwell Tr. 122-23; Findings at 77)

72. (Tr. 349, 415, 4556; Findings at 26-27) Dr. Ted Sanders, Superintendent of Public Instruction, further stated: "I'm concerned here about the disparity in spending between the high spending and low districts, as I state here. I further have stated that I believe that that translates into differing opportunities and I do think that is wrong." (Tr. 4557; Supp. 1546) The Trial Court extensively described the extent of educational deprivation in its Findings at 203-274.

73. (Goff Depo. at 141; see, also, Findings at 446-447) Dr. Goff is now Superintendent of Public Instruction.

74. According to Rule 1(B) of the Ohio Supreme Court Rules for the Reporting of Opinions: "The syllabus of a Supreme Court opinion states the controlling point or points of law decided in and necessarily arising from the facts of the specific case before the Court for adjudication." This Court has stated: "The syllabus of a decision of the Supreme Court of Ohio states the law of Ohio, but such pronouncement must be interpreted with reference to the facts upon which it is predicated and the questions presented to and considered by the Court." Williamson Heater Co. v. Radich (1934), 128 Ohio St. 124, 126, 190 N.E. 403, 404 (syllabus); accord, State v. McDermott (1995), 72 Ohio St.3d 570, 574, 651 N.E.2d 985, 988. The syllabus in Walter stated simply:

> The statutory system established by the General Assembly for the financing of public elementary and secondary education (R.C. 3317.022; R.C. 3317.023[A], [B] and [C]; R.C. 3317.02[E]; R.C. 3317.53[A]; and Section 30 of Am. Sub. S.B. 221 effective November 23, 1977) does not violate either Section 2, Article I, or Section 2, Article VI of the Ohio Constitution

The State has argued that the decision in Walter was unrelated to the specific statutes challenged in that case. This argument, which the State premises on the fact that the statutory references are enclosed in parentheses in the syllabus, is nonsensical. There is neither authority nor rationale for reading such critical information out of the syllabus, and doing so leads to the absurd result that Walter upholds any funding scheme devised by the legislature, regardless of the content of that scheme.

75. The State has characterized the equal yield formula as a "new concept" in school funding first effective with the 1975-76 school year and later abandoned. (Pl. Exh. 399, p. 2; Supp. 314) Under the equal yield formula, districts levying more than the minimum millage required by the state received additional funds as reward for effort. The "equal yield" funding statutes upheld by the Court in Walter are set forth in the Appendix at 533-545, together with the current version of the same statutes. Section 3317.53 was repealed and not reenacted, while Section 30 of Am. Sub. S.B. 221 expired by operation of law in 1979.

7. The State mistakenly attaches great significance to the fact that in subsequent years the equal yield funding system had the unintended effect of enhancing the very disparities due to wealth which that system was created to reduce. However, Walter must be viewed in the context of the time when it was decided. The equal yield formula went into effect in 1976. (Findings at 33) Walter was commenced on April 5 of that same year. Bd. of Edn. v. Walter, 58 Ohio St.2d at 368, 390 N.E.2d at 813. The Court in Walter took note of the equalization objective of the funding system, and had no reason to expect that this legislative objective would not be accomplished. Indeed, the Court indicated that the legislative Education Review Committee would have "independent research capabilities to enable ongoing study and monitoring of the new formula." Id. at 372, fn. 1, 390 N.E.2d at 817, fn. 1. Walter did not identify the actual degree of disparity (in dollars per pupil or otherwise) then in existence, perhaps because the Court expected a substantial imminent decrease in disparity due to the newly-enacted equal yield funding system.

77. The State Board of Education has recognized that in the 1990's the State of Ohio needs to "restructure school funding, realign resources to allow for greater flexibility at the district and building levels, and continue modernizing our vocational educational system to reflect the needs of a dynamic workplace." (Pl. Exh. 10, p. 1; Findings at 24) The State has admitted that Ohio's educational system has become obsolete and cannot fully respond to the challenges our state will meet in the remainder of this century and into the next. (Tr. 349; Findings at 27).

78. (Russell Depo. 90; Tavakolian Depo. 142; Tr. 4525-26, 1725-26; Fleeter Depo. 11; Findings at 27; Pl. Exh. 182, p. 6; Supp. 567)

79. The State has afforded handicapped pupils a priority claim to all school funds, thus depleting the resources available to districts for programs for non-handicapped pupils. The effects of this "rob Peter to

pay Paul" scenario fall more heavily on poor school districts that often not only have more handicapped pupils but also have more severely handicapped pupils, and fewer dollars. The consequences of this arbitrary system are illustrated by the situation in Plaintiff Youngstown City Schools. In each fiscal year 1989, 1990, and 1991, the District operated approximately 32 handicapped units with no State reimbursement. (Stip. Exh. 28; Supp. 116; Findings at 356) In FY91, the District served approximately 14,400 students, (Stip. Exh. 8, Supp. 80) approximately 1,922 of whom were handicapped. (Stip. Exh. 29; Supp. 117) The cost of special education at Youngstown City Schools currently siphons $5 million each year from the education of non-handicapped pupils. (Tr. 3204; Findings at 359) The level of educational opportunity for the 12,478 non-handicapped students at Youngstown City Schools thus was reduced by the $5 million that was required to be spent for the unreimbursed special education costs. These circumstances prompted the Trial Court to observe:

> Due to the funding requirements attached to the education of special education pupils, many school districts within this State including the Plaintiffs, are forced to rely on general fund moneys to attempt to comply with the standards established for the education of students with special needs. Too often this scenario results in the non-handicapped student being deprived of the "high quality" of education to which he or she is entitled ***. When the general fund is used to assist in providing the special education requirement the poorer school districts are hurt worse than the wealthier ones.

