IN THE SUPREME COURT OF OHIO

DALE R. DEROLPH, et al.,	:	
	:	Case No. 99-0570
Plaintiffs-Appellees,	:	
	:	
v.	:	Appeal from the Common Pleas
	:	Court of Perry County, Ohio
STATE OF OHIO, et al.,	:	Case No. 22043 as remanded by
	:	the Ohio Supreme Court,
Defendants-Appellants.	:	Case No. 95-2066

BRIEF OF THE STATE APPELLANTS

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INTRODUCTION

On March 24, 1997, this Court invalidated several laws governing Ohio's system of public schools on the ground that they violated the Ohio Constitution's "thorough and efficient" clause. In doing so, the Court gave the General Assembly and Governor one year to comply with its decision.

A lot has happened since then. In the year following the decision, the State responded with an array of legislative initiatives designed to meet the bookend requirements of a constitutional system of schools -- one that is both (1) "thorough" because it guarantees sufficient resources to provide an adequate education to every child in the State no matter the economic circumstances of his birth and (2) "efficient" because it spends the citizenry's money in a responsible and accountable manner. Whether by replacing each invalidated law with a new one or by addressing each concern identified in the Court's opinion with a targeted policy response, the State has met both of these requirements -- and, we respectfully submit, a lot more. Breathtaking increases in State funding for school buildings ($1.6 billion since the decision) and for operating expenses ($1.2 billion since the decision), together with a rational basis for determining the benchmark of an adequate education, meet the "thorough" requirements of the Constitution. And new accountability measures for students, teachers and school districts alike ensure that the new system will be an "efficient" one.

Nor can there be any doubt that education now represents the cornerstone priority of State government. Whether measured by the time and energy devoted to the issues or by the fact that well over 50% of State revenue in the capital and non-capital budget now goes to primary, secondary or college education, the State has proved its good faith in trying to tackle, and resolve, these difficult issues.

With each passing day, Ohio's educational system holds more promise and each of the defects in the old system becomes more dated. While much work remains to be done and is being done, these programs represent an impressive response to the Court's decision, and should only become stronger as the General Assembly and Governor are given additional time to develop, bolster and modify them.

In prematurely striking each and every component of the *DeRolph* remedy, however, the trial court refused to give the new legislation that time. Instead of giving the legislature "wide discretion" over the remedy, as *DeRolph* requires, 78 Ohio St. 3d 419, 421, and instead of requiring plaintiffs "to negative every conceivable basis which might support" the remedy, as rational basis review compels, *FCC v. Beach Communications, Inc.,* 508 U.S. 307, 315 (1993) the court second guessed each policy choice the legislature made.

Even then, moreover, this second guessing seemed to run in only one direction. The court adopted word-for-word every substantive finding of fact and conclusion of law proposed by plaintiffs, and virtually every non-substantive one, while at the same time rejecting every substantive proposal made by the State. After a summer's worth of discovery, a two-week trial, two rounds of legal briefs, and hundreds of pages of proposed findings of fact and conclusions of law (2400 paragraphs, all told), not one legal position raised by the State, or one substantive factual assertion, made its way into the trial court's 239-page decision. In the context of rational basis review, it is doubtful that a decision from any court, State or federal, trial or appellate, has ever concluded that so many legislative policy choices did not meet the minimum requirements of rationality.

Perhaps in the end a fervent desire to create the best possible educational system in Ohio might excuse these and other errors made by the trial court. But even that well-intentioned

desire, which is shared by the State and its lawyers, does not justify creating a tricameral system of legislation in which a trial court gets the final say over each value judgment and policy choice made by the General Assembly. The trial court's decision should be reversed and this Court should give the new, ongoing remedy a chance to succeed.

STATEMENT OF FACTS

At the same time that the Ohio Supreme Court invalidated several components of Ohio's system for funding public schools, it "refuse[d] to encroach upon the clearly legislative function of deciding what the new legislation will be." *DeRolph v. State* (1997), 78 Ohio St. 3d. 193, 213 n.9. It therefore stayed the effect of its decision for one year to give the legislature "time for adequate study, drafting of the appropriate legislation and transition from the present scheme of financing to one in conformity with this decision." *Id.* at 212.

Both before and after the Court's decision, the General Assembly did just that. In overhauling the deficiencies in the prior system while preserving its strengths, the legislature exhaustively debated, carefully studied and ultimately adopted a broad range of legislative initiatives, each one faithfully designed to respond to the Court's concerns. Among these significant budget and reform bills are the following:

H.B. 282 (1999)	Education Budget Bill
H.B. 283 (1999)	Biennial Budget Bill
H.B. 850 (1998)	Capital Bill
H.B. 770 (1998)	Education Funding Reform Modification/Facilities Funding Commitment $300 Million/Year
H.B. 650 (1998)	Education Funding Reform/Base Cost/Special Education/ Facilities/Transportation/DPIA/Charge Off Subsidy/ Increased Cost of Doing Business/Interest Subsidy
S.B. 55 (1997)	Academic Accountability/Report Cards/Performance Standards
H.B. 412 (1997)	Budget, Textbook, and Capital Maintenance Reserves
H.B. 215 (1997)	Budget Bill/Foundation Increase/Equity Aid/ Facility/SchoolNet
S.B. 102 (1997)	School Facilities Commission Established
S.B. 310 (1996)	Assistance for Districts in Financial Difficulty

S.B. 230 (1996)	Creates the Office of Information, Learning, and Technology/ Improved Teacher Licensure
H.B. 117 (1995)	Budget Bill/Education Funding / Facilities
H.B. 790 (1994)	Capital Bill/Facilities Funding/SchoolNet
H.B. 715 (1994)	Education Funding Increases
H.B. 152 (1993)	Budget Bill/Foundation Increases/Equity Aid/Facilities
H.B. 298 (1991)	Budget Bill/Equity Funding/Facilities Funding

On August 24, 1998, the trial court held a ten-day remand hearing. During trial, this Court placed the burden of proof on the State and confirmed that the remand concerned only questions regarding the thorough and efficient, not the equal protection, clause. *DeRolph v. State* (1998) 83 Ohio St. 3d 1212.

At the conclusion of the trial, the court asked for proposed findings of fact and conclusions of law. Plaintiffs took the position that the court should not make any findings, even if relevant and undisputed, that conflicted with their theory of the case. The trial court obliged. With the exception of the last 11 pages of its decision and biographical information in the first few pages, the trial court's 239-page decision is essentially a verbatim recitation of the findings of fact and conclusions of law proposed by plaintiffs.

On February 26, 1999, the trial court concluded that the system was not yet constitutional. The State appealed.

ARGUMENT

I. PROPOSITION OF LAW NO. 1: THE STATE'S ONGOING REMEDY SATISFIES EACH OF THE CONCERNS IDENTIFIED IN *DEROLPH V. STATE OF OHIO*.

The surest yardstick for measuring whether the State has met the requirements of the "thorough and efficient" clause is the Court's decision in *DeRolph.* There, the Court identified several defects in Ohio's educational system. And here, as we now show, the State has enacted laws designed to correct each one of them.

A. School Buildings.

1. *DeRolph* Concerns. The Court conveyed ambivalence about the Classroom Facilities Act. With one hand, it applauded the law's role in subsidizing school building renovations. But with the other hand, it felt that the Act was "insufficiently funded to meet the needs of districts that are poor in real property value." *DeRolph v. Ohio* (1997), 78 Ohio St.3d 193, 202. In the end, the Court upheld the facial validity of the Act but struck the legislation to the extent it was underfunded.

In focusing on school districts "that are poor in real property value," the Court identified two types of problems that needed attention. One was that some school districts lacked the funds "to provide their students a safe and healthy learning environment." *Id.* at 208. The other was that several school districts were using buildings that lacked sufficient space to provide an adequate education. *Id.* at 206-07.

