

IN THE COURT OF APPEALS FOR PERRY COUNTY, OHIO

FIFTH APPELLATE DISTRICT

DALE R. DEROLPH, et al.

Plaintiffs-Appellees

-vs-

STATE OF OHIO, et al.

Defendants-Appellants

CHARACTER OF PROCEEDING:

JUDGMENT:

DATE OF JUDGMENT ENTRY:

APPEARANCES:

For Plaintiffs-Appellees:

NICHOLAS A. PITTNER

100 South Third Street

Columbus, OH 43215

: JUDGES:

: Hon. W. Scott Gwin, P. J.

: Hon. W. Don Reader, J.

: Hon. John W. Wise, J.

:

: CASE NO. CA-477

:

:

: O P I N I O N

Civil Appeal from the  
Court of Common Pleas  
Case No. 2043

Affirmed in Part and  
Reversed in Part

For Defendants-Appellants:

MARK A. VANDERLAAN

JOEL S. TAYLOR

WILLIAM M. MATTES

DAVID K. KULLEN

175 S. Third Street, Suite 330

Columbus, OH 43215-5134

ROBERT B. McALISTER

65 E. State Street - Suite 2100

Columbus, OH 43215

**WISE, J.**

Defendants, the State of Ohio, the State Board of Education, the Superintendent of Public Instruction, and the Ohio Department of Education, appeal a judgment of the Perry County Common Pleas Court that held that Ohio's statutory scheme for financing public elementary and secondary education violates the Ohio Constitution. Plaintiffs include the Southern Local School District of Perry County, Dawson-Bryant Local District of Lawrence County, the Lima City School District, the Youngstown City School District, the Northern Local School District, the Superintendents and certain named members of the Board of Education of the various plaintiffs' school districts, certain named students and their parents and next of friends who reside in the plaintiffs' school districts, and certain teachers employed in the plaintiffs' school districts.

*Amicus Curiae* briefs have been filed in support of the appellees' position by the Cleveland Teacher's Union, the Buckeye Association of School Administrators and the Ohio School Boards Association, the Ohio Association of Public School Employees, the Coalition of Rural and Appalachian Schools, the Ohio Association of Elementary School Administrators and the Ohio Association of Secondary School Administrators, the American Civil Liberties Union of Ohio, the Ohio Association of School Business Officials, the Ohio Legal Rights Service, the Ohio Coalition for School Funding Reform, the Cleveland Heights-University Heights City School District, the Lakewood City School District, and the Shaker Heights City School District, the Ohio Professional Staff Union, and certain members of the Ohio Hundred Twentieth General Assembly. Hope for Ohio Children filed on behalf of the appellants.

The trial court held the Ohio school financing system violates numerous clauses of the Ohio Constitution, including Article I, Section II; Article I, Section VII; Article II, Section XXVI; Article VI, Section II; Article VI, Section III; and Article XII, Section IV. The above are reproduced on Table I of this opinion, *infra*.

Having found the statutory scheme incompatible with the Ohio Constitution, the trial court directed the Superintendent of Public Instruction for the Ohio State Board of Education to prepare proposals for legislation that would comply with constitutional mandates. The trial court also awarded reasonable attorney fees to the plaintiffs. The trial court's findings of fact alone in this case comprise some 448 pages. The case took 30 days to try with 38 witnesses called at trial and another 33 witnesses submitting deposition testimony. There are over 500 exhibits admitted into the evidence.

Defendants-appellants assign sixteen errors to the trial court, which because of their length, are set out on Table II attached to this brief and incorporated herein.

## FACTS

The appellants concede that few facts are in dispute in this case. Primary and secondary public education in Ohio is funded from two primary sources. Local funding is primarily through property tax revenues, and by state payments made to school districts. In 1976, the state devised an equal-yield formula, with the stated intention to provide an equal sum of combined state and local funds on a per-pupil, per-mill basis for each qualifying school district. That law required that each school district levy have at least 20 mills in order to participate, and it rewarded school districts which levied more than twenty school operating mills commensurately with their millage up to 30 mills. The objective of the formula was to equalize the property wealth based upon which the school districts raised their operating revenue. In the equal-yield for equal-effort formula, each district that levied 20 mills would be eligible to receive, from local, or from local and state if local did not generate sufficient funds, a basic amount, which in 1974 was \$960 per pupil. This was regarded as the basic support and was designed to guarantee each school child in Ohio a basic education, even if the local funds its school district generated did not provide for that basic amount.

Under this formula, the state also paid a bonus to any school district for their operating millage above 20 mills to a maximum of 30 mills. This provided a maximum of \$1,380 per pupil at 30 mills in 1974. Thus, the taxpayers were provided a measure of local control, that is, the voters could choose to pass higher operating levies and provide their children with educational opportunities beyond the state basic education.

Beginning in 1982, Ohio has employed what is referred to as a foundation formula. Like the equal-yield formula, the foundation formula is designed to guarantee that all school districts will receive enough state basic aid so that the local revenues plus state revenues will provide a defined foundation amount per pupil. In the fiscal year 1992-93, the foundation formula was \$2,817 per pupil. In addition, school districts may choose to levy more school operating millage and provide the children in their school

district with more than a foundation education. For 1992, the State Board of Education postulated that the foundation figure should be \$4,000 per pupil. This figure appears to be undisputed. The State Legislature does not calculate a foundation amount. Instead, it first funds certain mandated programs, such as Medicaid and the Department of Rehabilitation and Correction. The appropriations for those two programs have risen dramatically. After those programs are funded, the state education budget receives whatever funds remain. In fiscal year 1981, 35.54% of all state disbursements went for education. In fiscal year 1993, only 31.39% of total state disbursements were for educational purposes. For the last two fiscal years, the State Board of Education requested one billion dollars more in funding than it actually received. For fiscal year 1992, 42.7% of the total revenue that supported our public schools in Ohio came from state taxes while the federal revenue sources accounted for approximately 5.7%. The remaining 51.6% of the school funds came from local taxes.

The trial court devoted an extensive portion of its findings of fact to a discussion of the disparities in educational opportunities between the plaintiffs' school districts and some of the wealthier school districts. The trial court concluded that the way the state funds its public elementary and secondary schools violates the Ohio Constitution in at least seven different ways.

Walter

In *Board of Education v. Walter* (1979), 58 Ohio St.2d 368, the Supreme Court held:

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

*Syllabus*, by the court.

The Perry County Court of Common Pleas held that the finding in *Walter* is confined to its own set of facts. Although we agree with the trial court that *Walter* must be viewed in its historical context, nevertheless the legal pronouncements in *Walter* are the current law in this state.