(Tr. 522, 2912; McGee Depo. 92-93; Findings at 472)

80. The minimum standards relied upon in Walter were replaced with different standards in 1983. (See Stip. 95, 96; Supp. 22-23; Pl. Exh. 409-411; Findings at 284) The State acknowledges that the 1983 standards do not ensure a general education of high quality. (Tr. 4592; Findings at 288) Further, the State has admitted in testimony by Dr. Sanders, that it does not enforce and has no intention of enforcing even these inadequate standards. ("Q: Here today, in this courtroom, you have no present intention to resume routine school evaluations as of any specific date; do you? A. No, I do not." (Tr. 400; Supp. 1162)) (See also Tr. 399-401, 2857; Russell Depo. at 44; Drummond Depo. at 170; Stip. 97; Supp. 23, 1172; Findings at 288-289, 466-467) It now has been over four years since the State announced its intent to revise the abandoned 1983 minimum standards and still no standards have been implemented. The State's neglect is violative not only of the Ohio Constitution but also of R.C. 3301.07, which creates a parallel statutory entitlement to a "general education of high quality." In an analogous context, a state board of education has been held liable for a local district's failure to identify, place, and train, as required by federal law, children who have limited proficiency with the English language, when that state board has neglected to promulgate and enforce appropriate standards for these services. Gomez v. Illinois State Bd. of Edn. (C.A. 7 1987), 811 F.2d 1030.

81. The Court of Appeals furthered erred in dismissing on the basis of Walter claims that never were raised in Walter and in some cases could not have been since the legislation giving rise to these claims had not yet been enacted. Today, the Court has before it undisputed evidence of over ten billion dollars in school facilities needs engendered by years of legislative neglect. (Franklin Depo. 33, 52; Pl. Exh. 14; Stip. 135; Supp. 31, 741-800, 940, 945; Findings at 158) Equally devastating have been the statutes requiring school districts to borrow funds which deprive districts of local control and violate, among other provisions, Section 4, Article XII and Sections 1 and 3, Article VIII of the Ohio Constitution. Other examples of issues that could not have been considered by Walter include the full effects of the revenue-limiting aspects of H.B. 920 and the revenue-shifting implications of State-mandated special education requirements. It is the combined effect of provisions that either have been enacted or have come to have significant impact on the operation of our public schools since the time of Walter that is before the Court today.

82. As the State itself has emphasized, school children today increasingly are disadvantaged by social and economic conditions that complicate the jobs of educators:

> The task of educating some young people is extremely difficult. A recent study directed by Nicholas Zill for the National Center for Health Statistics reports that one in four children

> nationwide have learning, emotional, behavioral or developmental problems. Family dynamics is another significant factor and includes: the increased number of children who experience parental divorce; children born outside of marriage; children raised in dysfunctional families or in low income, low educated households. The use of drugs, especially cocaine, is another significant factor. The recent study on the plight of the young black male has documented that society and the schools must serve this population differently and more effectively.

Restructuring the Common School in Ohio: The Path to Educational Progress, Policy and Budget Recommendations of the State Board of Education to the Governor and 119th General Assembly. (Pl. Exh. 140, p. 4; Supp. 298)

83. The State has conceded that our current system of education is outmoded, a "factory model" unsuited to training pupils to function in an "information age" society. (Tr. 288; Supp. at 1158). As noted by Superintendent Sanders, "[I] believe we need an education system that supports an information age society, not a manufacturing one." (Tr. 292; Supp. 1161)

84. Quoting an earlier case, Justice Souter reaffirmed in his concurrence in Payne that "our 'considered practice [has] not [been] to apply stare decisis as rigidly in constitutional [cases] as in nonconstitutional cases.'" Payne v. Tennessee, 115 L.Ed.2d at 746-747 (bracketed matter in the original). See, also, State ex rel. Tavenner v. Indian Lake Local School Dist. Bd. of Edn. (1991), 62 Ohio St.3d 88, 90, 578 N.E.2d 464 (quoting Peerless Electric Co. v. Bowers (1955), 164 Ohio St. 209, 210, 129 N.E.2d 467, 468, as follows: "' *** [A] decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation, and the effect is not that the former was bad law, but that it never was the law. The one general exception to this rule is where contractual rights have arisen or vested rights have been acquired under the prior decision. *** ") (ellipses sic).

85. Nowhere in Walter can one find the statement that education is or is not a fundamental right.

86. (Pl. Exh. 140, p. 2; Supp. 296)

87. Similarly, Section 3, Article VI, reinforces the concept of a single, statewide system: "Provision shall be made for the organization, administration and control of the public school system of the state supported by public funds." During the debates preceding the adoption of this language in 1912, Delegate Anderson proposed an amendment--rejected by the convention--that would have replaced "of the state" with "in and throughout the state." The delegates' deliberate choice of the preposition "of" indicates that the State is the originator and the owner of the system.

88. The Court of Appeals, Judge Reader's concurrence, agreed with the Trial Court that "the current school funding in this state is not sufficient," but inexplicably concluded that "that does not mean it is unconstitutional." Opinion at 25 (concurrence of Judge Reader). The Court of Appeals manifestly was wrong in construing the Ohio Constitution to be so ineffectual with respect to the educational needs of our children.

89. The Trial Court described many aspects of educational deprivation. (Findings at 203-274, 297-320, and 427-441). Additional evidence is included in the Supplement at tabs XIII. Unserved Pupils, XVI. Thorough and Efficient, and XVII Equality of Educ. Opportunity.

90. This Court has recognized that school districts are instrumentalities created and controlled by the State.[138]

> [A] public school board can be accurately described as an "arm" of the state with its direct duties and powers defined extensively in Title 33 of the Revised Code and through its receipt of direct guidance and support from the State Board of Education. " *** [T]here is no question but that the

> public school boards, as 'arms or agencies of the state,' *** are ultimately managed and controlled by the dictates of the General Assembly ***."

