IN THE SUPREME COURT OF OHIO

DALE R. DEROLPH, et al.,	:	
	:	**Case No. 99-0570**
	:	
Plaintiffs,	:	
	:	
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,**
	:	**Case No. 95-2066**
Defendants.	:	

BRIEF OF PLAINTIFFS/APPELLEES

Nicholas A. Pittner (0023159)
Counsel of Record
John F. Birath, Jr. (0022024)
Sue W. Yount (0034514)
Quintin F. Lindsmith (0018327)
Susan B. Greenberger (0010154)
BRICKER & ECKLER LLP
100 South Third Street
Columbus, OH 43215
Telephone: (614) 227-2300
Telefax: (614) 227-2390

Counsel for Appellees

Jeffrey S. Sutton (051226)
Counsel of Record
JONES, DAY, REAVIS & POGUE
41 South High Street, Suite 1900
Columbus, OH 43215-6103
Telephone: (614) 469-3855
Telefax: (614) 461-4198

Mary Lynn Readey (0038591)
Roger F. Carroll (0023142)
James G. Tassie (0065184)
Assistant Attorneys General
30 East Broad Street, 15th Floor
Columbus, OH 43215-3428
Telephone: (614) 644-7250
Telefax: (614) 644-7634

Joel S. Taylor (0019572)
DINSMORE & SHOHL LLP
175 South Third Street, Suite 1000
Columbus, OH 43215
Telephone: (614) 628-6900
Telefax: (614) 628-6890

Counsel for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION

Over two years ago, in a sweeping and historic decision, the Court declared that Defendants (hereinafter "the State") were systematically violating the constitutional rights of public school children throughout Ohio. *DeRolph v. State* (1997), 78 Ohio St.3d 193. The State was directed to change *in its entirety* the manner in which it funds public schools. In the ensuing years, the State resolutely refused to acknowledge the enormity of the decision and the magnitude of the task ahead. Instead, the State sought at every turn to trivialize the Court's decision and minimize its duty to accomplish real and systemic reform.[1] As a result, Plaintiffs are now before the Court following the trial court's determination that the State failed to correct even a single of the manifold deficiencies identified by this Court. Despite the State's self-serving protestations of "good faith," "breathtaking" improvements, and "excellence, not adequacy," in truth the system by which the State funds education today is little different from, and no better than, that which the Court condemned more than two years ago. As the trial court concluded, "the State has not materially altered the foundation program in any substantive way."[2]

As a result, Ohio stands once more at a crossroads. This time, the Court must decide whether its 1997 decisions established an enforceable mandate or were

---

[1] The State has repeatedly argued that the system was largely fixed by the time the Court considered this case in 1997, so that relatively little remained to be done. See, *e.g*., State's Opening Brief to the Trial Court at 16. ("By the time of the Supreme Court's *DeRolph* decision, any concerns about the priority of education in the State budget had already become dated.") This Court expressly rejected that argument. *DeRolph*, 78 Ohio St.3d 193, 211.

[2] (Trial Court's Findings of Fact, Conclusions of Law, Order and Ruling at (hereinafter "Dec.") 223) Page numbers cited in this Brief are to the version of the foregoing decision as originally issued by the trial court on February 26, 1999, which version is contained in Appellants' Appendix. The decision contains specific citations to the record. For the convenience of the Court, Plaintiffs have organized their Supplement ("Second Supplement") consistent with the organization of the trial court's decision as reflected in table of contents which prefaces that decision.

merely precatory, leaving Ohio's children with no means of enforcing their educational rights. The stakes are even higher now than they were in 1997 since the State's defiant response to *DeRolph* challenges not only the rights of the children but also the authority of the Court and the vitality of the rule of law. As the Court recently reaffirmed, if the legislature is permitted to persist in unconstitutional acts for which there is no remedy, "'then indeed is our constitution a blank paper: there is no guarantee for a single right to citizens.'" *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), __ Ohio St.3d __, 1999 WL 617856, at *4 (quoting *Rutherford v. M'Faddon* (1807)).

At the outset, it must be bluntly stated that the State has presented this high Court with a portrayal of events and results that is simply not honest. This is a grave charge but nonetheless appropriate. The State's evident hope is that this Court will do what the trial court would not: accept the State at its word and disregard the burden assigned to the State and the overwhelming evidence of the State's failure. Thus,

- If the State claims excellence for its school system, it must be so – even though the record is replete with evidence of unabated educational deprivation.
- If the State says it fixed the borrowing problem, it must be so – even though forced borrowing remains an essential element of the State's system.
- If the State says it provided a $50 million textbook subsidy and the textbook problem is now solved, it must be so – even though the subsidy amounts to a paltry $16 per pupil (Dec. 186), and, as the State reprehensibly failed to tell this Court, *the subsidy was eliminated entirely by the legislature* after the hearing in the trial court concluded. [3]

[3] The subsidy was eliminated earlier this year in Am. Sub. H.B. 282 (hereinafter "H.B. 282").

- If the State says it made education funding a priority, it must be so – even though the evidence reveals calculated manipulations designed to produce a low foundation amount, unrelated to costs, at a time when the State repeatedly proclaimed that it literally had more money than it knew what to do with.[4]

- And if the State says it "fully-funded" its formula,[5] that must be so, too – even though it is plain on the face of the State's legislation that the State did *not* fully fund its formula.

- Finally, if the State says school facilities are now too lavish,[6] that too must be true – though the experience of children who attend dangerous and dilapidated schools, and the testimony of the State's own witnesses, is otherwise. (Dec. 231)

In stark contrast to the State's grand rhetoric, the evidence reveals that the State has pursued a deliberate, short-sighted, and punitive strategy of "tweaking" technical aspects of its school funding system while retaining – and in some respects exacerbating – the overarching unconstitutionalities decried by this Court. The State's system remains substantially reliant upon local property taxes, imposing new costs upon schools while increasing State funding for operations at a lesser rate than the old system had historically produced. (Dec. 196-97) Indeed, the State was unable to present any evidence that there was a *net* increase in school funding of even $1 (Dec. 221), nor was it established that any child in Ohio has the benefit of an adequate educational program. The State's only education witness, Dr. John Goff, refused to characterize education funding as adequate. (Dec. 201)

The State defends its system with buzz words like "accountability," even as it

[4] Since 1996 the State has returned, or indicated an intention to return, over $1 billion in "unneeded" tax dollars. (See DeMaria Tr. 1327; Dec. 171)

[5] Brief of the State Appellants filed in this Court (hereinafter, "State's Brief") *passim.* See, *e.g.*, *id*. at 21 ("the State established a rational cost benchmark for supplying an adequate education, then fully funded it"; "the adequacy benchmark is fully funded").

[6] (State's Opening Statement Tr. 23) ("[M]y conclusion will not be whether the building program is adequate, but whether it's too lavish.")

seeks to evade accountability to the Court and to the constitution. It touts legislation enacted since the close of the record, though there is no evidence that balances purported cash increases against increased expenses and loss of local taxes mandated in other legislation. It presents to the Court figures that blend monies spent on colleges and universities with those allocated for primary and secondary education, though this case has nothing to do with colleges or universities.

Summarizing the State's disingenuous efforts, the trial court concluded that "while many minor changes have been made, with little exception, those changes are largely changes of form and not substance." (Dec. 222) Once more, the State has relied on smoke and mirrors. In 1997, this Court concluded, in effect, that the State's funding system was like a car that had run out gas. Since then, the State may have tinkered with the engine, but the gas tank is still empty.

STATEMENT OF FACTS

After the trial court's original decision in 1994, the State assembled a "Panel of Experts" that was charged with determining an adequate level of funding for Ohio's public schools. In 1995, the Panel recommended a funding level equivalent to $5,051 per pupil in FY99 dollars.[7] The State ignored the report. The trial court found that within two months of this Court's decision in 1997, the State began "to develop a methodology that would allow the State to back into a base cost number that would be acceptable from a budgetary standpoint, regardless of whether it

[7] (Augenblick Tr. 696-7; Brunson Exh. 15) The use of "FY" herein designates the fiscal year ending on June 30 of the year specified.

would be adequate." (Dec. 224) [8]

The State formed a task force of politicians, and the Department of Education ("DOE") hired Dr. John Augenblick to develop a methodology for the task force that would determine an adequate funding level.[9] As described by Dr. Augenblick, his methodology had few fixed principles and was susceptible to infinite manipulations that produced an unlimited range of base costs, all of which he considered rational.[10] Dr. Augenblick conceded that his "inferential approach" merely described what exists; it is used "by people who do not want to deal with questions of what ought to be." (Augenblick Tr. 818) Dr. Augenblick's Ohio methodology had never before been used to determine school funding levels in any state. (Dec. 105)

Essentially, Dr. Augenblick sought to identify a sample of "effective" districts – defined as those districts that met 17 of 18 performance criteria then under consideration by the DOE – in order to extract from those districts an average per pupil expenditure figure that could have general application. Preliminarily, however, Dr. Augenblick excluded from consideration the top and bottom 5% of

---

[8] While State's legislative-leader witnesses insisted that "cost was not a factor" (State's Brief at 35), their own documents tell a far different story. For example, Connolly Depo. Exh. 3 states, in part, "The assignment we [legislative staff] were given in constructing this plan was to*** keep the price tag within the one-cent sales tax increase revenue projection. The second approach is called the 'Targeted Resource Plan.' This approach was based on having no new revenue and moderate spending cuts within the existing FY99 budget." (Dec. 150) Both Speaker Davidson and Senator Cupp conceded that cost *was a factor* in the legislative process. (Dec. 149, 150)

[9] Though nominally an "expert," Dr. Augenblick testified that he knew little about Ohio's schools (Augenblick Tr. 719, 812, 854-58, 865-68, 877-78, 936-37, 948); that he relied largely upon others to provide the data, make the decisions, and perform the technical analyses (which he did not verify and about which he remained uninformed) that resulted in the formula he recommended (*id*. 841, 887-96, 905-11); that he chose "eyeballing" a graph over more sophisticated and statistically-complex analyses as the basis for decisions affecting Ohio's 1.8 million school children (*id*. 737-39, 852-58); that he neither determined nor knew how to determine whether particular districts spend more or less than necessary to provide an adequate education (*id*. 852); and that he neither knew nor cared to know the results that would flow from the funding model he recommended (*id*. 719, 852, 878-81, 927-32, 957-58). Faced with only one of these failings – the absence of rationale – the New Jersey supreme court rejected what it disparagingly termed "putative" expert opinion. *Abbott v. Burke* (1997), 149 N.J. 145, 185, 693 A.2d 417, 437.