The *Walter* court examined two constitutional challenges to the equal-yield formula by which Ohio funded its schools in 1976, when the case first went before the Court of Common Pleas of Hamilton County. The *Walter* court found that Ohio's statutory scheme did not violate the equal protection and benefits clause, Section II, Article I of the Ohio Constitution. It also found that it did not violate the thorough and efficient system clause contained in Section II of Article VI of the Ohio Constitution.

Although the Perry County Court of Common Pleas cited various other aspects of the Ohio Constitution that it deemed this legislation violated, nevertheless those two issues appear most basic to this analysis. We find that the facts found by the trial court, excluding conclusions included as findings of fact by the court, do not rise to the level of overcoming the ruling in the *Walter* case. If the funding mechanism provided under the statutes are unconstitutional, then the Supreme Court of this state must tell us so - not the trial court nor this court.

Being mindful of the Supreme Court's mandate and App.R. 12(A) and (C), we proceed to the Assignments of Error:

I, II, III, V, VI, VII, X

## Applicability of *Walter*

Appellants argues that the trial court erred in holding that *Board of Education v. Walter* is confined to its facts and not binding upon the trial court. The law enunciated in *Walter* is binding upon the trial court and upon this court and only the Supreme Court and the General Assembly can change Ohio law.

## Equal Protection

Specifically, Assignments of Error II and VI address equal protection and whether Ohio's statutory system for financing elementary and secondary education violates the equal protection clause of the Ohio Constitution. Pursuant to the Ohio Supreme Court's decision in *Walter*, education is not a fundamental right. *Walter* at 375-76. The court specifically rejected the test set forth by the United States Supreme Court in *San Antonio Indep. School Dist. v. Rodriguez* (1973), 411 U.S. 1, which stated that the key to determining whether education is a fundamental right depends on whether such a right is explicitly or implicitly guaranteed by the Constitution. *Id.* at 33.

The Ohio Supreme Court found the *Rodriguez* test inapplicable to Ohio's Constitution because Ohio's Constitution is not one of limited powers since it contains provisions, such as workers' compensation, which would be suitable for statutory enactment. *Walter* at 375. In the *Walter* case, as in the case *sub judice*, we are reviewing the method used by the state to collect and spend state and local taxes. *Id.* at 375-76. Therefore, a fundamental right is not involved.

Since the manner in which education is funded in the State of Ohio does not involve a fundamental right, we must apply the rational basis test and not strict scrutiny. "\* \* \* [U]nder the rational basis requirement, any classification based upon a state of facts that reasonably can be conceived to constitute a distinction, or difference in state policy \* \* \* will be upheld." *Id.* at 376, citing *Allied Stores of Ohio v. Bowers* (1959), 358 U.S. 522, 530. Under rational basis analysis, every statute is presumed constitutional and is invalid only when its unconstitutionality is shown beyond a reasonable doubt. *Id.*

Since 1785, prior to Ohio becoming a state, education has been, for the most part, under local control. *Id.* at 377. It is this concept of local control that the court found in *Walter* to be the rational basis supporting Ohio's system of financing elementary and secondary education. *Id.* It is this local control that creates the disparity throughout Ohio's school districts. The disparity is a result of differences in property values and the willingness or unwillingness of voters to pass levies. *Id.* at 376. The court is mindful that whether it is local tax dollars, through local levies or state funding, it is still Ohio residents' tax dollars that must pay the bill. This issue should not be legislated by the judiciary but should be brought before the General Assembly for public debate and change if necessary or desired.

In both the equal-yield and foundation formula funding statutes, the state legislature set forth a basic minimum monetary amount that must be provided to a school district on a per pupil basis. That amount comes from state finances and local taxes. The formulas to determine the minimum monetary amounts were similar. The only substantial variance was that the state, through the foundation formula, eliminated some of the prior disparity in amounts it provided to children in each district by eliminating the 20 to 30 mill matching funds of the equal-yield formula.

Therefore, if anything, the current foundation formula is more fair on the issue of equal funding per pupil in each school district than the prior equal-yield formula found constitutional by the Ohio Supreme Court in *Walter*.

Ohio's current statutory scheme for school funding assures that all districts have funding to meet state basic standards. The local citizenry have the power and control the right to provide for their district above

and beyond state basic standards.

We find that the factual basis of the *Walter* decision simply does not significantly differ from the facts in the case *sub judice*. The law enunciated by the Ohio Supreme Court in *Walter* is binding upon the trial court and upon this court, and only the Supreme Court can change Ohio case law that it creates.

Nothing in *Walter* prevents the General Assembly from modifying the current funding system. Our finding of constitutionality does not mean the current school funding system cannot be improved. It would appear the issue for the General Assembly to decide is whether insufficient funds exist or whether the existing funds are inefficiently used in the operation of the schools.

### **Thorough and Efficient System of Common Schools**

Appellants claim in Assignment of Error III that the trial court erred in determining that the appellants have failed to provide a thorough and efficient system of common schools in violation of Section 2, Article VI, of the Ohio Constitution.

Assignment of Error III deals with the state's obligation to raise sufficient revenue to provide for its schools. We do not find that the facts found by the trial court support such a finding.

Our first concern under these assignments of error address how and upon what evidence the trial court based its decision that \$2,817 per student, as allocated by the legislature pursuant to the foundation formula which was guaranteed to local school districts from 20 mills of tax effort for school years 1992-93, was insufficient. We find that a review of the record tends to support the opposite conclusion.

During their last reviews, appellee school districts were found to be in compliance. Further, no expert testimony was offered to establish that they lacked the means to come into compliance for those areas in which school administrators believe that a lack of compliance currently exists.

The record further lacks evidence to support the stipulation entered into by the parties that \$4,000 per student is sufficient or necessary without establishing a proper factual foundation on the record supporting the appropriateness or accuracy of the stipulated amount. Without such foundation, this court cannot review the credibility or accuracy of that amount. This figure is not based upon the foundation formula as contained in R.C. 3317.022. As such, the parties apparently stipulated to the unconstitutionality of the current formula and proceeded to establish their own dollar amount. Although the parties may both agree that \$2,817 is insufficient funding for each student, this stipulation does not permit a conclusion that the statute is unconstitutional.

Pursuant to Section 1, Article II, the legislative power of the state "\* \* \* shall be vested in a General Assembly \* \* \*". It is the General Assembly that is responsible for enacting and modifying the statutes of the State of Ohio. If changes are needed in the manner in which schools receive funding, this matter is properly within the discretion of the legislative branch of the government, not the judicial branch.