Beifuss v. Westerville Bd. of Edn. (1988), 37 Ohio St.3d 187, 189, 525 N.E.2d 20, 23 (ellipses sic). See also, Verberg v. Bd. of Edn. of the City School Dist. of Cleveland (1939), 135 Ohio St. 246, 20 N.E.2d 368 ("Boards of education are created by statute, and their jurisdiction is conferred only by statutory provision. Just as any other administrative board or body, they have such powers only as are clearly and expressly granted."); Lopez v. Williams (S.D. Ohio 1973), 372 F.Supp. 1279 1293 ("It is well-recognized in Ohio that boards of education are purely creatures of statute whose powers and duties are limited by the Legislature.") (Note that while one aspect of the substantive holding in Beifuss--that school districts are not liable for pre-judgment interest on contractual claims--has been put into question by State ex rel Tavenner v. Indian Lake Local School Dist. Bd. of Edn. (1991), 62 Ohio St.3d 88, 578 N.E.2d 464, Beifuss's description of local school districts as agents of the State remains accurate today.)
See, also, Roosevelt Elementary School Dist. No. 66 v. Bishop (Ariz. 1994), 179 Ariz. 233, 240, 877 P.2d 806, 813 (holding that state cannot delegate its educational responsibility to local districts); Campbell County Local School Dist. v. State of Wyoming (Wyo. 1995), 907 P.2d 1238, 1270 ("In view of this determination that an education system is a function of state control, it would be paradoxical to permit disparity because of local control."); Gomez v. Illinois State Bd. of Edn. (C.A. 7, 1987), 811 F.2d 1030, 1043 (with respect to obligations created by federal law, "[s]tate agencies cannot, in the guise of deferring to local conditions completely delegate in practice their obligations").
Analogously, the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq., has been construed to impose upon the state board of education the "ultimate responsibility for assuring that all disabled children have the right to a free appropriate public education," even though special education services generally are provided by local education agencies. K.P. v. Juswic(D.Conn. 1995), 891 F.Supp. 703, 713.

91. The undisputed facts before this Court are wholly devoid of any evidence of mismanagement on the part of any local school district.

92. Mr. Quigley, delegate to the 1851 Convention, Ohio Constitutional Debates of 1851, Vol. II, 14, Thursday, December 5, 1850.

93. Ohio Constitutional Debates of 1851, Vol. II, 702. 94. Id. at 16.

95. See Pauley v. Kelley (W.Va. 1979), 255 S.E.2d 859, 877 (West Virginia Supreme Court, reviewing Ohio's "thorough and efficient" clause in order to interpret and define West Virginia's identical constitutional provision, concluded that a thorough and efficient system "develops, as best the state of education expertise allow, the minds, bodies, and social morality of its charges to prepare them for useful and happy occupations, recreation, and citizenship, and does so economically."); Abbot v. Burke (N.J. 1990), 575 A.2d 359, 403 ("A thorough and efficient education necessarily requires such level of education as will enable all students to function as citizens and workers in the same society, and that necessarily means that in poorer urban districts something more must be added to the regular education in order to achieve the commands of the constitution.")

Other state high courts have found their state school funding systems violative of a state constitutional provision providing for a "thorough and efficient" school system. Campbell County School District v. State of Wyoming (Wyo. 1995), 907 P.2d 1238 (Wyo. Const. Art. 7, §9); Abbott v. Burke (N.J. 1990), 575 A.2d 359 (N.J. Const. Art VIII, §4(1)); Pauley v. Kelly (W.Va. 1979), 255 S.E.2d 859 (W.Va. Const. Art. XII, §1). The state high courts in the following cases have relied upon a constitutional provision providing for an "efficient" system of schools in overturning their state school funding systems: Rose v. Counsel for Better Edn. (Ky. 1989), 790 S.W.2d 186 (Ky. Const. §183); Edgewood Independent School Dist. v. Kirby (Tx. 1989), 777 S.W.2d 391 (Tx. Const. Art VII, §1); DuPree v. Alma School Dist. No. 30 (Ark. 1983), 651 S.W.2d 90 (Ark. Const. XIV, §1).

96. The Trial Court found: "Numerous examples of deficiencies faced by the Plaintiffs can be found in this Court's Findings of Fact: Southern Local at pp. 209-210 (teachers), pp. 183-192 (buildings), pp. 263-265

(equipment); Northern Local at pp. 208-209 (teachers), pp. 175-183 (buildings), pp. 261-263 (equipment); Dawson-Bryant at pp. 206-207 (teachers), pp. 167-173 (buildings), pp. 258-259 (equipment); Lima City at p. 207 (teachers), pp. 173-175 (buildings), p. 206 (equipment); and Youngstown City at pp. 210-214 (teachers), pp. 192-197 (buildings), pp. 265-267 (equipment)." (Findings at 475)

97. Students in Plaintiff school districts use textbooks with copyright dates of 1985 and even as early as the 1970's, even though the suspended State "minimum standards" require textbooks to be current. (Pl. Exh. 79; Supp. 1118-1120; Findings at 257-267)

98. At Plaintiff Southern Local School District, paper, paper clips, art supplies, chalk, and even toilet paper and paper towels are rationed. (Tr. 589-90, 1347; Findings at 265)

99. The trial court found that the number of unserved handicapped children is increasing yearly. The gap between special education funds requested by the State Board of Education and those allocated by the General Assembly has widened from $1 million in calendar year 1980 to $121 million in fiscal year 1993. (Findings at 324) The problem is exacerbated by the transfer to public schools of multihandicapped students who previously were served by county boards of mental retardation and developmental disabilities. (Herner Depo. 98-99; Tr. 5530; Findings at 327)

100. Looking at the bigger picture, one must question a state that conducts a $37 million study to determine if it needs new office buildings, (Findings at 200), and seeks to devote substantial resources to building new sports stadiums, at the very time that it purports to satisfy the Constitution when it compels students to attend schools that have been designated by the State itself as improper housing. (Finding at 153) While Plaintiff Northern Local School District is scrounging for $20,000 to solve the problem of arsenic in its schools' drinking water, the State is considering a new Columbus office campus costing $150 million. Id.

101. Findings at 77, 133.

102. Findings at 377.

103. Findings at 364-65.

104. Findings at 387-89.

105. Findings at 147-8.

106. Findings at 227-30; Supp. at tab IX(D).

107. Reed v. Rhodes, United States District Court, Northern District of Ohio, E.D., No. 1:73CV1300, March 3, 1995. Appendix at 677.