[10] (See Augenblick Tr. 738-739, 740, 749-750, 757-758, 767, 890, 924)

districts as measured by wealth (property value and median income). These cuts, made by Dr. Augenblick solely on the basis of a "statistical analysis" that he described as "eyeballing a graph,"[11] lowered the average per pupil expenditure by primarily excluding from his sample higher-spending districts, since these districts would otherwise have qualified as effective whereas very few of the poorer districts met those criteria.[12] Using only expenditure figures from 1996 (i.e., under the unconstitutional funding system), and without anticipating new costs mandated in subsequent legislation, Dr. Augenblick arrived at a per pupil funding level of $4269 in FY99 dollars.[13] He testified that he would consider his formula (as enacted by the State) to be "rational" even if it produced a *lower* base funding amount than the system invalidated by this Court. (Dec. 104)

When Dr. Augenblick's methodology was exposed to the light of professional review, it was revealed as nothing more than "junk science." (Dec. 87) The trial court characterized the modified version of Dr. Augenblick's methodology enacted by the legislature in H.B. 650, as "fraught with a stunning array of problems." (Dec. 224) Commenting upon Dr. Augenblick's testimony, the trial court concluded that if "rational means anything, then rational means nothing." (Dec. 223-224)

---

[11] Dr. Augenblick testified as follows (Augenblick Tr. 853-54; Dec. 84): "Q. *** And I believe you testified to us yesterday, Doctor, that in connection with that graphical analysis, the way you selected districts was just to eyeball the graph. Is that your testimony?" "A. Yes." "Q. Now, Doctor, you've held yourself out to be an expert in the area of school finance; is that correct?" "A. Yes. " "Q. That's why you're here. Are you aware, sir, of any technical literature in the field of school finance that says that you make decisions affecting 12.8 [*sic*] million people by simply eyeballing a chart? Can you cite me any literature, Doctor?" "A. There is no literature that I know of that says that when you're talking about 1.8 million children in Ohio, that you can use that approach. That's correct." (Augenblick Tr. 852-54)

[12] (Brunson Depo. 24-8; Dec. 93)

[13] (Cohen Depo. 409; Cohen Depo. Exh. 26; Brunson Depo. Exh. 16) Dr. Augenblick's methodology also did not anticipate the two new types of phantom revenue created by the legislature which now inflict a total of five different types of phantom revenue upon school districts. (Maxwell Tr. 1399 – 1400)

The Panel of Experts' foundation level of $5051 (in FY99 dollars) was reduced by Dr. Augenblick to $4269.[14] Then the State, without relying upon any data, advice or policy, manipulated Dr. Augenblick's methodology to arrive at an even lower funding level of $4063. It did this, first, by increasing from 5% to 10% the income screen used to cut districts from consideration on the basis of wealth,[15] and second, by switching from the use of weighted to unweighted averages.[16] Still not satisfied, the legislature chose to *phase in* that level over four years, meaning that, by design, schools would be inadequately funded during the phase-in period, even using the legislature's own definition of adequacy. As a result, for FY99, the foundation level was $3851 – $212 per pupil below the legislatively-declared "adequate" base level, $440 below Dr. Augenblick's recommendation, and $1,200 below the Panel of Experts' recommendations. (Dec. 100)[17] Finally, the legislature imposed arbitrary caps on annual increases, as a result of which, in the first year of the formula, 214 districts did not receive even this inadequate level of funding.[18]

Funding for special education was also downsized and underfunded. Not

---

[14] Dr. Augenblick had been a member of the Panel of Experts.

[15] (Brunson Depo. Exh. 9; Brunson Depo. 103-4) David Brunson, of the LBO admitted, "[I]f you eliminate the high income districts, you will be lowering the cost of an effective district." (Brunson Depo. 29-30) Like Dr. Augenblick, the legislature acted on the basis of eyeballing a graph; Senator Cupp agreed that "that's as sophisticated as that decision got." (Cupp Tr. 421-425; see also Dec. 93-96)

[16] Dr. Klein explained the significance of weighting as follows (Klein Tr. Depo. 61-62):

> Suppose there were only 2 districts in the state and one district had 90,000 pupils, and that district, it cost $4 per pupil for lunch. And in another district, we had 10,000 pupils, and that district it only cost $2 for lunch. The total cost of providing these 100,000 students with lunch is 4 times 90,000, which is 360,000, plus 2 times 10,000, which is 20,000, which is a grand total of $380,000. So the price per pupil is $3.80 is what it would cost to feed these 100,000 students. If you didn't weight the values and used the procedure that the state used, you would say the average cost of feeding a student was $3. And so a lot of kids would go hungry, because you wouldn't have enough money to feed them…. So if your purpose is to produce per pupil expenditures, then what you want to do is you want to weight by pupil.

The State's funding approach leaves countless students hungry for the education promised them by the constitution.

[17] The foundation level for FY99 was over $2,100 per pupil less than the *average* per pupil expenditure ($6,036) of the previous year. (See Dec. 86)

knowing the cost of special education programs for any pupil, Dr. Augenblick recommended a set of weights derived from a mathematical regression formula developed by others. (Dec. 109-10) The legislative response was to substantially modify his recommendations, thereby substantially reducing the amount of State funding for special education. (Dec. 112-14) No educational reasons were advanced in support of either Dr. Augenblick's recommendations or the State's changes. (Dec. 112-116) The trial court concluded that "by design, special education funding is underfunded." (Dec. 224)

Having manipulated Dr. Augenblick's methodology to achieve a level of funding acceptable from a budgetary standpoint, the State then declared war on its schools by mandating programs with significant new costs but no new funding. As the trial court stated:

> H.B. 412 and S.B. 55 were intended to be funded by the state sales tax that did not pass. The mandates of these two pieces of Legislation without providing the accompanying funding will have a devastating impact upon the budgets of our State's school districts. As Dawson-Bryant Treasurer Stephen Sites explained the set-asides are like a "three-legged stool. We have the accountability in 412...we have the increase (sic) academic standards in 55, but we didn't get the increase necessary in funding. So we have a two legged stool." (Sites Tr. 65)

(Dec. 236)[19] The new mandates, which impose huge new expenses on the schools, were thus accompanied by not one dollar of new funding. LBO projected that the cost of the Am. Sub. H.B. 412 (hereinafter "H.B. 412") set-asides could be as much

---

[18] (Shams Depo. 85; Shams Depo. Exh. 6) The caps reduced funding for FY99 by $134 million (Shams Depo. 90).

[19] In the spring of 1998, the State argued to this Court (in its Motion for Extension Of The March 24, 1998 deadline) that the sales tax contained in H.B. 697 was the final piece of the State's school funding remedy. Pursuant to that bill, however, the sales tax the State contended was essential for adequate school funding was *conditioned* upon a vote of the electorate. The condition, however, was self-imposed as the State could have increased the tax without a vote. The tax failed. (Dec. 173)

as $800 million per year;[20] the trial court found that the additional costs of Am. Sub. S.B. 55 (hereinafter "S.B. 55") could be as high as an additional $90 million.[21] Adding insult to injury, the State began a phase out of equity money. As a result, many districts will not even be able to keep up with inflation. (Dec. 216-19) Plaintiff Dawson-Bryant, for example, projects that it will average little more than a 1% increase per year over the next 4 years.[22]

The State has also continued borrowing for school operations as an essential element of its funding system. Many districts will be forced to incur new operating debt, and no new funds are provided to assist them with repayment of existing debt. The only changes are that the State itself is now the lender, it calls the loans "advances," and it does not charge interest. (Dec. 223) But the trial court found that "the State did not present a single witness who could testify as to how the State addressed circumstances which generally lead a school district into debt," and "[the] legislation may actually exacerbate [these] circumstances." (Dec. 223)

Likewise, the State has done nothing to reduce reliance on local property taxes while it has, at the same time, reduced the local tax base. A 25-year phase out of inventory taxes has begun,[23] and deregulation of the telecommunications and

[20] (Brunson Depo. Exh. 4; Brunson Depo. 57-58)
[21] The new set-asides and mandated costs will cost Jackson City Schools $785,000 and will cause its unreserved fund balance deficit to balloon to $2.095 million. (Strawser Tr. 1810-12; Pl. Exh. 487) The 5% budget reserve required by H.B. 412 will cause the Lima City School District to set-aside approximately $1.5 million and the district will be obligated to borrow money to achieve the reserve. (Buroker Depo. 317-19) South-Western City School District has prepared 5-year financial forecasts since 1983 and has never been less than 96-97% accurate in revenue projections. (Hutchinson Depo. 10 and 38) It projects that over the next 5 years, the district will go from a positive balance of approximately $16 million to a deficit of over $33 million, of which $18 million is attributable to the set-aside and budget reserve requirements of H.B. 412. (Dec. 181)
[22] (Maxwell Tr. 1368; Sites Depo. 80, 95; Dec. 200)
[23] Am. Sub. H.B. 283.

natural gas industries has reduced local tax revenue by over $150 million.[24] Meanwhile, the portion of the State's budget devoted to primary and secondary education has fallen from 45.1% to 36.8% from FY75 to FY99.[25] During this time, only 30% of the per pupil increase in revenues has come from State sources.[26]

The State's numbers concerning school facilities are also not what they seem. The State claims that since 1997, it has "earmarked over $1.6 billion for classroom facilities."[27] Similar money-waving occurred before the trial court, where Mr. Fischer testified that from 1992 to 1998, the State appropriated $1.072 billion for school facilities at an annual average rate of $212 million.[28] Yet, it was revealed that since 1992, only 32 building assistance projects had been completed, amounting to only $225 million in State spending.[29] This equates to $37.5 million per year in State funds. While the State now touts $1.6 billion "earmarked" for classroom facilities, there clearly is no assurance that even $37.5 will actually be spent on facilities. Meanwhile, between 700 and 800 school buildings scheduled for or recommended for demolition in *1990* are still in use today.[30] The trial court concluded (Dec. 231):

> At the present rate of repair and replacement by the State of Ohio it will take 55 years to meet the facility needs of our public school districts. (Phillis Tr. 2234-35) The overcrowded schools, code violations, leaking roofs, asbestos, faulty electrical wiring and outdated labs continue while the State claims to have done "too much too quickly." (See State's Opening Statement Tr. 37)

[24] (Russell Depo. 138-39, 141; Russell Depo. Exh. 1)
[25] (Phillis Tr. 2008; Pl. Exh. 490)
[26] (Alexander Tr. 1676-77; Pl. Exh. 477, Chart 38.1; see also, Phillis Tr. 2019-20; Pl. Exh. 493, p. 2; Dec. 166-68)
[27] (State's Brief at 7)
[28] (Fischer Tr. 976-77)
[29] (Fischer Tr. 1034)
[30] (Phillis Tr. 2034)

By 1997, the $10.2 billion facilities problem had escalated to $20.1 billion, worsening at an average rate of $1.4 billion per year. The $4 billion in capital spending from FY90 to FY96 thus leaves a balance of $16.5 billion in unremedied facilities needs.[31] And while the trial court's estimate of 55 years assumed no new decay, in fact the magnitude of the facilities need is escalating at *14%* per year. Thus, at a spending level of $300 million, the State is responding to less than 2% of that need per year. At this rate, the State will never catch up.

In sum, the overwhelming evidence before the trial court established that the State made a tremendous effort to construct an illusion of compliance with this Court's order with no substance behind it.

ARGUMENT

I. Proposition of Law: Because The Factual Determinations Of The Trial Court Are Supported By Competent, Credible, Evidence Going To All Essential Elements Of The Case, They Must Be Accepted By This Court.

The Court's remand to the trial court expressly recognized "the unique role of trial courts as triers of fact and gatherers of evidence." *DeRolph*, 78 Ohio St.3d 421. Trial courts' findings of fact have historically been afforded a presumption of validity by reviewing courts, and the same presumption should be extended in the instant case. Consistent with this presumption, a reviewing court has no authority to substitute its judgment for that of the trial court when there exists competent, credible evidence supporting the findings of fact and conclusions of law rendered by

[31] The total estimated costs in 1997 of public school facility needs, according to the LBO, was $20.1 billion. This figure was reduced by $4 billion because "districts spent $4 billion in capital projects from FY 1990 through FY 1996." (Brunson Exh. 29)

the trial judge. *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77. A reviewing court thus limits its review "to whether there exists in the record some evidence to support" the trial court's findings of fact and the judgment based thereon. *State ex rel. Fisher v. McNutt* (1992), 73 Ohio App.3d 403, 406 (citing *C.E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St.2d 279, 280). Judgments that are so supported are not against the manifest weight of the evidence and may not be reversed. *C.E. Morris Co. v. Foley Construction Co.*

The State has not even suggested that the trial court's decision is in any way contrary to the manifest weight of the evidence. Rather, the State argues with isolated factual determinations[32] and complains about the total rejection of its position, insinuating that the fullness of Plaintiffs' victory suggests impropriety on the part of the trial court. While the trial court did not, as the State suggests, adopt Plaintiffs' proposed findings of fact verbatim, it is true that it adopted the substance of nearly all of Plaintiffs' proposed findings – all of which were supported by competent, credible evidence, most of which was undisputed.[33] The State's unmitigated defeat in the trial court was the inevitable consequence of the State's

[32] For example, the State asserts that, "The trial court erroneously found that the State had provided no rebuttal evidence to such [five-year budget] projections [of certain school districts]". (State's Brief at 44) *Indeed, there was no such rebuttal evidence*. The State takes issue with school district treasurers' five-year financial projections, when, with all of its resources, the State was unable to muster even one rebuttal witness who could testify that the five-year projections were inaccurate.