2. State Response. The State's response to this problem was well underway before the Court's decision. Beginning in the early 1990's, the State began funding school-building renovation aggressively through the Classroom Facilities Act and other repair programs. State Ex. *45*. By May 1998, 23 new construction projects had already been completed under this program and 14 more were under construction. State Ex. 45.

In addition to getting a running head start in resolving *DeRolph 's* building concerns, the State in 1997 also made several progressive improvements to the way it funds and oversees the school building program at the same time that it allocated significantly more dollars to solving the problem. Fischer Tr. 977; Davidson Tr. 71. First, the State created a separate public agency whose only purpose is to oversee all primary and secondary school building, funding, repair, renovation and construction. Davidson Tr. 78; Fischer Tr. 965. No such agency has ever existed

in Ohio history. The School Facilities Commission has 18 employees and over 100 private sector architects, engineers and construction managers under contract to aid in this oversight. Fischer Tr. 975. Since the formation of the Commission the State has earmarked over $1.6 billion for classroom facilities. Am. Sub. S.B. 102 (1997) ("S.B. 102"), Am. Sub. H.B. 215 (1997) ("H.B. *215")*, Am. Sub. H.B. 650 (1998) ("H.B. 650"), Am. Sub. H.B. 283 (1999) ("H.B. 283"), Am. Sub. H.B. 850 (1999) ("H.B. *850")*, Lottery Transfer (6/28/99), Controlling Board SFC 029 (7/26/99). *See State ex. rel. Brooks Equipment Manufacturing Company v. Evatt* (1939), 136 Ohio St. *56,* 59 (permitting Court to take judicial notice of new laws). To put these figures in historical context, the State spent a total of just $174 million on public school buildings between 1803 and 1991. Fischer Tr. 976; Maxwell Tr. 1444-1446.

Second, the State created and funded the Emergency Repair Program to address urgent health and safety needs in the most property-poor school districts in the State. Fischer Tr. 976, 978. Of the 292 school districts eligible for the program (because they fall in the bottom half of all districts in terms of property wealth), every district that timely applied for a grant received up to $500,000 in State money for this purpose. Fischer Tr. 991.

Third, the State overhauled the Classroom Facilities Act, which it had been using to help school districts repair existing buildings and construct new ones. A significant change in the program was to prioritize spending according to wealth. Fischer Tr. 1022. Although each district must contribute funding to the project, the amount is based on the district's ability to pay, a policy choice that all parties embrace. Fischer Tr. 1032; Phillis Tr. 2218; Maxwell Tr. 1486-87. The poorest school districts, for example, now receive roughly 90% in State aid with a 10% local match for each building project. Fischer Tr. 1032-33; State Ex. 45.

Fourth, State funding for the classroom building assistance program has significantly increased — and with each passing year has increased still more. At the time of the remand hearing, over $820 million dollars had been appropriated for the classroom facilities program since 1992, Fischer Tr. 1031, and the General Assembly had committed to funding the program at a minimum of $300 million/year in the future. Fischer Tr. 1062; Davidson Tr. 85; Cupp Tr. 391-92. Since the remand hearing, the State has appropriated an additional $830.7 million. H.B. 850; H.B. 283. Moreover, $13 million in lottery money has been transferred for facility use along with interest earnings of $45.4 million. Controlling Board SFC 029 (7/26/99). All told, then, the State has allocated $1.9 billion since 1992, and $1.6 billion since the Court's decision to this problem.

Finally, the General Assembly responded to the Court's building concerns by enacting fiscal accountability legislation designed to ensure that school districts use State and local dollars in their operating budgets to maintain their buildings and to address health-and-safety needs. Under Sub. H.B. 412 (1997) ("H.B. 412"), the State has required all school districts to allocate a set percentage of their budget to maintenance and repair. R.C. 3315.18. Based on input from school officials, Cupp. Tr. 383; Davidson Tr. 99, the legislature determined that each school district should allocate 2% of its budget to this priority in the 1998-99 school year, 3% in 1999-2000, and 4% in 2000-2001 and thereafter. Davidson Tr. 101; O.A.C. 117-2-23(B).

On this record, the State has amply complied with the Court's building concerns. It has established a systematic program for meeting the long-term building needs of every school district in the State and has successfully implemented a short-term emergency repair program for the 292 equity districts in the State. At the time of trial, 118 school districts in the State were already in the building facilities pipeline -- with 32 school districts completed, 27 districts under

construction or in the design phase, 19 districts in the process of raising their local share, and 40 districts being assessed. Fischer Tr. 1031, 1034, 1036. In the end, the place of one's residence will no longer effect the adequacy of the school building one attends.

B. Technology.

1. *DeRolph* Concerns. The Court also registered concerns about technology. It noted that schools are not keeping up with the technological training needs of students, and that Ohio ranked last in the number of computers per student among the States. 78 Ohio St. 3d at 205 n.7, 209.

2. State Response. Two programs in particular, SchoolNet and SchoolNet Plus, have addressed these issues and now are well preparing Ohio schools for the 21st century. Under these initiatives, the State has already allocated over $535 million in State money to school districts to connect all classrooms by telecommunications wiring and to ensure that every school district has at least one computer for every five students in kindergarten through fourth grade.

Nor did the legislature stop there. Just recently, the SchoolNet program was expanded to include grade 5 and another $85.4 million was appropriated for the program. Am. Sub. H.B. 282 (1999) ("H.B. 282"). Under the SchoolNet program, more than 44 percent of the wiring has been completed at the time of trial and in excess of 14,000 computers had been purchased for classrooms in low-wealth districts. DeMaria Tr. 1289-1290. Under the SchoolNet Plus program, the State purchased over 90,000 computers in the first phase and is in position to purchase over 50,000 computers in the next phase to meet its one-computer/five-students goal. DeMaria Tr. 1293. The State has also appropriated $9.2 million for a bold initiative called interactive video-distance learning, which allows teachers to conduct classes even though their students are located

in a different building or another school district. DeMaria Tr. 1287. In fact the director of the SchoolNet office estimates that Ohio now ranks third in the country regarding its school technology programs. Cupp Tr. 396-397; State Ex. 29. As these programs show, Ohio has set its sights on excellence, not adequacy. This initiative fully meets the Court's technology concerns.

C. Priority of Education.

1. *DeRolph* Concerns. At several turns in its decision, the Court criticized the State for failing to make primary and secondary education a priority in the budget. "Because of its importance," the Court emphasized, "education should be placed high in the State's budgetary priorities," 78 Ohio St.3d at 213, and the "education of our youth must be of utmost concern," *Id.* at 209. Yet, in the Court's view, that had not happened. Instead, the Court believed that education spending had become a "budgetary residual." *Id.* at 199.

2. State Response. For the first time in State history, the legislature has carved out a portion of the State budget and made a commitment of future educational spending beyond the two-year budget cycle. Under H.B. 650, education and education alone has become *the* priority in the State budget. No other component of the budget knows today what its share of State funding will be six years from now and no other component of the budget knows today that this commitment is intended to weather any future recession.

Above and beyond the State's long-term annual commitment of a minimum of $300 million in capital spending for facilities, H.B. 650 obligates the State to significant annual increases in per-pupil basic aid spending over the next four years. R.C. 3317.02; R.C. 3317.012. Time, moreover, has accelerated these spending increases. In the most recent education budget bill, the State increased the per pupil formula amount to $4,052 in FY 2000, and to $4,294 in FY 2001, thus allowing the State to phase in the new formula a year ahead of schedule. H.B. 282.

Other statistics confirm the priority of education in Ohio. Between fiscal year 1992 and fiscal year 1999, the State increased education funding 51.7%. State Ex. 55. And since fiscal year 1991, the Department of Education has received the biggest increase in State dollars of any agency, totaling approximately $1.7 billion. DeMaria Tr. 1262; State Ex. 53. The Department of Education now receives more State money than any other agency or department in the State. DeMaria Tr. 1262. At trial, testimony confirmed what these numbers suggest and what every citizen has seen over the last several years: Our elected officials have made education spending a top priority in the Ohio budget. Davidson Tr. 185.