We do not find that the appellants failed to provide a thorough and efficient system of common schools in violation of Section 2, Article VI, of the Ohio Constitution.

### **Handicapped Funding in Violation of R.C. 3323 and Section 2, Article I, of the Ohio Constitution**

In Assignment of Error V, appellants claim the trial court erred in determining that the system of funding public education in Ohio for handicapped students violated R.C. 3323 and Article I, Section 2, of the Ohio Constitution.

The trial court found a denial of a constitutional right because the state system of school funding for handicapped students does not provide sufficient funds and therefore violates the equal protection clause of the Ohio Constitution. The asserted violation is the same as made for non-handicapped students. In Ohio, handicapped students receive the same state funding as non-handicapped students. They also receive, through state enabling legislation, federal funds in addition to the state funds. This court has already found the state school funding system constitutional, despite the numerous findings by the trial court otherwise. Therefore, the handicapped students who receive the same state funding as non-handicapped students cannot logically be deprived of a constitutional right based on that finding. Since the additional or special funding they receive is provided by the federal government, through state enabling legislations, any violation cannot be constitutional but would have to be statutory. We find no such statutory violation.

### **Deprivation of Liberty and Property and Uniform Operation of Laws**

In Assignment of Errors VII and X, appellants claim the trial court erred in finding that appellees were denied liberty and property based upon Ohio's school funding system and said funding system also violates the uniform operation of laws provision of the Ohio Constitution.

Under both Assignments of Error, appellees have been unable to cite any Ohio case law that has ever interpreted the applicability of Section 1 or 16, Article I and Section 26, Article II as applicable to Ohio's school funding system. We specifically find that as to Assignment of Error VII, the loss of liberty and property rights has no application to school funding issues. This Court will not accept such an analysis and application of the law, especially when there is no precedent in Ohio to do so.

These Assignments of Error are sustained.

### IV

Appellants next argue that the trial court misconstrued the Ohio Rules of Evidence in excluding certain evidence regarding the school price index. The trial court specifically found that the evidence was relevant but apparently found that no proper foundation had been laid to introduce the evidence.

In *Calderon v. Sharkey* (1982), 70 Ohio St.2d 218, the Supreme Court reminded us that issues regarding the admissibility of evidence, particularly in the realm of expert opinion, are matters that rest in the sound discretion of the trial court. The Supreme Court has often held that the term abuse of discretion implies more than an error of law and judgment, but that the court's attitude is unreasonable, arbitrary or unconscionable, *State v. Adams* (1980), 62 Ohio St.2d 151 at 157-158.

This case was tried for 30 days, and the transcript of the proceedings totals 5,642 pages, with an additional 5,185 pages of deposition. The trial court admitted over 500 exhibits. Out of that unbelievable amount of data presented to the trial court by both parties, appellants ask us to find an abuse of discretion in the trial court's declining to accept calculations regarding the school price index, which comprises only a small facet of the funding program at issue here. This court declines to find that the trial court acted unreasonably, arbitrarily or unconscionably.

The fourth Assignment of Error is overruled.

### VIII, IX, XII

All of these Assignments of Error deal with the state's obligation to raise sufficient revenue to provide for its schools. We do not find that the facts found by the trial court support such a finding. Each of these

assignments are sustained for the reasons set forth below.

### **Deprivation of Liberty or Property**

With reference to Assignment of Error VIII, appellees at no time plead or alleged that the educational funding system of Ohio violated the debt limitation contained in Sections 1 and 3, Article VIII of the Ohio Constitution. This issue was raised, if at all, in post trial proceedings, as reflected by the record. Ohio law requires that the defendant must know what he is defending against. Usually there is an amendment to the pleadings, or some oral representation by counsel at or during trial alluding to the issue. The trial court fails to indicate on the record that it amended the pleadings to conform to the evidence. There is nothing in the record to reflect that a hearing was held on the issue. *State ex rel. Evans v. Bainbridge Twp. Trustees* (1983), 5 Ohio St.3d 41 requires a hearing where there is an affirmative showing that the parties clearly understand the evidence was aimed at an unplead issue. In other words, the defendant should have had an opportunity to respond to the issue prior to conclusion of the presentation of the evidence at trial.

### **Raising Revenue Provision**

With reference to Assignment of Error IX, the trial court, based on its belief that *Walter* is not controlling, found that the educational funding system violated the raising revenue provisions of Section 4, Article XII, of the Ohio Constitution. This court having found *Walter* authoritative and controlling in Ohio, on the issue of school funding, must follow the dictates of the Supreme Court that school funding based on local property taxation serves a proper legislative interest in local control. The inherent conclusion of the trial court that the state is the sole funding source of public education is inconsistent with *Walter* and must be reversed.

### **Public School Administration Provision**

With reference to Assignment of Error XII nothing was presented into evidence to suggest that the state has failed to provide for the organization, administration, and control of the public school system of the state as required by Section 3, Article VI, of the Ohio Constitution.

These Assignments of Error are sustained.

## **XI**

Appellants next argue that the trial court found that the existing system of school funding violated the freedom of religious belief as provided in Article I, Section VII of the Ohio Constitution. We have reviewed the trial court's findings of fact and conclusions of law, and we find that the trial court was alluding to the portions of that section which discuss education and knowledge. Although the trial court found, as a matter of fact, that the school funding system was immoral, the trial court did not find that Ohio's system of funding public education somehow violates religious freedom.

The eleventh Assignment of Error is overruled.

## **XIII**

The trial court set forth a number of conditions which it found must be met in order for the system of school funding to be constitutionally acceptable. Appellants argue that however laudable those goals are, there is no evidence that increased spending will bring about those goals. Whether that assertion is true or not, we find that the trial court had no authority to require such an outcome.

This Assignment of Error is sustained.

#### XIV

Appellants next argue that the trial court was without jurisdiction to order the State of Ohio to provide for and fund a system of public education in compliance with the Ohio Constitution. Appellants argue that it is absolutely clear that this is an order requiring the enactment or amendment of statutes. In fact, the trial court retained continuing jurisdiction over this matter in order to insure that steps would be taken to remedy school funding. The trial court also ordered the Superintendent of Public Instruction for the State of Ohio to prepare a report suggesting proposals for the elimination of wealth-based disparities to be presented to the legislature.

