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INTRODUCTION: DÉJÀ VU AGAIN

Four years after the initial decision and a year after the Court's rejection of the State's marginal response, the State has failed again. The harm to the school children is irreparable; with the passage of time, opportunities are lost that can never be regained. Those still in Ohio's public schools face yet another year of educational deprivation. And there is now another dimension to this case of critical importance: the integrity of the judiciary. This Court's orders have either been blatantly ignored or given mere lip service. As this Court has observed, "A remedy that is not enforced is truly not a remedy." *DeRolph v. State (2000)*, 89 Ohio St.3d 1, 12 ("*DeRolph II*"). What follows is a chronicle of the State's *second* failure to comply with the mandates that have been before the State since March 24, 1997.

FACTS

The State has offered the Court yet another warmed-over version of the same structurally flawed system already twice rejected. On the resource side, there is essentially no change in the way we levy, collect or distribute local property taxes, save for having given back nearly \$3.5 billion, primarily in the form of tax breaks for utilities and reductions in business inventory tax. Pl. Exh. 654. The excessive reliance on property tax as a primary source of school operating revenue continues essentially unchanged under Am.Sub.H.B.94 ("H.B.94"). The H.B.920 tax reduction factors and the growth in real property values combine to perpetuate older forms of phantom revenue while new

legislative "fixes" result in new forms of the same problem. At the same time politicians proclaim that there will be "no new taxes" to fund education, the march of school districts to the ballot box has continued unabated, with over 1300 tax levies having been proposed to the local electors since March 24, 1997. Pl. Exh. 536. Local property taxation continues to be a hallmark of Ohio's school funding system together with the educational disparities that inevitably flow from that reliance. Just as there has been no fundamental change on the revenue side of the school funding equation, so there also has been no significant change on the distribution side. The same school foundation formula continues to serve as the primary distribution mechanism for school funds.¹

Notably, the State's response gives the least to those who need it the most. Urban districts, which have the greatest levels of poverty (and thus the least ability to levy local taxes), the greatest percentages of minority pupils, and the highest percentages of disabled pupils, are the biggest losers in the State's latest scheme. The tragedy of our urban schools cries out for attention and resources but gets deprivation and neglect. Our largest school district posts a 34% high school graduation rate and in most of the other "Big 8" urban districts fewer than 60% of the high school population can be expected to graduate.² Every one of the Big 8, serving about 22% of all of Ohio's pupils, is

¹ See *DeRolph v. State* (1997), 78 Ohio St.3d 193 ("DeRolph I") ("The factors which contribute to the unworkability of the system and which must be eliminated are (1) the operation of the School Foundation Program").

² Pl. Exh. 527 (Phillis), Exh. C.

identified as "academic emergency" (the worst rating) and yet the State's answer is less, not more, funding.

Only 4.26% (74,689) of Ohio's 1.75 million pupils attend schools that the State considers effective, and the rest have little hope of improvement.³ The State has made no effort to determine the actual cost of public education and has, instead, chosen to perpetuate the disconnect between the actual needs of our pupils and the resources available to them. "Residual budgeting" continues, and the illogical methodology used by the State to defend its education funding scheme is little different from that used in the development of H.B.650, rejected in *DeRolph II*.⁴ There have been no studies to determine the additional needs of pupils in conditions of poverty and the State continues, by design, to underfund the needs of disabled pupils. Gifted pupils, a key resource, fare even worse.

The State continues to send pupils into dangerous, unsafe buildings. No funds to make our schools safe are currently available nor are any planned under the legislation advanced by the State. Technology funds for grades above five have disappeared and technical obsolescence now threatens to erase even the brief progress that was made for grades one through five. Having twice been told that mandated borrowing for operations is unacceptable, the

³ Pl. Exh. 528 (Harris), Exh. Q.

⁴ That rejection was underscored by the Court this past January: "These enactments should include, but are not limited to, a complete set of statewide academic standards, requirements that all school buildings be brought up to fire and building codes, elimination of overreliance on local property taxes, funding for all state mandates, and an accurate determination of the per-pupil cost of an adequate education to be funded immediately. It is of the utmost importance to require the state to address all of the requirements set forth in the *DeRolph* decisions by the deadline of June 15, 2001." Jan. 25, 2001 Order (Resnick, J., concurring).

State has continued, virtually without change, mandated program reductions, borrowing, and repayment requirements that continue to deprive pupils of educational opportunities.

Among the most egregious of the State's responses is its steadfast refusal to abide by the Court's direction that the unfunded mandates identified in *DeRolph II* be "immediately" funded and paid. While the State's own studies identified hundreds of millions in costs from those mandates, the State boldly declares: essentially there are no unfunded mandates.

Virtually every flaw identified previously by the Court persists, some now in *heightened* form – no simple achievement. Once again, "the General Assembly decided to polish up the existing formula, declare victory, and call in their legal team without attempting the climb." *DeRolph II* at 46 (Pfeifer, J., concurring).

ARGUMENT

The centerpiece of the State's response to *DeRolph II* is a purported \$1.4 billion "increase" in State funding. It is a false number. The increase from FY01 to FY02 is \$529 million and the increase from FY02 to FY03 is \$274 million, together totaling \$803 million.⁵ Siphoned off this amount is \$130 million that is paid to community schools ("charter") in FY02 ⁶ and another \$142 million diverted to charter schools in FY03. *Id.* Another \$91 million in

⁵ Shams Depo. Exh. 4, last page. The State gets close to its reported \$1.4 billion increase by counting the FY02 increase again in FY03, which would result in a figure of \$1.33 billion.

⁶ Shams Depo., 85-90, Exh. 18.

funds are not new but only replace local revenue lost by utility deregulation.⁷ Applying these deductions and ignoring the double counting of the FY02 increase, the overall increase shrivels to \$438 million. Adjusted for inflation using the State's rate of 2.8% (\$215 million), the effective change in State funding shrinks to \$223 million. Deduct the new costs imposed upon districts with no new funding and this figure potentially dives into the negative.⁸

The State's misleading numbers are accompanied by contrived findings. Just one example: the General Assembly "finds" that the cost of the increased graduation credit requirements of S.B.55 are only \$12 per pupil.⁹ This "finding" is only possible by deliberately ignoring overwhelming evidence the State gathered from school districts indicating that the actual costs of the mandates of S.B.55 could be as much as \$197 per pupil.¹⁰

Indeed, independent experts confirm that the methodologies and findings of the General Assembly have "no support in any empirical data," have "a perverse effect," and that "politics and residual budgeting drive the funding system rather than objective measures."¹¹ They conclude:

⁷ Pl. Exh. 528 (Russell) at ¶ 8.

⁸ The Legislative Budget Office ("LBO") initially estimated, based upon a written survey of districts, that the remediation and other mandates of S.B.55 alone cost districts as much as \$345 million *per year*. Brunson Depo. Exh. 12. Biennially, this would be almost \$700 million. Moreover, another \$235 million in federal "TANF" funds were used in H.B.94, with no provision made if the federal government would disallow the use. Pl. Exh. 529 (Russell) at ¶8.

⁹ H.B.94, §3317.012(A)(2); Payton Depo. at Exh. 2.

¹⁰ \$345 million ÷ 1.751 million pupils = \$197 per pupil.

¹¹ Pl. Exh. 531, Exh. A at 40. Plaintiffs believe the Court should give particular attention to the June 2001 report of ETPI, "Complete Systematic Overhaul?" analyzing the impact of H.B.94 on school districts (hereafter "ETPI"). Pl. Exh. 531, Exh. A. Authored by education funding experts, Howard Fleeter and William Driscoll, this report from an independent source retained neither by the State nor the Plaintiffs chronicles the stunning array of flaws and fabrications found in this piece of legislation.

Sub. H.B.94 sees a few trees but it misses the forest. Every improvement occurs at the expense of a tradeoff *** The number of tradeoffs make it clear that the ultimate funds received by a school district do not result from an objective attempt to determine what schools need but rather from a series of bargains intended to contain school costs within the boundary of existing State revenue streams. *Id.* at 40.

I. Proposition Of Law: Reliance On Local Property Taxes Remains, Perpetuating Educational Inadequacy And Inequity.

There has been essentially no reduction in the reliance on local property taxes. The change in the State's share of total revenue received by school districts is almost imperceptible; from 42.4% in FY93 to 43.7% in FY00.¹² The extent of reliance on real property tax, and the disparities that flow from that reliance, will continue unabated.¹³ And the new legislation changes nothing.

In 1997, there were 447 issues placed on the ballot. In 2000, there were 446.¹⁴ Sadly, the districts tell this story best:

- "The District only receives 29% of its funding from the State. This percentage has been decreasing in recent years. That percentage was 34.5% in 1991 and has steadily declined since then.*** The District's increasing reliance upon property taxes has forced the District to place more issues on the ballot at an ever increasing rate. ***H.B.94 will not change the District's financial outlook in any significant manner.*** The increases provided by [H.B.94] will not even permit the District to reinstate the budget cuts that were made in the past fiscal year, let alone other budget reductions the District made six years ago in fiscal year 1995." ¹⁵
- "[T]he District is now forced to continually renew levies for 5 mills and 9 mills, meaning that even without asking for new money, the District is on the ballot twice every five years*** The State's plan will not change the District's financial outlook."¹⁶

¹² Shams Depo., Exhs. 14 and 10.

¹³ Pl. Exh.528 (Harris) at 5-6, Exh. H.

¹⁴ Pl. Exh. 536.

¹⁵ Pl. Exh. 534 (Overly) at ¶¶ 3, 5, 11.

¹⁶ Pl. Exh. 535 (Smith) at ¶¶ 5-6, 9; see also Pl. Exh. 529 (Russell) ¶31.

With no dramatic increase in the State's share of funding, no change in the manner in which local revenues are raised, no alteration in the damaging effects of H.B.920, and no halt to the phase-out of the business inventory tax, reliance upon local property taxes will continue unabated.

II. Proposition Of Law: The State Offers Insufficient Funding Based On Previously Rejected And Unsupportable Methodologies.

School districts are required to provide services to pupils in four primary service areas: education (i.e., services funded by basic aid), special education, disadvantaged pupil aid (DPIA), and transportation. *A formula that underfunds any one of these four is inadequate.*

A. The State Has Not Honestly Determined And Provided A Minimum Per-Pupil Basic Aid Amount.

1. The State established its basic aid amount using the same flawed methodology that produced H.B.650 – a methodology inherently incapable of assuring adequate educational resources and opportunities (Augenblick Redux).

Instead of allowing the resource needs of Ohio's students to drive educational funding, the State has again used a variant of the methodology espoused by Dr. Augenblick – a methodology used to justify desired funding levels rather than to establish actual levels of needed resources.¹⁷

¹⁷ Dr. Augenblick testified that his methodology had few fixed principles and was susceptible to infinite manipulations that could produce an unlimited range of base costs (See Augenblick Tr. 738-739, 740, 749-750, 757-758, 767, 890, 924). When he calculated base costs in South Carolina using an *input*-based model (i.e., a model based on the provision of specified resources), Dr. Augenblick came up with a base cost of either \$6189 or \$6680 for FY99, depending on the level of performance expected of students on statewide tests - the equivalent of \$6724 or \$7257 for FY02. See Pl. Exh. 555 (Truitt) at ¶6-7, Exh. A.