[33] The trial court not only inserted findings proposed by the State, but it rejected numerous of Plaintiffs' proposed findings. Well before its last eleven pages, all of which were written by the trial court and were not part of Plaintiffs' proposed findings, the Court edited redundant sentences and added findings of its own. It is well-established that a trial court may adopt proposed findings and conclusions verbatim, provided the court reviews the document thoroughly and ensures it is accurate. *Paxton v. McGranahan* (1985), 25 OBR 352, 356; *Clark v. Smith* (Seneca Co. 1998), 1998 WL 852726 at *7; *Adkins v. Adkins* (1988), 43 Ohio App.3d 95, 98. The numerous additions and deletions made by the trial court demonstrate that court's thorough review of the proposed findings and conclusions.

overwhelming failure to accomplish the reform it was ordered to undertake. Any suggestion that the State's defeat should somehow be credited not to its own failure but to that of the trial court judge is as offensive as it is untrue.[34]

Accordingly, while the Court is free to review the legal conclusions reached by the trial court, precedent would require the Court do so on the basis of the facts determined by that court. Those facts compel the legal conclusion reached by the trial court that the State has failed to respond to this Court's reform mandates.

II. Proposition of Law: The State Has The Burden Of Proving Full And Complete Compliance With Each Of The *DeRolph* Mandates, And It Has No Discretion To Fail Or Refuse To Comply With Them.

This Court's clear mandates to the General Assembly left no doubt as to the specific results to be accomplished by remedial legislation – a "complete, systematic overhaul" of Ohio's school funding system ensuring each school child an adequate educational program. *DeRolph*, 78 Ohio St.3d 193, 212. While the Court granted broad discretion to the General Assembly to determine the *means* of accomplishing that end, it gave no discretion as to the *ends* to be accomplished. But the State continues to argue not only that it should have complete discretion as to the form of legislation enacted to comply with the Court's order, but also that it should have discretion to decide *whether* and *when* to comply with such orders.

This Court has recognized that "The state has the burden of production and proof and must show by a preponderance of the evidence that the constitutional

[34] The eloquent tribute to the integrity and skill of the trial court previously expressed by a Justice of this Court is as appropriate today as it was when expressed. *DeRolph*, 78 Ohio St.3d 193, 247 (Douglas, J, concurring).

mandates have been satisfied."[35] Thus, there is no presumption of constitutionality to be afforded the remedial legislation under review here. Having failed to demonstrate attainment of any of the constitutional ends mandated by this Court, the State has no legitimate claim to deference – and not one of the cases cited by the State suggests otherwise. Indeed, not one of the cited cases involves the remedy phase of litigation after a statute has been declared unconstitutional. Rather, these cases all involve an *initial challenge* to a statute.[36]

A second theme that pervades the State's brief is the claim that the State should be afforded more time to attain the ends mandated by this Court.[37] This argument is tantamount to a concession of failure, suggesting that the State hopes in the future to accomplish what it has as yet failed to do. But the State points to no feature of its legislative plan that would justify any hope of such a result. This case is permeated with empty promises of legislative reform while the State continues to inflict constitutional harm on its children.

III. Proposition of Law: Forced Borrowing Continues As An Essential Element Of The State's Funding System, In Blatant Violation Of The Court's 1997 Decisions.

The State's arrogant disregard of the Court's mandates is perhaps most obvious in the General Assembly's flagrant reenactment of statutes requiring school

[35] Entry of September 1, 1998. The State has continually manifested its disregard of the Court's ruling regarding the burden of persuasion, claiming an entitlement to a presumption of constitutionality. For example, in its brief to this Court, the State faulted the trial court for failing to require *Plaintiffs* "'to negative every conceivable basis which might support the remedy," thus invoking a standard that has no application to these remedy-phase proceedings. (State's Brief at 2)

[36] (See State's Brief at 2, 32-34, and 48.) The State even resurrects *Board of Edn. v. Walter* (1979), 58 Ohio St.2d 368, 385, quoting, "the judicial department of this state should exercise great circumspection before declaring public school legislation unconstitutional." (State's Brief at 48) That the State is still relying upon *Walter* in the *remedy* phase of this action is further proof of its failure to accept responsibility for school funding reform.

[37] (State's Brief at 2, 3, 9, 15, 29-30 and 31)

districts to borrow operating funds – *after* those statutes were expressly struck down and the one-year grace period for their continued operation had expired.[38] This Court unequivocally declared both spending reserve borrowing and emergency school assistance loans to be unconstitutional.[39] The State's response: reenactment of both the spending reserve requirement, now R. C. 5705.29(F), and a look-alike version of the emergency school assistance loan program, the latter re-named the "school solvency assistance program," now R.C. 3316.20.[40]

For FY98, spending revenue loans were approved for 42 districts totaling over $54 million. (Brown Depo. Exh. 3) In addition the repayment of outstanding emergency school assistance loans, even without any additional borrowing, drained over $62 million from school programs in FY99 and will take an additional $54.8 million in FY00. (Dec. 69)[41] And, the State has actually *increased* the need for districts to resort to borrowing by imposing new mandates for which it provides no funds. (Dec. 68) "What good does it do if you have to go borrow the money to meet the set-asides?" (Barr Depo. 122)

Debt payments drain dollars away from educational programs, yet the State

[38] In its decision on the State's motion for reconsideration and clarification, the Court ruled that, pursuant to general principles of constitutional and contract law, debts legally incurred by school districts *prior* to the expiration of the stay on March 24, 1998, could create ongoing binding obligations. There is, however, no legal authority for the State to maintain in operation a statute struck down by this Court after the expiration of the Court's stay of judgment.
[39] 78 Ohio St.3d 193, syllabus paragraphs (a) and (b).
[40] The trial court, reviewing the similarities, concluded, "The Court finds that in substance the operation of [the school solvency assistance program] fund is not legally different from the operation of the emergency school assistance loan provisions *** struck down by the Supreme Court and therefore finds the provision of R.C. 3316.20 to be unconstitutional as well." (Dec. 225 (citations omitted)) Under the new program, as under the old one, the State penalizes districts that must borrow from this program by *reducing* the amount of State funds provided to the district in future years.
[41] Repayment of emergency school assistance loans originating in FY97 alone will drain over $207 million from school districts' budgets. (Dec. 69)

fails to take such payments into account when it claims it provides an "adequate" foundation level to its districts. The State's meager response is to "pay interest above two percent," leaving the bulk of the burden to be borne by the schools.

The continued imposition of debt underscores the State's unwillingness to acknowledge – and refusal to accept – its responsibility for public education. When the statutorily-required five-year budget projections demonstrate the inability of districts to finance their operations without resort to debt, no monetary help from the State results. Instead, projected deficits trigger the fiscal watch and fiscal emergency programs under which the State does nothing more than it did before – require school districts to reduce expenses, pass more tax levies and borrow money to maintain operations. As the trial court concluded:

> The fiscal emergency and fiscal watch programs provide no additional funding for districts in fiscal watch or fiscal emergency, only financial oversight with virtually no sensitivity to the impact expenditure reductions have upon the district's ability to educate its children.

(Dec. 206) The State thus has continued the same programs – and the same harm – that this Court previously declared to be in violation of the constitution.

The State arrogantly offers this Court neither explanation nor excuse for its undisguised noncompliance with this Court's judgment, stating only that "each of the borrowing programs found unconstitutional by the court is being, or has been, abolished." (State's Brief at 27)[42] The State's evident belief that it may

[42] In closing arguments to the trial court, the State explained its rationale for continued forced borrowing as follows:

> There's nothing the Courts can do that will prohibit school districts in the future from having an unanticipated revenue shortfall. That can come from a sudden Court decision that determines that a school district owes more taxes than it had paid in the past, or that can come from a factory's sudden closing down. This component of the program, it seems to me, is entirely appropriate to keep.

(State's Closing Argument Tr. 2352-53). What still seems appropriate to the State has been determined to be

choose to implement its own timetable rather than the Court's for discontinuation of an unconstitutional statute is unprecedented, and its continuation under a different name of a statutory program previously declared unconstitutional is equally contemptible. If Am. Sub. H.B. No. 350 "mark[ed] the first time in modern history that the General Assembly has openly challenged this court's authority ***to render definitive interpretations of the Ohio Constitution binding upon the other branches," *Academy of Trial Lawyers***,** 1999 WL 617856, *4, the State's continuation of its forced borrowing programs for schools marks the second such insurgency.[43]

IV. Proposition of Law: The State Has Failed To Enact Legislation And Allocate Funds Sufficient To Ensure That All School Facilities Are Conducive To Learning, In Good Repair, And Maintained In A Safe Manner.

This Court has expressly condemned the condition of Ohio's school facilities.[44] Yet, more than two years after this Court's ruling, the condition of Ohio's schools remains deplorable – school buildings are unsafe places, in violation of code requirements, inaccessible to the handicapped, and full of asbestos. Moreover, almost 10 years after this litigation began, the State lacks any plan that would assure sufficient funding to correct the deteriorating, dilapidated and dangerous

---

unconstitutional by this Court. *DeRolph*, 78 Ohio St.3d 193, 210. The State cannot remedy its failure through the use of a funding mechanism – borrowing – which has already been declared unconstitutional.

[43] As was the case in *Academy of Trial Lawyers*, "[t]hese provisions were not reenacted inadvertently, but [the General Assembly] intends for the courts to treat these laws as valid notwithstanding our previous pronouncements." *Academy of Trial Lawyers*, 1999 WL 617856, at *13.