We agree with appellants that this goes far beyond the judicial authority of the trial court to review the present legislation and declare whether or not it is constitutional. The belief that a Common Pleas trial judge has the authority to effectively legislate school funding by telling the school board to recommend legislation and then retaining jurisdiction to review the legislation violates the basic principle of a balance of powers between the executive, legislative and judicial branches. This court can find no such authority granted to a Common Pleas court either statutorily or constitutionally.

More directly to the issue, the Supreme Court in the *Walter* case makes it very clear that what the trial court disparagingly referred to as "wealth-based disparities" do not violate the Ohio Constitution if steps are taken to provide a basic education to all children. This court will adhere to the law as set forth by the Ohio Supreme Court just as the Common Pleas court should have done.

The fourteenth Assignment of Error is sustained.

#### XV

The trial court awarded attorney fees to the plaintiffs, setting forth its legal reasoning on pages 476 and 477 of its judgment entry. The trial court cited the Civil Rights Attorney Fee Awards Act of 1976, Section 1988, Title 42, U.S. Code, as amended which in affect states that a court, in its discretion, may allow the prevailing party reasonable attorney fees as part of the costs. The trial court further relied on *Gibney v. Toledo Board of Education* (1988), 40 Ohio St.3d 152, which in affect states that a court will normally grant a prevailing plaintiff's attorney fees unless special circumstances would render such an award unjust.

The case of *Vance v. Roedersheimer* (1992), 64 Ohio St.3d 552, speaks to the issues of the award of costs and attorney fees. The court interpreted Civ.R. 54(D) and stated that the court was not empowered to award costs to a non-prevailing party. Further, the court stated that an award of attorney fees must be predicated on statutory authorization or upon a finding of conduct, which amounts to bad faith. See *Sorin v. Board of Education* (1976), 46 Ohio St.2d 177. Here, there is no statutory authorization which would justify an award of attorney fees, nor is there any evidence of bad faith. We find that the appellees in this case are not the prevailing party, and therefore, are not entitled to attorney fees.

The fifteenth Assignment of Error is sustained.

#### XVI

Finally, appellants argue that the trial court should have dismissed this action for improper venue or should have transferred the case to Franklin County. The trial court found that appellants acted in Perry County, Ohio, and the administration of the system of funding complained of occurred in Perry County

and for those reasons appellants were subject to the jurisdiction of the court. Appellants agree that two of the plaintiffs are situated in Perry County, but all of the other appellants are state offices and officials with their place of business being in Franklin County.

Appellees respond that appellants' presence in Perry County, Ohio has been "pervasive" because the purpose of their being there has been to assure the administration of the state funding system which is the issue of this case. They have undertaken extensive involvement with Perry County, and have subjected themselves to the jurisdiction of the court. Further, appellees State of Ohio actually owns property in Southern Local School District.

Appellees also point out that Perry County is the site where appellants have caused the harm which this suit seeks to remedy.

We find that venue was proper in Perry County pursuant to Civ.R. 3(B).

The sixteenth Assignment of Error is overruled.

For the foregoing reasons, the judgment of the Court of Common Pleas of Perry County, Ohio is affirmed in part and reversed in part, and that portion of the judgment ordering appellants to proceed to remedy the situation is vacated.

By: Wise, J.

Reader, J., concurs separately.

Gwin, P. J., dissents.

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TABLE I

O CONST 1 §2 Equal protection and benefit

All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repeated by the General Assembly.

O Const 1 §7 Religious freedom; encouraging education

All men have a natural and infeasible right to worship Almighty God according to the dictates of their own conscience. No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent; and no preference shall be given, by law, to any religious society; nor shall any interference with the rights of conscience be permitted. No religious test shall be required, as a qualification for office, nor shall any person be incompetent

to be a witness on account of his religious belief; but nothing herein shall be construed to dispense with oaths and affirmations. Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the General Assembly to pass suitable laws, to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction.

O Const II §26 General laws to have uniform operation; laws other than school laws to take effect only on legislature's authority

All laws, of a general nature, shall have a uniform operation throughout the State; nor shall any act, except such as relates to public school, be passed, to take effect upon the approval of any other authority than the General Assembly, except, as otherwise provided in this Constitution.

O Const VI §2 Public School system to be adequately funded, use of school funds by religious sects

The General Assembly shall make such provision, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the State: but, no religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this state.

O Const VI §3 Organization, administration, and control of school system

Provision shall be made by law for the organization, administration and control of the public school system of the state supported by public funds; [provided, that each school district embraced wholly or in part within any city shall have the power by referendum vote to determine for itself the number of members and the organization of the district board of education, and provision shall be made by law for the exercise of this power by such school districts.

O Const XII §4 Legislature to provide for sufficient revenue to pay expenses and retire debts

The General Assembly shall provide for raising revenue, sufficient to defray the expenses of the state, for each year, and also a sufficient sum to pay principal and interest as they become due on the state debt.

TABLE II  
ASSIGNMENTS OF ERROR:

I. THE TRIAL COURT ERRED IN HOLDING THAT THE OHIO SUPREME COURT'S DECISION IN BOARD OF EDUCATION V. WALTER WAS CONFINED TO ITS FACTS AND NOT BINDING UPON THE TRIAL COURT (MEMORANDUM, P. 467, 468\*).

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\* The trial court's 478-page decision is divided into three parts: (1) Findings of Fact; (2) Conclusions of Law; and (3) Memorandum.

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II. THE TRIAL COURT ERRED IN DETERMINING THAT THE SYSTEM OF FUNDING PUBLIC EDUCATION IN OHIO HAS CREATED CONSTITUTIONALLY

IMPERMISSIBLE DISPARITIES IN EDUCATIONAL OPPORTUNITIES DEPRIVING APPELLEES OF EQUAL PROTECTION OF THE LAW UNDER THE OHIO CONSTITUTION (Conclusions of Law, p. 457, par. 21, 22; p. 459, par. 5.d; p. 461, par. 8; Memorandum, p. 478).

III. THE TRIAL COURT ERRED IN DETERMINING THAT THE APPELLANTS HAVE FAILED TO PROVIDE A THOROUGH AND EFFICIENT SYSTEM OF COMMON SCHOOLS IN VIOLATION OF SECTION 2, ARTICLE VI, OHIO CONSTITUTION (Conclusions of Law, p. 457, par. 20; p. 458, pars. 1, 2, 3, 5.b; p. 459, pars. 5.e and 5.f; Memorandum, p. 476).

IV. THE TRIAL COURT MISCONSTRUED OHIO RULES OF EVIDENCE 703 AND 705 IN REFUSING TO ADMIT INTO EVIDENCE CALCULATIONS PERFORMED UTILIZING THE SCHOOL PRICE INDEX (Memorandum, p. 466).