The Augenblick methodology is fundamentally flawed in its assumption that an honest basic aid amount can be derived by *averaging* the expenditures of a group of selected districts. Neither the State nor Dr. Augenblick has ever produced any evidence in support of the critical assumption that all schools can produce like outcomes with the same basic aid amount.¹⁸ Another court has debunked such an assumption:

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.

2. From H.B.650 to H.B.94 – from bad to worse

a. The State dumbed-down its criteria for selecting model districts (used to determine the basic aid amount), and nearly all are ineffective according to the State.

The critical assumption of an "inferential" model is that if some school districts attain a given performance level by spending a given amount, then all school districts can attain the same performance levels for the same amount. Under this theory, the State must first identify the desired performance levels and then infer the funding amount from districts that achieve that level. Here, in identifying the desired performance levels, the State aimed low and then deliberately undershot its mark. The performance levels or "standards"

¹⁸ Demographics were ignored in Dr. Augenblick's recommendations, in H.B.650 and again in H.B.94. As a result, several of the State's seven different designations of school districts (based on socioeconomics) were completely ignored in the "model", including *all* of the "Big 8" urban schools. Brunson Depo. 242-4, Exh. 32.

(i.e., the outputs) used by the State to identify "model" districts are in fact indicators of educational *inadequacy*.

Like the performance standards used to calculate the basic aid amount rejected a year ago, the standards in H.B.94 primarily consist of proficiency tests. R.C. 3317.012. These standards reveal little about what is actually happening in a classroom and virtually nothing about any other aspect of a district's educational program.¹⁹

Despite the similarities, the performance standards used in H.B.94 to identify model districts are actually weaker than those in H.B.650, meaning *the State has used lower performing districts to determine current funding levels than it used to establish the level previously declared insufficient by this Court.*²⁰ Whereas the base cost previously rejected by the Court was inferred from districts meeting at least 17 of 18 then-prescribed performance standards (94.4%), the State now requires districts to meet only 20 of the current 27 (74%) in order to be designated as "model" districts. R.C. 3317.012(b)(1). By using districts that met 20 of 27 standards rather than 17 of 18, the State reduced its base cost for FY02 by \$169.²¹ Using the State's cut-rate approach

¹⁹ The proficiency tests only assess achievement in math, reading, writing, citizenship, and science and therefore provide only limited information about a district's curriculum. (2 of the 27 standards concern student attendance rates and graduation rates.) A student could pass all of the tests without ever having had any instruction in foreign language or the arts, and without ever having taken advanced placement or honors courses. Proficiency tests reflect only *minimum* levels of expectation. Goff Tr. 474, 477-479, *DeRolph I*.

²⁰ The State also transformed the standard requiring a "three per cent or lower dropout rate" into a "ninety percent or higher graduation rate," reflecting the State's evident belief that a district in which one in ten students fails to graduate not only is tolerable, but is exemplary. R.C. 3317.012(B)(1)(a).

²¹ A Department of Education memorandum dated May 19, 2001, reveals that the State

to adequacy, a district with passage rates of zero on all five 12th grade proficiency tests, poor student attendance, and no student graduating from high school could *still* be a funding "model" for the rest of Ohio!

While for funding purposes the State is satisfied with any district achieving 20 of 27 standards, in order to receive a report card rating of "effective" a district must satisfy 26 of those same standards. R.C. 3302.03(B)(1) Any district meeting fewer than 26 is required to develop and implement a plan of improvement. The State thus requires a district to allocate the resources necessary to pass the 26 of 27 standards needed to be "effective" – but requires it to do so with a funding amount based on the expenditures of districts that achieve only 20 of 27 standards.

The following statistics summarize the performance of the 127 "model" districts²²:

- 93% (118 districts) were *ineffective* when selected as models. Pl. Exh. 528 (Harris) Exh. B.
- Of the 118 ineffective models, in the following year (2000),
 - 64% failed to improve in the number of standards met; and
 - 42% actually met fewer standards, 27% declining to the point where they no longer qualified to be models. *Id.* Exh. K²³
- 7% (9 districts) were *effective* at the time they were selected as models,

examined the 1999 performance of school districts using the 1996 standards and determined that only 35 districts satisfied the 17 of 18 benchmark – far fewer than met the 20 of 27 benchmark. Pl. Exh. 554. The same memorandum indicates that the average weighted base cost of the 35 districts was \$4576; adjusted by the State's 2.8% inflation multiplier, this yields a base cost for FY2002 of \$4971 – \$169 more than the base cost of \$4802 the State calculated using its new, lower benchmark (to which it then added \$12 for unfunded mandates).

²² The State selected model districts on the basis of performance in FY99. The statistics presented here describe the performance of the model districts in that base year and in the following year, FY00.

²³ Two districts fell to within one standard of being in "academic watch." *Id.*

but three of these districts declined in the following year (2000) and no longer are considered effective. *Id.*

- The average number of standards met by the 127 models in 1999 was 21 of 27 – a far cry from the 26 needed to be deemed "effective." *Id.* Exh. B

The State's methodology predicts that the rest of Ohio, funded at the level the State inferred from the "model" schools, will achieve like results.

b. The State excluded forty-three *high-spending* districts that *qualified* to be models, while including seven *low-spending* districts that *did not*, thus lowering the basic aid amount considerably.

The State further manipulated its funding "model" in two ways. First, the State utilized arbitrary "wealth screens" to *exclude* 43 districts that performed at a sufficiently high level to qualify them as models using the State's 20 of 27 benchmark.²⁴ Among the 43 excluded districts were two-thirds of the effective districts in the State (21 of 30). Pl. Exh. 528 (Harris) Exh. C. Then, the State *included* in its group of model districts 7 that did *not* meet the dismal benchmark of 20 of 27 standards.²⁵ Six met only 19 standards, and one met just 18. *Id.* at ¶II(e). Both manipulations lowered the basic aid amount. Inclusion of the 7 unqualified districts caused that amount to drop by \$40 for FY02, while excluding the qualified districts reduced it by yet another \$110.

²⁴ In R.C. 3317.012(B)(2)(3), the State describes the two arbitrary wealth screens used to remove school districts in the top and bottom five percent of Ohio based on property valuation and income. The effect of the screens was solely to eliminate high wealth districts, since no district at the bottom of the wealth spectrum satisfied the 20 of 27 performance standards, while most of the districts on the high end of the wealth spectrum easily surpassed the 20 of 27 benchmark. Pl. Exh. 528 (Harris) at ¶II(d).

²⁵ H.B.94 explains the inclusion of the 7 unqualified districts as the result of a "rounding procedure previously recommended by the department of education," additionally asserting that the same procedure was used in H.B.650. R.C. 3317.012(B) If such a procedure was, in fact, used in H.B.650, it was used covertly, as no such language appeared in that bill.

Id. ¶II(d). Together, these two manipulations depressed the basic aid amount by \$150 per pupil.

c. The State fabricated an "echo effect" to justify capping the base costs of most model districts at the lower of 1996 or 1999 levels, further lowering the basic aid amount.

The State then further depressed the basic aid amount by using a fictional assumption that some of the 127 model districts may have spent more than they actually needed; the State then compensated for that assumption by choosing the *lower of 1996 or 1999* funding levels (each adjusted by 2.8% for inflation).²⁶ The model districts subject to this base cost-lowering manipulation were those that the State determined also qualified to be models in 1996. After analyzing the actual expenditures of the 83 districts affected by this manipulation ETPI concluded, "The data show that the theory designed to limit education expenditures known as the Echo Effect is completely unsupported by the facts."²⁷

The State's unsupported assumption that increases in funding from 1996 to 1999 *may* have been wasteful is as offensive as it is bizarre.²⁸ Among the more irrational flaws in the State's reasoning are the following:

- From 1996 to 1999, the State raised the number of performance standards from 18 to 27. Each of these standards has associated with it additional costs. Accordingly, the cost of meeting the 1999 standards

²⁶ H.B.94 did not originally contain the "or lower" provision.

²⁷ ETPI at page 6.

²⁸ David Brunson of the LBO testified that he did not believe it was possible to conduct a study which could determine how much districts spent beyond what they purportedly needed to be able to achieve 20 out of the 27 performance criteria. He was unable to explain how picking the lower of the 1996 or 1999 base cost numbers would "control for this effect," as asserted by H.B.94. Brunson Depo. at 151-3.

would be expected to be considerably higher than the cost of meeting the 1996 standards.²⁹

- *Most of the additional funding acquired by these model districts from FY96 to FY99 was locally-generated – not State-provided* Pl. Exh. 531, Exh. A (ETPI) at 5 – and there is no evidence to support the implicit suggestion that local voters imposed additional taxes on themselves for wasteful purposes; another court has firmly rejected such a proposition.³⁰
- The model districts reduced to FY96 spending levels were not particularly high-spending ones. Indeed, even before the reductions, 10 had actual base expenditures in FY99 that were *already* less than the \$4063 declared in H.B.650 to be minimally adequate for that year.³¹ The State thus took poor districts, underfunded by the State's own definition of adequacy, but assumed they overspent because three years prior they were even poorer!³²

The State simply ignored a total of over \$40 million in actual FY99 expenditures of 66 districts. Pl. Exh. 528 (Harris) at ¶II(f). As a result of this manipulation, the State's basic aid amount for FY02 was further reduced by

²⁹ Wendy Zahn, of the LBO, acknowledged that the change in performance criteria for 1999 may bring higher costs than those in place in 1996. Zahn Depo. at 75-6. When asked if any study had been performed to determine whether there are higher costs in terms of curriculum, training, staffing, etc., needed to meet those standards, Ms. Zahn replied, "No, we have not done the study." *Id.*

³⁰ *Abbott v. Burke* (1997), 149 N.J. 145, 169-171, 693 A.2d 417

³¹ Note that although HB 650 declared \$4,063 as the cost of adequacy for FY99, due to phase-in provisions, the basic aid amount for that year was only \$3,851.

³² For example, in FY99, Lisbon Exempted Village School District in Columbiana County had *actual* expenditures of \$3691, a figure \$361 per pupil *less* than H.B.650 asserts was necessary for an adequate education. But, because Lisbon qualified as a model district in FY96 – a time when it was even more poorly funded – the State took Lisbon's FY96 expenditures of \$3268 and inflated that number by 2.8% annually to arrive at a base cost for FY99 of \$3551. Pl. Exh. 528 (Harris) Exh. B. The State thus determined – without any examination whatsoever of the educational programming and resources available to students – that the district spent \$140 *more* per pupil than necessary. According to the State, Lisbon should have made do in FY99 with \$512 *less* than H.B. 650 declared to be minimally adequate. An additional 13 model districts that did spend above the adequacy figure in FY99 were regressed to FY96 levels and thus treated by the State as though they spent *less* than an adequate amount. For example, Bluffton Village School District had a FY99 base cost figure of \$4,530 – *above* the adequacy figure – but its FY96 base cost, inflated to FY99, was only \$3,761 – hundreds of dollars *below* the adequacy figure. The State thus supposes that Bluffton Village spent \$769 more per pupil than it needed to achieve 20 out of the 27 performance criteria. When Ms. Zahn was asked about this, she responded only, "we did not do the district-by-district analysis." Zahn Depo. at 72. Pl. Exh. 528 (Harris) at ¶ III, Exh. L.

\$181 per pupil. (*Id.*)

d. 28% of the "model" districts were *underfunded* according to H.B.650.