The recent education budget only re-enforces this trend. Of all State dollars in the budget, over 54% of them now are devoted to primary, secondary and college education, and over 60% of the capital budget is devoted to this purpose. Far from being a "budgetary residual," educational spending has become the first among equals in the State budget. H.B. 282; H.B. 283.

D. Rationality of School Funding Formula.

1. *DeRolph* Concerns. One of the chief complaints of the Court, and one of the chief grounds on which the Court distinguished *Board of Education v. Walter* (1979), 58 Ohio St. 2d 368, was the absence of an objective benchmark for ascertaining the cost of an adequate education. 78 Ohio St. 3d at 199. In the Court's words: The "formula amount has no real relation to what it actually costs to educate a pupil," *id.*, and there is "no connection" between the amount of money allocated by the State and the costs of an adequate education. *Id.* at 210.

2. State Response. The State hired Dr. John Augenblick to develop an objective and rational method for measuring the cost of an adequate education. A nationally-renown school funding expert who previously was one of five members of the panel of experts

hired by the Department of Education to respond to the trial court's 1994 decision, Dr. Augenblick started by looking at what works. Augenblick Tr. 708-9. In other words, he examined school districts in the State that were meeting the accountability standards, or educational outputs, set by the Ohio State Board of Education, State Superintendent and General Assembly. Augenblick Tr. 706, 714-15, 743; State Ex. 15; State Ex. 16, p. 4. These educational outputs included three features -- high performances on the State's proficiency tests, low dropout rates and strong attendance figures. State Ex. 15, p. 8. Next, Dr. Augenblick determined the average basic educational spending patterns of the 102 districts that were meeting the State's accountability standards. Then this average amount became the proposed basic foundation level of spending.

In keeping with their duties as independently elected representatives of their constituents, the General Assembly embraced Dr. Augenblick's output-based approach but made three modest changes to his recommendation. Dr. Augenblick agreed that each of these modifications made sense and that each represented a rational policy choice. Augenblick Tr. 770-1, 784, 791, 805, 923; State Ex. 16, p. 7.

Nor were Dr. Augenblick, the Ohio General Assembly and the Governor the only participants to recommend an output-based approach for determining the cost of an adequate education in Ohio. The 1995 panel of experts' report, which included plaintiffs' own key witness (Dr. Kern Alexander), recommended using an approach that was based at least in part on outputs. Augenblick Tr. 697-8; Alexander Tr. 1695-6. The BEST organization, which stands for Building Excellent Schools for Today and the 21st Century and includes prominent business and education leaders in Ohio, ultimately endorsed an output-based approach. Maxwell Tr. 1440. The Buckeye Association of School Administrators, which represents school superintendents

throughout Ohio, endorsed this approach. Maxwell Tr. 1440. And even plaintiffs, by recommending that the panel of experts' report be adopted on an interim basis, and through testimony by their witnesses, Dr. Howard Fleeter and Mr. William Driscoll, embraced this approach. Tr. 66.

By adopting an output-based approach for determining the base cost of an adequate education, Ohio has directly responded to the charge that the foundation formula "reflects political and budgetary considerations at least as much as it reflects a judgment as to how much money should be spent on K-12 education." *DeRolph*, 78 Ohio St. 3d at 199. The whole premise of this approach is to develop a neutral benchmark for ascertaining what it costs to educate a child, one that could not be more different in appearance or practice from a residual approach to determining the foundation amount.

In the end, the approach is based on a series of common sense judgments steeped in sound educational policy: (1) It identifies desirable accountability standards (e.g., proficiency tests, attendance rates, dropout rates); (2) it determines which school districts are meeting them and at what average cost; (3) it creates a funding formula that assures each school district will receive sufficient funds to meet this average cost; and (4) it then holds all school districts accountable for meeting these standards. In the mere span of a year, it is difficult to imagine that the legislature could have done more to develop an objective benchmark for funding public schools in Ohio. This method is rational, complies with the Court's decision, and deserves a chance to succeed.

E. Categorical Spending.

The foundation formula provides only the base cost of an adequate education. It is elsewhere supplemented by categorical spending programs that allocate additional funds to school districts with special needs.

1. Special Education.

a. ***DeRolph* Concerns**. The only concern the Court mentioned regarding special education related to the method for funding it. The Court complained that "no adjustment is made for the relative wealth of the receiving district," 78 Ohio St. 3d at 200, and that "children in funded handicapped 'units' are not included in the State basic aid formula." *Id.* As a result, the Court concluded, "wealthier districts are in a better position to make up the difference" between the costs of educating special education students and other students in a school district. *Id.*

b. State Response. In response, the State now wealth-equalizes all spending for special education and includes all students in each district's average daily membership for State funding purposes. State Ex. 16, p. *5;* R.C. 3317.02; Davidson Tr. 166, 187; Cupp Tr. 395-396. The legislature established three categories of special education funding, each based on the seriousness of the students' disability and each assigned a different weight that is then multiplied by the State foundation amount. Augenblick Tr. 776, 889-891; State Ex. 15, p. 18-19; State Ex. 16, p. *5;* R.C. 3317.013; Davidson Tr. 166-167; Cupp Tr. 374-375.

By including special education students in the school districts' average daily membership, the funding formula now accounts for the relative abilities of wealthy and poor school districts "to make up the difference" between educating the two types of student. The reason goes to the way the foundation formula is funded: The State subsidizes the difference between the relatively

small amount of local revenue generated by 23 mills of taxation in property-poor school districts and the foundation amount. In contrast, property-wealthy school districts generate far more local revenue through 23 mills of taxation and therefore need, and receive, less State assistance. In applying this approach to special education funding, the State therefore has addressed the very concern identified by the Court -- that of equalizing the way special education costs are paid -- and of accounting for the difficulties some school districts face in meeting these expenses. Nor were these changes inexpensive. The new law added an additional $125 million in State funding in the first year alone, over a 23% increase. State Ex. 64.

2. Disadvantaged Pupil Impact Aid (DPIA).

a. ***DeRolph*** **Concerns**. Under prior law, DPIA funding remained the same for each pupil regardless of whether the district had 20% of its pupils on Aid to Dependent Children (ADC) or 60%. Accordingly, the Court was concerned that the "level of distribution freezes once the concentration reaches twenty percent. Thus, districts with higher concentrations of ADC pupils are forced to carry more of the extra cost" -- even though "educational need increases at a faster rate than the concentration percentage." 78 Ohio St. 3d at 200.

b. State Response. The State went well beyond just addressing this concern. To start with, it eliminated the cap on DPIA funding. R.C. 3317.029. The new DPIA formula is now based on relative concentrations of poverty without any limitation for regions of the State with high concentrations of poverty. *Id.* At the urging of urban legislators, however, the State did more. It also targeted DPIA funding for three types of programs found to be particularly advantageous to school districts with high welfare concentrations: (1) all-day kindergarten, (2) lower student-instructor ratios for grades K-3, and (3) remediation and security.

Id. All told, the State increased DPIA funding by $109 million from fiscal year 1998 to fiscal year 1999, a significant 40% increase. State Ex. 72.

3. Transportation.

a. *DeRolph* Concern. The Court had few complaints regarding the State program for transportation expenses. It merely stated that "no adjustment is made for the relative wealth of the receiving district." 78 Ohio St.3d at 200.

b. State Response. The State, once again, went well beyond responding to this concern. Based on the panel of experts' 1995 recommendation, the legislature developed a sophisticated method for determining the transportation costs of each school district, one that fairly accounts for the miles that need to be traveled for each student in a district. The legislature then agreed to fund 50% of this cost in the first year and eventually to fund 60% of this cost in future years. In prior years, State funding accounted for just 38% of each district's total transportation costs. The change adds over $50 million to the State budget for school district transportation, which represents a 33% increase in just the first fiscal year. Maxwell Tr. 1463-4; State Ex. 73.