[44] The Court noted "deplorable, and "alarming" conditions in Ohio's schools, " *DeRolph*, 78 Ohio St.3d 193, *passim*, and admonished that "state funding of school districts cannot be considered adequate if the districts lack sufficient funds to provide their students a safe and healthy learning environment." *Id*. at 208. "A thorough and efficient system of common schools includes facilities in good repair and the supplies, materials, and funds necessary to maintain these facilities in a safe manner, in compliance with all local, state, and federal mandates." *Id*. at 211.

conditions of our children's schools.[45]

A. The State Continues to Underfund School Construction.

In 1989, the State approved 44 school districts for Classroom Facilities Assistance, with a total of $414 million in approved facility needs. (Dec. 31) Nine years later, only 14 of the 44 approved projects had been completed, with 9 others in the closeout phase and another 9 under construction. (*Id.*) This amounted to $225 million in State spending for these 32 projects, an average of $37.5 million per year.[46] Even after the new facilities were built, seven of these school districts still needed to apply for scarce Emergency Repair funds. (Dec. 32)[47]

The State contends that "[a]t the time of trial, 118 school districts ... were already in the building facilities pipeline." (State's Brief at 9) But at the time of trial, the Facilities Commission had completed inspections of only 48 equity districts, and funds had not been appropriated for all of those projects. (Dec. 33)[48]

The inadequacy of the Classroom Assistance program continues to require

---

[45] The State told the trial court that this Court's goal of bringing school buildings up to code was simply wrong and therefore not where the State was "focused." (State's Opening Statement Tr. 44-45)

[46] Defendants incorrectly assert that by May of 1998, 23 new construction projects from the list of 44 "had already been completed." State's Brief at 6. Once again, this is contrary to the evidence. (Dec. at 31)

[47] This Court recognized that even after completion of Facility Assistance projects, significant problems remain in those school districts fortunate enough to obtain some state facilities assistance. *DeRolph*, 78 Ohio St.3d 193, 207, fn. 8. A separate but important problem is that these facilities are designed and built only to house programs of an unconstitutional system. As this Court recognized, "The curricula in the Appellant school districts are severely limited compared to what might be expected of a system designed to educate Ohio's youth and prepare them for a bright and prosperous future." *DeRolph*, 78 Ohio St.3d 193, 208. The design of these facilities does not take into consideration needed programs envisioned by the Court or even recent State mandates such as required additional course offerings and science laboratories under S.B. 55 and smaller class sizes under DPIA, or the additional space needed for technology. (See St. Exh. 40)

[48] Amicus Taft asserts that "over one-third of the equity school districts either already have new buildings or are in the construction, design, or assessment-planning stages." (Brief *Amicus Curiae* of Ohio Governor Bob Taft at 11-12) What this *amicus* fails to mention is that there are no funds appropriated by the State for the majority of these districts, nor is there any plan in place to provide funds to satisfy their acute facility needs, let alone the needs of the other equity and non-equity districts.

districts to compete for funds. In fact at the time of remand, eligibility for facility funding depended on where a district stood on the equity list – which could fluctuate wildly from year to year. For example, on the new FY99 equity list, Youngstown jumped ahead 31 places, whereas Northern Local had the "misfortune" of falling 14 places farther back in the pack.[49] Even by moving to a three-year average for eligibility (H.B. 282), placement on the list continues to be a moving target for districts. Schools "fortunate" enough to be on the equity list cannot reasonably plan for interim facilities and a levy campaign for new facilities when their placement on the list varies so much.[50]

The State ignores districts that are farther down the equity list, as well as non-equity districts, even though the facility needs of those children are no less than those of the children in districts at the "head of the list." At the present rate of repair and replacement, and without considering new deterioration, it will take 55 years to meet the facility needs of our schools and 16 years just to complete the equity districts.[51] Meanwhile, the Facilities Commission would like to limit its work to 15 to 20 school construction projects each year. (Dec. 35)

B. The State Continues to Ignore Immediate and Substantial Dangers to the Health and Safety of Ohio's School Children.

Continuing its theme of "it's so because we say it's so," the State contends that it "created and funded the Emergency Repair Program [in Am. Sub. S.B. 102]

[49] (Fischer Tr. 1058, 1198-99)

[50] The Superintendent of Groveport Madison Schools summed up his district's building needs and when the district can expect assistance fromthe State: "I'll be long dead before we would ever get to where we could share any of the funding for that equity." (Barr Depo. 182)

[51] (Phillis Tr. 2234-35; Dec. 231; Fischer Tr. 1202; Dec. 35) When the combined impact of rolling decay and inflation are taken into account it becomes clear that the State will never solve the problem at current funding levels.

to address urgent health and safety needs in the most property-poor school districts." (State's Brief at 7) What the State does not say, however, is that the Emergency Repair Program, like its predecessor, was underfunded, did not begin to address the emergency needs of equity and non-equity districts, and is now bankrupt. Funding under this program was limited to equity districts. Applications totaling $157 million were received from 254 districts, but only $118 million was made available.[52] The program was soon out of money. (Dec. 33, 38, 49)

Similarly, the Big 8 programs provided limited matching State Funds to the largest urban districts for emergency repairs. However, these districts have been able to match only $49 million, less than half of the available funds, because of the dearth of available local monies. (Dec. 46-47)

Contrary to the State's assertions, the limited emergency funds have not corrected the emergency needs of those districts that received funds. Most damning to the State's argument are the reports prepared by the four 1998 Site Evaluation Teams (SETs) hired by the State to assess the needs of equity districts for emergency repairs. The four 1998 reports are the most current analyses by the State as to the emergency needs of many districts.[53] The SET reports underscore the seriousness of the facility problems that plague Ohio's schools and the fact that buildings continue to deteriorate and endanger our children.

The teams found conditions posing an *immediate danger* to building occupants and visitors in many districts. They also reported a large percentage of

[52] (Fischer Tr. 991, 1001, 1122-24; Dec. 230)
[53] (Fischer Depo. Exhs. 27, 28, 29 and 30)

requests for deferred maintenance items, which, if not corrected, could also pose an immediate danger.[54] All four teams reported that many of the school districts did not have the funds to fix these deferred maintenance items. [55]

At trial, the State argued with reference to facilities, that the State "has done too much too quickly."[56] This assertion was demolished by the SET reports. Regency Construction, responsible for 57 districts, reported that "[a]ll the fire alarm systems [it] reviewed did not meet NFPA [National Fire Protection Agency] and OBBC [Ohio Basic Building Code] codes."[57] Another SET, Ruhlin Company, found similar problems in its inspections of 48 districts and 110 buildings. Ruhlin reported that many buildings were built in the late 1920's; that roofs were over 20 years old, and masonry walls and windows were old and leaking; that electrical systems are not able to handle today's power requirements for computers; that school well water and septic systems do not meet today's EPA standards and must be replaced; that buildings remain inaccessible to the handicapped; and that schools lack emergency egress lighting and up-to-date fire alarm systems.[58] This was the state of things *after* the now-bankrupt Emergency Repair Program remedied the "urgent health and safety needs in the most property-poor districts."

---

[54] (Fischer Tr. 1137-39)
[55] (Fischer Tr. 1140, 1142-46)
[56] (State's Opening Statement, Tr. 37)
[57] (Dec. 44) Regency continued: "The SET observed that many [alarm] systems consisted of pull stations and horns; some throughout the building and some with no smoke detectors. Most districts had no battery back-up for the fire alarm panel and buildings generally were not sprinkled. The districts reviewed for egress lighting had a limited number of illuminated exit signs to identify the building exit route. Similarly, there was no emergency egress lighting to illuminate the path of egress from the building, and exit signs were not battery powered. *Inoperable exterior doors are chained because they do not close.*" (Emphasis added.) (Dec. 44; Fischer Depo. Exh. 29)
[58] (Fischer Depo. Exh. 28)

Finally this Court recognized the gravity of the problem of asbestos in our schools. *DeRolph,* 78 Ohio St.3d 193, 206. The 1990 Facility Study identified $328 million in funds needed for asbestos abatement. Yet, since 1991, the State has had no program for the abatement of this known health hazard.[59] Even in its haste to pass legislation after the trial court's decision on remand, the State has not enacted any program to specifically address this danger to our children.

C. The State Continues to Ignore the Needs of Handicapped Students and Federal Mandates Regarding Accessibility.

Conspicuously missing from the State's Brief is any reference to handicapped accessibility and compliance with federal mandates. The reason is very simple – there was no evidence of any ongoing State program providing aid to districts for handicapped accessibility. The 1990 Facility Survey identified a cost of $153 million to make Ohio's school buildings handicapped accessible. In 1997, $5 million was appropriated for this purpose. (Dec. 47) In pursuit of these limited funds, 210 equity and non-equity districts applied, representing 8,626 disabled students. (Dec. 47-48) Total applications amounted to $14.7 million. (Dec. 48) The State distributed $4.6 million to 53 districts, and the remaining 157 districts, with a total of 7,653 handicapped students, went unserved.[60]

---

[59] (Dec. 49; Fischer Tr. 1104) Like the now-bankrupt Emergency Repair Program, there is no money available for abatement of asbestos.

[60] (Fischer Tr. 1095; Fischer Depo. Exh. 2) Although some funds were made available to districts under the Emergency Repair Program for handicapped accessibility, over the last eight years, the State has provided only $18 million for these handicapped needs. (Fischer Tr. 1098) *Amici* Finan and Davidson tout that since the trial court's decision on remand, the State "earmarked $5 million to improve school building access for individuals with disabilities." (Brief *Amici Curiae* of Richard Finan and Jo Ann Davidson at 4) At this rate, and considering only the 1990 Facility Survey, it will take over 30 years more to meet *1990* needs.

D. The State Has No Plan That Would Assure Adequate Funding For Facilities In The Future.

The State contends that it now has "a systematic way for addressing these building needs." State's Brief at 30. Nothing could be farther from the truth. With reference to new facility construction, the *only* provision for future funding is in H.B. 770, which asks the governor "to request" $300 million each year from the General Assembly. This does not even begin to address the $1.4 billion average annual increase in facilities needs. And there is no requirement that the General Assembly actually appropriate *any* money for facilities.[61] Continued underfunding of these massive facilities needs will only serve to further escalate the problem as the combined effects of "rolling decay" (Dec. 223) and rising construction costs continue to drive up the price of the total package.

In the wake of the trial court's decision on remand, the State once again has repeated the tactics employed after the trial court's 1994 decision – hurry up and throw some more money into the pot, in hopes of placating this Court.[62] But contrary to the State's claim to "have done too much too quickly," the evidence clearly established that the State has done little at all relative to the overwhelming facility needs of our schools.[63] Equity districts fortunate to be eligible for building

---

[61] (Dec. 49-50; Fischer Tr. 1061; DeMaria Tr. 1303) According to the State, "the General Assembly had committed to funding the [facilities] program at a minimum of $300 million/year in the future." (State's Brief at 8) Confusingly, the State argues that "the most [the State] can do is allocate what is needed in the two year budget bill." (State's Brief at 29) Yet in another portion of its brief, the State contends: "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." (*Id*. at 11)

[62] In doing so, Defendants apparently have abandoned their argument, rejected by the trial court, that the system can absorb only $300 million each year in facilities aid. (Davidson Tr. 85-86)

[63] Even Dr. John Goff, then State Superintendent of Public Instruction, agreed with BEST's recommendation that $700 million per year in State funds be dedicated to funding for facilities. (Goff Tr. 626-27; Dec. 51)

funds, but unable to pass local share bond issues, continue to be bypassed and there is no facilities help for non-equity districts – regardless of the extent of their pupils' needs. The State continues to ignore the deteriorating, dilapidated and often dangerous conditions of our children's schools.

V. Proposition of Law: The Current School Foundation Program Is Structurally The Same As The Program Invalidated In 1997, And It Inflicts The Same Harms.

Far from a "complete, systematic overhaul," the State has served up a warmed-over version of the foundation program that suffers from the same structural flaws previously condemned by the Court. In 1997, the State argued that its system was adequate because it included a foundation program that guaranteed a legislatively-determined basic aid level to all pupils. The Court unequivocally rejected that argument.[64] Today, the State makes the same argument to defend virtually the same flawed foundation program, now claiming it has "established a rational cost benchmark for supplying an adequate education, then fully funded it." (State's Brief at 21) The trial court found, however, that "the State has not materially altered the foundation program in any substantive way to address the problems discussed by the Supreme Court." (Dec. 223)

Relying upon the testimony of credible experts, the trial court summarized the flaws inherent in the State's "new" foundation program as follows:

> [T]he funding methodology enacted in H.B. 650 itself is fraught with a stunning array of problems including (1) that it is based on the cost levels of an already unconstitutional funding system, (2) that it is based on one year's data even though the performance of students in that data is achieved

[64] "The factors which contribute to the unworkability of the system and which must be eliminated are (1) the operation of the School Foundation Program***" *DeRolph*, 78 Ohio St.3d 193, 212.