The absurdity of H.B.94 is further demonstrated by the fact that among the group of 127 model districts, 36 districts were included in the "model" at spending levels *lower* than H.B.650's FY99 base cost adequacy figure of \$4063. The State thus purported to infer an "adequate" funding level from a group of "model" districts, 28% of which were underfunded by the State's own yardstick. *Id.*, Exh. L.

e. The aggregate effect of the State's manipulations is residual budgeting yet again.

The following chart tracks the progressive decline of H.B.94's basic aid amount. The first line (below the headings) shows the base cost if the State had utilized as its model all 30 of the FY99 *effective* districts. The remainder of the chart depicts the steps actually used by the State to reduce the base cost amount found in H.B.94. The final column indicates the reduction in State funds for each line of the chart as compared with the preceding line, based on a \$1.2 million reduction in state funds for every \$1 reduction in base cost.³³

³³ Pl. Exh. 528 (Harris), Exh. I (footnotes omitted). Note that all FY99 base figures are calculated on the basis of FY96 and FY99 data obtained from the Department of Education; these figures are determined utilizing the same data used in the development of H.B.94. *Id.* FY02 figures are based on FY99 base cost inflated by 2.8% annually, without the \$12 purportedly added for the unfunded mandates. *Id.*

Criteria (FY99) Used To Select "Model" Districts	Report Card Status of Districts	Expenditures Used To Determine Base Cost	Base Cost FY99	Base Cost FY02	FY02 Reduction in State Funds
26 of 27 performance standards 30 Districts	30 Effective	Actual FY99	\$5,687	\$6,178	
20 of 27 performance standards 163 Districts	30 Effective 133 Continuous Improvement	Actual FY99	\$4,725	\$5,133	\$1.254 billion
20 of 27 performance standards with wealth screens 120 Districts	9 Effective 111 Continuous Improvement	Actual FY99	\$4,624	\$5,023	\$132 million
20 of 27 performance standards (with rounding) with wealth screens 127 Districts	9 Effective 118 Continuous Improvement	Actual FY99	\$4,587	\$4,983	\$48 million
20 of 27 performance standards (with rounding) with wealth screens 127 Districts	9 Effective 118 Continuous Improvement	Actual FY99 for 44 districts; actual FY96 (plus inflation) for remaining 83 districts ³⁴	\$4,447	\$4,831	\$182.4 million
20 of 27 performance standards (with rounding) with wealth screens 127 Districts	9 Effective 118 Continuous Improvement	Actual FY99 for 44 districts; <u>lower</u> of actual FY99 <u>or</u> FY96 (plus inflation) for remaining 83 districts ³⁵	\$4,420	\$4,802	\$34.8 million
			TOTALS:	- \$1,376 per pupil	- \$1.6512 billion

³⁴ In this line, FY96 expenditures, inflated to FY99, are used for *all* 83 districts among the 127 that also met the State's criteria for model districts in FY96. *Id.*

³⁵ In this final iteration of the formula, the base expenditures attributed to the 83 districts that also met the State's FY96 criteria is the *lower* of FY96 expenditures (inflated to FY99) or actual FY99 expenditures. Sixty-six of the 83 districts were thus regressed to their FY96 expenditures (plus inflation). For the other 17 districts, the lower FY99 figure was used. The base cost shown on this line is the same as that established by H.B.94 before the addition of \$12 for unfunded mandates (yielding a total of \$4814) *Id.*

3. The result: The State's "models" are models of underfunded educational deprivation.

A survey of the State's 127 model districts reveals the following:³⁶

- 91.5% lack full day kindergarten for all students. One model district reports: "Kindergarten classes are held in old locker rooms –cannot afford to add space. Cannot afford hiring of two additional teachers." Pl. Exh. 561 at 7.
- One-quarter of the models report inadequacy in their core curriculum, with deficiencies commonplace in every single subject area, foreign languages being most problematic. One model district reports: "[W]e have the least number of teachers allowable to operate a district. No advanced placement – 28 kids per section K-6 –lack adequate high school curriculum to meet student needs." *Id.* at 8.
- Over a third have inadequate technology-related resources. *Id.* at 9.
- Performing arts programs are inadequate in over half. *Id.* at 9.
- Most of the models are severely limited in their ability to offer advanced placement courses – some of the models offering none. *Id.* at 10-11.
- 80% of the districts do not serve all identified gifted students. *Id.* at 11.
- Several districts (5.7%) are not serving all eligible special education students *Id.* at 12.
- Some model districts have *no* services for at-risk students; others can only afford to provide these services in the primary grades, and intervention services are inadequate in nearly half the model districts. *Id.* at 13. *Id.* at 12-13.
- Seriously inadequate facilities are a problem for most of the model districts. One model district reports: "Our elementary buildings have no space for science labs. Our art and music teachers have to share a single room." Another comments: "We are considered 'high wealth' yet our buildings are 1920's with a coal fired furnace. 427 on the equity list. Go figure." *Id.* at 14.
- Among the model districts, there are at least 95 buildings that do not meet handicapped accessibility requirements, 149 with asbestos, 25 that are unsafe for reasons other than asbestos, and 83 that lack wiring or space for technology. *Id.* at 15.

³⁶ Data concerning the 127 models was amassed by the Ohio Coalition for Equity & Adequacy of School Funding and summarized in a report entitled "Determining the Cost of an Adequate Education: Yet *Another* Failed Attempt." Pl. Exh. 561. Other evidence supports the survey's findings. E.g., Pl. Exh. 576 (Sheldon) at ¶ 5; Pl. Exh 560 (Osborn).

- The model districts lack equipment and supplies. One model district reports: "There are no funds for consumable science materials. Teachers use their own money for these." *Id.* at 16.
- 55.9% of the model districts do not believe that they are appropriate for inclusion as funding models. *Id.* at 18.

One model district, Northridge Local Schools, is in *fiscal emergency*. The funding provided by H.B.94 will not permit the district to restore the cuts made in staff and services required by the mandated fiscal recovery plan. Pl. Exh. 619 (Sullivan) at ¶¶5-11. Another model district, Canal Winchester Local Schools, has made \$1.6 million of cuts in all areas of its \$15.5 million budget for both FY01 and for FY02. With the funding from H.B.94 and with *no salary increases* for employees, the district is facing a deficit of over \$1 million for FY03. Pl. Exh. 559 (Bochnovich). Some models.

a. Reality check: Districts funded at the State's basic aid level are overwhelmingly *ineffective*, while those the State regards as *effective* spend far more.

The State's approach to school funding assumes that all districts funded at the base level, with minor adjustments, have sufficient resources to provide their students an adequate education. But the State's own data belie that assumption. Of the 167 school districts in Ohio whose base expenditures were at or *above* H.B.94's base funding level deflated to FY99 (the year examined by the State) the vast majority – 141 – were ineffective: 116 were in need of continuous improvement, 18 were in a state of academic watch, and 7 were in academic emergency. Pl. Exh. 528 (Harris), Exh. U. Yet, the State would have the Court believe that every one of these districts was adequately funded

The State's unfounded assumptions simply cannot be reconciled with the reality of these districts' inadequate performance. As in the case of H.B.650, the State has conjured up a basic aid amount totally disconnected from the reality of educational needs residual budgeting once again.

4. Basic aid is a sham: the State doesn't guarantee it, and hundreds of thousands of students don't get it.

The State's funding system is built around the fundamental premise that the basic aid amount is guaranteed by the State to *every* child in Ohio. That premise is false. In FY99, of Ohio's 607 school districts, 232 had per pupil base expenditures *below* the basic aid amount of \$3851³⁷ established by H.B.650 for that year, with some districts spending more than a thousand dollars less per pupil. Pl. Exh. 528 (Harris) at ¶V, Exh. N. The problem is particularly acute in Ohio's urban areas, where funds desperately needed for basic aid purposes must be diverted to provide mandated services for those with special needs or for transportation. The diversion occurs because the State does not provide anything close to full funding for these services. Significantly, six of Ohio's Big 8 school districts spent less than the basic aid amount in FY99, and every one of the eight – together serving over 400,000 students – is in "academic emergency."³⁸ In short, the notion that basic aid represents a guarantee of funding – let alone of educational quality – is simply false.

³⁷ See, fn. 31 above.

³⁸Pl. Exh. 538 (Harris) Exh. O. Regarding the "academic emergency" status of these districts, see School District Report Cards. Pl. Exh. 527, Exh. C.

5. The State's arbitrary inflation multiplier will cause even greater educational deprivation in future years.

Under H.B.94, the basic aid amount is predetermined for a period of six years to grow at a rate of only 2.8% per year. However, recent studies of the real-world costs demonstrate the essential flaw in the State's unsupported assumption regarding inflation. A recent study by ETPI concluded that the actual rate of growth in school expenditures is 3.64% per year.³⁹ Other studies, though not as comprehensive, suggest even higher costs. A State Employment Relations Board study suggests increases for health care at the rate of 10.7%.⁴⁰ At the same time, rapidly escalating double-digit increases in the costs of energy and bus fuel far exceed the State's arbitrary 2.8%.⁴¹ The notion that school costs will be limited to 2.8% for the next five years is as false as the rest of H.B.94's fantasy world. As a result, the real tab for public education will continue to be picked up by the local taxpayers.

B. The Big Cities Are The Big Losers: Students In Failing Urban Districts Are Abandoned By The State.

Nowhere are the failings of the State's "remedy" more pronounced than in Ohio's urban schools. The Big 8 have 22.3% of all pupil enrollment.⁴² They also have disproportionately large percentages of disabled pupils, minority pupils, and pupils in conditions of high poverty. Their high school graduation

³⁹ Pl. Exh 557

⁴⁰ Pl. Exh 558

⁴¹ Pl. Exh 556; Pl. Exh. 661 (Thomas.)

⁴² Pl. Exh. 528 (Harris), Exh. O.

rates and proficiency test scores are among the lowest in the State⁴³ and all are in "academic emergency." By every measure, the Big 8, as well as many of the other large urban districts, are abject failures.

Typical of the urban school problem is the Dayton Public Schools, which passed only 3 of 27 performance measures on the most recent school district report card. Nearly 16% of Dayton's pupils have disabilities, over 63% qualify for free or reduced price lunch, and the median household income is \$22,602 – more than \$6,700 below the state average. Only 56.5% of the students graduate from high school. Identified gifted pupils constitute only 0.03% of the pupil population because the district lacks sufficient funds to identify its gifted.⁴⁴ Dayton's buildings are old, decrepit, and in many cases unsafe and inaccessible.⁴⁵ In some cases, wiring for technology cannot be accomplished due to the presence of asbestos. While the district has 11,000 computers, 7,500 are obsolete or broken, and the district lacks funds to repair them.⁴⁶

The State defended H.B.650 on the theory that basic aid, special education, DPIA, vocational education, and transportation were fully funded. But urban schools, like many of their non-urban counterparts, are underfunded in every category. While, in theory, the basic aid amount is supposed to be available to every pupil, in FY99, 7 of the Big 8 had base cost

⁴³ Pl. Exh. 533

⁴⁴ Pl. Exh. 628 (Cooper) at ¶¶ 6-8

⁴⁵ Facilities assessments conducted thus far by the OSFC have resulted in recommendations for the demolition of 32 of the 36 buildings assessed. A summary of the conditions in the facilities of the Dayton Public Schools is set forth in more detail in the Affidavit of Sam Wilson and attachments, Pl. Exh. 593 (Wilson).

