ORIGINAL

IN THE SUPREME COURT OF OHIO

JOHN DOE, Petitioner, v. MARY RONAN, and CINCINNATI PUBLIC SCHOOLS, and OHIO DEPARTMENT OF EDUCATION, Respondents.	On Certified Questions of Law from the United States District Court Southern District of Ohio Supreme Court of Ohio Case No. 09-2104 District Court Case No. 1:09cv243

PRELIMINARY MEMORANDUM OF PETITIONER JOHN DOE

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DEC 08 2009
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FILED
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EXPLANATION OF WHY THIS CASE INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION OR IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST

This case involves two substantial constitutional questions regarding R.C. 3319.391 and Ohio Adm.Code 3301-20-01[1] (hereinafter referred to as the "Statutes" or the "Statutory Scheme"). Simply stated, the Statutes *mandated* the termination of certain public school employees, despite the fact that the employees had a substantive right to continued public employment and despite the fact that many of these employees had contracts for employment. The Statutory Scheme thus violates two provisions of the Ohio Constitution — the Retroactivity Clause and the Contracts Clause both found in Section 28, Article II of the Ohio Constitution. Accordingly, the Court should accept jurisdiction and answer these substantial constitutional questions.

STATEMENT OF THE CASE AND FACTS

A. Statement of the Case

This is a federal action for breach of contract, declaratory judgment, relief under 42 U.S.C. § 1983, permanent injunction, and a writ of mandamus. Petitioner John Doe[2] ("Petitioner") originally filed suit in the Hamilton County Court of Common Pleas. Respondents Cincinnati Public Schools ("CPS") and Superintendent Mary Ronan ("Ronan") removed the case to the United States District Court Southern District of Ohio. On November 16, 2009, the District Court issued an Order Certifying State Law Questions to the Supreme Court of Ohio and

[1] Unless otherwise stated, all references to Ohio Adm.Code 3301-20-01 are to Former Ohio Adm.Code 3301-20-01, 2005-2006 Ohio Monthly Record pam. #3 (R-E), eff. September 23, 2005. This is the version of the provision in effect at the time of Petitioner's termination. The code was amended in 2009. See Ohio Adm.Code 3301-20-01, 2008-2009 Ohio Monthly Reports pam. #2 (R-E), eff. August 27, 2009.

[2] John Doe is a pseudonym permitted by the District Court's Order on June 4, 2009.

Staying Proceedings Pending Resolution of the State Law Questions. The certified questions are:

I. Does Ohio Revised Code 3319.391 and Ohio Administrative Code 3301-20-01 violate the Retroactivity Clause of Article II, Section 28 of the Ohio Constitution?

II. Does Ohio Revised Code 3319.391 and Ohio Administrative Code 3301-20-01 violate the Contract Clause of Article II, Section 28 of the Ohio Constitution?

B. Statement of Facts

Petitioner was a dedicated public school employee at CPS for eleven years. He began his career at CPS as a Safe & Drug Free School Specialist and was promoted to Due Process Hearing Specialist. Petitioner's education, training, and experience made him particularly qualified for these jobs. He has a Bachelor of Science Degree in Sociology, and he is a licensed social worker and certified chemical dependency counselor. Despite his strong qualifications and positive job evaluations, CPS and Ronan terminated Petitioner to comply with an Ohio law administered by Respondent Ohio Department of Education ("ODE"). Clearly, Doe was terminated because of this new law — R.C. 3319.391.

R.C. 3319.391 was enacted and became effective in 2007. See 127th General Assembly Substitute House Bill 190 ("H.B. 190"). R.C. 3319.391 requires criminal records checks every five years for all unlicensed school employees such as cafeteria workers, janitors, and other non-teaching positions. R.C. 3319.391. The law explicitly applies to individuals seeking employment after the effective date of the statute *and* to individuals employed by a school when the statute became effective. R.C. 3319.391(A). If the criminal records check shows that the person has been convicted of or pleaded guilty to an enumerated offense, the person "shall not be

hired *or shall be released from employment* * * * unless the person meets the rehabilitation standards adopted by [ODE]." R.C. 3319.391(C) (emphasis added).