Since then, the legislature has made further adjustments. Under H.B. 282, the State developed a new simpler formula. Among other things, it includes a "rough road" subsidy, which will assist rural districts coping with low-quality roads and low student population density.

4. Textbooks And Supplies.

a. *DeRolph* Concerns. At several points in the Court's opinion, it criticized the types of textbooks and supplies available to school districts in the State. It said that textbooks are often "old" and "outdated," 78 Ohio St. 3d at 208, and it was concerned that even "[e]veryday supplies" were not always available. *Id.*

b. State Response. The State responded on several fronts. Over the last two years, the State funded a $50 million textbook subsidy for all but the wealthiest school districts in Ohio. Davidson Tr. 96-97; Cupp Tr. 381. Through H.B. 412, the State also has ensured that school districts reserve some of their allocation of State money for textbooks and supplies. During the 1998-99 school year, they had to allocate 2% of their budget to textbooks and supplies. After that, they must allocate 3% in the school year starting in 1999 and finally 4% in the school year starting in 2000. O.A.C. 117-2-23(A). The textbook subsidy, H.B. 412 and the significant increases in the foundation formula over the next six years all should eliminate this problem.

F. Overreliance On Property Taxes.

1. *DeRolph* Concerns. Another concern registered by the Court related to the State's undue reliance on local property taxes to fund Ohio's school system. "Overreliance on the tax base of individual school districts," the Court found, "means that the poor districts simply cannot raise as much money even with identical tax effort." 78 Ohio St.3d at 210. The Court therefore instructed the State to "eliminate" "the emphasis of Ohio's school funding system on local property tax." *Id.* at 212.

At the same time it criticized the State's overreliance on local property taxes, the Court "recognize[d] that disparities between school districts will always exist" due to differences in property values and income levels of different school districts. *Id.* at 211. "[A]ppreciating the limitations imposed on us," the Court thus emphasized that we "are not stating" Ohio needs "equal educational opportunities for all" or that there must be a "leveling down" (or "Robin Hood") approach to the expenditures of wealthier districts. *Id.* Quite to the contrary: The Court refused to impose "spending ceilings on more affluent school districts. School districts are still

free to augment their programs if they choose to do so." *Id.* at 211. Similarly, in its reconsideration decision, the Court held that local property taxes could still be used as part of a funding solution, so long as they were not "the primary means of providing the finances for a thorough and efficient system of schools." 78 Ohio St.3d at 419.

2. State Response. In meeting this mandate, the General Assembly did several things. First and foremost, the State established a rational cost benchmark for supplying an adequate education, then fully funded it. Under the new system, the State has established a minimum funding base of $4,063 per pupil, which together with categorical spending will supply sufficient State and local funds to provide an adequate education. R.C. 3317.02. In order fully to fund the new system, school districts must levy a minimum of 20 mills of local taxes, and ultimately they must be credited with levying 23 total mills of local taxation. All districts in the State meet, and always have been able to meet, the 20 mill threshold, and the State's gap-aid program (R.C. 3317.0216; State Ex. 62, p. 7) ensures that any district which is unable to raise enough local operating revenue to cover the local share of education will receive supplemental funds from the State to make up the difference. Davidson Tr. 189-190; Cupp Tr. 398; Driscoll Depo. 97-8. Under these circumstances, the adequacy benchmark is fully funded, and any additional reliance on local property taxes results only from a community's decision to do precisely what this Court permitted it to do: "augment their programs if they choose to do so." 78 Ohio St 3d at 211.

These changes also respect the Court's position that the State may continue to rely on local property taxes, so long as they are not the "primary means" for funding public schools. With respect to school districts in the lowest 40% of the State in terms of property wealth, local property taxes plainly are not the "primary" source of funding. These school districts generate as

little as 10% of their operating funds to as much as 35% of those funds from local property taxes. State Ex. 65. The rest comes from State or federal money. While wealthier school districts in the State do turn to local property taxes to fund over half of their operations, that is just as it should be. More is properly expected from those with more to give, particularly from school districts that have ample property wealth. At the same time, local support in these districts is often designed to go well beyond the adequacy requirements of the State's foundation formula. Thus, if a Beachwood or Upper Arlington chooses to spend more than $4,063 per pupil, it is welcome -- indeed encouraged -- to do so, but only by raising local taxes. The State, has fairly and in good faith met this requirement.

G. State Responsibility For School Funding.

1. *DeRolph* Concerns. For many of the same reasons that it criticized the State's reliance on local property taxes, the Court emphasized that the "General Assembly shall recognize that there is but one system of public education in Ohio. It is a statewide system." 78 Ohio St.3d at 213. Similarly, the Court concluded that it is a State, not local, responsibility "to establish a framework for a 'full, complete and efficient system of public education.'" *Id.* at 203.

2. State Response. The new system satisfies this admonition. From A to Z, the State now bears responsibility for creating the system, ensuring that property-poor school districts have sufficient funds to meet building and operating expenses, and of standing prepared to help school districts head off impending deficits through its fiscal watch and fiscal emergency programs. R.C. 3316.03; Cupp Tr. 400-401. While school districts still bear responsibility for spending State and local money efficiently, as the Ohio Constitution requires, the failure to raise additional local revenue above and beyond what is required to participate in the State funding system will no longer lead to an inadequate education.

H. H.B. 920/Phantom Revenue.

1. ***DeRolph*** **Concern**. In the Court's view, two other components of the prior State system hindered school district efforts to raise local revenue for their schools. One of them, H.B. 920, has the affect of preventing property taxes from rising automatically as a result of inflationary growth in real property values. The second component, phantom revenue, stems from a feature of the law that charges school districts with reaping the benefits of inflationary growth in real property even though they have not levied additional mills to capture that growth. R.C. 319.301. The net result, the Court held, was that a "school district can experience an increase in the valuation of its taxable real property without enjoying any additional income and yet receive less under the formula because the total taxable value of property has increased." 78 Ohio St. 3d at 201.

2. **State Response**. The State has addressed each issue. Under the new system, the key point is that all school districts are guaranteed sufficient State funds to reach the foundation level, ultimately set at $4,063. R.C. 3317.02. And that is true whether they levy 20 or 23 mills, whether they face high property growth or low property growth. The twin goals of the new system are to create a per-pupil spending level that will purchase an adequate level of education, then to ensure that all school districts can reach that amount. Neither H.B. 920 nor phantom revenue can or will prevent this from happening under the new system. Davidson Tr. 189-193; Cupp Tr. 398.

To the extent these two problems continue to affect school districts, it is those districts that are well-to-do, not those that are disadvantaged. As the unrebutted evidence in this case confirms, the elimination of H.B. 920 not only would lead to a $1.6 billion unvoted tax increase (for the years 1986-1996), State Ex. 84; Maxwell Tr. 1527-8, but it also would primarily benefit

the wealthiest school districts in the State. For example, of this $1.6 billion increase, 45% of it would go to the wealthiest 20% of the school districts in the State, while only 6.5% of it would go to the poorest 20% of the school districts in the State. Faced with these numbers, plaintiffs' first witness, Mr. Richard Maxwell, admitted that the elimination of H.B. 920 would be "wealth disequalizing," Maxwell Tr. 1531-32 -- that is, it would dramatically increase the spending gap between rich and poor school districts -- and it would ultimately dramatically increase the State's reliance on property taxes. Maxwell Tr. 1532. All things considered, the legislature properly focused on school districts most in need in addressing this issue. Anything more would have created a windfall for high-wealth districts and ultimately disserved a goal of plaintiffs' original complaint -- closing the gap between rich and poor school districts in the State.