108. Cleveland Bd. of Edn. v. Loudermill (1985), 470 U.S. 532, 538, 105 S.Ct. 1487, 1491, 84 L.Ed.2d 494, 501; Logan v. Zimmerman Brush Co. (1982), 455 U.S. 422, 430, 102 S.Ct. 1148, 1154-1155, 71 L.Ed.2d 265, 274; Arnett v. Kennedy (1974), 416 U.S. 134, 167, 94 S.Ct. 1633, 1650-1651, 40 L.Ed.2d 15, 40-41 (Powell, J., concurring). See also Hewitt v. Helms (1983), 459 U.S. 460, 103 S.Ct. 864, 74 L.Ed.2d 675, holding that "the repeated use of explicitly mandatory language in connection with requiring specific substantive predicates demands a conclusion that the state has created a protected liberty interest."

109. The number of identified school-aged pupils (5-21 years of age) in Ohio with disabilities receiving required special education and related services in FY93 was approximately 200,848. (Stip. Exh. 30; Supp. 118; Findings at 320)

110. The ultimate responsibility to uphold, defend and ensure the rights of handicapped pupils rests with the State. Honig v. Doe (1988), 484 U.S. 305, 329, 108 S.Ct. 592, 607, 98 L.Ed.2d 686, 710. As another court has stated:

> The regulations reflect that Congress intended the state educational agency to be "a central point of responsibility and accountability in the education of children with disabilities within each State." 34 C.F.R. § 300.600 (West, 1993) (comments). Quoting a Senate report, the comment states:
>
> > Without this requirement, there is an abdication of responsibility for the education of handicapped children. *** While the committee understands that different agencies may, in fact, deliver services, the responsibility must remain in a central agency overseeing the education of handicapped children, so that failure to deliver services or the violation of the rights of handicapped children is squarely the responsibility of one agency.

K.P. v. Juswic (D.Conn 1995), 891 F.Supp. 703, 713. See also, Grinsted v. Houston County School District (M.D. Georgia 1993), 826 F.Supp. 482, 485; Straube v. Florida Union Free School Dist. (S.D.N.Y. 1992), 801 F.Supp. 1164, 1172 ("[I]t is very clear that the state has the ultimate responsibility for ensuring that each eligible child receives an appropriate education"); Ramon H. v. Illinois State Bd. of Edn. (N.D. Ill. 1992), 1192 WL 186248 ("We note that the attempt by the State to foist responsibility to another agency is not a novel argument, and in an analogous decision from the Seventh Circuit, was rejected as a basis for a Rule 12(b) motion."); Valerie J. v. Derry Co-op School District (D.N.H. 1991), 771 F.Supp. 483.

111. The full effect of the State's commitment to ensure a "free appropriate public education" to all handicapped children has been substantially expanded by statutory amendments and court interpretations since Walter.

112. The circumstances of handicapped pupils in the Plaintiff school districts were described by the Trial Court in Findings at 320-366. Additional evidence is included in the Supplement at 1313-1371.

113. While most buildings in, for example, Plaintiff Youngstown City School District are not handicapped accessible, and no State funds exist to aid any school district in meeting the 1995 federal mandate of total handicapped accessibility, the State of Ohio provides $50 million each year to upgrade State park facilities, including making park buildings handicapped accessible. (Tr. 4433-4434; Supp. 1013-1014; Findings at 202-203)

114. Stip. Exh. 29-30; Supp. 117-118.

115. The State Board of Education has acknowledged that the lack of equalization of unit funding for school district wealth is a "weakness" in the State's funding system. (Pl. Exh. 140; Supp. 211-212) Over 1180 more units were requested by school districts than were available. (Schindler Depo. 22; Findings at 327)

116. Sections 1 and 2, Article I; Section 26, Article II. (Appendix 522-523; Findings at 471)

117. Section 2, Article I, Ohio Constitution. (Appendix 522)

118. (Supp. at tab IV. History of School Funding) Plaintiffs urge the Court to review the portions of the record referenced in the Trial Court's historical summary. (See Findings at 28-31, 442-445) See, also, Hawk, "As Perfect As Can Be Devised: DeRolph v. State of Ohio and the Right to Education in Ohio (1995), 45 Case W.Res.L.Rev. 679.

119. Ohio Constitutional Debates of 1851, Vol. II, 11, Wednesday, December 4, 1851.

120. One could speculate that this circumstance reflects a belief that moneys are better spent building prison cells and responding to prison riots.

121. Even before Ohio became a state, the essentiality of education was expressed in the Ordinance of 1787, also known as the Northwest Ordinance. In Article 3 of that document, Congress stated that "[r]eligion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." This language was incorporated into Ohio's first constitution.

122. See, Samuel Lewis, First Annual Report of the Superintendent of Common Schools to the Thirty-Sixth General Assembly of the State of Ohio, Legislative Document, 1837-38 (Columbus, Samuel Medary, Printer to the State, 1838) at 12.

123. "This amendment [Section 3], if adopted, will give the law making body of the state complete control over the organization and administration of the state's public school system, and is designed to make clear that local communities cannot destroy the unity of the state's system." Journal of the Constitutional Convention of the State of Ohio (Columbus: F.J. Heer Printing Co., 1912), at 869 (emphasis added).

124. Editor's Comment, Section 2, Article VI, Ohio Constitution, Baldwin's Revised Code Annotated (1990).

125. The concept was based on the view that education is one of the rights of man, that every person was entitled to knowledge, and that knowledge should be protected by government. The "common school" related to commonality of benefit from education. The word "common" in this context historically and philosophically means that the government participates in a social contract with all of the people in the state and they all participate equally. Government has no reason to treat them differently. (Supp. 253-257; Findings at 442)

126. The fundamentality of education intended by the drafters of Ohio Constitution has been recognized by the West Virginia Supreme Court:

> There was no explicit definition of the words "thorough and efficient" that appeared in the final committee report which the 1851 Ohio Convention adopted. The tenor of the discussion, however, by those advocating the entire education section as it was finally adopted, leaves no doubt that excellence was the goal, rather than mediocrity; and that education of the public was intended to be a fundamental function of the state government and a fundamental right of Ohioans.