⁴⁶ Pl. Exh. 589 (Ward) at ¶ 3; Dayton's pupil enrollment has plummeted from 25,489 in FY97 to 21,268 in FY01. See, Pl. Exh. 649 (McGill), ¶¶ 3-4.

expenditures below that level in large part due to the need to divert basic aid to these other purposes.⁴⁷

1. H.B.94 shortchanges the big cities.

A recent New Ohio Institute study reveals the disproportionate negative impact of H.B.94 on urban schools.⁴⁸ The study questioned the rationale for allocating greater funding increases to those who need it least, while allocating far less to those in greatest need. Of particular concern are minority pupils, who tend to be concentrated in the large urban school districts.

A comparison of racial groups shows a similar picture. Racial minorities on average are in districts that would receive an average 13.5% increase in state aid under House Bill 94, compared to a 17.4% increase in state aid for white students.

Urban districts enroll 68% of the state's poor students (the average poverty enrollment for urban districts is 21%, not shown on table) and 77% of the state's minority students. Nine of every 10 students who attends a school in Academic Emergency are enrolled in an urban high-poverty school district, and 3 of every 10 students who attends an Academic Watch districts are enrolled in an urban high-poverty district.

Under House Bill 92, urban high-poverty school districts would receive the smallest percentage increase in state aid over current allotments for FY01, 14%, compared to 17% for low-poverty districts and 19% for rural high-poverty school districts.

Id. at 5, 7-8.

⁴⁷ Pl. Exh. 528 (Harris), Exhs. N and O; *id.*, at 5.

⁴⁸ Pl. Exh. 533.

2. Reductions in the cost of doing business factor, DPIA, and special education further disadvantage urban districts.

Among the provisions of H.B.94 singled out for criticism by ETPI is the reduction in the cost of doing business factor, which change reduces the State's commitment by over \$380 million in FY02 and \$462 million in FY03. Pl. Exh. 528 (Harris) ¶IV. (Similar State reductions are summarized in Pl. Exh. 527, Exh. E.) The ETPI report confirms that large city districts are by far the biggest victims of this reduction due to both a generally higher cost of doing business and higher enrollments.⁴⁹ The reduction also has the effect of reducing State funding for categorical programs like special education and vocational education because the lower cost of doing business factor reduces the "state share percentage" of weighted funding for these programs. ETPI concludes, "[t]he driving force behind this change is either the desire to transfer state aid from urban areas to rural areas or simply the desire to seemingly increase the foundation level without paying the full price of doing so."⁵⁰

With respect to DPIA the State has, incredibly, actually *reduced* the total amount of funding by 3¹/₂% for FY02 and held it flat for FY03.⁵¹ Moreover, by enlarging the definition of pupils eligible for DPIA, H.B.94 further disadvantages urban districts by increasing the total number of pupils eligible statewide, resulting in more pupils receiving relatively fewer dollars.⁵²

⁴⁹ Pl. Exh. 531, Exh. A (ETPI) at 14.

⁵⁰ Pl. Exh. 531, Exh. A (ETPI) at 15.

⁵¹ Sub. H.B.94, Line item 200-520.

⁵² The New Ohio Institute Report describes H.B.94's DPIA provisions as based on "[n]othing

The harsh reality of what H.B.94 does to pupils in the large cities leaves no question that the State has written them off.⁵³

3. Charter schools make the problems worse.

The State further weakens its large city districts by favoring an unproven and essentially unregulated experiment. The adverse impact of charter schools is exemplified by the Dayton City Schools. First, when a Dayton pupil enrolls in a charter school, the *full amount* of the foundation level for that student is deducted from the funds that would otherwise flow to Dayton and is paid instead to the charter school; this has resulted in the deduction of over \$17 million from Dayton in the current fiscal year.⁵⁴ As a result, Dayton has been forced to defer maintenance of its already-decayed buildings and reduce educational programs and extracurricular opportunities. Programs formerly directed at encouraging pupils to stay in school and graduate have been eliminated, and the graduation rate has declined further. In addition, if the pupil is handicapped, the full value of the weight assigned to that handicap is also paid to the charter school without any local share deductions. The handicapped pupil in a charter school is thus "worth more" in

more than how much money was available in previous years (and H.B.94 calls for a *decrease* in this amount)." Pl. Exh. 533 at 12-13. ETPI at 22, (emphasis, *sic*).

⁵³In the context of the legal challenge to the voucher program, the State implicitly acknowledged its failure to establish thorough and efficient schools, at least insofar as its largest district, Cleveland, is concerned. The State characterized the conditions within the public schools in Cleveland as "dire" (Brief of State Appellants filed May 22, 2000, in *Simmons-Harris v. Zelman*, 234 F.3d 945 (6th Circuit 1999) at 3), noting that "the district continues to suffer academic problems as currently it does not meet any of the State's 27 minimum performance standards concerning student proficiency, attendance and graduation," (*Id.* at 2). The State explained that the program has a "'primary effect' of saving students from an educational crisis in the Cleveland public school district," *Id.* at 18.

⁵⁴ Pl. Exh. 649 (McGill), ¶ 5.

State support.

Frighteningly, the circumstances in Dayton are the rule rather than the exception for Ohio's big city districts. Statewide, over \$79 million has been diverted from city school districts to fund charter schools this year.⁵⁵ Recent State estimates place the cost for FY02 at over \$130 million.⁵⁶

The State still does not know, and has made no effort to determine, the true educational needs of pupils in our urban districts. The State has turned Robin Hood on its head by taking from the poor to give to the rich.

C. Special Education, Vocational Education And Gifted Education Continue To Be Underfunded.

To the extent that funding for special education mandates fall short, the difference must be made up from other funds. H.B.650 introduced weighted per pupil funding for special education for FY99, with weights of .22 and 3.01 applied. But ODE determined that these weights were inadequate: "*Thus, in constant dollars, the state special education funding per pupil declined \$87 per pupil (2.4%) from FY98 to FY01.*" Pl. Exh. 565, at 1, 2 (emphasis sic).

H.B.94 contains a 6-weight funding system, but funded only at 82.5% of the State's own recommended level in FY02 and at 87.5% in FY03. Pl. Exh. 531, Exh. A (ETPI) at 18. The 6 weights (that are not fully funded) may result in some districts receiving a decrease in funding for special education. *Id.*⁵⁷

⁵⁵ Pl. Exh. 527 (Phillis), at ¶¶ 45-46.

⁵⁶ Shams Depo., Exh. 18 at 2. FY03 is estimated to be over \$142 million. *Id.*

⁵⁷ The weights were initially based upon Capital Partners' recommended 6 weights, but in conference committee the weights were changed at the last minute without any public debate and with no technical justification. *Id.* at 20. The ETPI report also shows that H.B.94's removal of the income adjustment in computing the charge-off amount will increase the

A special education cost study by Capital Partners estimated that H.B.650 under-funded special education by \$200-300 million each year.⁵⁸ Overall, however, H.B.94 provides only a \$20 million increase for special education in FY02 and \$28 million in FY03. Pl. Exh. 527 (Phillis) ¶20. The State needed to appropriate *five to ten times* these amounts to meet even the low end of this unfunded mandate estimated in November 2000. Further, the State was aware of but did not provide any funding for remediation of U.S. Department of Education findings that Ohio's special education programs are not in compliance with federal law.⁵⁹ Underfunding special education affects all districts, but poor districts and large cities receive the greatest hit, draining funds earmarked for regular education to make up the difference.

For vocational education, H.B.94 reduces the excess cost weights from .6 to .57 and from .3 to .28. The result is reduced funding to districts, compounding two reductions discussed elsewhere in this brief: the cost of doing business factor, (CODBF) and state aid ratio. ETPI at 15-17, 23.

In the last three years, there have been two gifted cost studies – one

charge-off (local share) and will thereby increase the local share of the state aid ratio. Thus, the 300 poorest districts' local share of special education and vocational education costs will increase. *Id.* at 23.

⁵⁸ Pl. Exhs. 571, 572. Special Education Finance In Ohio, Analysis and Recommendation, November 2000, Prepared by Capital Partners (headed by R. Gregory Browning, former Director of the Ohio Office of Budget and Management) for the Ohio Coalition for Children With Disabilities.

⁵⁹ Pl. Exh. 567 is a State legislative memorandum summarizing the noncompliance areas cited by the federal report, which included items such as: failure to provide psychological counseling, positive behavioral interventions, strategies, and supports to pupils who require these services; failure to provide adequate supports and services to disabled children in regular classroom settings; and failure of the ODE to ensure the availability of an adequate supply of qualified related services personnel. Pl. Exh. 568 is the March 30, 2001, report from the U.S. Department of Education citing several areas of noncompliance.

commissioned by H.B.770—and two gifted identification studies. *All* have been ignored. In H.B.94, gifted education remains underfunded using the old unit system, based on the State's *minnum teachers' salary schedule that has not changed since 1991*. The schedule begins at \$17,000—below the federal poverty guideline. R.C. 3317.13; Pl. Exh. 658, ¶ 6. The inadequate number of units leaves 2/3 of identified gifted students unserved, just as in 1991. Pl. Exh. 576 (Sheldon) ¶5.⁶⁰ Gifted funding, too, will remain completely insufficient and disparate.

D. Transportation Funding Contains Little Change

If transportation were fully funded based on actual costs, the State's complicated maneuvers (adding transportation to gap aid and including it in the excess cost adjustment) would not be necessary.⁶¹ There is no reason for providing small amounts of transportation funding three ways within convoluted formulae other than to reduce the State's cost and make it look like something was done.

E. Charge-Off Supplement (Gap Aid), Parity Aid, And Excess Cost Aid Do Not Remedy The Deficiencies In The Funding Formula.

The State has underfunded each of the basic components of the school funding system, and it has failed to remedy the deficiencies with the new provisions in H.B.94. First, the increase in gap aid (adding transportation to

⁶⁰ While there are as many gifted children identified in high wealth as in low wealth districts, higher wealth districts are almost *twice* as likely to provide gifted services. *Id.* ¶10.

⁶¹ The reimbursement percentages of the transportation calculation (not actual costs) remain the same as under prior law for FY02 (57.5%) and FY03 (60%). Pl. Exh. 578.

the factors used to calculate it) for FY02 is \$25 million, only .37% of the State's education budget. For FY03, the *total gap aid declines* to \$28.6 million. Next, the excess cost supplement will not even become a feature of the funding system until FY03, and then will only add \$29.5 million, or .41% of the State's FY03 education budget.

Parity aid, likewise, is more promise than reality as it is phased in over the next five years. In FY02, for example, though distributing some funds to 487 districts, the total amount budgeted will add \$99.8 million, or only 1.47% of the State's education budget. For FY03, parity aid will amount to \$210 million or 2.9% of the State's FY03 budget. As noted by ETPI, "Even when fully achieved, Parity aid as enacted in the bill would close barely one-half of the gap between discretionary funding in the poorest and wealthiest districts." Pl. Exh. 531, Exh. A, page 36. Had the State fully funded the costs of basic education, special education, and transportation there would be no need for parity aid. Further, since the State was directed to fund these components without phase-in, it must be assumed that parity aid and the excess cost supplement are not considered part of the State's response.