> through many years of expenditures, (3) that it is based on 1996 per pupil costs and completely ignores the new costs mandated under H.B. 412 and S.B. 55, (4) that is unsupported by any studies or analysis which demonstrate reliability or predictability of the methodology, and (5) that the methodology was modified to achieve a lower base cost number over the objections of Dr. Goff and by decision of individual legislators, none of whom presented evidence of expertise.
>
> Worse, the legislature then inflicted upon this already highly flawed methodology caps of any funding increase and a phase-in of the new base cost number. The pretense of these further reductions in funding is the suggestion that the school districts simply cannot efficiently handle more money. Yet, no expert testimony or any type of detailed analysis was provided to the Court to support this proposition which leaves as the only logical motive for these funding limitations a budgetary concern.
>
> The evidence does not indicate that categorical spending would offset these numerous flaws in the base cost methodology. For example, the funding of special education is now expressly tied to the flawed base cost methodology so that by design, special education funding is underfunded. Funding of vocational education has not been materially changed. Gifted funding remains flat. DPIA funding is tied to new categories of expenditures and is only targeted toward a limited category of students in a limited number of school districts.

(Dec. 224) Just as before, funding is based on what the State is willing to pay rather than the cost of pupil programs.

A. The State's Base Funding Level Is Unrelated To Adequacy.

Essentially, the State established its foundation level by averaging the expenditures of a select group of what it considered to be *effective* but *low-spending* districts. As the foregoing quote from the trial court indicates, the State's approach was multiply-flawed. At the outset, the State used inadequate indicators of effectiveness so that the methodology was inherently incapable of yielding a funding figure that was in any way related to educational adequacy. "Effectiveness" was determined on the basis of 18 so-called "performance criteria" including student attendance rates, graduation rates, and 16 proficiency tests – criteria that reveal

little about what is actually happening in a classroom.[65] The proficiency tests cover only four subjects,[66] their results are unstable and unreliable,[67] and the "cut-scores" used to determine passage are so low as to render the tests useless as a measure of adequacy.[68] Moreover, the State designates many districts as "effective" in which huge numbers of students fail even these inadequate tests.[69]

Utilizing these performance criteria, and eliminating districts from consideration on the basis of wealth, Dr. Augenblick created a sample of 102 school districts that he used as the basis for his cost recommendations. The legislature's cost-saving modifications to Dr. Augenblick's methodology yielded a similar group of 103 districts. Yet, in 1997, after the State increased the "cut scores" used to determine proficiency test passage, only 19 districts met the State's performance

---

[65] (See Dec. 105) As Dr. Alexander asked (Alexander Tr. 1655),

> What are those components, what is the curriculum, what is the personnel, what are the operational aspects necessary, what are the capital outlay aspects of a program that are necessary, what does it take to provide a reasonable, logical, adequate program. The Legislature hasn't done that. The Legislature has simply backed into an amount of money and has assumed that it pays for something.

[66] Proficiency tests cover only reading, writing, mathematics and citizenship, and they provide little information about a district's curriculum. (Dec. 76, 82) A student could pass all of the tests without ever having the chance to take advanced placement or honors courses – despite this Court's mandate to the contrary.

[67] The passage or failure of one test by one pupil could determine whether a school district is considered sufficiently successful to be included in the analysis. (Dec. 81) Further, relating dollars spent in FY96 with performance in FY96 is not reliable, because pupil performance is a cumulative result of a pupil's entire academic career. (Dec. 86)

[68] Proficiency tests reflect *minimum* levels of expectation. (Goff Tr. 474). The twelfth grade test does not measure what a college-bound student is expected to know (Dec. 77), and Dr. Goff tellingly testified that the State premises the *graduation* statistics which underlie its funding formula on the demonstrated ability of a high school senior to perform *eighth* grade work, with minimum competency – and, again, only in the subjects of reading, writing, citizenship, and mathematics. (Goff Tr. 477-79; Dec. 76-77) As Dr. Goff candidly acknowledged, "very few people [believed] that a student ought to be able to qualify to graduate from high school just by completing eighth grade work or an eighth grade exam." (Goff Tr. 485) Yet, these are the criteria that the State has argued are "Obviously an A grade. Quality." (State's Opening Statement, Tr. 38)

[69] For example, the State requires a district to achieve only a 60% pass rate on the 12th grade proficiency test in order to be deemed successful. This means that in a given school district, 40% of the students who make it to 12th grade may fail to demonstrate *minimal 12th grade proficiency* without imperiling their district's designation as successful. Significantly, this passage rate which the State defines as effective is actually worse than that which this Court recognized as abject failure. See *DeRolph*, 78 Ohio St. 193, 209 ("As of the fall of 1993, thirty-two out of ninety-nine seniors at Dawson-Bryant had not passed all parts of the ninth grade proficiency test. This means that nearly one-third of the senior class had not met basic graduation requirements. The district did not have enough money to pay tutors to assist these students. Poor performance on the ninth grade proficiency tests is further evidence that

standards. (Dec. 83)[70] Had the State's "wealth screens" been applied to those 19 districts, it is unlikely that any would have remained. It thus appears that, judged by the State's current standards for "effectiveness," most of the districts upon which the State and Dr. Augenblick premised their determinations of base cost would now be considered *ineffective*. Moreover, the blatant manipulation of the data by applying arbitrary "wealth screens" served to eliminate from consideration many of the high performing districts and arbitrarily reduced the average expenditure level. (Dec. 84) Significantly, there is no evidence that any of the excluded high-wealth districts spent "too much," and there was, therefore, no reason to screen them out other than to drive down the resulting funding level. (Dec. 83-84)[71] The legislature further drove funding levels down by eliminating Dr. Augenblick's use of *weighted* averaging of expenditures for the districts included in its sample.

The fundamental illogic of this "inferential" approach to establishing the cost of education derives from the flawed premise that all school districts can achieve the same outcomes with the same amount of funds, regardless of the unique needs, resources, and costs of each district.[72] If the "inferential approach" were valid, one should find that virtually every district which spent at or above the amount Dr.

---

these schools lack sufficient funds with which to educate their students.")

[70] Thus the State has relied on out-dated criteria measured against an unconstitutional funding system (FY96) to establish what it calls "rational" funding – for six years. H.B. 650; H.B. 282.

[71] As noted by Dr. Alexander, "Wealth determines the quality of a child's education in Ohio. *** When Augenblick simply says that he is cutting off 90,000 children on one end or a percentage of children because they are in wealthy districts, then he is attacking the main variable that created the discrimination – wealth." (Dec. 83) The General Assembly exacerbated the effect of Dr. Augenblick's manipulations by *increasing* the percentage of districts eliminated from consideration on the basis of wealth.

[72] As another court has stated: "The fallacy in the use of a hypothetical model school district is that it can furnish only an aspirational standard. It rests on the unrealistic assumption that, in effectuating the imperative of a thorough and efficient education, all school districts can be treated alike and in isolation from the realities of their surrounding environment." *Abbott v. Burke* (1997), 149 N.J. 145, 172, 693 A.2d 417, 431.

Augenblick recommended also was successful according to the criteria he employed. In fact, *most* districts, including many spending far in excess of Dr. Augenblick's amount, *failed* to satisfy his criteria – and, as one would expect, the success rate was even lower among those districts spending at or above the *legislature's* base funding amount (an amount far less than Dr. Augenblick's). These districts were unable to meet the State's performance measures notwithstanding the fact that, according to Dr. Augenblick's theory, they were all adequately funded. In fact, the only reliably successful group of districts as judged by Dr. Augenblick's criteria for success, was the group composed of the wealthiest districts – the very districts *eliminated* from consideration by Dr. Augenblick through the use of his wealth screens. (Dec. 84; see also, Dec. 93)

Presuming that a representative sample of successful school districts could be identified, it is nonetheless illogical to derive a base funding amount by *averaging* the expenditures of those districts. For example, the group selected by the legislature ranged in expenditures from a low of $2,755 per pupil to a high of $5,898 per pupil. (Dec. 84) Rather than inquiring into the reasons for the differences, Dr. Augenblick and the legislature simply mandated an averaged funding amount for every district. This approach dictates that the district that previously achieved successful outcomes with the lowest expenditure level – $2,755 per pupil – henceforth receive additional, presumably superfluous funds, and the model correspondingly dictates that the district that had been achieving successful outcomes with $5,898 per pupil henceforth be forced to reduce its spending to the

average. Dr. Augenblick testified that he could not predict whether the latter district could be expected to continue to perform successfully once its funding was cut to the level of the average. (Dec. 84)

In short, and just as before, "[t]he Legislature has simply backed into an amount of money and has assumed that it pays for something." (Dec. 105) The State evidently believes that if it can just *explain* its formula, the formula is *rational*; and if it is *rational* in the sense that it is explainable, the State has satisfied its constitutional duty. The State's claim of rationality thus emphasizes process over results, form over substance, and it misses entirely the point of *DeRolph* that education is measured by the opportunities provided to pupils.[73]

1. Textbooks continue to be outdated and inadequate in many schools.

The State has failed to produce any evidence that its now-eliminated (in H.B. 282) $16 per pupil textbook subsidy (Dec. 186) – or any other element of its funding system – has any relationship to the actual needs of students. Math texts *alone* replaced in the Dawson-Bryant Local School District in FY 98 cost $38 each – nearly three times the $13 per pupil subsidy actually received by the district that year. (Dec. 183) With the single exception of K-8 math texts purchased in 1992, the Lima City School District has not bought any new editions of textbooks in *ten years*.

[73] This Court found: "The curricula in the appellant school districts are severely limited compared to other school districts and compared to what might be expected of a system designed to educate Ohio's youth and to prepare them for a bright and prosperous future. For example, elementary students at Dawson-Bryant have no opportunity to take foreign language courses, computer courses, or music or art classes other than band. Junior high students in this district have no science lab. In addition, Dawson-Bryant offers no honors program and no advanced placement courses, which disqualifies some of the students from even being considered for a scholarship or admittance to some universities.*** The district did not have enough money to pay tutors to assist these students [to pass the ninth grade proficiency test]." *DeRolph*, 78 Ohio St.3d 193, 208-09. The Dawson-Bryant Superintendent testified that all

(Dec. 214)[74]

The State's assertion that it has solved the textbook problem by mandating unfunded set-asides carries all the logic of pouring water on a drowning victim.[75] The lack of textbooks and supplies is a direct result of underfunding. To suggest that the problem can be solved by yet another unfunded mandate defies reason.

2. The technology gulf between rich and poor school districts continues.

In 1997, this Court expressed concern with the State's inadequate funding for technology and the consequent inability of students in poorer districts to compete with more technologically-sophisticated students educated in better-funded districts.[76] The State, however, has chosen to ignore the massive technology gulf that separates its pupils. Meaningful access to technology still does not exist for many pupils, and the State has no plan to correct this situation.[77] (Dec. 145-49) Appropriations for computer technology are still inadequate, and many schools are unable to benefit from the State's limited appropriations for the same reasons previously identified by the Court – "asbestos, faulty wiring, or the lack of teachers."