Pauley v. Kelly (1979), 162 W.Va. 672, 703, 255 S.E.2d 859, 867 (emphasis added). 127. In evaluating fundamentality, this Court has considered whether a right is "a fundamental part of our concept of ordered liberty," Arnold v. Cleveland (1993) 67 Ohio St.3d 35, 43, 616 N.E.2d 163,170. Analogously, the United States Supreme Court has stated that fundamental rights are those that are "implicit in the concept of ordered liberty," Bowers v. Hardwick (1986), 478 U.S. 186, 191, 106 S.Ct. 2841, 2844, 92 L.Ed.2d 140, 146, "deeply rooted in America's history and tradition," Moore v. East Cleveland (1977), 431 U.S. 494, 503, 97 S.Ct. 1932, 1938, 52 L.Ed.2d 531, 540, or go to "the very essence of a scheme of ordered liberty," Palko v. Connecticut (1937), 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288, 292.

128. Quoted by this Court with approval in State ex rel. Nagle v. Olin, 64 Ohio St.2d 341, 352 fn.15, 510 n.15, 415 N.E.2d 279, 287, fn. 15. Many courts around the nation have cited, with approval, language from Brown emphasizing that constitutional decisions are to be made in light of contemporary reality. See, e.g., Chew v. Gates (C.A. 9, 1994), 27 F.3d 1432, 1464; Reed v. Rhodes (C.A.6, 1979), 607 F.2d 714, 718; Penick v. Columbus Bd of Edn. (C.A.6, 1978), 583 F.2d 787, 792; Shad Alliance v. Smith Haven Mall (N.Y.App. 1985), 66 N.Y.2d 496, 488 N.E.2d 1211; Oliver v. Kalamazoo Bd of Edn. (W.D.Mi.1971), 346 F.Supp. 766, 770; Perkins v. Northeastern Log Homes (Ky.1991), 808 S.W.2d 809, 817. Analysis in light of current and changing circumstances permitted recognition in Brown of the right to an integrated

education. Such analysis similarly has allowed recognition of rights as diverse as those involving privacy (including rights to abortion and to inter-racial marriage) and those involving speech in the context of television and radio. Limiting analysis to historical considerations alone would produce patently unacceptable results, such as validation of poll taxes--thus limiting the franchise to the wealthy--and approval of discrimination based on gender and national origin.

129. 20 U.S.C. § 3401 provides:

> The Congress finds that--(1) education is fundamental to the development of individual citizens and the progress of the Nation.

20 U.S.C. § 6301 provides:

> The Congress declares it to be the policy of the Untied States that a high-quality education for all individuals and a fair and equal opportunity to obtain that education are a societal good, are a moral imperative, and improve the life of every individual, because the quality of our individual lives ultimately depends on the quality of the lives of others.

20 U.S.C. § 1221-1 provides (emphasis added):

> Recognizing that the Nation's economic, political, and social security require a well-educated citizenry, the Congress (1) reaffirms, as a matter of high priority, the Nation's goal of equal educational opportunity, and (2) declares it to be the policy of the United States of America that every citizen is entitled to an education to meet his or her full potential without financial barriers.

130. The Ohio Constitution, with its express provisions concerning education, creates fundamental entitlements beyond those created by the federal Constitution. Arnold v. Cleveland (1993), 67 Ohio St.3d 35, 42, 616 N.E.2d 163, 169 ("In joining the growing trend in other states, we believe that the Ohio Constitution is a document of independent force. In the areas of individual rights and civil liberties, the United States Constitution, where applicable to the states, provides a floor below which state court decisions may not fall. As long as state courts provide at least as much protection as the United States Supreme Court has provided in its interpretation of the federal Bill of Rights, state courts are unrestricted in according greater civil liberties and protections to individuals and groups.")

131. "This case is more directly concerned with the way in which Ohio has decided to collect and spend state and local taxes than it is a challenge to the way in which Ohio educates its children." Bd. of Edn. v. Walter (1979), 58 Ohio St. 2d at 375-376, 390 N.E.2d at 819. See Proposition of Law I(A).

132. "[I]f this court were to accept the [explicitly or implicitly guaranteed by the Constitution] test, educational opportunity would be a fundamental interest entitled to strict scrutiny."

133. (Tr. 3637-3638; Supp. 261-262). 134. While denying that there are any constitutional infirmities in the system of funding public primary and secondary education in Ohio, the State's own descriptive phraseology belies the notion that the system is consistent with the Constitution. In a constitutionally sound system, the State could not use the adjectives "rich" and "poor" to describe its school districts.

135. The extent of State regulation of the schools has escalated dramatically in the years since Walter was decided. See, Decision of Judge Holschuh, denying Motion for Summary Judgment of the state based in part on the pervasive state regulation of education since Walter. (Appendix at 644)

136. The State has admitted imposing unfunded mandates upon its school districts. Senator Aronoff conceded that the State has been "guilty" of imposing such mandates and Superintendent Sanders also conceded that there is "too much regulation." (Supp. at 1470; Findings at 400) The full magnitude of these mandates is reflected in Pl. Exh. 276 (Supp at 1458-1468), in which the Court will find reference to over 90 Revised Code amendments, 7 Administrative Code amendments, and numerous federal regulatory changes, each promulgated since 1987, and each having a direct or indirect impact on the cost of school operation.

Not one of these changes was accompanied by additional funding directed to the payment of the consequent additional local costs.

137. Thus, for example, while the State rebukes districts for paying teachers in excess of the minimum amount established by the State, it requires the districts to engage in collective bargaining. Teacher salaries are driven by market forces--not by a district's desire to squander resources.