III. Proposition Of Law: The State Has Failed to Respond To The Court's Directives Concerning Safe, Educationally-Appropriate Facilities.

The State continues to ignore unsafe, unhealthy and unsanitary conditions that pose immediate dangers to our children. Contrary to this Court's orders, the State has not brought school facilities into "compliance with state building and fire codes." *DeRolph II* syllabus 3. The State still has not

undertaken any up-to-date "inventory of the state's facilities and [determined] a solid cost estimate for bringing all Ohio school[s] up to standard" *DeRolph II* at 22. Moreover, the Governor's "12 year Plan" will *not* address the facility needs of all Ohio school districts within the next 12 years.⁶² State funding for the repair, renovation and construction of school buildings remains uncertain, dependent upon the whims of the General Assembly, State surpluses, the economy, and subject to uncertainties regarding receipt of tobacco moneys. The State continues to require districts to pass levies as a prerequisite for obtaining State funding, regardless of unsafe conditions or the fiscal capabilities of the district.

A. Facility Assessments; Code Compliance

Randall Fischer, Executive Director of the Ohio School Facilities Commission (OSFC), candidly admitted the following:

- Since the 1990 Ohio School Facility Survey (Fischer Depo., Exh. 14), no agency of State government has performed any study of public schools to determine if they are in compliance with State building, fire and life safety codes. The State does not know whether code violations reported in the 1990 Survey have gotten worse. Fischer Depo. at 20, 40, 47-49, 314, 378. ⁶³
- Neither he nor OSFC knows the amount of asbestos in school buildings or the cost to remove it. There are no longer any State programs that specifically address this contaminant. *Id.* at 18, 65, 97, 202, 304.
- Neither he nor OSFC is aware of how many schools are not handicapped accessible, nor is there any surviving program that specifically

⁶² Randall A. Fischer Deposition (herein "Fischer Depo.") Exh. 10 at 6.

⁶³ Mr. Fischer also admitted that all school buildings are subject to state building, fire and life safety codes. He described "life safety codes" as being "life and death matters for occupants of the building [.]" The affidavit of the Chief of Code Enforcement for the State Fire Marshall is incongruous at best and, at worst, an admission of dereliction of duty in office. Defendants' Site Evaluation Teams found numerous life safety code violations, as confirmed by OSFC's facility assessments. Pl. Exh. 612.

addresses handicapped accessibility. *Id.* at 17, 65, 97.

- After 11 years, 20 of the original 44 school districts in the 1990 Building Assistance Program still have not had their facility needs met. Some have not even been assessed for their entire facility needs, and "not all of the 1990 districts will have [their facility needs] served over the next four years."⁶⁴
- The 1990 Facility Study found that 15% of schools were 70 years of age or older, and 50% were 50 years old or older; the trial court found that 700-800 buildings were recommended for demolition in 1990 but were still in use in 1998. *DeRolph*, 98 Ohio Misc.2d 1, 36. The State does not know the present number of buildings that now fall within these categories. *Id.* at 357-58.

B. Present Condition of School Buildings

The Coalition for Equity and Adequacy of School Funding recently conducted two surveys.⁶⁵ The concerns expressed in the first include:

- Inadequate numbers of rooms in planned construction for program needs.
- No funding for auditoriums and athletic areas.
- Even with new construction, continued need for modular classrooms.
- Class size dictated by a 25:1 student/teacher ratio is too large.⁶⁶

The second survey was equally informative:

- Districts in immediate need of space and facilities are "far down the list."⁶⁷

⁶⁴ Fischer Depo. at 29, 98, 102-03. Dawson-Bryant School District received 1990 Building Assistance aid, which was insufficient to satisfy its facility needs. The OSFC has assessed that district's needs, finding serious life safety code issues, as well as lack of ADA compliance and structural problems. See Pl. Exh. 612, Exh. A; Pl. Exh. 613 (Weber) A, B, C.

⁶⁵ One was directed to the 116 school districts at the top of the equity list for State facility aid, and 89 districts responded. The other survey was mailed to the remaining 496 districts and 49 Joint Vocational Districts, with 309 districts responding (excluding JVS districts). The results are contained in Pl. Exh. 590, Exh. A.

⁶⁶ ODE reported to the OSFC the advantages of reduced class sizes asserting that this would improve student and teacher performance. Fischer Depo. at 364-73.

⁶⁷ One district reported "We are a poor community with high valuation due to square miles we cover. We have buildings over 110 years old. But still at the end of list because of valuation. Our median household income is \$25,007." Pl. Exh. 590 (Phillis), Exh. A at p. 14.

- Buildings are full of asbestos.
- Districts are unable to pass bond issues.
- The debt load for building program participation is too high.
- Forty-four percent use modular classrooms; 70% have a total of 892 buildings that are not barrier free; 75% have asbestos in a total of 956 buildings.

Additionally, the OSFC has completed facility assessments for some districts.⁶⁸ Almost every district has buildings which present immediate dangers to occupants.⁶⁹

C. Defendants' Programs and Initiatives

The State's facilities program is long on promises, but short on delivery:

- Governor Taft's "Rebuild Ohio Program." This "initiative" was begun in 2000 and touted as "a major policy initiative***to address the facility needs of *all* Ohio school districts within the next twelve years." Fischer Depo., Exh. 10 at 3, (Emphasis *sic.*) Yet, even assuming the availability of state and local funds, under the most optimistic of projections it would take much longer than 12 years to complete construction. Assumptions are critical for this "initiative," since without enough state and local dollars (the latter's share of which is impossible for many districts), and without a permanent source of state funding, Defendants' claims to a facilities remedy are what they have always been – illusory. There is no legislation that implements any 12 year framework. *Id.* at 296-98, 326-28.
- Classroom Facilities Assistance (CFAP). This successor to the 1990 Building Assistance Program, begun in 1997, is the vehicle that provides state funding for school buildings. To date, only 23 buildings

⁶⁸ Pl. Exh. 611. Portions of these assessments, particularly those pertaining to immediate life safety issues, are summarized in Pl. Exh. 612, Exh. A.

⁶⁹ Additional evidence of the sorry state of schools is contained in the videotape of West Muskingum Schools. Pl. Exh. 610, Exh. A. This tape shows the overcrowded building conditions in a district that presently ranks 368 on the FY01 Equity List. Fischer Depo. Exh. 8. Pl. Exh. 593, an affidavit and accompanying reports from Sam Wilson, the General Manager for Facilities in Dayton, show a need for more than \$393 million to repair, demolish and build schools. Similarly, Pl. Exh. 608, Exh. A, a videotape of 11 school districts, depicts the deteriorated condition of both urban and rural schools. This Court previously noted the urgent need to remedy the bathroom infested with lethal mold in the Mad River-Green School District. *DeRolph II* at 21. Yet OSFC funds were not available to fix this problem. Pl. Exh. 592.

have been completed and only three very small school districts have had their construction completed. Local participation remains a requirement and 4 school districts with demonstrated *immediate* needs have been unable to pass the levies needed for them to access state aid. *Id.* at 137-40, 417.

- Exceptional Needs Program. This program allows districts on the lower half of the equity list and at least 3 years out from obtaining CFAP eligibility to apply for state aid for replacement of a building when the health and safety of students and staff are affected. Applications from 76 districts for 132 buildings were received by the cutoff date of April 1, 1999, but only 7 districts received funds in 1999. *Id.* at 156-177.
- Extreme Environmental Contamination Program. This program purports to assist districts with buildings whose "occupants are exposed to contaminants at levels that violate applicable state and federal standards," but eligibility requires a showing that the building must be *replaced* rather than modified or renovated. Only one district has been approved for funds; notably, Mad River-Green was denied. *Id.* at 198-201.
- Expedited Local Partnership. This program allows districts not yet eligible to participate in CFAP to go forward, with State approval, on projects before they become eligible for CFAP. However, all funds for these projects are local moneys, with no State involvement.⁷⁰ *Id.* at 186.
- Emergency Assistance Program. This is "a limited program" providing assistance to districts that experience catastrophes like tornadoes and floods. Fifteen million dollars was appropriated in FY00-01, but no applications have been received. *Id.* at 83-90.
- Big 8 Program/Accelerated Urban Initiative. A remnant of the Big 8 Program, the "acceleration" refers to completion of facility assessments for the 6 remaining districts by August of 2002, but there is no acceleration of State or local *funding*. If and when State funds become available, local funding will be a prerequisite. There are over 500 buildings in these districts, and if funding were available in 2002, it would still take an estimated 15 years to complete construction. *Id.* at 258-283.

D. Funding

The "initiatives" all continue to rely upon local funding as a requirement

⁷⁰ Districts later can obtain credits for future CFAP funding, when and if it becomes available, and they pass the requisite levy for their local share.

for receiving State aid, with student safety consequently compromised as evidenced by four school districts⁷¹ that have not been able to pass their local share for CFAP assistance, and two districts that have not passed their local levy for Exceptional Needs funds.⁷² The removal of the 9% statutory debt limitation for local participation does nothing to enable schools to access State aid.⁷³ Rather, it will expand the local share for many districts to an insurmountable burden. Nothing has been done to ensure the availability of safe and adequate school buildings when local electors cannot, or will not, be able to shoulder the increasing local burden.

Since *DeRolph II*, the funding situation remains the same – there still is no degree of certainty as to what future funding from the State will be.⁷⁴ The local share has not been reviewed, as directed by the Court, and elimination of the 9% debt limit increases the local burden to unreasonable debt levels.⁷⁵

⁷¹Lisbon, East Liverpool, United, and South Point School Districts. Fischer Depo. at 114-15, 417-19.

⁷²Patrick Henry and Jefferson Local School Districts. Fischer Depo. at 117, 417-19.

⁷³ In considering the possibility of the State picking up local shares exceeding the former 9% cap, OSFC determined that the estimated cost in the 152 districts whose local share would exceed 9% – just considering CFAP debt – would be \$605.7 million. If other existing debt were considered, the amount by which 187 districts would exceed the 9% limitation was \$1.06 billion. Fischer Depo. at 244-46, 252; Fischer Depo. Exh. 14. In addition, Mr. Phillis prepared a spreadsheet of the 198 districts that would have to exceed the then 9% debt limit to participate in CFAP. Pl. Exh. 590 (Phillis), Exh. B. This shows the heavy and often insurmountable burden placed on many districts by the local share requirements.

⁷⁴ The only provision in law pertaining to facility funding remains as before – the Governor must recommend and request no less than \$300 million be appropriated annually. Am.Sub.H.B.770; Fischer Depo. at 183. Receipt of Tobacco Settlement Funds, as noted by the LBO, will be affected by a variety of factors, including federal actions (cigarette tax increases, federal lawsuits), reduced tobacco consumption, and inflation rates. Pl. Exh. 614.

⁷⁵ The total facilities debt could run over 20% of valuation. Pl. Exh. 590 (Phillis), Exh. B.

IV. Proposition Of Law: Borrowing Continues To Be A Significant Feature Of The Funding System, Contrary To The Court's Clear Directives.