---

of these deficiencies still exist and that the State's claimed "remedy" offers no hope that these deficiencies can be corrected. (Washburn Tr. 1954-57; Dec. 212; Dec. 209-10; see also, Maxwell Tr. 1368; Dec. 200)

[74] The State misrepresents to this Court that Lima "*already spends* 3.5% of its budget on textbooks." (State's Brief at 45) (Emphasis *sic*.) The superintendent of Lima testified that his district was down to spending a paltry $20,000 a year on new textbooks. (Buroker Depo. 156-57; 187) The State derived its figure of 3.5% as to textbooks from an exhibit that does not even have a line item for textbooks. Rather, there is a line item for "materials and supplies" which includes much more than just textbooks – things such as janitorial supplies. (See Buroker Depo. 193-4)

[75] (See State's Brief at 19-20)

[76] *DeRolph*, 78 Ohio St.3d 193, 209.

[77] Two and a half years ago, appearing before this Court, the State touted the identical programs it now relies on in support of its claim. This Court responded: "While these programs and funds are desperately needed, they simply are insufficient to get the job done and do not rectify the serious problems inherent in Ohio's financing scheme." *Id*. at 211. The Court's concerns are equally apropos today.

Id. at 211. (Dec. 145-46) [78] SchoolNet and SchoolNet Plus provide partial funding for computers for kindergarten through fourth (now fifth) grade, but no such funding is available for higher grades, and there is no funding for maintaining or upgrading currently-used equipment. (Dec. 145-46) Moreover, both programs are now out of money. (Dec. 146)[79] Without the means to upgrade and maintain the limited technology that does exist, schools will soon see the few gains that have been made erased by evolving technology and the passage of time.

B. The Phase-In Of The State's "Adequacy" Level, Combined With Funding Caps, Intensifies The Degree Of Funding Inadequacy.

Even if the base funding level of $4063 per pupil were "adequate," which it clearly is not, the State has failed to fund the foundation program at that level; that foundation level will not be phased in until FY01.[80] Further, the funding caps, which limit the aggregate increase a district may receive in any year, serve no purpose other than budgetary comfort. In FY99, the funding caps reduced school district revenue by $134 million. (Dec. 99) Significantly, caps primarily disadvantage poor and growing districts. For poor districts, caps mean the State will give them less than they are otherwise entitled to this year because it gave them less than they needed last year; for growing school districts, caps mean the State will give them proportionally less per pupil than even the State would define

[78] The State's outrageous and unsupported claim that Ohio "ranks third in the country" in level of technology has no foundation and was specifically rejected by the trial court. (See State's Brief at 11, 31; cf., Dec. 145-49)
[79] Though not part of the record in this case, H.B. 282 does provide funds for computers for fifth grade pupils. However, even when fully implemented all this does is move the "cliff" up a year, as pupils go from having access to technology in a lower grade to the absence of technology in a higher grade. The amount of funds appropriated for sixth grade technology is a small fraction of the need.
[80] As the State again scrambles to salvage its failed system, it has now accelerated the attainment of this level to FY01 rather than FY02. H.B. 282.

as "adequate." In short, funding caps guarantee educational inadequacy.[81]

C. Categorical Spending Is Underfunded By Design.

Each of the adjustments to the State's base funding amount –special education, gifted education, DPIA, transportation, and cost of doing business – are likewise subject to the arbitrary funding caps and are funded at levels *below* that which the State itself has determined to be necessary.

1. Special education

Before *DeRolph*, the State did not know the cost of educating its handicapped pupils and it still doesn't know that cost. (Dec. 109) The State's response to *DeRolph* focuses exclusively on the Court's observation that special education unit funding was not "wealth equalized." Having now "wealth equalized" special education funding, the State claims its work is finished, thus ignoring the real problem – the fact that the State still has not assured funding for the enormous costs of special education.[82]

The pupil weights ultimately enacted in H.B. 650 were based on a mathematical model that sought to determine the cost of special education based on what districts reported spending in FY96 under the funding system subsequently declared unconstitutional by this Court. (Dec. 87-88, 109, 110) One of the

[81] In view of these circumstances, the trial court concluded, "The use of phase-in and the caps with a complete absence of credible evidence justifying the phase-in and caps, causes the Court to conclude, after weighing the credibility of all of the witnesses, that the strongest basis for these limitations was budgetary comfort." (Dec. 224)

[82] While the change from unit funding to per pupil funding is significant, it should be viewed in light of the well-accepted premise that disabled pupils cost more, not less, to educate than their non-handicapped counterparts. (Cohen Depo. 58) Thus, the additional funding attributed to counting these pupils in ADM is more indicative of the enormous failure of the past system than it is of any degree of adequacy under H.B. 650. In fact, special education was under-funded to the tune of $198 million for the period from 1984 to 1995. (Dec. 107)

fundamental flaws in that approach is the illogical premise that school districts in 1996 spent as much as they needed to spend to properly educate their disabled pupils. But it is plainly unreasonable to assume that inadequately funded schools were spending as much as necessary to meet the needs of any pupils.[83] In any event, the special education funding recommended by Dr. Augenblick sent the legislature into sticker-shock, and what emerged in H.B. 650 bore little resemblance to those recommendations – and cost the State far less.[84]

Even districts that receive the full value of the legislature's reduced weights cannot provide required services with those funds. (Dec. 115) The difference must be made up from local tax dollars, increasing reliance on local property taxes and diminishing programming for regular students. Further, contrary to this Court's admonition that there be no "leveling down,"[85] 32 school districts receive *no special education funding* under the State's system because of their relative wealth. (Dec. 114) The same underfunding of special education that was a hallmark of the funding system struck down in *DeRolph* continues today. (Dec. 119-122)

2. Gifted education

The same underfunded unit system for gifted education that was ruled

[83] Dr. Klein characterized as "heroic" the assumption that a district's needs drive its expenditures, meaning that the assumption is a critical underpinning of the State's model, but false. (Klein Trial Depo. 43-44 ("The procedure rests on an assumption which I would characterize an -- a heroic assumption, that's implausible. * * * It's a very strong assumption that is critical and important to the whole process. And that assumption is that in FY96, districts spent as much as they needed to spend to provide an effective education for their students.")) (Dec. 88) Contrary to the State's assertion, Dr. Fleeter (who was hired as a consultant by the State to assist in the process) also acknowledged the same flaw in the process. (*Id*.)

[84] Data provided to legislators indicated that the total cost of special education recommended by Dr. Augenblick was $1.226 billion using a base cost of $4269 per handicapped pupil and the recommended weights. Of that amount, the weights would have cost $493 million. (Dec. 112)

[85] *DeRolph*, 78 Ohio St.3d 193, 211.

unconstitutional by this Court continues, and thus, the State's only argument is that it was not obligated to remedy gifted education. Sixty-two percent of gifted students were *unserved* in 1991, and that figure remains unabated today. (Dec. 123-24) The legislature commissioned a cost-based study of gifted education in H.B. 770, but then ignored the study. (See H.B. 282) The State's disregard of its obligation to adequately educate over 230,000 identified gifted students cannot be excused with an argument that this Court did not critique services for gifted students. (See State's Brief at 46)[86]

3. Transportation

The State's claim that it has gone "well beyond responding" to this Court's concerns about transportation misunderstands the nature of the concerns. It is the lack of adequate funds for transportation rather than the lack of wealth-equalization, that produces the real mischief. Just as in 1997, what the State fails to provide must come from school districts' limited resources, and every dollar spent to transport a pupil is a dollar less for that pupil's educational program. The State funded only 37.3% of transportation expenses in FY98 and was projected to fund only 39% in FY99, leaving Ohio's school districts a staggering $296.9 million transportation tab. (Dec. 144) But for the one-year guarantee, some districts would have received less in transportation reimbursement in FY99 than in FY98. (Dec. 144) Even the funds that are provided are subject to the State's arbitrary funding

[86] See *DeRolph*, 78 Ohio St. 3d 193, 200 (criticizing categorical programs under R.C. 3317.024 of which gifted was included), 209 (criticizing system's failure to provide funding to meet students' needs), 210 (criticizing system's failure to educate our youth to their fullest potential), and 208 (condemning system's failure to provide funding to prepare Ohio's youth for a bright and prosperous future, specifically referencing the lack of access to honors and advanced placement courses).

caps, so that there is no assurance that any district will receive additional transportation funding.[87] Once again, the State has chosen to address only a small fraction of the issue, ignoring the real problem.

4. Disadvantaged Pupil Impact Aid

This Court found that the arbitrary limitation on the amount of additional funding for districts in high poverty situations was a structural defect in the funding system.[88] Funding for DPIA programs is still arbitrarily limited, now by the same funding caps that limit increases in all categorical programs. Moreover, the extensive legislative cost analysis that went into the development of DPIA provisions of H.B. 650 demonstrates that it was budget driven. (See Dec. 141-42)

The levels of DPIA funding trumpeted by the State are also illusory. School districts only receive DPIA funds if, and to the extent that, they are able to devote those funds to targeted purposes established by the State on the basis of political expedience (rather than studied response to educational needs). DPIA funds formerly available for a range of programs serving pupils at all grade levels now are limited to three narrow purposes: all-day-every-day kindergarten, class size reductions in K-3, and safety and security. (Dec. 133-136)[89] A school district lacking classrooms or teachers to offer all-day-every-day kindergarten will not receive funding for that purpose. As the highest court in New Jersey has recognized in

[87] The State's arbitrary funding level of 60% of the *formula amount* (not the actual cost) will not be reached until 2003. H.B. 282.
[88] *DeRolph*, 78 Ohio St.3d 193, 200.
[89] Further, DPIA funding is arbitrary, as 506 school districts will not qualify for any funding for all-day kindergarten, 424 districts will not qualify for any funding for class size reduction, and 283 districts will not qualify for any funding for safety and remediation. (Dec. 132) Even in districts that do qualify for DPIA funding, safety and remediation funds are the only funds that can be used to provide any services to pupils above the third grade.

connection with that state's school funding litigation, a state cannot satisfy its constitutional obligation by identifying necessary educational programs unless it also assures funding sufficient to ensure implementation of those programs.[90]

Finally, it should be noted that not all children who live in circumstances of poverty are counted for purposes of determining DPIA. (Dec. 131-32, 137) To the extent that poverty is under-calculated, DPIA is underfunded.

D. The State's H.B. 412 Set-Aside Requirements Are New, Unfunded Mandates.

When fully phased in, H.B. 412's set-aside requirements (for capital/ maintenance and textbook/instructional materials) will require school districts to set aside as much as $800 million per year; an additional $500 million requirement will be phased in for budget reserve accounts for some districts.[91] School districts thus will ultimately be faced in FY01 with expenses approximating *eight percent* of their general funds *per year* without corresponding revenue. The impact of these requirements on school districts' budgets is massive. Every one of the school districts that testified in the compliance hearing have projected new or increased deficits due to the impact of the set-asides. The fact that both H.B. 412 and S.B. 55 were intended to be funded by a sales tax increase that did not pass is little solace to a school district confronted with these set-asides. (Dec. 173-74, 221-223) As

[90] *Abbott v. Burke* (1997), 149 N.J. 145, 181-182, 693 A.2d 417, 435.