138. Reed v. Rhodes, United States District Court Northern District of Ohio, E.D., No. 1:73CV1300, Order requiring the State to take over the finances of the Cleveland City School District, filed Mar. 3, 1995. (Appendix at 677)

139. The dilemma faced by poor districts was well-summarized by the court in Alabama Coalition for Equity v. Hunt (1993), 19 1DELR 810, 839, 1993 WL 204083 (copy included in Appendix):

These systems cannot be said to exercise meaningful choice about the kind of education they desire or dream about for their children; they face, instead, a daily Hobson's choice whether, for example, to do without library books or to leave the roof unmended in order to meet the budget. See Horton, 172 Conn. at 645, 376 A.2d at 373 (the option of local control "to a town which lacks the resources to implement the higher quality educational program which it desires and which is available to property richer towns is highly illusory."); see, also, Serrano II, 135 Cal.Rptr. at 369, 557 P.2d at 953 ("[t]he poor district cannot freely choose to tax itself into an excellence which its tax rolls cannot provide. Far from being necessary to promote local fiscal choice, the present system actually deprives less wealthy districts of that option.") Thus, the Court holds that the differential treatment in question cannot be sustained under the rational relationship test as a permissible, or even effective, means of promoting local control. Further, the Court cannot conceive any rational justification, educational or otherwise, for school funding and educational opportunity to depend upon the happenstance of local wealth and of students' places of residence.

140. "The American people made a wise choice *** by retaining within the community, close to parental observation, the actual direction and control of the educational program."" Walter, 58 Ohio St.2d at 380, fn. 8, 140 N.E. 821, fn. 8. It is noteworthy that, for many school districts today, the actual rate of voted tax levy millage has little to do with the amount of revenue received by a school district. Thus, even under the restrictive definition of local control adopted by the Court of Appeals, the current funding system does not advance local control. See Plaintiffs' Brief to the Court of Appeals at 6-27.

141. Significantly, there was far more revenue-related local control under the equal yield funding system than there is today. The State's equalization of millage between twenty and thirty mills under that system provided poor districts an incentive to pass local millage in excess of twenty mills. Today, without the equalization component in the funding system, a mill of local tax yields revenue based solely on the value of the local tax duplicate, and no more.

142. Adequate funding to all districts will permit competition and innovation that ultiimately will benefit students throughout the state, as successful local programs become the statewide norm. See, Campbell Cty. School dist. v. State of Wyoming (1995), 907 P.2d 1238, 1274.

143. Section 3, Article VIII provides that "no debt whatever shall hereafter be created by, or on behalf of the state;" limited exceptions, none of which authorize the school indebtedness challenged here, are created in Sections 1 and 2 of Article VIII. Section 4, Article XII requires the State to raise sufficient revenue both to cover current expenses of the State and to service those debts permitted by the exceptions to Section 3, Article VIII. Together, these articles express the constitutional requirement that the State of Ohio not engage in the kind of deficit spending that currently is bankrupting our schools.

144. These programs are described in detail in Stip. 5-9, Exh. 20-26, Findings at 127-147 and Supp. 664-723.

145. One cannot review the record in this case without concluding that the harm to pupils is direct and immediate. (Findings at 138) Plaintiff Southern Local School District provides an example of the devastation wreaked upon our schools by these cuts. This District was required to borrow an emergency assistance loan of $211,000 in FY 93. Because of the loan, the District was required to make cuts in programs and services to pupils. Plans to acquire text books and updated instruction materials were put on hold, even though some students have no text books or must share (Tr. 294-95); also, the District's text books are woefully outdated, some over three decades old. (Pl. Exh. 79; Supp. 1118-1120) Field trips and professional leave were cut, and extracurricular programs were reduced. The District instituted a pay-to-play program to meet athletic costs and to keep some programs operating. The imposition of pay-to-play in a school district in which average income was $19,245 (ranking it 607 out of 611 school districts in the State in 1989) (Pl. Exh. 338) has severely limited students' ability to participate. As Plaintiff Christopher Thompson, a student explained, "There's a $35.00 fee for pay-to-play. However, it costs more. You know your -- you have to buy your shirt for baseball, your hat, the shoes, etcetera." (Tr. 1343)

Also, the amount of contact between pupils and professionals was reduced. Needed support from instructional aides was taken away. Many class sizes were too high for effective instruction. High school English class sizes were over 30, which did not permit adequate individualized attention for learning writing skills. At the elementary level, the third grade classes had the highest number of students with many of the classes having 30 students. Seven students were retained in that grade level, which was approximately 10 percent of the class. Retention kills children's spirit for achievement and affects their motivation to learn for the remainder of their school career. Obviously, the district was not providing appropriate intervention for those students who were retained, and could not have adequate systematic intervention for all students, thus failing to achieve the intent of minimum standards for student intervention. (Tr. 497-99; Findings at 146)

146. In similar circumstances, the Supreme Court of West Virginia recently held that a statute providing for state-issued revenue bonds for school facilities violated the debt limitation provisions of that state's constitution. See Winkler v. School Bldg. Auth. (W.Va. 1993), 189 W.Va. 748, 434 S.E.2d 420. As in the case of Ohio's emergency school assistance loans, the West Virginia legislation expressly denied that the obligations were debts of the state. Relying on Ohio Funds Mgt., the court held that because the sole source of revenue to repay the obligations was state appropriations, the arrangement in reality created a debt of the state in violation of the West Virginia Constitution.

147. The State also argued, and the Court of Appeals also held, that the state debt argument is precluded by this Court's decision in Walter. However, the issue of state debt was not raised in that case, nor was it analyzed or decided, as both the syllabus and the opinion of Walter clearly demonstrate. "[A] reported decision, although in a case where the question might have been raised, is entitled to no consideration whatever as settling, by judicial determination, a question not passed upon or raised at the time of the adjudication." State ex rel. Gordon v. Rhodes (1952), 158 Ohio St. 129, 131, 107 N.E.2d 206, 208. The suggestion of the Court of Appeals that Walter implicitly approved deficit spending as a means of serving "a proper legislative interest in local control," Court Of Appeals Opinion at 15, not only is completely unsupported by Walter but also is unsupported by the findings of fact in this case regarding local control. (Findings at 400-419, 469-470)

148. Plaintiffs' Response to Defendants' First Set of Interrogatories No. 13; Plaintiffs' Response to Defendants' Second Set of Interrogatories No. 18 at pp. 7-8, Filed on April 5, 1993 with the Perry County Court of Common Pleas; Final Joint Stipulations of Fact pp. 5-11; Supp. 7-13, 336-337; Plaintiffs' Pre-Trial Brief at 28-30, 44-45; Findings at 127-148, 406-408. Indeed the State never objected to any of the evidence regarding forced school district borrowing and never asserted any claim of "surprise" until the appeal of this case.