The rehabilitation standards are set forth in Ohio Adm.Code 3301-20-01. The rehabilitation inquiry is factual and includes a general determination that the individual will not jeopardize the health, safety or welfare of the students. Ohio Adm.Code 3301-20-01(E)(2)(e). However, under the statute and the corresponding administrative rules, an individual may not be employed, *regardless of rehabilitation*, if the person has been convicted of or pleaded guilty to one of forty-seven offenses or their substantial equivalent under prior law or another state's law. R.C. 3319.391; R.C. 3319.39; Ohio Adm.Code 3301-20-01(B), (E)(1). Those offenses are generally described as (1) drug-abuse offenses, (2) theft offenses, (3) sexually-oriented offenses, and (4) violent offenses. See Ohio Adm.Code 3301-20-01(A)(9)-(12).

Over twenty years before CPS hired him, Petitioner was convicted of Unlawful Sale of Narcotic Drugs and was sentenced to several years in state prison. After his incarceration, Petitioner obtained his bachelor's degree and certifications and, in essence, turned his life around. He also had his conviction expunged. Petitioner has not had another conviction, and he has spent a significant amount of time working with young people to avoid drugs and the peer-pressure that resulted in his conviction. As succinctly stated by Judge Michael R. Barrett of the district court, Petitioner "has been a model citizen since being released from jail."

CPS hired Petitioner as a Safe & Drug Free School Specialist in 1997 and promoted him to a Due Process Hearing Specialist in 2002. As a Due Process Hearing Specialist, Petitioner did not have direct contact with students except at administrative hearings when a student's parent or guardian was present. Throughout his eleven-year career, CPS and its agents consistently evaluated Petitioner's work as "acceptable" or "accomplished." Most recently, CPS and Ronan

entered into a contract with Petitioner for Petitioner to be a Due Process Hearing Specialist for the 2008-2009 and 2009-2010 school years.

On November 24, 2008, CPS and Ronan contacted Petitioner through an agent to inform him that they intended to terminate his employment. The agent also informed Petitioner he was barred from continued employment at CPS pursuant to the Statutes because of his 1976 conviction. Through an agent, CPS and Ronan reiterated that Petitioner would be terminated in a letter dated January 25, 2009.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law I: Ohio Revised Code 3319.391 and Ohio Administrative Code 3301-20-01 violate the Retroactivity Clause of Section 28, Article II of the Ohio Constitution.

Section 28, Article II of the Ohio Constitution prohibits the General Assembly from passing retroactive laws. Section 28, Article II, Ohio Constitution. This Court employs a two-part test to determine whether a statute violates this constitutional provision. *State v. Consilio,* 114 Ohio St.3d 295, 2007-Ohio-4163, 871 N.E.2d 1167, at ¶10. Under this test, the Court must first determine whether the General Assembly expressly made the statute retroactive. Id. If the Court finds that the statute is expressly retroactive, then it must determine whether the statute is substantive or remedial in nature. Id. An expressly retroactive statute that impairs substantive rights violates the Ohio Constitution.

A. The Statutes are Expressly Retroactive.

The first question is whether the Statutes are expressly retroactive. The term "retroactive" refers to a law that affects "acts or facts occurring, or rights accruing, before it came into force." *Consilio* at fn. 1. Statutes in Ohio are presumed to be prospective in

application. R.C. 1.48; *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, 522 N.E.2d 489, at paragraph one of the syllabus. "A statute must clearly proclaim its own retroactivity to overcome the presumption of prospective application." *Consilio* at ¶15. However, a finding of express retroactivity does not require that certain "talismanic phrases or magic words" be present in the statute. *Hyle v. Porter* (2007), 117 Ohio St.3d 165, 2008-Ohio-542, 882 N.E.2d 899, at ¶28 (O'Donnell, J., dissenting). Rather, the Ohio Constitution requires the General Assembly to "clearly enunciate its intent in plain terms [which] allow[] casual readers of the law to immediately know what statutes are retroactive * * *." *Consilio* at ¶23, citing *State v. Williams* (2000), 88 Ohio St.3d 513, 532, 2000-Ohio-428, 728 N.E.2d 342.

The General Assembly clearly intended the Statutory Scheme to apply retroactively. By its express terms, R.C. 3319.391 applies to individuals who seek employment at a school district after the effective date *and* to individuals who were employed at the time the statute became effective. R.C. 3319.391(A). Further, the statute provides specific procedures for the retroactive application of the statute: "For each person to whom this division applies who is hired prior to [the effective date], the employer shall request a criminal records check by a date prescribed by [ODE] * * *." R.C. 3319.391(A). Finally, the statute specifically states that a current employee who has been convicted of or pled guilty to specific offenses "*shall be released from employment*" unless that person meets the rehabilitation criteria in the administrative code. R.C. 3319.391(C). Thus, R.C. 3319.391 "'clearly proclaim[s]' its retroactive application." *Hyle* at ¶10, quoting *Consilio* at paragraph one of the syllabus.