[91] (Dec. 101-3, 171-88) H.B. 412, when fully phased in, will require each school district to set aside four percent of its general fund revenue into a capital and maintenance fund, and an additional four percent into a textbook and instructional materials fund (the "set-aside" requirements). In addition, qualified school districts will be required to deposit an additional one percent per year into a budget reserve fund until that fund reaches five percent of the district's general fund. Regardless of fiscal circumstances, nearly all school districts will be required to set aside the amounts on an annual basis.

acknowledged by the State's own director of the Office of Budget and Management, the new legislation created "a structural change to the *expenditure* side of Ohio's budgetary equation" without a structural change on the *revenue* side.[92]

While the goal of these set-asides is meritorious, the manner in which they were imposed is further evidence of the State's cavalier attitude toward school funding reform, particularly when considered in light of the fact that the State undertook no analysis to determine the level of the set-aside amounts. (Dec. 178, 179) These mandates will require districts to seek additional tax levies or incur additional indebtedness to maintain operations. (Dec. 223) Districts already in debt face an impossible conundrum, because many such districts are subject to an *expenditure reduction plan* that requires reductions in spending for textbooks, equipment and supplies as well as for capital and maintenance. The same State that forces these districts to *reduce* expenditures in these areas as a penalty for indebtedness also irrationally requires them to *increase* their indebtedness in order to set aside funds for the very same purposes. The State has yet to accept the notion that public education in Ohio is a *State* responsibility that cannot be satisfied simply by imposing unfunded mandates upon school districts.

E. The Curricular And Performance Requirements Of S.B. 55 Are Similarly New, Unfunded Mandates.

The same flaws that make the set-asides unworkable also appear in the accountability requirements of S.B. 55. Here, too, the State has sought worthwhile but costly objectives through the simple expedient of *legislating* without *funding*.

[92] (Emphasis added.) (DeMaria Tr. 1273-74; 1310)

S.B. 55 imposes additional minimum requirements for high school graduation in the areas of English, Language Arts, Mathematics, Science, and Social Studies. An LBO survey revealed that most districts will need to add additional units of credit – entailing substantial additional costs for teachers, textbooks, equipment and, in some cases, science laboratories – in order to meet the new requirements. (Dec. 190-91) Projected statewide, the total cost of implementing just the additional graduation requirements of S. B. 55 approximates $90 million. (Dec. 194)

Like the set-asides, these additional costs were never considered in the development of the foundation level. The trial court concluded that these new costs substantially offset any additional revenue provided schools, so that there is "no material improvement in the net level of funding" from the State. (Dec. 222)

VI. Proposition of Law: The State Has Not Made Education A Budgetary Priority, And Funding Remains Substantially Reliant Upon Local Property Taxes, Thus Perpetuating Unconstitutional Disparity In Educational Opportunity.

This Court also made it clear that the State bears the ultimate responsibility not only for the design but also for the *funding* of a thorough and efficient system of education; to achieve these purposes, the State was ordered to place education "high in the state's budgetary priorities." *DeRolph*, 78 Ohio St.3d 193, 212-213. If school districts lack safe buildings, necessary textbooks and supplies or those curricular offerings necessary to prepare our children to compete effectively, the State has failed. *Id*. at 210. More than two years after this Court first ruled in this case, the Court again has before it a massive body of evidence documenting the State's continued failure to carry out – or even to acknowledge – its constitutional

responsibility to its children.

A. The State Has Not Assumed Responsibility For Education.

Just as in 1997, there are, today, no minimum standards, and the State does not review, monitor or enforce model curriculum requirements or provide assurance that any school district is even offering the model curriculum. (Dec. 76) At the same time, over half of Ohio's pupils attend schools labeled by the State as "academic emergency" or "academic watch." (See State's Exh. 74; Pl. Exh. 524) Ohio's largest school district, Cleveland, meets none of the State's performance standards and has a dropout rate in the range of 60%, with the rest of the Big 8 city districts having dropout rates between 40-50%. (Dec. 215)

While rejecting any responsibility for educational "inputs," the State continues to starve its schools, denying them the very resources by which this Court defined educational adequacy. What are educational "inputs," if not the "teachers, buildings and equipment" that this Court has consistently said are part and parcel of the State's responsibility? *DeRolph*, 78 Ohio St. 3d, 193, 203-4, citing *Miller v. Korns* (1923), 107 Ohio St. 287, 297-298.[93] In the face of continuing educational deprivation, the State's claim of "responsibility" is mere lip service.

B. The State Has Not Made Education a Budgetary Priority.

Just as it has in the past, the General Assembly backed into the current funding formula on the basis of the amount it was willing to allocate to education. (Dec. 149-154) Belying any claim of priority, the State's "adequacy" funding level:

[93] The State has refused to accept this Court's definitions of "thorough" and "efficient," preferring instead to craft its own definitions. (See State's Brief at 1)

(1) represents a lesser rate of increase in the foundation level than was historically provided *before DeRolph* (Dec. 197); (2) is far less than the amount *actually spent* by school districts per pupil (Dec. 86); and (3) is *even less than* the arbitrary level the state has legislatively determined to be adequate. As the trial court noted, "the only logical motive for these funding limitations [is] a budgetary concern." (Dec. 224) Simply put, education is still subject to the residual budgeting denounced by this Court in 1997. The State cannot claim to have shouldered its responsibility by enacting a separate – but still underfunded – education budget. (State's Brief at 11)

C. Reliance On Local Property Taxes As The Primary Funding Source For Education Continues, As Does The Educational Disparity Such Reliance Produces.

This Court unequivocally ordered the State to eliminate the funding system's excessive reliance upon local property taxes. *DeRolph*, 78 Ohio St.3d 419 ("[P]roperty taxes can no longer be the primary means of providing the finances for a thorough and efficient system of schools"). In direct violation of that order, the State has perpetuated a system which actually *increases* reliance upon local property taxes, with State participation in education funding diminishing. (Dec. 167) Meanwhile, the continuing erosion of the local property tax base further compounds the problem. (Dec. 162) The trial court concluded that the State has presented no options for many districts other than to increase the reliance upon property taxes or to cut programs. (Dec. 166) As a result of the State's failure to change the system, schools are forced to continue the relentless march to the ballot box for additional tax levies at the rate of over 400 per year. (Dec. 162)

The evil inherent in a local property-tax based funding system is that many

property-poor districts cannot provide their students with the educational resources that will allow them "to be productive members of our society, with the skills and knowledge necessary to compete in the modern world," *DeRolph*, 78 Ohio St.3d 193, 197. The inability of these students to compete is a critical flaw that the State was clearly directed to remedy. On reconsideration, this Court underscored the fact that remediation of disparity is indispensable to the creation of a constitutional funding system.[94]

But far from remediating disparity, the State chose to direct whatever meager increases in State funding it has authorized in a "random and scattered" fashion with no apparent relationship between increases in revenue per pupil and the wealth of the school district. (Dec. 161) Under the system the State proffers as its "remedy," differences in per-pupil expenditure as great as $10,000 per pupil per year remain as a hallmark of Ohio's school funding structure. (Dec. 159) This amounts to a difference of a quarter million dollars per year for a classroom of twenty-five pupils.

The State claims that its "adequacy benchmark" makes local property taxes above 23 mills irrelevant (State's Brief at 21), even though the average school district millage rate is over 44 mills (State Exh. 74) – almost double the claimed

---

[94] "We accord respect to the coordinate branches of government, and we have full faith and trust that they will act to *remedy the disparate effects* of the current statutory method for raising and distributing funding for education. The creating of a constitutional system for financing elementary and secondary public education in Ohio is not only a proper function of the General Assembly, it is also expressly mandated by the Ohio Constitution."
DeRolph v. State (1997) 78 Ohio St.3d 419, 420-421 (Emphasis added). The State claims that funding disparity is no longer an issue and that the trial court erred in even considering it. (State's Brief at 45-47) In applying the mandates expressed by this Court, however, the trial court was clearly required to consider the continuing funding disparities.

"adequacy" level. The State's suggestion that local property taxes above 23 mills are irrelevant and unnecessary for students in poorer districts[95] is also refuted by the harsh realities of continuing educational deprivation in Ohio's schools. In reality, the State admits that it does not know what educational resources are provided to students in *any* district in Ohio (see Dec. 76) – wealthy or poor – and it has failed to produce any evidence to support its suggestion that voters in wealthier districts are merely purchasing unnecessary frills with their tax dollars. [96]

This Court has already made it clear that the adequacy of the education afforded a particular student in a particular district cannot be evaluated in a vacuum, even under the thorough and efficient clause. This is because students throughout Ohio are constitutionally entitled to a *competitive* education.[97] Yet, educational opportunity continues to be a function of the wealth of the school district, and the gap in expenditures per pupil between the rich and poor remains essentially the same after this Court's 1997 decisions as it was before. (Dec. 160)[98] The State's own analysis supports the conclusion that at the end of the "phase-in" period, the gap between rich and poor school will be *greater* than before. (*Id*.)

The State errs if it presumes that it can disregard this critical component of the remedy merely because the Court premised its decision on the thorough and efficient clause rather than the equal protection clause.

[95] (See State's Brief at 21; State's Opening Brief to Trial Court at 36) ("local support in [wealthier] districts is often designed to go well beyond the adequacy requirements of the State's foundation formula").

[96] Such a suggestion was expressly and unequivocally rejected by the New Jersey Supreme Court. *Abbott v. Burke* (1997), 149 N.J. 145, 165-171, 693 A.2d 417, 427-430.

[97] See *DeRolph*, 78 Ohio St.3d 193, 197 ("Education is essential to preparing our youth to be productive members of our society, with the skills and knowledge necessary *to compete* in the modern world." (Emphasis added)); *id*. at 198 ("At the heart of the present controversy is the School Foundation Program (R.C. Chapter 3317) for allocation of state basic aid and the manner in which the allocation formula and other school funding factors have *caused or permitted to continue vast wealth-based disparities among Ohio's schools, depriving many of Ohio's public school students of high quality educational opportunities*." (Emphasis added.)); *id*. at 208-209.

[98] Similarly, the disparities in local property tax revenue between the rich and poor also continue, with a mill of property tax in a poor district yielding $18.80 per pupil while the same mill of tax in a wealthy district yields

Further, the State's consultant, Dr. Howard Fleeter admitted, "***the fact that reliance on local property taxes hasn't been reduced gives me my biggest concern about equity." (Dec. 161) As observed by Dr. Kern Alexander (Dec. 160),

> Wealth-based disparities among Ohio's public school districts have not been eliminated by the General Assembly. The State's contribution is insufficient to offset the local disparities created by wealth. If the trend continues, the need for greater local resources will increase *** the disparities will increase. The differences in the prospects in education, and in quality of education, will be exacerbated under this system as it moves into the future.

D. The Continued Problem Of Phantom Revenue Further Exacerbates The State's Reliance On Local Property Taxes.

If the State had reduced reliance on local property tax, as it was directed to do, the continuing phantom revenue problem would be of less significance. Instead, the State has not only failed to reduce that reliance, but it has also increased the scope of phantom revenue. There are three significant aspects of phantom revenue that remain or have been newly-added as prominent features of the State's system.

Recognized value The effect of value increases resulting from reappraisal or triennial update are now spread out over three years. The end result is the same, and the phantom revenue impact of increases in property value on school district revenue continues. (Dec. 169)

State Aid Ratio The "state aid ratio" now used to calculate the value of the weights assigned to a school district's disabled pupils, injects yet another aspect of phantom revenue into the funding system. As the value of a district's property increases, its state share percentage decreases and with it the district's special

---

$551.93 per pupil. (Dec. 159) Thus, a poor school district would have to levy 29 mills of additional tax to equal the same amount of revenue that could be generated by one mill of additional tax in a wealthy district.

education funding. Thus, H.B. 650 has introduced a new aspect of phantom revenue into its funding system. (Dec. 169-70) [99]

Power Equalization The "power equalizing" feature of H.B. 650 brings yet another new type of phantom revenue into Ohio's school funding system. The power equalizing feature of the legislation provides for additional revenue for school districts that levy more than 23 effective mills against class 1 (residential and agricultural) property with a valuation per pupil below the state average. The equalizing feature will operate to bring the yield from those mills between 23 and 25 up to the statewide average yield per pupil. (Dec. 170)

Districts eligible to receive additional revenue under this feature of the legislation will be harmed by increases in property valuation in two ways. First, as district property values increase, the per-pupil valuation increases and, all other things being equal, the district will receive less in power equalizing aid. Second, increased value from reappraisal or update will trigger a H.B. 920 reduction in the district's effective millage which may, in turn, further reduce power equalizing funds or cause the district to be ineligible for such funds – yet another "double-whammy." School districts in this circumstance will be forced to pass additional tax levies to maintain access to power equalization. (Dec. 170)

Taken together, it is clear that the General Assembly not only has failed to remedy the structural defects of phantom revenue but has actually made the problem worse. And, contrary to the State's claims, the problem of phantom

[99] In H.B. 282, vocational funding now also contains a state share percentage, and thus, vocational funding has also been infected with phantom revenue.

revenue is not a "rich district" problem. Its impact on school funding is pervasive, and all districts, rich and poor alike, will be required to pony up additional local tax dollars as local property values increase and State funding decreases, yet another indication that the General Assembly has fallen woefully short of the mark.