149. Clearly, Articles VIII and XII are to be read in pari materia, and the allegation in the First Amended Complaint that the State violated Article XII was sufficient to raise the issue about which the State now would claim surprise. Because the two Articles express the same "balanced budget" requirement--that is, that there be no borrowing to carry out the day-to-day activities of the government--there can be neither fact nor argument relevant to a claimed violation of Article VIII that is not also relevant to the claimed

violation of Article XII. Accordingly, the State has not been hindered in any way in its ability to fully defend against the merits of Plaintiffs' claims that the school funding system creates unconstitutional debts of the State. The omission of Article VIII by name is legally insignificant because either article alone is sufficient in its prohibition of the immense state debt created by the present school funding system. The instant case is distinguishable from State ex rel. Evans v. Bainbridge Twp. Trustees (1983), 5 Ohio St.3d 41, 448 N.E.2d 1159, upon which the Court of Appeals relied without mentioning this Court's subsequent decision in Illinois Controls. In Evans, the Court held that a "new and different issue as to which different and additional evidence would have been relevant" could not be addressed for the first time by the court of appeals when that issue had neither been pleaded nor considered by the trial court. Id. at 45, 448 N.E.2d at 1162-3. Since Section 4 of Article XII and Section 3 of Article VIII express the same constitutional prohibition of state debt, and since the State's compliance with the former was litigated at trial ("The fact that the General Assembly has abided by this constitutional directive [Section 4 of Article XII] for a balanced budget was the subject of extensive testimony at trial." Defendants' Post-Trial Brief at 142), the latter constitutional clause merely provides additional evidence of the importance of the constitutional prohibition and does not constitute a "new and different issue" within the meaning of Evans.

150. When the State reduced education appropriations in 1989 in order to balance the State budget, school districts were forced into debt to make up the difference. (Brown Depo. 78; Findings at 132)

151. This principle has been applied by other state high courts in school funding litigation. See, e.g., Edgewood Indep. School Dist. v. Kirby (Tex.1989), 777 S.W.2d 391, 394 ("If the system is not 'efficient' or 'suitable,' the legislature has not discharged its constitutional duty and it is our duty to say so.") (emphasis sic); Abbott v. Burke (N.J.1990), 575 A.2d 359, 408, 119 N.J. 287, 385 (finding a violation of the "thorough and efficient" clause of the New Jersey constitution and permitting the legislature to use whatever method it chose to provide an educational system which meets that constitutional mandate.); Campbell Cty. School Dist. v. State of Wyoming (Wyo.1995), 907 P.2d 1238, 1264-5, quoting with approval Rose v. Counsel for Better Edn., Inc. (Ky.1989), 790 S.W.2d 186, 209 ("'The judiciary has the ultimate power, and the duty, to apply, interpret, define, construe all words, phrases, sentences and sections of the Kentucky Constitution as necessitated by the controversies before it. It is solely the function of the judiciary to do so. This duty must be exercised even when such action serves as a check on the activities of another branch of government or when the court's view of the constitution is contrary to that of the other branches, or even that of the public.'")

152. In the context of a similar challenge to its state system of education, the Kentucky Supreme Court emphatically rejected the propriety of judicial deference:

> The issue before us--the constitutionality of the system of statutes that created the common schools--is the only issue. To avoid deciding the case because of "legislative discretion," "legislative function," etc., would be a denigration of our own constitutional duty. To allow that General Assembly (or, in point of fact, the Executive) to decide whether its actions are constitutional is literally unthinkable.

Rose v. Council for Better Edn. (Ky.1989), 790 S.W.2d 186, 209. Judicial deference is particularly inappropriate where, as here, constitutional infirmities have been permitted by the State to persist over time. See, e.g., Gomez v. Illinois State Bd. of Ed. (C.A.7, 1987), 811 F.2d 1030, 1042 ("Judicial deference to the school system is unwarranted if over a certain period the system has failed to make substantial progress" in satisfying its obligations pursuant to the federal Equal Educational Opportunities Act, 20 U.S.C. § 1703(f).) The need for judicial intervention in the instant matter is heightened by the State's failure to remedy the unconstitutionalities of the current system even as the State acknowledges the scale of the problem and the severity of the consequences.

153. The mandatory duty of the General Assembly with respect to education is established in Section 2, Article VI, and Section 7, Article I, Ohio Constitution.

154. Construing the role of the judiciary far more narrowly than did the United States Supreme Court in Brown (and than has this Court in a number of cases), the Court of Appeals opined that the Trial Court

exceeded its authority both by ordering the State to prepare and present to the legislature proposals for a constitutional system of school funding and by retaining "jurisdiction for a period of time to assure this Order is followed and steps are being taken to resolve the matters involved in the case at bar." (Findings at 462) It is well-established, however, that a court may compel the performance of a duty required by law. See, e.g., State ex rel. Scott v. Masterson (1962), 173 Ohio St. 402, 405, 183 N.E.2d 376, 379 ("[T]he judicial power to compel the performance of duties imposed upon public officers by the basic laws extends equally with the judicial power to determine invalid the enactments of legislative bodies which are violative of such basic law. Failure to act is as much subject to judicial control as improper actions.") Moreover, the equitable powers of the courts of Ohio, like those of the courts of the United States, include the exercise of continuing jurisdiction for the purpose of enforcing a judgment. American Motors Corp. v. Huffstutler (1991), 61 Ohio St.3d 343, 575 N.E.2d 116. See, also, Shapiro v. Thompson (1969) 394 U.S. 618, 633, 89 S.Ct. 1322, 1330, 22 L.Ed.2d 600, 614 ("We recognize that a State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens. It could not, for example, reduce expenditures for education by barring indigent children from its schools."); Harris v. Champion (C.A.10, 1994), 15 F.3d 1538, 1562. ("The only reasons offered by the State were the lack of funding and possibly the mismanagement of resources by the Public Defender. *** Neither of these reasons constitutes an acceptable excuse for the delay."); Todaro v. Ward (C.A.2, 1977), 565 F.2d 48, 54 fn. 8 ("Inadequate resources no longer can excuse the denial of constitutional rights."); Alabama Coalition for Equity, Inc. v. Hunt (1993), 19 IDELR 810, 828, 1993 WL 204083 ("Nor is the Court inclined to accept the self-serving defense that school children are not entitled to sue for additional school funding and opportunities because the government cannot spend education money properly; if this is true, it is hardly the fault of the students.").