This Court has *twice* declared that forced borrowing for school district operations is a structural flaw in the school funding system. Yet, like H.B.412, S.B.345 imposes the same sequence of events that characterized the system rejected in *DeRolph I*. First, districts without sufficient resources to end the fiscal year in the black are required to decrease expenses through reductions in programs and services.⁷⁶ Second, districts are required to seek the passage of additional property tax levies. Finally, as before, loans are mandatory for any district declared to be in "fiscal emergency." R.C. 3316.20.⁷⁷

The State has budgeted \$24 million for the School Solvency Assistance fund for each year of the new biennium, an increase of 380% over FY01 and yet still below the \$40 million per year recommended by the Department of Education. Pl. Exh. 621. If the State sincerely believed it had adequately funded education, would it really need to set aside nearly \$50 million for loans in a budget considered "tight"?

Currently, 13 school districts in "fiscal watch" or "fiscal emergency " are

⁷⁶ The affidavits of William R. White, James Lawrence and Donald W. Sullivan graphically detail the program reduction process and the attendant loss of essential educational programs and opportunities for students. Pl. Exh. 617, 618, and 619, respectively. Northridge Local School District was one of 127 districts used by the General Assembly as a "model district" for school funding, but has been placed in Fiscal Emergency. Pl. Exh. 619 at ¶5. This is not an aberration. Pl. Exh. 559.

⁷⁷ The only significant change is that the solvency assistance fund is now divided into two parts: one dedicated to insolvent school districts – the "shared resource account" – and the other identified as the "catastrophic expenditures" account. As before, moneys from the "shared resource account" must be repaid within two years by the withholding of funds that would otherwise flow to the district in the form of operating funds. R.C. 3316.20(B).

in the process of forced program reductions and loan repayments under a system no different from that before the Court in *DeRolph I*. An additional 93 districts face potential deficits based on their five-year budget projections, Def. Exh. 51; these districts are already experiencing pressure from the State to produce similarly harmful expenditure reduction plans.⁷⁸

The funding formula also makes no provision for debts previously incurred. Estimated State funding for Lordstown Local, a fiscal emergency loan district, will be *cut* by 15.7% for FY02 and increased only 1.9% for FY03. Switzerland of Ohio, another fiscal emergency district, will see funding increase by only 0.9% for FY02 and 0.7% for FY03 – well below inflation. What has improved for the pupils in such districts? Nothing. Lack of funding continues to reduce educational opportunities for pupils.

V. Proposition Of Law: The State Continues To Defy The Court's Order Concerning The Unfunded Mandates Of S.B.55 And H.B.412 And Has Imposed Additional Unfunded Obligations On Ohio's Schools.

The unfunded mandates of Sub. H.B.No. 412 ("H.B.412") and Am.Sub. S.B.No. 55 ("S.B.55") were among the primary flaws identified in *DeRolph II* – the *only* flaws the Court ordered remedied "immediately." Yet, to date, not one dollar has been paid by the State to any school district on account of funds already expended to comply with the mandates, and the dollars built into H.B.94's basic aid amount on account of these mandates – a paltry \$12 – do not begin to cover the massive costs to school districts.

⁷⁸ See Analysis of 2001 Five-Year Forecasts, Ohio Department of Education ("ODE"), February, 2001. Def. Exh. 51.

A. S.B.345 Is Contemptuous Of The Court.

S.B. 345 reflects an extraordinary belief on the part of the drafters that the legislature can simply declare a legislative finding⁷⁹ that is directly contrary to a previously-declared judicial finding, a revolutionary proposition already firmly rejected by the Court. *DeRolph II* at 12.

B. The State Knows, But Ignores, The Massive Costs Of The Unfunded Mandates

Senate Bill 55 (R.C. 3313.603) mandated that school districts increase their minimum credit graduation requirement to 21. While H.B.94 reduced the requirement to 20, the *subject matter credit requirements* of S.B.55 remain – only an elective credit was reduced. The real cost of the change in credit requirements was not the increase in the total number of units, but the increase in the minimum number of credits required in the core subjects of English, math, science, and social studies.⁸⁰

The true costs of the unfunded mandates far exceed the State's appropriations. The LBO distributed a comprehensive survey concerning these costs to school districts, eighty-five of which responded. From those responses, LBO prepared a draft report indicating that the costs of S.B.55

⁷⁹ S.B.345 (uncodified law) ("Section 5. Sections 3315.17 and 3315.18 of the Revised Code...required school districts to set aside percentages of their general operating funds for textbooks and instructional materials and for capital and maintenance costs***The *Ohio Supreme Court, in DeRolph v. State (2000), 89 Ohio St. 3d 1, concluded that all of these requirements impermissibly imposed unfunded mandates upon school districts. The General Assembly finds that the costs of the set-aside requirements of sections 3315.17 and 3315.18 are not unfunded to the extent the required set-asides are percentages of the base cost formula amount.*" (emphasis added)).

⁸⁰ For example, the LBO previously determined that increasing the minimum science requirements from one to three units would result in some districts having to hire additional science teachers and to purchase \$140,000 science labs. See LBO Fiscal Note and Local Impact Statement for Senate Bill 55. 1998 Brunson Depo., Exh. 5 at 8.

totaled almost \$345 million annually. These costs translate into \$197 per pupil statewide.⁸¹ Yet the General Assembly ignored this information when it made the legislative finding of a \$12 per pupil cost.⁸²

The finding was based on an "analysis of fiscal year 1999 data" that consisted solely of LBO conducting a telephone survey of the State's 127 model districts, and asking only one question: "How many total units were required for graduation?"⁸³ At the time, LBO already possessed eighty-five responses to the written survey, indicating that even districts which already had minimum credit requirements of 20 or more incurred substantial increased costs – not from the increased credit requirement, but from the increased units in the subjects of English, math, science, and social studies.⁸⁴ If LBO had simply asked in its telephone survey how many units a district required for those subjects, it would have received very different answers.⁸⁵

⁸¹ Additional future costs were projected at over \$115 million. Mr. Brunson did not like these numbers and directed the main author of the report to remove certain line items. This reduced the \$344 million figure to \$288 million. This was still too big and, ultimately, Mr. Brunson himself deleted from the final version of the report issued May 11, 2001, all statewide cost figures. Brunson Depo. at 90-2, Exh. 18.

⁸² H.B.94, Section 3317.012(A)(2); Payton Depo. at Exh. 2.

⁸³ Zahn Depo. at 16.

⁸⁴ For example, one district reported that even though it already required 20 units for graduation before S.B.55, the increased requirements in math and science required the district to hire new staff at a cost of \$75,873. Zahn Depo. at 27-9 and Brunson Depo., Exh. 4. Another district indicated that even though 100% of its graduating seniors had 20 credits or more before S.B.55 was enacted, the increased subject matter credit requirement would cause that district to incur \$600,000 in future costs. *Id.*, at 38-42; Brunson Depo., Exh. 6.

⁸⁵ One of the 127 "model" districts which was the subject of the telephone survey was Northridge Local School District, where the credit requirements have forced the hiring of one additional math and one additional science teacher, with costs contributing to the district's current state of Fiscal Emergency." Pl. Exh. 619 (Sullivan) at ¶ 10. When asked why LBO did not attempt to determine with more certainty the actual increased costs resulting from S.B.55, Ms. Zahn stated only, "because there's a formula that has been established to determine how to fund these credits." Zahn Depo. at 34.

The final draft of the S.B.30 report⁸⁶ states that 42 districts reported an average cost of \$287,972 just for transportation expenses relating to non-summer remediation requirements. Statewide, these figures would total \$175 million just for this one cost item.⁸⁷

The implications drawn from the incomplete S.B.30 report are corroborated in a draft report from the records of OMB indicating the following statewide costs (See Pl. Exh. 627):

Math/Science Unit Funding	\$63,689,825
Intervention/Remedial Services for Grades 1-6	\$534,719,430
Intervention/Remedial Services for Grades 1-4	\$359,900,100
Intervention/Remedial Services for At-Risk Students Grades 1-6	\$207,900

If the State had seriously analyzed the costs of S.B.55, it would have found them to be staggering, crippling, and unfunded.

C. Schools Are Burdened With Additional Unfunded Mandates.

Not only has the State refused to acknowledge the costs of existing mandates, it has actually imposed more costs upon districts, again without funding.⁸⁸ The State now requires districts in "academic emergency" – which includes all of the "Big 8" districts – to adopt the model curriculum. Even LBO acknowledges this imposes a "major potential cost."⁸⁹ One large urban district

⁸⁶ Brunson Depo., Exh. 16 at 3.

⁸⁷ Mr. Brunson maintains that in order to have a reliable survey, the large urban districts had to be over-sampled; he also said that the results of the survey are unreliable because the large urban districts were over-sampled. Brunson Depo. at 28-32. But even if this cost were half as much statewide, it would still be over \$87 million *just for this one cost category*.

⁸⁸ These new unfunded mandates are found in Am.Sub. S.B.1 of the 124th General Assembly.

⁸⁹ Fiscal Note & Local Impact Statement to S.B.1, Brunson Depo., Exh. 30.

estimated the cost at approximately \$125 per student *per subject area*. *Id.*⁹⁰

Other new mandates include intervention services formerly required for students who fail the 4th grade proficiency test and now required for all of those who fail 4th, 6th, or 9th grade proficiency tests, *as well as* those who fail the 3rd, 4th, 5th, 7th, and 8th grade achievement tests – all without a single dollar of funding. *Id.*

Finally, the problem of unfunded mandates extends far beyond those identified above. In *DeRolph II*, the Court described the broad scope of the problem.⁹¹ While the Court previously ordered the State to *immediately* fund the unfunded mandates of H.B.412 and S.B.55, there can be no doubt that, as part of any long-term, comprehensive remedy, the State must ensure funding for *all* mandates, including those imposed since the time of *DeRolph II*.

VI. Proposition Of Law: Old And New Forms Of Phantom Revenue Continue To Permeate The System.

Overreliance on local property tax goes hand-in-hand with phantom revenue, a problem the Court has twice directed the State to fix.⁹² Every time

⁹⁰ *Id.* Other mandates include forcing districts to "adopt a new curriculum to match the content students are expected to learn" to prepare for new state diagnostic tests. *Id.* The LBO reports, "A spokesperson from a suburban school district estimates that designing a new course of study and adopting a new textbook would cost approximately \$69 per student per subject area." *Id.* It approaches the comical to observe how the LBO, so fearful of discovering the reality of additional costs, stops with one spokesperson from one district. It appears that if just one district is reporting a staggering cost of \$69 per student *per subject area* as to one mandate, and another district is reporting an even more staggering cost of \$125 per pupil *per subject area* as to another mandate, it is almost too terrifying to go on and ask other districts what these mandates will cost them. It is this fear of performing its statutory obligation to find out the true costs of education legislation which has caused some people to view the letters LBO to mean the "Legislative Budget Ostrich."

⁹¹ *DeRolph II* at 8-9.

⁹² "The phenomenon known as phantom revenue has not been eliminated and may increase as a result of H.B.650." *DeRolph II* at 37.

local school district property valuation goes up, the district "looks richer" and thus faces a loss in State revenue while local property tax revenue remains restricted by the H.B.920 tax reductions.⁹³ Rather than address the phantom revenue problem head-on, the State has not only retained the old, but created new versions of the problem. Now, *several* different types of phantom revenue permeate the State's funding system.

A. Reappraisal Phantom Revenue Continues.

Reappraisal phantom revenue describes the impact on the foundation formula of increases in the value of school district taxable property. As local property values increase, the district receives progressively less in State funds. In H.B.650, the State claimed to have solved this aspect of phantom revenue with an additional payment for some districts described as "gap aid."⁹⁴ With the exception of an additional transportation component, the gap aid provision in H.B.94 is the same as the previously-rejected provision in H.B.650. However, for districts not eligible for gap aid, (the majority of Ohio's districts) the problem of reappraisal phantom revenue continues.