B. The Statutes Impair a Public School Employee's Substantive Due Process Right to Continued Employment.

Once a statute is deemed expressly retroactive, the Court must then determine whether the statute is substantive or remedial in nature. *Van Fossen*, 36 Ohio St.3d at paragraph three of

the syllabus. A retroactive statute is only unconstitutional if it is substantive or, in other words, if it impairs vested substantive rights. Id. A "substantive" statute "impairs or takes away vested rights, affects an accrued substantive right, or imposes new or additional burdens, duties, obligations, or liabilities as to a past transaction." *Smith v. Smith*, 109 Ohio St.3d 285, 2006-Ohio-2419, 847 N.E.2d 414, at ¶6, quoting *Bielat v. Bielat*, 87 Ohio St.3d 350, 354, 2000-Ohio-451, 721 N.E.2d 28. A "remedial" statute, on the other hand, affects "the methods and procedure by which rights are recognized, protected and enforced, not * * * the rights themselves." *Weil v. Taxicabs of Cincinnati, Inc.* (1942), 139 Ohio St. 198, 205, 22 O.O. 205, 39 N.E.2d 148.

This Court, as well as the United States Supreme Court, has held that a public employee has a *substantive,* constitutionally-protected, property right to continued employment. *Ohio Assn. of Pub. School Employees v. Lakewood City Schools*, Ohio St.3d 175, 176, 1994-Ohio-354, 624 N.E.2d 1043 (school custodian has a substantive right to or expectation of continued employment); see, also, *Cleveland Bd. of Edn. v. Loudermill* (1985), 470 U.S. 532, 538-39, 105 S.Ct. 1487, 84 L.Ed.2d 494. This sentiment is echoed in R.C. 3319.081, which provides that, following successful completion of one- and two-year contracts, a school employee "shall be continued in employment" and terminated "*only for* violation of written rules or regulations" or for a number of other misbehaviors. R.C. 3319.081 (emphasis added).

Thus, following Petitioner's initial one-year contract in 1997 and subsequent two-year contract in 1998-1999, Petitioner had a vested substantive right to "continued employment." Petitioner's termination under R.C. 3319.391 and Ohio Adm.Code 3301-20-01 not only impaired this substantive right, but destroyed it altogether. Because the retroactive application of the Statutes impairs a vested substantive right, they are unconstitutional under Section 28, Article II of the Ohio Constitution.

Notably, the instant case is distinguishable from *State v. Cook,* 83 Ohio St.3d 404, 1998-Ohio-291, 700 N.E.2d 570 and *State ex rel Matz v. Brown* (1988), 37 Ohio St.3d 279, 525 N.E.2d 805. Those cases also involved retroactivity claims by individuals convicted of crimes. In *Cook*, the plaintiff argued that changes to Ohio's sex offender registration and notification statutes were unconstitutionally retroactive, *Cook*, 83 Ohio St.3d at 410-14, and in *Matz*, the relator claimed that a statute prohibiting certain felons from collecting a Victims of Crime Compensation award was unconstitutionally retroactive. *Matz*, 37 Ohio St.3d at 281. The argument in both cases was that the statutes attached a new disability to the conviction and therefore were substantive. This Court disagreed and held that neither statute was unconstitutionally retroactive because neither impaired a substantive right. *Cook*, 83 Ohio St.3d at 414; *Matz*, 37 Ohio St.3d at 281-82. The Court explained:

> [A] later enactment will not burden or attach a new disability to a past transaction or consideration in the constitutional sense, unless the past transaction or consideration, if it did not create a vested right, created at least a reasonable expectation of finality. * * * Except with regard to constitutional protections against *ex post facto* laws, * * * felons have no reasonable right to expect that their conduct will never thereafter be made the subject of legislation.

Matz, 37 Ohio St.3d at 281-82.

Here, however, Petitioner does not claim that R.C. 3919.391 attached a new disability to his status as a convicted felon. Rather, Petitioner claims the statute impaired an existing substantive right. Petitioner had a clear substantive right to continued public school employment, and the Statutes impaired this right. Thus, Petitioner's claim is not disposed of by the reasoning of *Cook* or *Matz*, and the Statutes are unconstitutionally retroactive.

Proposition of Law II: Ohio Revised Code 3319.391 and Ohio Administrative Code 3301-20-01 violate the Contract Clause of Article II, Section 28 of the Ohio Constitution.