VII. Proposition of Law: Attorney Fees Have Already Been Awarded By This Court And Are Not Precluded By R.C. 2721.16.

The State argues that Plaintiffs are not entitled to attorney fees for their efforts in the remedy phase of this action because of recent amendments to R.C. §2721.16. However, the amended statute does not bar attorney fees in a case such as this where the Court has already granted Plaintiffs' declaratory relief.[100] Moreover, by virtue of this Court's decision granting attorney fees, Plaintiffs have a vested right that cannot be impaired by statute. Ohio Constitution, Article II, Section 28. See also, *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100 (Ohio Constitution prohibits the retroactive application of laws that affect substantive rights.)

SUMMARY AND CONCLUSION

Considering the net effect of the State's claimed increases in school funding balanced against the additional costs, the trial court concluded that what was left overall was about a ½ of one percent increase in total funding between FY98 and FY99, "a year in which there is a one-time 'blip' in special education funding." (Dec.

[100] *DeRolph*, 78 Ohio St.3d 193, 213. R.C. §2721.16(B)(2) provides in part: "Division A of this section shall apply [to]***(2) an action or proceeding that was commenced prior to the effective date of this section, that is pending in a court of record on that date, and *that seeks* declaratory relief under this chapter." (Emphasis added). While the revised statute appears to preclude an award of fees in actions that have not yet proceeded to judgment, in the instant case, the Court has already granted the declaratory relief sought by Plaintiffs and the current proceedings are for the limited purpose of determining whether the State has complied with the Court's previous declarations.

222)[101] Thus, two conclusions are inevitable. First, the State has failed to comply with this Court's mandate that it implement a "complete, systematic overhaul" of school funding. The State's answer, at every turn, demonstrates refusal to accept its constitutional responsibility for public education in Ohio. In the battle between politics and compliance with this Court's mandates, politics has carried the day. Second, by its refusal the State has placed at issue the very integrity of the judicial branch of government. *DeRolph* is the law and it must be enforced.[102]

While the Court properly granted wide discretion to the legislature regarding the means to carry out its 1997 order, it did so with "full faith and trust that they [General Assembly] will act to remedy the disparate effects of the current statutory method for raising and distributing funding for education." *DeRolph*, 78 Ohio St.3d 419, 421. The legislative response has demonstrated beyond question that the Court's "full faith and trust" were misplaced. Not only has a remedy not been forthcoming, but an additional two and one-half years of educational deprivation have been inflicted upon Ohio's public school pupils. The harm to Plaintiffs, and indeed to all of Ohio's 1.8 million public school pupils, continues. Yet, nearly an educational generation of students has passed through our schools since this

[101] The court continued, "Fifty million is left before even considering the further impact of (l) ordinary rising costs to districts, for which the State statutorily projects to increase its funding at 2.8% in H.B. 650, (2) the continued impact of phantom revenue which remains materially unabated and (3) the continued erosion of the local property tax base." (*Id*.)

[102] As this Court has noted, "[n]o member of this court can, consistent with his or her oath of office, find that the General Assembly has operated within the boundaries of its constitutional authority by brushing aside a mandate of this court on constitutional issues as if it were of no consequence. Indeed, the very notion of it threatens the judiciary as an independent branch of government and tears at the fabric of our Constitution." *State ex. rel. Ohio Academy of Trial Lawyers. v. Sheward, Judge* (1999), 1999 WL 617856, *14.

litigation began.[103] The cycle of legislation-litigation must now end.

In order to assure prompt compliance, Plaintiffs ask the Court to address the following specific elements in its order. The first of these is an express declaration that the right to a public education is fundamental under the Ohio Constitution, thus casting the burden on the State to justify disparities created or maintained by its funding system.[104] Such a declaration will create a measurable standard against which any further remedial legislation will be measured, sending a clear message that legislatively-created inequities unrelated to the needs of pupils will no longer be permitted. By this request Plaintiffs do not suggest that school districts willing and able to provide programs above the constitutional standard should in any way be prohibited form doing so. However, it is clear that the State has the duty to establish and fund a system designed to permit all of our pupils to compete effectively. That level of opportunity should be available to all pupils, regardless of where they may happen to live.

Equality of opportunity, however, is incomplete unless accompanied by a definition of the substantive rights to which all children are entitled. Thus, it is essential that the Court also put in place a mechanism to give definition to the level of educational opportunities that Ohio owes its children. Mindful of separation of powers considerations, it is nonetheless appropriate that the Court order interim

---

[103] As noted by Judge Lewis: "In the fall of 1991 [when this case was filed] there were thousands of young school children across this State attending their first day of school- - next fall they will be entering high school." (Dec. 238)

[104] In *DeRolph* the Court declined to address this issue, premising its decision on the thorough and efficient clause of the Constitution. *DeRolph*, 78 Ohio St.3d 193, 202 (fn. 5) However, two justices separately opined that a determination of fundamentality *was then* appropriate. *Id.* at 256, Douglas, J. concurring, and at 260, Resnick, J. concurring. For all of the reasons contained in Plaintiffs' brief pages 47-60 filed March 11, 1996 with this Court and the State's utter disregard of this Court's 1997 directives, education should now be declared a fundamental right.

relief, as other courts have done.[105] It is also necessary that the Court address, as other courts have, the need to give guidelines to the General Assembly.[106] Indeed, appropriate guidelines have already been articulated in this case, in the trial court's initial decision, at pages 460-461. Legislation that identifies the specific components of a high quality education for *all* of Ohio's children will, at last, give meaning to Ohio's long-overdue promise of a thorough and efficient public education system. Specification of the types of programs and services to which children are entitled at every level, together with assurances that the necessary textbooks, equipment, and supplies are available, would be a first step toward compliance with the "adequacy" requirement as defined in *Miller v. Korns* (1923), 107 Ohio St. 287. Once such a determination has been made, a long-term funding system must then be developed to ensure the availability of those components for all pupils, regardless of where they may happen to live.

To facilitate a long-term solution, Plaintiffs ask the Court to stay the effect of its decision, retain jurisdiction of this case and, pursuant to S. Ct. Prac. R. XIV Section 6, direct the parties to settlement conference under the supervision of a master commissioner. The purpose of the settlement conference would be to permit the parties, under the supervision and guidance of the master commissioner, to expeditiously develop agreement for final resolution of this case.

Additionally, the Court has available to it the power to direct the expenditure

---

[105] *Abbott v. Burke* (1997), 149 N.J. 145, 693 A.2d 417. For FY98, *Abbott* ordered, as interim relief, that the plaintiff school districts be funded at a level estimated to be $8,431 per pupil. *Id*. at 189, fn. 38.

[106] *Rose v. Council for Better Edn., Inc.* (Ky. 1989), 790 S.W.2d 186; *Alabama Coalition for Equity, Inc. v. Hunt* (Ala. Cir. Ct. 1993), 1993 WL 204083, p. 46 (copy included in Appendix)

of funds where necessary to ensure constitutional compliance. It is appropriate to exercise that power in this case.[107] Accordingly, Plaintiffs ask the Court to issue an interim funding order, to remain in place until an agreed framework has been adopted and implemented.

Mindful of the continuing educational deprivation that has been inflicted upon Ohio's pupils, Plaintiffs believe it appropriate that an interim funding order address some of the most serious needs. Without reducing current levels of funding for school operations, the State should also be required: (1) to fund the foundation level at $5051 per pupil, updated for inflation from FY99,[108] (2) to fund all State-mandated special education programs and services and vocational education programs at the weighted value without the state share percentage reduction,[109] and (3) to fund gifted education based on the recommendations contained in the recently completed State-commissioned study of gifted education.[110] Also, though by no means adequate to meet the massive needs of Ohio's school buildings, the State should be required to provide State funding for school facilities at a level of not less than one $1 billion each fiscal year.

Plaintiffs hope that any interim funding order will have a very limited

---

[107] The Court has recognized that the power of the purse cannot be used to restrict the ability of the judiciary to carry out its essential functions. *State ex rel. Arbaugh v. Richland County Bd. Of Com'rs* (1984), 14 Ohio St.3d 5. As the Court recognized in *Arbaugh*, the power to direct the expenditure of funds by co-equal branches of government is an inherent element of judicial power. See also, *Abbott v. Burke* (1997), 149 N.J. 145, 693 A.2d 417.

[108] This represents the funding level established by the initial Panel of Experts, including Dr. Augenblick, updated by the State to FY99.

[109] Special education weights were established in H.B. 650; vocational education weights were established in H.B. 282.

[110] This study was commissioned by the General Assembly in H.B. 770 and was completed and presented to the General Assembly prior to the enactment of H.B. 282.

lifetime and will not be necessary beyond the current school year. However, in the event that a final settlement has not been reached by July 1, 2000, Plaintiffs ask the Court to order that the foundation level for the 2000-2001 school year (FY01) be set at the weighted average of all school districts' per pupil expenditures during the 1999-2000 school year. Thereafter, should the parties be unable to reach agreement, the foundation funding level should increase for FY02 to the level of school districts' per pupil spending at the 60th percentile during FY01, with equivalent annual increases each year that the interim order remains in effect.

As Ohio approaches a new millennium, it is fitting that its children receive fulfillment of the constitutional promise that their State has purposely withheld. Securing fulfillment of that promise is required if our children are to become productive, competitive, and responsible citizens. Only through a sound system of public education – the pillar upon which our democracy rests – can they and their children carry forward and advance the knowledge of our time to their time. Enforcement of our constitution's promise will result in educational opportunities for generations of Ohio's children and a long-lasting legacy from this Court.

Respectfully submitted,

Nicholas A. Pittner (0023159)
John F. Birath, Jr. (0022024)
Sue W. Yount (0034514)
Quintin F. Lindsmith (0018327)
Susan B. Greenberger (0010154)
BRICKER & ECKLER LLP
100 South Third Street
Columbus, Ohio 43215

CERTIFICATE OF SERVICE

I do hereby certify that a true copy of the foregoing document was served upon the following counsel by hand delivery this 1st day of September, 1999, addressed as follows:

Jeffrey S. Sutton
JONES, DAY, REAVIS & POGUE
41 South High Street, Suite 1900
Columbus, OH 43215-6103

Mary Lynn Readey
Roger F. Carroll
James G. Tassie
Assistant Attorneys General
30 East Broad Street, 15th Floor
Columbus, OH 43215-3428

Joel S. Taylor
DINSMORE & SHOHL LLP
175 South Third Street, Suite 1000
Columbus, OH 43215

Counsel for Appellants

_____
Nicholas A. Pittner