V. THE TRIAL COURT ERRED IN DETERMINING THAT THE SYSTEM OF FUNDING PUBLIC EDUCATION IN OHIO FOR HANDICAPPED STUDENTS VIOLATED OHIO REVISED CODE CHAPTER 3323 AND ARTICLE I, SECTION 2, OHIO CONSTITUTION (Conclusions of Law, p. 457, par. 23; 459, par. 5.f; Memorandum, p. 471).

VI. THE TRIAL COURT ERRED IN HOLDING THAT THE EXISTING SYSTEM OF SCHOOL FINANCE IN OHIO VIOLATES THE EQUAL PROTECTION RIGHTS OF NON-HANDICAPPED STUDENTS UNDER THE OHIO CONSTITUTION (Conclusions of Law, p. 456, pars. 14 and 15; p. 457-458, par. 24; Memorandum, p. 472-473).

VII. THE TRIAL COURT ERRED IN DETERMINING THAT ANY ASPECT OF THE SYSTEM OF SCHOOL FINANCE IN OHIO DEPRIVED APPELLEES OF LIBERTY OR PROPERTY IN VIOLATION OF THE OHIO CONSTITUTION, ARTICLE I §§1 or 16 (Conclusions of Law, p. 455, par. 9; Memorandum, p. 471, 473, 476).

VIII. THE TRIAL COURT ERRED IN HOLDING THAT THE PRESENT EDUCATIONAL FUNDING SYSTEM IN OHIO VIOLATES THE DEBT LIMITATIONS IN ARTICLE VIII, §§1 AND 3, OHIO CONSTITUTION (Conclusions of Law, p. 458-459, pars. 5.a and 5.c; Memorandum, p. 476).

IX. THE TRIAL COURT ERRED IN HOLDING THAT THE PRESENT EDUCATIONAL FUNDING SYSTEM IN OHIO VIOLATES THE "RAISING REVENUE" PROVISION OF ARTICLE XII, §4, OHIO CONSTITUTION (Conclusions of Law, p. 458-459, pars. 5.a and 5.c; Memorandum, p. 476).

X THE TRIAL COURT ERRED IN DETERMINING THAT ANY ASPECT OF THE SYSTEM OF SCHOOL FINANCE IN OHIO VIOLATES THE PROVISION IN THE OHIO CONSTITUTION REQUIRING UNIFORM OPERATION OF LAWS, ARTICLE II, §26 (Conclusions of Law, p. 458, par. 2; Memorandum, p. 471, 475).

XI. THE TRIAL COURT ERRED TO THE EXTENT IT FOUND THAT THE EXISTING SYSTEM OF SCHOOL FINANCE IN OHIO VIOLATED FREEDOM OF RELIGIOUS BELIEF AS PROVIDED IN ARTICLE I. §7, OHIO CONSTITUTION (Memorandum, p. 468, 475).

XII. THE TRIAL COURT ERRED TO THE EXTENT IT FOUND THAT THE EXISTING SYSTEM OF SCHOOL FINANCE IN OHIO VIOLATED THE "PUBLIC SCHOOL ADMINISTRATION" LANGUAGE IN ARTICLE VI, §3, OHIO CONSTITUTION (Memorandum, p. 475).

XIII. THE TRIAL COURT ERRED IN REQUIRING THAT AN ADEQUATELY FUNDED SYSTEM OF PUBLIC EDUCATION PRODUCE DEFINED OUTCOMES WHEN THE EVIDENCE SHOWED NO CAUSAL CONNECTION BETWEEN FUNDING AND TEST RESULTS WHICH MEASURE OUTCOMES (Conclusions of Law, p. 460-461, par. 6.c).

XIV. THE TRIAL COURT ERRED IN ORDERING THE "STATE OF OHIO" TO PROVIDE FOR AND FUND A SYSTEM OF PUBLIC EDUCATION IN COMPLIANCE WITH THE OHIO CONSTITUTION (Conclusions of Law, p. 451, par. 6; p. 460, par. 6).

XV. THE TRIAL COURT ERRED IN AWARDING ATTORNEYS' FEES TO APPELLEES (Conclusions of Law, p. 462, par. 12; Memorandum, p. 477).

XVI. THE TRIAL COURT ERRED IN DETERMINING THAT VENUE OF THIS ACTION WAS PROPER IN PERRY COUNTY (April 1, 1992 Entry; Conclusions of Law, p. 456, par. 17).

**Reader, concurs separately:**

I concur with the majority's analysis and with the judgment of this case. The case of *Board of Education v. Walter* (1979), 58 Ohio St.2d 368, is the law in this state. Facts found by the trial court in this matter do not rise to the level of overruling the Supreme Court of this state. If the present situation of funding is unconstitutional, let the Supreme Court of this state say that it is or it isn't.

The quantity or mass of material that was generated by this case is staggering. The defendants, the State of Ohio, the State Board of Education, the Superintendent of Public Instruction, and the Ohio Department of Education in their appellate brief indicated that there are few facts in dispute. Of course, there aren't--they agreed with almost everything the plaintiff-appellee stated. In fact, an examination of testimony by defense witnesses in this case would indicate that these witnesses stated that the system of funding was immoral and inequitable. If there was ever a case where the parties acted more in concert than this one, I haven't seen it. It is like asking the fox how many hens do you want. Further, it is a matter of public record that the appellants, having previously indicated their satisfaction with the trial court's decision, were literally forced to appeal the ruling.

The purpose of this litigation should be obvious even to those who aren't particularly interested in it. The General Assembly of Ohio is the proper forum for solving the problem of insufficient funding. The plaintiffs and the defendants, and all other interested parties are of the opinion that if a court finds the current laws unconstitutional, it will force the General Assembly to look at the issues. It is the belief of all the parties that failure to find the laws unconstitutional will permit the General Assembly to do what they have been doing - nothing. In addition, the tax payers of this state should understand that every person and every institution, either directly or indirectly involved in this case, is being paid by tax dollars.