I. Borrowing.

1. *DeRolph* Concerns. The Court criticized two loan programs under prior law that it characterized as "forced borrowing," 78 Ohio St. 3d at 201, and as something equivalent to "a clever disguise for the State's failure to raise revenue sufficient to discharge its constitutional obligations." *Id.* at 202. The first of these programs involved "spending reserve" loans, R.C. 133.301, which allowed districts to borrow against a subsequent year's tax revenue with the approval of the Superintendent. The second was a loan with interest from a commercial lender, which often had to be repaid within two years, with the possibility that large loans could cause the district to be placed under State supervision. R.C. 3313.483. The Court directed the State to eliminate both programs.

2. State Response. The State addressed the problem of "forced" borrowing most fundamentally by developing a new per-pupil funding benchmark, which guarantees that a school district will now receive sufficient State and local funds to supply an adequate education.

It no longer may fairly be said that the State is using borrowing to "disguise" a failure to meet its constitutional obligations.

Next, because even the best funding formula cannot prevent individual school districts from facing sudden fiscal problems, whether from sudden economic dislocations, unanticipated revenue shortfalls or simply a new influx of students, the legislature has also established an early warning system for identifying such problems and heading them off. To this end, the legislature empowered the State Auditor to determine if a school district's economic problems require it to be placed in a state of "fiscal watch" or "fiscal emergency." R.C. 3316.03. A fiscal watch district is required to prepare a financial plan addressing its financial problems, and a fiscal emergency district is placed under the management authority of a financial planning and supervision commission which can directly exert control over district spending.

In 1997, consistent with these policy considerations, H.B. 412 created still another important fiscal management tool. The law required the Auditor and Department of Education to adopt rules providing that school districts include five-year revenue-and-expenditure projections in their spending plans. R.C. 5705.391; O.A.C. 3301-92-04. In accordance with the law, the State then examines each projection to gauge the fiscal health of the district, thus providing another early warning of potential fiscal problems. *Id.* To assist in addressing any such problems, the same legislation requires school districts with a yearly revenue increase of 3% or more to begin annually funding a budget reserve fund until it reaches *5%* of the district's most recent general fund revenue. O.A.C. 3301-92-03. Once each district has complied with this requirement, it will have a spending-reserve fund to handle unanticipated financial problems in the future, and for that reason alone should not need to engage in emergency borrowing. R.C. 5705.29(K).

Lastly, each of the borrowing programs found unconstitutional by the court is being, or has been, abolished. Spending reserve borrowing is being phased out over five years, with reduced amounts of borrowing being permitted each year. R.C. 133.301; R.C. 5705.29. No emergency loans have been permitted since March 1, 1998, and H.B. 650 includes a State subsidy available for prior loans to cover any interest paid above 2%. R.C. 3313.484.

Should any school district nevertheless find itself with a financial problem despite all of the mechanisms provided to assure responsible spending, H.B. 412 creates a school district solvency assistance fund to allow interest-free advancements by the State from future school foundation payments, with repayment within two years. R.C. 3316.04, 3316.20. No commercial lender is involved, and no interest is charged. The State, once again, has fully met the Court's requirements in this area.

II. Proposition of Law II: The Trial Court Erred In Striking The Entire *DeRolph* Remedy.

Despite the legislature's point-by-point response to each and every component of the *DeRolph* decision, the trial court categorically invalidated not just some, but all, of the legislature's remedy. In doing so, the trial court failed to give the General Assembly and Governor virtually any policy discretion, instead deferring to plaintiffs on a wide range of exceedingly complex education, finance and social questions. The decision should be reversed.

A. The Trial Court Erred In Striking Each Component Of The *DeRolph* Remedy.

1. School Buildings. In concluding that the new school building legislation and financial appropriations failed to meet the minimum requirements of rationality, the trial court registered these general criticisms: (1) the courts cannot trust the legislature to continue to fund these programs in the future and that the current building programs "are all out of money,"

Dec. 49; (2) school buildings in the State still need repair; Dec. 46, and (3) the State's program will take too long to complete, Dec. 50. Each conclusion is inaccurate.

The first conclusion is the least compelling. The General Assembly, it is true, has just "committed" to spending a minimum of $300 million/year in future State money to renovate school buildings. But that is only because the Ohio Constitution requires it to do so. Under Article II, § 22, of the Ohio Constitution, the General Assembly is not allowed to bind a future legislature to spend State dollars. The most it can do is allocate what is needed in the two-year budget bill, then repeat the process in another two years. The State does not violate one provision of the Ohio Constitution (the thorough and efficient clause) by respecting another (the two-year budget limitation).

Nor, at any rate, have plaintiffs suffered from this constitutional requirement. With the passage of H.B. 650, H.B. 850 and H.B. 283, the legislature has appropriated over $1 billion for classroom facilities, easily surpassing its $300 million/year commitment to the public. Plaintiffs, it turns out, have benefited, not suffered, from this feature of the remedy.

The trial court's next general complaint -- that some school buildings still need repair -- is true, but plaintiffs' own testimony defeats the relevance of this point. Recognizing the amount of time it takes to fix, renovate and build these new facilities, plaintiffs' sole witness on the State building program, William Phillis, acknowledged that it could take 6-10 years to address these needs. Nor did the *DeRolph* decision require the State to address each building concern within the short year following the decision. Phillis Tr. 2119. It instead required the State to put in place a long-range system for addressing these needs, which is just what the State has done.

Finally, the trial court complained that the State's building program will take too long to complete, and at one point suggested that "[a]t the current rate of progress, it will take nearly

fifty-five years to remedy currently identified school facilities needs." Dec. 50. The fifty-five year estimate was based on an assumption by Mr. Phillis that the State would spend no more than the minimum commitment of $300 million/year and that the State would pay for *all* construction costs. Phillis Tr. 2234-35. Yet no one, the trial court and Mr. Phillis included, has ever contended that the State must pay for all school building costs. Mr. Phillis acknowledged that any State share would be for less than half of overall expenses. Phillis Tr. 2245, 49, 50. And of course the $300 million minimum has restrained no one -- as the legislature has nearly doubled that amount by appropriating over $1 billion for the next two fiscal years, 1999 and 2000. S.B. 102; H.B. 215; H.B. 650; H.B. 850; H.B. 283.

Perhaps most importantly, this argument once again is premature and runs headlong into *DeRolph's* admonition that change, particularly dramatic change, takes time. *Id.* at 213. The fact of the matter is that the citizens of Ohio and their representatives are entering new territory. Until two years ago, the State did not have a systematic way for addressing these building needs. Time could well show that these problems may be addressed more quickly, Fischer Tr. 1231, or it may show that the pace of building should slow down to avoid driving up costs and to ensure responsible and efficient building. Davidson Tr. 85; Fischer Tr. 1066. Either way, the trial court has not tenably demonstrated that the current program falls outside the broad parameters of rational legislation.

2. Technology. In its discussion of technology, the trial court (Dec. 145-49) nowhere mentions this Court's discussion of the issue. Nor does it acknowledge, let alone refute, evidence that Ohio ranked third nationwide in this area. Cupp Tr. 396-397. Instead, the trial court principally registered policy concerns that SchoolNet and SchoolNet Plus do not yet supply computers for students in grades 5-12. Dec. 145. As an initial matter, the record does not even

indicate whether high schools and middle schools throughout the State are lacking in computers. Surely, moreover, the fact that Ohio has addressed this problem one step at a time -- and indeed has already extended the program to the fifth grade since the trial court's decision -- does not suffice to invalidate the law now. This is a quintessential example of a newly-enacted program that should be allowed to develop, expand and adjust.