B. Special Education And Vocational Education Phantom Revenue.

H.B.650 introduced a new form of phantom revenue which has been carried forward into H.B.94 in the form of special education and vocational

⁹³ Real world examples of this problem are found in the affidavits of Superintendents who must daily try to explain to their taxpayers why, despite increases in local property values, the school districts need more money. See, Pl. Exhs. 659, 660, 661 and 662.

⁹⁴ Gap aid compares the district's total taxes from all sources against 23 mills times the district's recognized valuation plus the local share percentage of special education and vocational education and pays any "gap" between local funds and the attributed state funds. In FY02, a local share of transportation cost will be added to the formula.

education phantom revenue.⁹⁵ Districts with higher recognized valuation will pay proportionately greater local shares of special education and vocational education costs. As a school district's recognized local property value increases, its local share of these expenses also increases, thus constituting another form of phantom revenue.⁹⁶

C. "3-Mill Limit" On Calculated Local Share.

The "excess cost supplement" provides funding for some school districts to the extent that the *State's calculation* of local share of special education, vocational education and transportation costs, combined, exceed three mills times the district's recognized property value.⁹⁷ Districts that do receive additional funds through the "excess cost supplement" formula will find themselves subject to yet another new form of phantom revenue. As property values increase due to reappraisal, the value of the 3 mill trigger grows, meaning more local share expenditures for these purposes are required.⁹⁸

D. Parity Aid Is Doubly Infected With Phantom Revenue.

Though parity aid is phased in at 20% for FY02 and 40% for FY03, it is

⁹⁵ Under the formula, the local share of special education weights are aggregated for all handicapped pupils, with the aggregate weight then being multiplied by the foundation amount and adjusted for the district's cost of doing business factor. A similar calculation is performed for the district's local share of vocational costs. The calculation is based on the percent of the basic aid amount paid by the State, with the remainder being the local share.

⁹⁶ See, Pl. Exh at 529, ¶ 24.

⁹⁷ What the "excess cost supplement" will not do is to provide any assurance that any school district actually has sufficient funds to pay the *actual costs* of these expenses in excess of the local three mill threshold. The State's formula is based on "attributed local share" amounts for special education and vocational education as well as a clearly underfunded transportation formula.

⁹⁸ Pl. Exh. 529 (Russell) ¶ 23.

structurally no different from the equity aid earlier rejected by this Court.⁹⁹ There are two essential measures that determine what any school district may receive under this formula in any year. Since each of the critical measures of parity aid is based largely on property valuation, the amount of a district's parity aid is subject to change from year-to-year as property values change.¹⁰⁰ Thus the parity aid formula is infected with the phantom revenue problem at both ends of the equation.¹⁰¹ Moreover, the inclusion of parity aid is an acknowledgment that the State has failed to fund the basic educational needs of Ohio's pupils.¹⁰²

E. The Continuing Phantom Revenue Problem.

Real property values have increased between 5 1/2 and 6 1/2% per year. Under H.B.94, basic aid will increase at only 2.8% per year. Thus the formula will continue to shift increasingly larger shares of the tax burden to local property taxes. Add to that fact the ever increasing numbers of school districts at or near the twenty-mill "floor" of tax reductions and the scale clearly tilts to *increased* rather than reduced reliance as a source of school funding revenue under H.B.94.¹⁰³ In recognition of the disastrous impact of this structural

⁹⁹ *DeRolph I* at 211.

¹⁰⁰ To put this in perspective, the cost of parity aid is budgeted at \$95.2 million in FY02 and \$200 million in FY03. At the same time, the reduction in the cost of doing business factor *reduced* the State's commitment to public education by \$380 million in FY02 and by an additional \$480 million in FY03. Pl. Exh. 529 (Russell) ¶25.

¹⁰¹ The first end is the ranking of the receiving school district on the wealth scale and the second is the wealth of the district at the 80th percentile on that scale (the 490th district). The amount of parity aid is the difference between the value of 9.5 mills of property tax in the receiving district and 9.5 mills applied to the value of the district at the 80th percentile. See, Pl. Exh. 529 (Russell).

¹⁰² Pl. Exh. 528 (Harris), at ¶ 26; Pl. Exh. 531, Exh. A (ETPI) at 32,33.

¹⁰³ Pl. Exh. 540. An example of the relationship between property growth and base cost

flaw, the State commits that it will "do something" if, in any future biennium, the *total state share percentage* varies by more than 2 1/2 percent.¹⁰⁴ As noted by ETPI, "[t]he local share could exceed the state share by about \$875 million before hitting the 2 1/2% trigger. This means that the local share could increase by about \$575 million more than the State share increase without causing the 'Phantom Revenue Solution to deploy.'¹⁰⁵

VII. Proposition Of Law: The State Has Failed To Adopt And Implement Comprehensive Statewide Standards Of Academic Opportunity.

At the core of this case is the State's refusal to adopt uniform statewide standards of educational opportunity, resulting in inadequacy and disparity in levels of educational opportunity.¹⁰⁶ S.B.1 fails to respond to the Court's mandate.¹⁰⁷ Far from establishing "standards" for public education, S.B.1 does little more than mandate the development of "model" curricula reflecting the information tested by a revised battery of proficiency tests. Tests remain the standard for education in Ohio. Development of model curricula does not constitute a "standard" since the model curricula are not required to be taught

growth is reflected in Pl. Exh. 528 (Harris) at ¶ VII, and Exhs. V, W.

¹⁰⁴ R.C. 3317.012(D)(3) through (D)(5). "[t]he general assembly shall determine and enact a method that it considers appropriate to restrict the estimated variance for each year to within two and one half percentage points." R.C. 3317.012(D)(4).

¹⁰⁵ Pl. Exh. 531 (Fleeter), Exh. A (ETPI) at 36.

¹⁰⁶ For example, elementary students at Dawson-Bryant still have no opportunity to take foreign languages courses, computer courses, or music or art. Pl. Exh. 657 (Payne) ¶5; see, *DeRolph I* at 208.

¹⁰⁷ In reality, S.B.1 represents a wholesale retreat from the massive policy failure of the earlier 4th grade reading guarantee. Faced with hundreds of thousands of 4th graders being retained for failure to meet reading goals, the State responded in traditional form; it repealed the "guarantee." See, Pl. Exh. 639 (Washburn) and Pl. Ex. 527, (Phillis).

by any school districts.¹⁰⁸

A. Meaningful Statewide Standards Require Defined Levels of Educational Opportunity Uniformly Available to All Pupils.

The goal of providing that level of educational opportunity necessary to educate pupils to their highest potential cannot be achieved simply by elevating a handful of tests as standards and then teaching only what is tested. Totally absent from the testing landscape is any consideration of foreign language, advanced placement courses, honors courses, higher level science and math, drama, art, music or a myriad of other components that make up the body of knowledge necessary to enable a pupil to continue their education or enter the world of work successfully after graduation.

One of the essential components of a new funding system must be standards that define the *levels of opportunity* that are guaranteed to pupils in *all* of our schools, rich and poor alike.¹⁰⁹ These standards must ensure that a high quality education is available to all pupils. The wide disparities in pupil performance – graphically demonstrated by the State's own studies showing vastly disparate performance in districts of different socioeconomic makeup,

¹⁰⁸ "[S]chool districts *may* utilize the model curriculum established by the state board together with other relevant resources***. Nothing in this section requires *any* school district to utilize all or any part of a model curriculum developed under this division." R.C. 3301.079(B).

¹⁰⁹ The opportunities may be manifested differently in different schools. If the opportunity to develop facility with a foreign language at an advanced level is an essential component of an adequate public education, then some variation of it must be required by the standards and available everywhere. Similarly, it is not sufficient for the standards to require that high schools "teach math" when the spectrum of math instruction extends from basic addition and subtraction to advanced calculus and beyond.

with a heightened adverse impact on minority pupils¹¹⁰ – must be remediated.

The development of opportunity standards must lead to the establishment of adequate funding levels. Once we identify the components of a high-quality public education program – those opportunities that should be available to all pupils, regardless of where they live – we must then establish a funding level sufficient to deliver those opportunities.¹¹¹ A declaration of performance "standards" is meaningless without sufficient funding to deliver the opportunity for all pupils to attain those standards. Pl. Exh. 528 at 7-9.

B. The Widening Technology Gap Between Wealthy And Poor Schools Underscores The Need For Uniform Standards.

The Court has recognized that providing *all* students access to technology is an integral part of public education.¹¹² The information age continues to evolve at an increasingly rapid pace." Skilled jobs of just a few years ago are disappearing and school children now may one day work in jobs that do not yet exist. ¹¹³ The ability to use technology is rapidly becoming an essential part of public education.

Following *DeRolph I*, SchoolNet made lofty plans to link schools to one

¹¹⁰ Pl. Exh. 635, 636, and 528 (Harris), Exh. T.

¹¹¹ Dr. James Guthrie and Rothstein, *Education Finance in the New Millennium*, American Education Finance Association 2001 Yearbook at 103-04. Plaintiffs have consistently urged a "horse-before-the-cart" approach of implementing standards setting forth the components of a high-quality education and then establishing funding levels based on the actual cost of delivering those components. See, Pl. Exh. 527, Exhs. D and G; Pl. Exhs. 642, 647. See also Pl. Exhs. 639-41.

¹¹² "[I]t does not appear likely that the children in the appellant school districts will be able to compete in the job market against those students with sufficient technological training." *DeRolph I* at 209

¹¹³"The industrial economy that shaped 20th century Ohio has been eclipsed by a new economy that is global, digital, and knowledge-based. *The Economic Wisdom of Technologically Enriched Teaching and Learning Environments*. White paper from the Ohio SchoolNet Commission, March 6, 2001, Pl. Exh. 587.

another, libraries, and the internet.¹¹⁴ While funding has been provided to maintain the network, no funding has been provided for additional computers in grades 6 -12. The cost of providing computers for pupils in those grades amounts to about \$70 million per grade, and while the State may have a networked computer system accessible to some pupils, for others there is no on-ramp to the information highway.¹¹⁵ Others, with access to computers in grades K-5, fall off a cliff when they advance to higher grades without the technology they enjoyed in lower grades.¹¹⁶ Moreover, much of the technology that was initially made available in 1995 for pupils in grades K-5 has become obsolete or otherwise lost due to the lack of resources for repair.¹¹⁷ As a result, even the marginal progress that was made is being lost.

Without uniform standards, the technology gap will continue to grow. Even with standards, the continued lack of funding guarantees disparity. In wealthy districts, technology will be available even without State support. In poor districts, it will not.¹¹⁸ The basic tools essential to educate our youth are being withheld from many, for no reason other than the wealth of the school district in which they reside.

¹¹⁴ *Ohio Schools Technology*. Report of the Ohio School Education Technology Implementation Task Force, March 3, 1999. Senator Robert R. Cupp, Chairman at page 13. Exh 586.

¹¹⁵ *Id.*, at page 30.

¹¹⁶ *DeRolph II* at 36 ("This is a crucial need so that students nearing graduation will be computer-literate.")