Having been a school teacher and coming from a family of school teachers, I believe I understand some of the problems. I believe that the current school funding in this state is not sufficient, but that does not mean it is unconstitutional. Pouring money into the system is not the whole answer. Tax payers of this state should ask the educators some hard questions. In this case, the State Board of Education took the

position that the foundation figure should be \$4,000 per pupil. Plaintiff didn't disagree, so the court found this figure to be a fact, but where in the testimony is there any justification for this figure? Is this based on one computer for four students, or some other criteria? Why is it that the professors at Ohio State University complained to their administrators that they were tired of teaching sixth-grade mathematics to incoming freshmen? Why is it that we still have, in most of our urban areas, "social promotions" wherein youth complete twelve grades who are functional illiterates and can't pass the ninth grade proficiency test? Why is it that the number of children being sent to private schools and parochial schools is on the increase in this state? Why is it that the East Holmes School District, at \$4,369.00 per student, consistently achieves 100% passage of the Proficiency Tests, while many districts spend twice as much and never achieve that status? A few years ago, educators in this country were boasting that we had the greatest educational system in the world. Why is it that recent test results in math and science indicate that we are far behind other countries?

The former Secretary of the Department of Education said, "Today, there are greater, more certain and more immediate penalties in this country for serving up a rotten hamburger than for furnishing one thousand school children with a rotten education."

The tax payers of this state should rise up in righteous indignation and tell all the parties in this case to take their truckloads of paper and solutions if any, to where it would do the most good - the General Assembly of the State of Ohio.

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W. DON READER, JUDGE

**Gwin, P. J., Perry County, Case No. CA-477, concurring in part and dissenting in part**

I concur with the majority's disposition of assignments of error IV, XI, XIV, and XV.

I heartily disagree with the majority on the central issue of this case whether Ohio's school funding system, as implemented today, treats all of Ohio's students fairly, and achieves its stated goal of providing a basic education.

In reading the majority and concurring opinions, I sense a feeling that the court system is not the proper place to decide this matter. *Marbury v. Madison* (1803) 5 U.S. (1 Cranch) 137 recognized the separation of powers between the branches of government and nearly 200 years ago definitively established the principle of law wherein the court system is the appropriate forum for challenging the constitutionality of legislation. Both the authoring and concurring judges cite to the *Walter* opinion, which devotes several pages to a discussion of the appropriateness of judicial review. To an assertion that the issue of school funding was a political issue, or an issue left to the sole discretion of the legislature, the *Walter* court responded:

We wish to state clearly at the outset that this court has the authority, and indeed the duty, to review legislation, to determine its constitutionality under the Constitution of Ohio and to declare statutes inoperative.

*Walter* at 383.

The majority overlooks certain facts as found by the trial court.

The trial court found that in the poorest school district, state basic aid might represent 80% or more of the dollars guaranteed for 20 mills, because 20 mills on their property values might raise only a few hundred

dollars per pupil. On the other hand, in many of the wealthier school districts, 20 mills of property taxation yields local revenues far in excess of the foundation amount, and those school districts received no state basic aid, except for certain guarantees.

The funding formula is complicated by other calculations that the state uses when it allocates funds amongst the districts. For example, the state basic aid is adjusted by a factor called the school district equalization factor or the cost-of-doing-business factor. The rate of adjustment varies from county to county according to what the state determines is the cost of doing business in that county. The state applies the same cost-of-doing-business factor equally to all school districts in a given county without regard to the actual cost of the operations and the individual school district. The formula assumes that costs are lower in rural school districts than in urban districts. Also complicating the computation of aid is the Disadvantaged Pupil Impact Aid, or DPIA, which is the dollar amount provided to school districts based upon the concentration of disadvantaged pupils in the district. The state computes the percentage of the district's pupils who are on the state Aid to Dependent Children program ADC. As the percent of the district's ADC pupils increases over a certain threshold percent, the amount paid for each eligible pupil increases.

The School Foundation Program also contains a guarantee provision, which assures that a school district will receive the greater of the program amount or the guarantee amount. There are three guarantee provisions, the most common of which is the basic aid guarantee. The purpose of the guarantee provision is to prevent substantial losses of school district revenue because of the change of valuation or in the size of the pupil population. The trial court specifically found that the majority of the funds distributed under the guarantee provision go to the higher wealth districts.

Amended Substitute House Bill 920 was enacted in 1976 and limits growth of real property tax revenues that would otherwise occur through inflation of property values. It requires the application of tax reduction factors when property values increase because of reappraisal. It does not apply to new building. A school district receives the same level of revenue from voted tax levies after reappraisal as it did before reappraisal. The result of Amended Substitute House Bill 920 is that school districts with new construction growth get a higher percentage of additional revenue than districts whose growth is attributable solely to inflation. House Bill 920 and various other tax reduction factors result in a phenomenon called phantom or attributed revenue. The tax-revenue factors result in the district receiving no more revenue than it would have received in the absence of inflation, but the new reassessed valuation figure is utilized in the foundation formula, and has the effect of reducing state assistance because it is computed on the larger valuation per pupil. Thus, districts lose once because local revenues do not keep pace with inflation, and lose a second time when their state assistance is reduced because of the inflated valuation.

In order to supplement their budgets, school districts are permitted by law to take out loans in order to meet their current expenses. A school district may borrow against the revenue expected in the next year's taxes, which the trial court found was taking away resources for operations from the future and leading into a spiral where the school districts must continually borrow to pay back for the following year. Although there is a maximum amount that can be borrowed under a spending reserve loan program, the superintendent of public instruction may, and does, permit school districts to borrow more than their maximum limit. Evidence was offered that in some schools borrowing has become a way of life and indebtedness can only increase each year. The trial court also reviewed various programs, such as the Classroom Facilities Act, to improve the state's school buildings, and found that the program is seriously underfunded. The trial court found that Ohio schools generally do not meet, and cannot meet state and federal provisions aimed at removing dangerous asbestos and making the school buildings handicap accessible. Witnesses estimated that over 99% of all public school structures in Ohio have asbestos in them and 75% of those should be abated either immediately or very soon. Only 20% of the existing

public school buildings in Ohio have satisfactory handicap access, in spite of federal law requiring that buildings be modified.

I agree, of course, with the majority that *Walter* is the controlling case in Ohio and that it may be overruled only by the Supreme Court. I believe that applying *Walter's* reasoning to the facts of this case results in a finding that Ohio's school funding system is unconstitutional.

### EQUAL PROTECTION

The *Walter* opinion summarizes the test first formulated by the United States Supreme Court to apply to equal protection challenges. The test is that unequal treatment of different classes of persons by a state is valid only if the state can show that a rational basis exists for the inequality, unless the discrimination impairs the exercise of the fundamental right or if the classification is one defined as suspect, *Walter*, at 373, citing *McGowan v. Maryland* (1961), 366 U.S. 420. If the discrimination impairs a fundamental right, or if the classification is suspect, then courts apply strict judicial scrutiny to the unequal treatment, and it may be upheld only if the state shows that it is justified by a compelling state interest, *Id.*, citing *Eisenstadt v. Baird* (1972), 405 U.S. 438, 477. The *Walter* opinion notes that when a statutory classification interferes with the exercise of a fundamental right it must be supported by compelling state interests, and the legislation must be closely tailored to effectuate only those interests, *Id.*, citing *Zablocki v. Redhail* (1978), 434 U.S. 374.