3. Priority of Education. No less mistaken is the trial court's conclusion that the State has failed to place education "high in the State's budgetary priorities." Dec. 226. Nowhere does the court acknowledge that education is now the only component of the budget that has been carved into a separate appropriations bill and represents the only part of the budget to which the State has made commitments beyond the budget biennium. Nor does the court even acknowledge the billions of dollars that have already been devoted to this matter. Instead, adopting verbatim each of plaintiffs' proposed findings and conclusions, the court simply relied on statistics showing that the percentage of the budget devoted to education has declined from the 1970s to the present. Dec. 170-71. Yet *DeRolph* never made any criticism of school funding along these lines. And statistics concerning a 20-year period, all but one year of which *predate DeRolph*, offer little guidance about the validity of a remedy that is still in its early years. The notion, moreover, that the rationality of a law is determined by spending patterns of *other* parts of a State budget, which may rise more quickly for a whole host of reasons (e.g., new federal mandates could lead to higher human services costs and an increase in crime could increase corrections costs) has no legal pedigree of any kind. At all events, to the extent this benchmark is a relevant one, the recent budget bill undermines even this analysis. It shows that, of all State dollars in the Ohio budget, more than 54% of them go to education, whether primary, secondary

or college, and that 39.5% of these dollars go to primary and secondary education alone. H.B. 282, H.B. 283.

4. Rationality of School Funding Formula. In reading this portion of the court's decision, it is difficult to avoid the conclusion that, instead of applying rational basis review, the trial court imposed its and plaintiffs' views of educational policy. And this, even though "those attacking the rationality" of legislation must "negative every conceivable basis which might support it." *Beach Communications,* 508 U.S. at 315. Plaintiffs' own experts admitted, as did every expert in the case, that there is more than one way to design a school funding plan: Each methodology has its own logic, and there is no agreement among school finance experts on a right way to determine the cost of a basic education. Klein T. Dep., 93-94; Alexander Tr. 1704.

This should have ended the matter. "[T]hose challenging the legislative judgment" in a rational basis setting, even when the State has a more-likely-than-not burden of proof, must show "that the legislative facts on which the classification is based could not reasonably be conceived to be true by the governmental decision maker." *Vance v. Bradley,* 440 U.S. 93, 111 (1979). Nonetheless, the trial court became hopelessly bogged down in unvarnished policy debates about the best design for a school finance system. While Ohio's policy leaders have strived to identify and enact the best financing system and we respectfully submit that they have done just that, this is by no means the right criterion for assessing compliance with the Ohio Constitution. The test is one of rationality, not whether plaintiffs or the trial court could conceive of a "better" approach.

At bottom, most of the trial court's decision turns on its embrace of a market basket (or input) approach to school funding, which plaintiffs support, as opposed to an output-based

approach, which Dr. Augenblick recommended and which the legislature adopted. One of plaintiffs' experts, Dr. Kern Alexander, advocated the market basket approach and sought to construct a program for an adequate education by analyzing the curricula of wealthy school districts. Dec. 73.

Instead of giving even a hint of deference to the legislature's contrary view, the trial court concluded that the remedial legislation was "not a rational plan" for "the reasons Dr. Alexander set forth in his criticisms." Dec. 104. "Inputs," the court concluded, "should have been utilized in the formulation of legislation and costed out." *Id.* The trial court further complained that the General Assembly had "failed to establish a foundational level of inputs" and "ignored the trial and Supreme Court's opinions concerning inputs into education." Dec. 105. But this Court never required the legislature to design a system of school finance by costing out the "inputs" determined to be appropriate for inclusion in an adequate education. Such a judicial mandate would clearly encroach upon the discretion lodged in the legislature to determine "what is necessary to provide each district enough money to ensure an adequate educational program." *DeRolph*, 78 Ohio St.3d at 210. Nor does the trial court's authority to make "findings of fact' . . . authorize it to resolve conflicts in the evidence against the legislature's conclusion." *Firemen v. Chicago*, R.I. & P.R. 6, 393 U.S. 129, 139 (1968).

The trial court next suggested that the output methodology was "capricious" because of the policy choices underlying it. Dec. 104. The market basket approach, however, is no different: Which courses should be included in it? Which electives should be included? Which extracurricular activities should be included? In which grades should foreign language be taught? And how in the end does one cost out each of these choices without necessarily making a series of other policy-laden choices? These and other decisions no doubt affect the cost of the market

basket approach in the same way as the choices required by the output approach (e.g., whether to define success by passage of 15 or 17 out of 18 standards?). Mr. Phillis, acknowledged that the choices underlying the market basket approach were susceptible to "manipulation." Phillis Tr. 2183-2185.

Equally flawed was the trial court's conclusion that the State engaged in residual budgeting in developing the output methodology. Dec. 224. In reviewing Dr. Augenblick's report, State Ex. 15, the legislature considered 12 different ways to calculate the cost of an adequate education. State Ex. 17. Four of those options resulted in a *lower* foundation amount than the one ultimately adopted by the legislature in H.B. 650. Legislative leaders, moreover, testified across the board that cost was not a factor in making changes to the Augenblick methodology. Cupp Tr. 413; Davidson Tr. 148; Johnson Dep., 47. The legislature also *added* costly programs not recommended by Dr. Augenblick such as a supplemental charge-off subsidy, a power equalization component, and a textbook fund. Augenblick Tr. 768-770; Davidson Tr. 315-316; Cupp Tr. 365-366. If the State was engaged in residual budgeting, in short, it did not do a very good job.

At the same time that the trial court elevated the choice between an output and input approach to one of constitutional dimension and did so on the basis of just one witness, it ignored that other witnesses for the plaintiffs, including experts, who either preferred the output approach or at least acknowledged that it was a reasonable alternative. Fleeter Dep., p. 177-179; Driscoll Dep., p. 53, 131; Maxwell Tr. 1549; Russell Dep., p. 44-45. Plaintiffs themselves agreed that the market basket approach was not the only reasonable way to fund an educational system. Phillis Tr. 2171.

For like reasons, the trial court erred in invalidating the new formula on still more obscure questions of education finance. Neither the legislature's choices to exclude certain high-spending and low-spending districts from its base cost calculation, Augenblick Tr. 734-735; State Ex. 15, p. 6-7; Dec. 83, 84, 91; Fleeter Dep. 184-185; Driscoll Dep. 141-147; Maxwell Tr. 1477-1479, nor its decision to use on "unweighted" as opposed to a "weighted" average, Dec. 26-27, violates the Ohio Constitution.

It is one thing to say that the former system for funding public schools lacked a rational basis. But it is quite another to say that among the competing remedies to that ruling, there is one and only one remedy --a market basket approach -- that the Constitution tolerates. While plaintiffs have identified one expert -- Kern Alexander of Kentucky -- who embraces a market-basket approach, that by no means suffices to prohibit the use of an output approach under the Ohio Constitution. The State's approach is rational; it deserves a chance to succeed.

5. Categorical Spending.

a. Special Education. The trial court's explanation for striking the special education remedy turns *DeRolph* on its head. At the Ohio Supreme Court's urging, 78 Ohio St. 3d at 200, the State abandoned unit funding for these services and instead agreed to fund them on a wealth-equalized basis through the basic aid formula. Now, however, the trial court complains that the new approach is inappropriate because, even though it vastly increases the State share of funding for low-wealth districts, it decreases State funding for high-wealth districts and therefore creates a "Robin Hood effect." Dec. 234. It is no doubt correct that distributing State funds for special education on a wealth-equalized basis re-distributes these funds in favor of poorer school districts, as opposed to giving the same amount of money per "unit" to all school districts, no matter how wealthy they happen to be. But that is precisely what

the Court asked the State to do; it is eminently fair; and it is exactly how the State's basic aid has long been progressively distributed.

No less flawed is the trial court's other attack on the special education remedy. Once the legislature agreed to fund special education through the basic aid formula, it had to determine how much additional money it would take to educate a handicapped student. In making this calculation, Dr. Augenblick used a regression model to determine those extra costs based on total Ohio spending patterns in fiscal year 1996. Depending on the nature of the disability, the model created three different weights for three different categories of disability. In invalidating these weights, the trial court relied exclusively on criticism of this approach by Dr. Klein and accepted verbatim each of plaintiffs' proposed findings of fact on this point. Dec. 86-89.