¹¹⁷ See, Ohio SchoolNet Commission, ScholNet Plus CARE: Continued Acquisition and Repair of Equipment indicating that the useful life of a desktop PC is 3 years. By this standard, most of the technology infusion that took place in 1995 is now obsolete. In Dayton alone, 75% of its computers are obsolete or broken. Pl. Exh. 589 (Ward) at ¶3.

¹¹⁸ See, AETA chart showing that pupils in the 3rd and 4th wealth quartiles having, generally, a lesser level of access to computers and multimedia, especially in grades 6-11. Pl. Exh. 585.

VIII. Proposition Of Law: Constitutional Wrongs Twice Declared By The Court Must Be Remedied – Enforcement Options.

When the economy was robust and booming the State had ample funds to fix school funding. That the State chose, in the fat years, to pursue political gain by reducing taxes rather than using such revenue to comply with *DeRolph I* and *II* is unconscionable and contemptuous. And that the State now refuses, in the lean years, to generate the revenue needed to bring schools into compliance with the constitution is equally outrageous. The State's position is akin to that of the proverbial defendant who, convicted of killing his parents, pleads for mercy on the ground that he is an orphan. The fiscal crisis the State claims is a crisis of its own making, and public school children cannot be denied their constitutional entitlement because the State's leadership lacked foresight and backbone.

The State should always have understood that the Court, ultimately, would bring about a remedy if the State failed to do so.

[W]hile it is for the General Assembly to legislate a remedy, courts *do* possess the authority to enforce their orders, since the power to declare a particular law or enactment unconstitutional must include the power to require a revision of that enactment, to ensure that it is then constitutional. If it did not, then the power to find a particular act unconstitutional would be a nullity. As a result there would be no enforceable remedy. A remedy that is never enforced is truly not a remedy.

DeRolph II at 12 (emphasis *sic*). With another year elapsed, the funding system remains essentially unchanged. A review of the events of the past year calls into question both the State's ability and its willingness to comply with the Court's mandates. It seems the State labored mightily to alter the

appearance of the system changing its essence, and it is now inescapably clear that the State cannot be relied upon to provide the remedy.¹¹⁹

Rather than request a specific form of remedy, Plaintiffs ask the Court to put in place a *process* that will ensure that the Court's past and present mandates are fulfilled with all deliberate speed. The process should ensure that meaningful academic opportunity standards are developed, that a wholly new funding system is established, and that adequate resources are provided--linked to the standards-- without the flaws that infect the current system. The process must occur openly, and it should ensure a place at the table for Plaintiffs, who have thus far been frozen out of the remedy process.

The Court has broad remedial powers pursuant to its inherent equitable authority¹²⁰ to Rule 70 of the Ohio Rules of Civil Procedure.¹²¹ Options

¹¹⁹ Indeed, the State has engaged in conduct that suggests both arrogant disregard of, and intentional refusal to comply with, its obligations as directed by this Court. For example, the General Assembly enacted into law a finding that was clearly inaccurate regarding the costs of the S.B.55 mandates (purportedly \$12); it enacted into law a "finding" that the unfunded mandates were already funded after it modified those mandates on a prospective basis, ignoring costs already incurred by virtue of the mandates as originally enacted; and it enacted into law a misleading cap on the expenditures of its model districts in order to lower the resulting basic aid amount. Note, too, the conduct of the General Assembly's LBO, which first undertook a comprehensive survey of the costs of the mandates and then, when the numbers were found to be too large, buried the report until forced to produce it, at which point LBO simply deleted the statewide cost data and attempted to make unintelligible the costs that remained. The citizens deserve better.

¹²⁰ *Swann v. Charlotte-Mecklenburg Board of Education* (1971), 402 U.S. 1, 15-6, 91 S.Ct. 1267, 28 L.Ed.2d 554. ("If school authorities fail in their affirmative obligations under these holdings, judicial authority may be invoked. Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.*** As with any equity case, the nature of the violation determines the scope of the remedy. In default by the school authorities of their obligation to proffer acceptable remedies, a district court has broad power to fashion a remedy...."); *Associated General Contractors of America v. City of Columbus* (6th Cir.1999), 172 F.3d 411, 417 ("the equitable power of the federal courts has been held to extend to the management of other types of institutions where the state's administration of the institution in some particular is held to be in violation of the constitutional rights of those who occupy or

employed by other courts in similar circumstances suggest the following possibilities:

- The Court could retain jurisdiction and direct the parties to a settlement conference under the supervision of a master commissioner.
- The Court could order the State to take specific actions, including the expenditure of funds for specified purposes, in addition or as an alternative to the enhancement of basic aid requested below.¹²² In the absence of compliance with such orders, or for the failure to comply with the Court's past orders, the Court could issue contempt citations and impose appropriate sanctions.¹²³ The Court could also add such parties as the State's treasurer and order such parties to pay out funds from the State's treasury.¹²⁴

utilize them.").

¹²¹ The federal courts have used Fed.R.Civ.P. 70 to enforce a wide variety of judgments. See, e.g., *Morales Feliciano v. Hernandez Colon* (D.Puerto Rico 1991), 771 F.Supp. 11, 12-13 ("The rule also has been relied upon by courts to effectuate judgments in public reform litigation. In *United States v. City of Detroit* (E.D.Mich.1979), 476 F.Supp. 512, the district court appointed the Mayor of Detroit (who had acknowledged that 'the buck stops here and with me') to administer the water treatment plant of the City of Detroit after the defendants, the City and its Sewer Department, had failed to achieve compliance with a consent decree."); *Gary v. State of Louisiana* (E.D. La. 1977), 441 F.Supp. 1121, 1127 *aff'd*, 622 F.2d 804 (5th Cir.1980) (where the legislature of Louisiana refused to comply with an order of the United States District Court that the state pay court costs and attorney fees to a successful plaintiff in a civil rights case, court ordered that the judgment be paid directly from funds held by the state's Department of Health and Human Resources.).

¹²² This Court has recognized that the power to direct the expenditure of funds by the other branches of government is an inherent element of judicial power. *State ex rel. Arbaugh v. Richland County Bd. Of Com'rs* (1984), 14 Ohio St.3d 5. See also, *Abbott v. Burke* (1997), 149 N.J. 145, 693 A.2d 417. See, also, *State ex rel. Scott v. Masterson* (1962), 173 Ohio St. 402, cited with approval in *DeRolph I* at 216 (Douglas, J., concurring) ("One of the basic functions of the courts under our system of separation of powers is to compel the other branches of government to conform to the basic law. Thus, where a specific duty is imposed by law upon another branch of the government, the enforcement of such duty is just as much within judicial cognizance as holding invalid the performance of acts which violate the basic law. In other words, the judicial power to compel the performance of duties imposed upon public officers by the basic laws extends equally with the judicial power to determine invalid the enactments of legislative bodies which are violative of such basic law. Failure to act is as much subject to judicial control as improper actions.") Note, too, that if the Ohio Constitution requires the General Assembly to raise revenue "sufficient to defray the expenses of the state."

¹²³ See *United States v. State of Tennessee* (W.D. Tenn. 1995), 925 F.Supp. 1292 section 4 of Article 12.

¹²⁴ See *Gates v. Collier* (5th Cir. 1980), 616 F.2d 1268, 1270-72, *modified*, 636 F.2d 942 (1981) (Rule used to execute a judgment against an agency of the State of Mississippi whose position was summarized by the court as, "you can order us to pay, but you can't make us pay if we don't want to." Finding it "beyond peradventure that the remedy fits the wrong," the court upheld order of the trial court adding the state's auditor and treasurer as defendants and ordering the newly added defendants to satisfy the judgment out of any funds subject to the

- The Court could appoint a commission empowered to employ or contract with experts and other staff and charged with overseeing studies and developing a school funding remedy.¹²⁵
- The Court could appoint its own experts to develop a remedy plan.¹²⁶

The posture of this case also warrants consideration by the Court of two additional issues: first, whether an additional stay is appropriate, and, second, whether the school funding system is so integral to H.B.94 that the entire bill must be enjoined.¹²⁷ Plaintiffs also ask the Court to consider establishing for FY02 an interim base amount at the average level of the base expenditures of the 30 effective districts in Ohio: \$6178.¹²⁸

control of the treasurer.)

¹²⁵ See, e.g., *Reed, III v. Rhodes* (N.D. Ohio 1980), 500 F.Supp. 363, 371-72 *aff'd in part and rev'd in part* by 635 F.2d 556 (6th Cir. 1980), *modified by* 642 F.2d 186 (6th Cir. 1981). ("[B]ecause the defendants refused to secure the assistance of experts for purposes of fashioning and implementing a desegregation remedy, the Court reluctantly was forced to establish a Department of Desegregation Implementation.*** The Cleveland Board of Education also failed to provide qualified personnel to assist Dr. Leftwich in carrying out his court ordered duties. Therefore 'to assure that desegregation planning goes forward with all due speed' *** this Court was required to order the Board of Education to hire seven assistants."); *id.* at 397 ("Following a finding of liability, it is common in institutional reform litigation for courts to appoint parajudicial officers to assist in conducting and overseeing actual implementation of the remedies. These officials have been given various names: masters, special masters, examiners, experts, monitors, referees, commissioners, administrators, observers, committees, panels, etc. *** Because these officials inevitably and necessarily displace certain functions and responsibilities that otherwise would rest with those who control the institution, they have been classified as a group as 'neoreceivers.' (FN22. The process leading to the utilization of neoreceivers involves the failure of the political process to produce an institution conforming to law.)").

¹²⁶ *Swann v. Charlotte-Mecklenburg Board of Education* (1971) 402 U.S. 1, 8, 91 S.Ct. 1267.

¹²⁷ See, e.g. *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 500-01 (where passage of a bill was dependent on unconstitutional component parts, severance is inappropriate); *State ex rel. v. Sheward* (1994), 71 Ohio St.3d 513, 523, 644 N.E.2d 369 (before severing a statute, the Court must find that severance will not fundamentally disrupt the statutory scheme of which the unconstitutional provision is a part). The Court might find particularly appropriate to strike the entire bill in this case because the State has made clear its opposition to raising additional revenues – something the State is certainly capable of doing should it wish. In the absence of additional revenue, allowing State funds to be expended pursuant to the non-educational portions of the budget will guarantee residual budgeting for education, since the most the State would then be able to do is move money around within an education budget of fixed amount.

¹²⁸ See chart, page 15, *supra*. Also see, e.g., *Abbott v. Burke* (1997), 149 N.J. 145.

CONCLUSION

The stakes in this case are unparalleled. Ours is a society premised upon the rule of law. But if the rights guaranteed to unenfranchised children by the supreme law of the state can be sacrificed upon the alter of politics, then no right is secure. Will Ohio's school children have the benefit of their constitutional birthright—the high quality educational programs that they, as citizens of our state—are entitled to receive? Or will we continue to relegate many of them to second-class citizen status by reason of inadequate educational opportunities?

Plaintiffs implore the Court to utilize its constitutional authority to do what it must because the other branches of government will not: ensure that every public school child in Ohio has access to the educational foundation promised by our constitution. By ensuring full and complete compliance with its orders in *DeRolph I* and *DeRolph II*, the Court can ensure the future of our State and of the judicial branch of government.

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CERTIFICATE OF SERVICE

I do hereby certify that a true copy of the foregoing brief was served upon the following counsel via hand delivery, this 18th day of June, 2001, addressed as follows:

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