The *Walter* court cited *San Antonio Independent School District v. Rodriguez* (1973), 411 U.S. 1 as defining how to determine whether education is a fundamental right. *Rodriguez* held that we look not to the significance given by the society to education, but rather to the constitution to see if it guarantees, explicitly or implicitly, a right to education. *Walter* found that the *Rodriguez* test compels a finding that education is fundamental, and would apply the doctrine of strict scrutiny to Ohio's school funding scheme. The Supreme Court rejected the *Rodriguez* test, however, finding a distinction between the grant of powers in the United States Constitution with those of the Ohio Constitution.

The Supreme Court found that the Ohio Constitution contains provisions which are not fundamental to our concept of ordered liberty. Further, it found that the *Rodriguez* test was not particularly helpful or desirable to apply to difficult questions of local and statewide taxation, fiscal planning, and educational policy.

Nevertheless, *Walter* acknowledges that it has frequently applied the *Rodriguez* test to construe the Ohio Constitution. Subsequent decisions of the Ohio Supreme Court continue to utilize the *Rodriguez* test, see, e.g., *Beatty v. Akron City Hospital* (1981), 67 Ohio St. 2d 483; *Lyle Construction, Inc. v. Division of Reclamation* (1987), 34 Ohio St. 3d 22.

I believe that education is a fundamental right. More than one-third of the entire state budget is devoted to education. An entire Article of our State Constitution addresses public education, and it mandates that schools be adequately funded so that our schools are thorough and efficient. Finally, common sense dictates that nothing is more important to Ohio's children than to make them competitive and fulfilled personally. To hold otherwise is to bury our heads in the sand.

*Walter* rightly holds that merely demonstrating a disparity in treatment amongst Ohio school students is insufficient to violate the equal protection and benefit laws. *Walter* finds that Ohio's two-tiered system ensures all students are guaranteed a basic education, and the formula also allows for a degree of local control, in that the local citizenry may choose to fund education beyond the state required basics. The *Walter* court concluded that local control was of a rational basis to support the Ohio system of financing elementary and secondary school education, *Walter* at 377.

While school funding need not be equally distributed, it certainly must be adequate to all districts. Unfortunately in our society, money is the common denominator that provides access to resources that theoretically equate to educational productivity. A variety of studies show money alone doesn't solve problems but a lack of funds may exacerbate existing problems and create new ones. Money does not just provide buildings and equipment, but also salaries for the personnel who directly or indirectly interact with the children. Lack of funding is undeniably one contributing factor in a sub-par basic education.

Appellants argue that the Ohio statutory scheme has not changed since the *Walter* case was decided. The majority apparently agrees. I do not. *Walter* notes that in 1973-74 the General Assembly determined the state basic aid amount based upon the recommendation of the education review committee, a joint non-partisan legislative committee created by the General Assembly to analyze Ohio's school finance system. The committee prepared a report which found that in 1973-74 school districts needed \$715 per pupil to operate at the state minimum standards for general education of high quality. The committee recommended \$960 per pupil and the legislature enacted legislation to ensure that amount.

The record before us demonstrates that the legislature, for whatever reasons, has abandoned that approach. Evidence presented to the trial court showed that the State Board of Education has recommended that the basic figure should be \$4,000 per pupil, but the legislature established a basic amount at about 70% of that rate. It is difficult to find, even applying the lesser standard of judicial review, that this is rationally related to the advancement of any state interest. The *Walter* rationale was that "the number of dollars guaranteed per pupil at the 20 mill level has been determined by the educational review committee to be sufficient to assure that all school districts are given the means to comply with the State Board of Education minimum standards, which describe a program of high quality pursuant to R.C. §3301.07(D)." *Walter* at 382. This is simply no longer the case in Ohio.

The majority takes issue with the stipulated and unchallenged facts because it cannot otherwise justify the result it reaches. In so doing it loses sight of the most fundamental appellate procedures. The majority opinion reads as if this were a *de novo* review. Appellate review must look to the record, and defer to the finder of fact if the record contains evidence that support the findings. The majority gives no deference to the trial court, and even takes exception to stipulations unchallenged before us. The majority has gone far beyond the assigned errors, and far beyond the record, to substitute its judgment for that of the trial court.

Turning now to the issue of "local control" the trial court found that local control without discretionary funds is a myth, and a hollow argument. Certainly, where state mandates minimum standards and curriculum, and mandatory services, but does not sufficiently fund the program, then local control is simply not realized on a wide-spread scale. In fact, it may well be argued that no student in Ohio receives a basic state-funded education, and the voters of the local districts are told that they can dig deeper in their pockets to provide extras for their children, when in fact they are merely bridging the gap between inadequate state funding and the basic necessities. *Walter* points out that some districts may have "less freedom of choice with respect to expenditures" than others, but nevertheless the state had provided a basic education, and thus some inequality in the manner in which the state met its goals did not violate the Ohio Constitution. I find that Ohio's method of implementing its school funding program has deteriorated to the point where courts can no longer find that it is rationally related to the competing state interests of basic education for all students coupled with local control. Ohio's statutory scheme for financing its schools violates Ohio's equal protection and benefit clause.

#### THOROUGH AND EFFICIENT SYSTEM

The *Walter* court held that the issues concerning legislation passed pursuant to the thorough and efficient system of common schools clause presents a justiciable controversy. *Walter* at 384. The court cited *Miller v. Korns* (1923), 107 Ohio St. 287, in which the Ohio Supreme Court was also confronted with a

constitutional challenge to a statute authorizing funds raised by property tax. In *Miller v. Korns*, the Supreme Court held "a thorough system could not mean one in which part or any number of the school districts of the state were starved for funds. An efficient system could not mean one in which part of any number of the school districts of the state lacked teachers, buildings, or equipment." *Korns*, at 297-298. *Walter* agreed, stating "for example, in a situation where a school district was receiving so little local and state revenue that the students were effectively being deprived of educational opportunity, such a system would clearly not be thorough and efficient." *Walter* at 387.