Even assuming that a debate over a regression analysis is one that would have concerned the framers of the thorough and efficient clause, the trial court erred in nullifying this prong of the remedy on the basis of Dr. Klein's testimony. Most notably, he gave his opinions without reviewing any of the testimony of the two experts who were actually involved in determining these weights. Klein T. Dep. 63-64, 85-88, 136. Having failed to read this necessary testimony, Dr. Klein misstated the fundamental assumption underlying the analysis -- in his view, "that in FY 1996 districts spent as much as they needed to spend to provide an effective education for their students." Dec. 88. The trial court then used this false assumption to jump to the conclusion that the regression analysis was based upon inadequate expenditures and that the special education weights therefore had no reliable basis. Dec. 121, 233. But the assumption was not that *all* districts spent as much as they needed on special education in FY 1996, but that Ohio school districts did so "on average." Fleeter Dep. 124. Since the sole record evidence on this score shows that Ohio's educational spending patterns in FY96 ranked above the national average in

per pupil spending (DeMaria Tr. 1264), the trial court's reliance on the FY96 date undermines rather than supports its conclusion. *See also* Augenblick Tr. 775, 778.

b. DPIA. The trial court invalidated the DPIA remedy (Dec. 226) because the State dedicated these funds to specific programs, such as all-day kindergarten and class-size reduction, rather than simply giving block grants to the districts. Dec. 131-144, 221-222. Again, however, because the Constitution delegates "wide discretion" to the legislature in this area and because "control follows money" in all areas of State government, *San Antonio v. Rodriguez* (1972), 411 U.S. 1, 51-53, State officials were entitled to require districts to spend the money on specific educational problems. Indeed, urban legislators, whose districts have the highest concentrations of poverty and who necessarily know these problems firsthand, were the ones who lobbied most aggressively for these requirements. Cupp. Tr. 373-374; Davidson Tr. 165.

c. Transportation. Nowhere in the trial court's conclusions does it explain its conclusions about the new funding formula for transportation. It does briefly mention the subject in its findings of fact, but even then only to complain that certain school districts must still pay a portion of their transportation costs. Dec. 144-145. This Court, however, never held that the Constitution requires the State to assume *all* costs of transportation. And the 33% increase in State transportation funding in FY1999 (State Ex. 73) admirably moves the State from its previous share of 38% of total costs to a 60% share when fully phased in. Davidson Tr. 156-157; Cupp Tr. 366-370, 395. Even plaintiffs agreed this was a step in the right direction. Phillis Tr. 2161.

d. Textbooks and Supplies. The trial court failed to acknowledge that the State resolved this issue by appropriating $50 million for textbooks for low-wealth

school districts and by requiring school districts to allocate a percentage of their budget to textbooks and instructional materials. All school districts should have sufficient resources for up-to-date textbooks under this approach, and the trial court's decision is not to the contrary.

6. Overreliance on Property Taxes. The trial court found that overreliance on local property taxes continues under the new system because (1) the new foundation formula is scheduled to be phased in through fiscal year 2002 as opposed to being provided immediately, and (2) because there has been no "dramatic improvement" in aid to low-wealth school districts. Dec. 234. Each concern is mistaken.

As for the phase-in, plaintiffs' own expert admitted that a phase-in can be appropriate for a new school funding system. Alexander Tr. 1698-1699. The allegation, moreover, will soon become moot, first because the phase-in is well underway and, second because the recently-passed budget bill, H.B. 282, accelerates the phase-in so that it will be completed by the fall of 2000.

As for the "dramatic improvement" concern, the trial court overlooked the equity aid program that has devoted $550 million to low-wealth districts since fiscal year 1992. State Ex. 4. For low-wealth districts in the State, in other words, the new allocation of State dollars under the Augenblick formula frequently did not create a sudden increase in State money precisely because those districts had already received these increases through the equity aid program and thus were already receiving the full $4,063 per pupil in basic aid funding by FY1999. Brunson Dep. 84. The districts that needed the money the most, in short, had already received it within a year of the Court's decision.

7. State Responsibility for School Funding. With no real explanation, the trial court accepted verbatim one of the conclusions of law proposed by plaintiffs, indicating that

the State has failed to recognize its responsibility for school funding in the State. Dec. 226. Anyone paying the least bit of attention over the last two years, however, would have to disagree. In terms of time, energy and money, it is difficult to think of another component of State law today or in the past that has ever received more legislative attention. The State has embraced its responsibility by determining the cost of a basic education and by ensuring that all school districts receive sufficient funds to pay for it. Nor is there anything in this Court's decision precluding *any* local responsibility for funding the new system. To the contrary, the Court specifically held that local funding could be part of the new system as long as it was not "the primary means of providing the finances for a thorough and efficient system of schools." 78 Ohio St. 3d at 419 (1997). It is not.

8. Phantom Revenue. The trial court's criticism of phantom revenue simply exceeded the scope of the remand, and for that reason alone should be reversed. The remedial legislation, as shown, resolves this problem by providing a charge-off subsidy to poorer school districts to make up for any phantom revenue shortfall necessary to reach the foundation amount. R.C. 3317.021, 3317.0216(A) and (B). Instead of acknowledging this undisputed feature of the new law, the trial court said that *new* types of "phantom revenue," which just impact a district's ability to raise funds beyond the adequacy amount, have arisen under the new system and therefore make it unconstitutional as well. Dec. 170, 235. But any such phantom revenue effect, if it exists at all, involves questions of tax policy, not constitutional law, since it deals with funds raised to go beyond, not just establish, an adequate education.

9. Elimination of Forced Borrowing. The trial court registered three general complaints on this score: (1) the spending reserve loan program is being phased out over five years, rather than being terminated immediately; (2) school districts with short-term

financial difficulties may still obtain advancements of their school foundation payments through the newly-created State Solvency Assistance Fund; and (3) even with no additional borrowing, payments on prior loans will continue through the year 2007. Dec. 66-67, 237-238. Each concern is misplaced.

First, the phase-down of the spending reserve loan program ultimately will *end* the prior cycle of borrowing, rather than continuing it, and the repayment of outstanding loans over the next several years was explicitly authorized by this Court in its reconsideration decision. 78 Ohio St. 3d at 420. Second, the State Solvency Assistance Fund, to be sure, allows school districts with temporary financial difficulties to obtain an interest-free advancement of their foundation payments. But that is as it should be. Even though an adequate education has been fully funded, it is still possible that a school district could nevertheless find itself in short-term financial difficulties because of unwise spending decisions, unanticipated local revenue disruptions, or rapid enrollment changes. The State has attempted to head off these problems through its extensive early warning system for identifying potential financial problems. *See* R.C. 3316.03, 5705.391, 5705.29(K), 3315.17 and 3315.18. The additional provision of a State Solvency Assistance Fund simply represents another device for assisting distressed districts. It should be upheld.

B. The Trial Court Unduly Speculated About The Future Application Of The Remedy.

The remedial legislation also increases academic requirements for school districts (Am. Sub. S.B. 55(1997)) and requires districts to reserve funds for textbooks, maintenance of facilities, and budgetary emergencies (H.B. 412). Unable to challenge these statutes on their substantive merits, plaintiffs instead speculated that these bills were "unfunded" and would have

a "massive impact" upon school districts in the future. The trial court then adopted each of plaintiffs' proposed findings about these concerns. Dec. 101-103, 235-236.

The trial court's own findings of fact illustrate the pitfalls allowing a court to predict the implementation of these measures. *See Heller v. Doe* (1993), 509 U.S. 313, 320("a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data"). It found that the Chillicothe City Schools would need an additional $1.5 million per year to meet the requirements of this legislation, which the trial court held out as an example of the "great weight of evidence" of such increased cost. Dec. 174. Yet the trial court admitted into evidence a five-year projection of revenues and expenditures (Overly Dep. Ex. 2) that indicates that the school district is already meeting the set-aside requirements for textbooks, that it will not have to set anything aside as a budget reserve, and that it was reallocating its resources to comply with the increased graduation and remediation requirements in S.B. 55 thereby leaving from $385,000 to $446,000 per year to comply with the capital maintenance set-aside. Overly Ex. 1.