In Invisible Empire Knights of KKK v. City of W. Haven (D. Conn. 1985), 600 F.Supp. 1427, 1434, the court reasoned as follows:

> The Ordinance in question, which imposes a cost on expression, treats the First Amendment as a privilege to be bought rather than a right to be enjoyed. It is society that benefits by the free exchange of ideas, not only the person whose ideas are being shared. In order to fully preserve and protect the people's right to be informed, it is society that should bear the expense, however great, of guaranteeing that every idea, no matter how offensive, has an opportunity to present itself in the marketplace of ideas.

If, on the theory that society is the ultimate beneficiary, cost is no impediment to ensuring the ability of the Ku Klux Klan to freely disseminate its ideas, can it seriously be contended that society has any less an obligation to fund an education of the quality mandated by the Ohio Constitution?

156. Former Superintendent Sanders acknowledged that educational failure is costly to the state in terms of increased human services costs and correctional institution costs. (Sanders Tr. at 349; Findings at 310) In contrast to the annual cost of educating a public school student, incarceration of a prisoner costs the state $15,000 to $30,000 per year. (Russell Depo. at 185; Findings at 310)

157. The Court additionally may find it useful to appoint a special master to oversee the State's compliance with an order to establish a constitutional system of school funding. 158. The State also overlooks the fact that attorney fees are available to Plaintiffs in connection with their special education claims. Persons aggrieved by the provision of services to handicapped pupils may file directly in court when the administrative remedies of Section 1415, Title 20, U.S. Code and its mirror image in R.C. 3323.05 are futile. The right to a civil action "may be brought in any State court of competent jurisdiction or district court of the United States," and the court "shall grant such relief as the court determines is appropriate." 20 U.S.C. 1415(e)(2) (Emphasis added.). The same section explicitly provides for attorney's fees to prevailing parties.

159. Section 2721.09 provides that "[w]henever necessary or proper, further relief based on a declaratory judgment or decree previously granted may be given;" section 2721.11 provides that "[i]n any proceeding under sections 2721.01 to 2721.15, inclusive, of the Revised Code, the court may make such award of costs as is equitable and

just;" section 2721.13 provides that "[s]ections 2721.01 to 2721.15, inclusive, of the Revised Code are remedial, and shall be liberally construed and administered."

160. The Court of Appeals clearly erred in holding that "appellees in this case are not the prevailing party, and therefore, are not entitled to attorney fees." Opinion at 18. Brandenburg permits a trial court to allocate attorney fees in a declaratory judgment action based upon the relative equities, regardless of which party prevails; Brandenburg further indicates that the trial court's determination "will not be disturbed, absent an abuse of discretion." Motorists Mutual Ins. Co. v. Brandenburg, 72 Ohio St.3d at 160, 648 N.E.2d at 490. The Trial Court made hundreds of findings of fact, based on largely undisputed testimony, concerning the deplorable conditions knowingly maintained in our schools by the State. Having erred on the merits of this matter, the Court of Appeals further misconstrued the law regarding the availability of attorney fees, as is evidenced by its statement that attorney fees are predicated on prevailing party status. In view of the desperate plight of the children, the State's reckless indifference to their educational needs, and the vast economic and political disparity between them and the State, the Trial Court's award of attorney fees absolutely was justified and did not constitute an abuse of discretion.

161. Wholly aside from the unequivocal authority granted by Chapter 2721, the State's lack of good faith in its dealings with the children of Ohio provides independent justification for the award of attorney fees. In the insurance context, it long has been recognized that the special relationship between an insurer and an insured creates a duty of good faith. The justification for imposing this duty has been explained as follows:

> The imposition of the duty of good faith upon the insurer is justified "because of the relationship between the *** [insurer and the insured] and the fact that in the insurance field the insured usually has no voice in the preparation of the insurance policy and because of the great disparity between the economic positions of the parties to a contract of insurance.

Hoskins v. Aetna Life Ins. Co. (1983), 6 Ohio St.3d 272, 275, 452 N.E.2d 1315, 1319 (bracketed material and ellipsis sic). Surely, the special relationship created by the Ohio Constitution between the State and the politically- and economically-unempowered school children of Ohio carries with it at least an equivalent duty of good faith. Attorney fees further are warranted in view of the limited funds available to Plaintiffs. In a related context, the United States Supreme Court has stated as follows: "No matter what the source of their funds, school boards have limited budgets, and allowing them fees 'encourage[s] compliance with and enforcement of the civil rights laws.'" Washington v. Seattle School Dist. No. 1 (1982), 458 U.S. 457, 487, fn.31, 102 S.Ct. 3187, 3203 fn.31, 73 L.Ed.2d 896, 918 fn.31 (citing Dennis v. Chang (C.A.9, 1980), 611 F.2d 1302, 1306-7).

162. This Court has awarded attorney fees where a public official unreasonably attempted "to avoid the clear mandate of the statute." State ex rel. Multimedia, Inc. v. Whalen (1990), 51 Ohio St.3d 99, 101, 554 N.E.2d 1321, 1323. Certainly, then, attorney fees are awardable where, as here, the State has attempted to avoid the clear mandate of the Constitution.