*Walter* concluded that the state had not failed so dismally as to violate the thorough and efficient clause. The trial court's opinion details extensively how far Ohio's school systems have sunk since *Walter* was decided. The trial court's lengthy findings of fact detail the glaring discrepancies in the buildings, facilities, access to technology, and curriculum provisions. In the area of capital improvements, for example, it is apparent that the majority of Ohio school districts are "starved for funds." The trial court found that many Ohio schools do lack teachers, buildings and equipment, see *Korns, supra*. Appellants do not challenge the trial court's findings of fact on appeal, and this court must defer to those findings, see *Seasons Coal Co. v. Cleveland* (1984) 10 Ohio St.3d 77. The trial court found that in some school districts, the students were effectively being deprived of educational opportunity, and this court upon the record before us should not find that the trial court was incorrect.

I find that Ohio's educational funding system as implemented violates the thorough and efficient clause of the Ohio Constitution.

## FINANCES

The trial court found the state is obligated by law to provide sufficient funds to fund a thorough and efficient system of education. The court concluded that the current funding system transfers the obligation for funding from the state to the local school districts, in violation of the constitution. It has long been established that it is the duty of the General Assembly to provide for raising revenues sufficient to defray the expenses of the state, see *State ex rel Williams v. Glander* (1947), 148 Ohio St. 188, cert denied, 332 U.S. 817; *State ex rel Donahey v. Edmondson* (1913), 89 Ohio St. 93. By underfunding Ohio's schools at a 70% rate of what is necessary to provide the basic education, coupled with the practice of permitting schools to borrow against future revenue, it appears that the state has indeed shirked its duty of generating revenue for schools as required by Article XII, Section IV of the Ohio Constitution. The editor's comment to that section points out that taxes are a sensitive subject, and legislators shy away from levying taxes that may irritate the voters. According to the comment, the purpose of this constitutional section is to force the legislature to generate enough revenue to pay the state's debts and expenses.

The *Walter* court found that Ohio's system of funding its public school system did not violate this constitutional mandate. As I noted above, when *Walter* was decided, the legislature addressed the problem much differently from the way it does today. In 1976, it appears that the legislature determined first what the public school system needed in order to provide its students with a basic education. It then proceeded to allocate the necessary funds. It is undisputed in this record that the legislature is now doing the opposite, that is, determining how much money is available, and then setting the basic rate without much regard to what the schools actually need. This is exactly the sort of behavior that Article XII, Section IV intended to discourage.

## I

*Walter* is a fact-specific opinion. Ohio School Funding when *Walter* was decided was much different. Obviously, the law enunciated in *Walter* is binding upon the trial court and upon this court and only the

Supreme Court can change Ohio law. Given the different set of facts here, however, the principles that form the rationale of *Walter* require a different outcome here.

I would overrule assignment of error I.

## II, VI and X

All these assignments of error deal with the equal protection argument. As noted *supra*, the trial court found in defiance of *Walter* that education was a fundamental right. Because I believe that under either equal protection analysis, strict scrutiny or rational relation test, the school funding scheme fails to meet constitutional requirements, I would overrule each of these assignments of error.

## III

Appellant next suggests that the trial court erroneously found that the state has failed to provide a thorough and efficient system of common schools. I would find from this record that the trial court was correct in its determination, and would overrule the third assignment of error.

## V, VIII, IX and XII

All of these assignments of error relate to the state's obligation to raise sufficient revenue to provide for its schools, and I agree with the trial court that the state has impermissibly shifted the burden of funding of basic education from the state level to the local level. Each of these assignments of error should be overruled.

## VII

The trial court found that Ohio's system of funding its public elementary and secondary schools harms pupils and their parents because it provides an inadequate level of education, and diminishes their inalienable right to enjoy life and defend liberty, to acquire, possess and protect property and to seek and obtain happiness and safety. The trial court does not specifically find that this rises to the level of a constitutional infringement.

I would overrule this assignment of error.

## XIII

As appellees point out, the trial court did not mandate the "outcome" of an acceptable system of school funding and order a system of school funding that would insure those outcomes. Instead, it appears that the trial court was stunned at the evidence of how widely disparate levels of education are being provided in Ohio's state schools. The trial court intended that equal opportunity for development in those basic areas should be provided. I agree with appellees' analysis, and would find that the trial court did not mandate certain outcomes, which certainly would be beyond the judicial role and more appropriate for the legislature to set forth.

I would overrule this assignment of error.

## XV

The trial court awarded attorney fees to the plaintiffs, setting forth its legal reasoning on pages 476 and 477 of its judgment entry. As the court notes, an award of fees is generally directed to the trial court's

discretion, and I find no error of law and no abuse of discretion herein.

I would overrule this assignment of error.

This case presented an overwhelming amount of information to the trial court, and I believe that it frequently was so offended by the evidence of how Ohio's school funding system has failed that it determined the system must all be scrapped in favor of a radically new approach. That is not a matter for the judiciary to determine.

For better or worse, equal access to educational opportunity is inextricably and inevitably tied to our purse strings. It is certainly not the court's responsibility to legislate adequate funding so that all children have equal access to educational opportunities. It certainly is the court's responsibility to analyze constitutional challenges asserting the minimum funding to provide equal access to educational opportunities has not been legislated.

The Ohio Supreme Court in *Walter* has determined that Ohio's system of funding its schools can be constitutional under certain conditions. In 1976, those conditions were met. In the 1990's they are not.

I would find that by applying the Supreme Court's directives in *Walter*, we are forced to conclude that Ohio's school funding system is not rationally related to its goal of providing its children a basic education because Ohio's children are not receiving a basic education. It is not rationally related to its goal of permitting local control over education, because voters are told they can provide extras when in fact they are only making up for the deficiency. I applaud the school districts and voters who do provide more for their children, but I think they have been lied to. The Ohio Constitution mandates that the legislature raise sufficient revenue, without going into debt, to provide a thorough and efficient system of schools. Ohio's schools are **not** thorough and efficient, and they are trapped in a spiral of debt.

Although the trial court applied an incorrect legal analysis, it nevertheless reached the right conclusion.

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JUDGE W. SCOTT GWIN

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IN THE COURT OF APPEALS FOR PERRY COUNTY, OHIO

FIFTH APPELLATE DISTRICT

DALE R. DEROLPH, et al.	:	
	:	
Plaintiffs-Appellees	:	CASE No. CA-477
	:	
-vs-	:	
	:	
STATE OF OHIO, et al.	:	JUDGMENT ENTRY
	:	
Defendants-Appellants	:	

For the reasons stated in the Memorandum-Opinion on file, the judgment of the Court of Common Pleas of Perry County, Ohio is affirmed in part and reversed in part for further proceedings not inconsistent with this opinion.

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JUDGES