The trial court also gave great weight to several school district drafts of their five-year financial projections. The trial court referred to the results of these projections throughout its opinion, e.g., Dec. 19-23, 165, 166, 183-187, 216-221, each of which showed the school districts in question to be running deficits by the end of five years. The trial court erroneously found that the State had provided no rebuttal evidence to such projections and noted that it "gives great weight to the testimony of the Treasurers and finds their projections to be very credible." Dec. 219-220. The evidence showed that these projections were riddled with error. For example, much of Dawson-Bryant's cumulative five-year deficit of $500,000 is accounted for simply by the fact that the Treasurer underestimated State aid for fiscal year 1999 by $360,000. Compare State Ex.

1 to State Ex. 62. Southern Local underestimated its State aid by 8% ($363,000), constituting more than one-third of its claimed five-year deficit. Compare Grandy Ex. 1 to State Ex. 62. Lima need not reprioritize 13% of its budget since it *already spends* 3.5% of its budget on textbooks and 2% on capital maintenance, and the budget reserve requirement is only 1% per year. Buroker Ex. 7. Even more importantly, in fiscal year 1999 alone, the State provided Lima with $2.3 million in State funds beyond those estimated by the district. Compare Buroker Ex. 7 to State Ex. 62.

The trial court's decision contains many such conclusions, which the facts either disprove or are so speculative that they cannot possibly support the conclusion that the remedy has no rational basis.

C. The Trial Court Did Not Limit Its Review To Whether The Legislation Ensured "Conformity With This [Court's] Opinion."

Instead of confining itself to determining whether the new legislation was in "conformity with this [Court's] opinion," 78 Ohio St. 3d at 213, the court repeatedly addressed issues not included in the remand and repeatedly looked to its own 1994 decision, not this Court's 1997 decision, in assessing the *DeRolph* remedy. By any standard, this mistake constitutes reversible error.

First, on the eve of the remand trial, this Court reminded the litigants that "[t]he remand involves the Thorough and Efficient Clause of the Ohio Constitution and not the Equal Protection Clause." 83 Ohio St. 3d. 1212. Despite the clarity of this directive, an entire portion of the trial court's decision deals with "wealth-based disparities." Dec. 157, 159. The trial court then implemented these findings of fact by finding violations of the Equal Protection Clause. Dec. 225 (incorporating trial court's 1994 conclusions of law). One cannot possibly respect the

insertion of the equal protection claim into the case without slighting this Court's conclusion that it was not part of the remand.

Second, even though this Court did not address funding for gifted children in its decision, the trial court inserted this issue into the case as well. At plaintiffs' invitation, it embraced several proposed findings of fact regarding gifted children services. Dec. 122-127. It then embraced plaintiffs' proposed conclusion of law that the legislature "has not complied with the rulings of this Court nor the deadline established by the Ohio Supreme Court regarding gifted education." Dec. 234. While gifted children services are undoubtedly good educational policy, and indeed continue to be vigorously debated and supported, nothing in this Court's decision critiqued these services. The subject simply was not, and is not, part of the remand.

Third, the trial court measured the validity of the remedy by looking to whether it "result[ed] in dramatic increases in State funding." Dec. 221. Concluding that the over $300 million increase in non-capital education spending from fiscal year 1998 to fiscal year 1999 was not sufficiently "dramatic," the trial court then found the remedial legislation invalid. Even apart from the issue whether one-third of a billion dollars is "dramatic" and even apart from whether such an adjective could create a constitutionally-enforceable standard, one reads the Court's 1997 decision in vain for any suggestion that a remedy must involve enormous increases in spending. Nowhere did the Court make the mistake of assuming that State dollars and educational adequacy are one and the same. For this reason as well, the trial court's decision should be reversed.

D. The Trial Court Failed To Respect The Discretion That *DeRolph* Delegated To The Legislature To Fashion A Remedy.

The very decision that the trial court purported to obey in striking the General Assembly's remedy forbids its across-the-board, second-guessing of each and every policy choice made by

the legislature. When this Court issued its initial ruling, it was careful to remind Ohioans that the scope and details of any remedy remained the province of the legislature and Governor. The trial court's failure to heed this admonition by itself warrants a reversal and goes a long way to exposing the flaws in its policy-laden criticisms of the State's remedy.

In *DeRolph* itself, the Court began its remedial discussion by explaining that "we do not instruct the General Assembly as to the specifics of the [remedial] legislation that it should enact. . . . [W]e refuse to encroach upon the clearly legislative function of deciding what the new legislation will be." 78 Ohio St.3d at 212 n.9. Whether one looks to the *DeRolph* opinion for the Court, the several concurring decisions, the dissent, or the reconsideration decision, each opinion and all seven Justices recognize that the delicate policy choices regarding school finance are, at bottom, decisions that the Ohio Constitution delegates to the Ohio General Assembly rather than to this Court. So long as duly-enacted laws fall within the broad contours of constitutional minimums, the Court itself has made clear that policy disputes once fought within the boundaries of a fair legislative debate may not simply be refought in the courts.

Nor does *DeRolph* stand alone. As early as 1922, the Ohio Supreme Court said the following about the legislature's discretion over school policy: "With the wisdom or the policy of such legislation the court has no responsibility and no authority." *State ex rel. Methodist Children's Home Assn. v. Board of Education of Worthington Village School Dist.* (1922), 105 Ohio St. 438, 448. Other cases follow a similar path. "Because this constitutional grant reenforces the ordinary discretion reposed in the General Assembly in its enactment of legislation, the judicial department of this State should exercise great circumspection before declaring public school legislation unconstitutional as a violation of Article VI, Section 2." *Board of Edn. v. Walter* (1979), 58 Ohio St. 2d 368, 385 (quotation omitted). *See also State ex.*

rel. Core v. Green (1953), 160 Ohio St. 175, 180 ("the General Assembly is given exceedingly broad powers to provide a thorough and efficient system of common schools by taxation, and for the organization, administration, and control thereof"); *Gigandet v. Brewer* (1938), 134 Ohio St. 86, 91 (same).

The United States Supreme Court, too, has been careful to defer to the legislative branch in the field of education policy. "Education . . . presents a myriad of intractable economic, social, and even philosophical problems. The very complexity of the problems of financing and managing a statewide public school system suggests that there will be more than one constitutionally permissible method of solving them, and that within the limits of rationality, the legislature's efforts to tackle the problems should be entitled to respect." *Rodriguez* (1972), 411 U.S. at 42.

In conspicuous contrast to these hallmark requirements of judicial restraint, the trial court engaged in a review that parallels strict scrutiny more than rational basis review. From the first page to the last of the trial court's 239-page decision, not once does it acknowledge the deference that this Court has repeatedly said applies to these intricate policy questions. And in striking every component of the new legislation, the trial court nowhere mentions the Court's admonition that the legislature has "wide discretion" over any remedy. 78 Ohio St.3d at 212 n.9, 213. This error --in effect applying the wrong standard of review -- permeated every aspect of the trial court's decision warrants reversal.

E. The Trial Court Erred in Awarding Costs and Attorney Fees.

On March 24, 1997, this Court held for the first time that a litigant could obtain attorney fees in actions filed under R.C. 2721.09, Ohio's declaratory judgment statute. That statute,

however, no longer permits such awards and is applicable to actions pending on the effective date of the statute. *See* R.C. 2721.16. The trial court's fee award therefore should be reversed.

CONCLUSION

This Court should reverse the decision of the trial court and find that the General Assembly has complied with its March 24, 1997 decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Brief of the State Appellants was served by hand-delivery this 2nd day of August, 1999 to Nicholas A. Pittner, Bricker & Eckler, 100 South Third Street, Columbus, Ohio 43215.

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