Similarly, the Ohio Constitution prohibits the General Assembly from passing "laws impairing the obligation of contracts." Section 28, Article II, Ohio Constitution (hereinafter referred to as the "Contracts Clause"). The first step in a Contracts Clause analysis is "whether the change in state law has 'operated as a substantial impairment of a contractual relationship.'" *State ex rel. Horvath v. State Teachers' Retirement Bd.*, 83 Ohio St.3d 67, 76, 1998-Ohio-424, 697 N.E.2d 644, quoting *Gen. Motors Corp. v. Romein* (1992), 502 U.S. 181, 186, 112 S.Ct. 1105, 117 L.Ed.2d 328. If a substantial impairment is present, the court must determine whether the impairment was reasonable and necessary in serving an important public purpose. See *City of Middletown v. Ferguson* (1986), 25 Ohio St.3d 71, 77, 495 N.E.2d 380.

A. The Statutes Substantially Impaired the Contractual Relationship Between Petitioner and CPS.

The first inquiry has three components: (1) whether there is a contractual relationship; (2) whether a change in law impairs that contractual relationship; and (3) whether the impairment is substantial." *Horvath*, 83 Ohio St.3d at 76, quoting *Romein*, 502 U.S. at 186. Petitioner satisfies each of these components. First, Petitioner had a contractual relationship with CPS and Ronan. Petitioner had both a written contract and an implied contract pursuant to R.C. 3319.081. Second, the passage of H.B. 190 impaired that contractual relationship because it required Doe to be terminated in violation of his contract with CPS and Ronan. In other words, the statutory scheme was the impetus for CPS's decision to terminate its contract with Petitioner. Further CPS and Ronan admit this is the reason they terminated Petitioner.

Third, the impairment was substantial. There are two considerations important to the substantial impairment analysis. The first is the extent to which reasonable expectations in the contract are disrupted. *Middletown*, 25 Ohio St.3d at 77, citing *Energy Reserves Group, Inc.* v. *Kansas Power & Light Co.* (1983), 459 U.S. 400, 411, 103 S.Ct. 697, 74 L.Ed.2d 569; *Allied Structural Steel Co.* (1978), 438 U.S. 234, 245-247, 98 S.Ct. 2716, 57 L.Ed.2d 727; *United States Trust Co.* v. *New Jersey* (1977), 431 U.S. 1, 31, 97 S.Ct. 1505, 52 L.Ed.2d 92. The second consideration is whether a party has relied on an obligation which is impaired by the statute, as when the legislation impairs the express terms of a contract. Id., citing *Allied Structural Steel Co.*, 438 U.S. at 246-247. Such an impairment is especially severe. Id.

The substantial nature of the impairment is obvious because the Statutes required and resulted in the termination of Petitioner's contract in its entirety. The Statutes did not merely impair the contractual relationship; rather, the Statutes made the contract void. Prior to enactment of the Statutes, Petitioner had both an implied contract pursuant to R.C. 3319.081 and a written contract, and Petitioner had very reasonable expectations to continued employment by CPS and acted in reliance on those expectations by building skills over a period of eleven years applicable to employment within a school. Clearly, the Statutes substantially impaired the contractual relationship between Petitioner and CPS and Ronan.

B. The Impairment Caused by the Statutes is Not Reasonable and Necessary to Serve an Important State Interest.

The inquiry next moves to the justification for the impairment. The Contract Clause does not prohibit all impairments and "is not to be read with literal exactness like a mathematical formula." *United States Trust Co.*, 431 U.S. at 21, quoting *Home Building & Loan Assn.* v. *Blaisdell* (1934), 290 U.S. 398, 428, 54 S.Ct. 231, 78 L.Ed. 413. Rather, a law substantially impairing the obligations of a contract must be "reasonable and necessary to serve an important

public purpose" in order to pass constitutional muster. *Middletown*, 25 Ohio St.3d at 79, quoting *United States Trust Co.*, 431 U.S. at 25. The level of scrutiny of the Statutes should be high because they substantially impaired Petitioner's contract. Id., citing *Allied Structural Steel Co.*, 438 U.S. at 245. The stricter scrutiny included in this step of the test does not involve the usual great deference afforded to legislative enactments. *Smith v. Denihan* (1990), 63 Ohio App.3d 559, 574, 579 N.E.2d 527; see, also, *United States Trust Co.*, 431 U.S. at 26.

Assuming that the General Assembly enacted the Statutes to protect school children from interaction with certain types of convicted criminals and assuming this is an important public interest, the Statutes are still completely unreasonable because they are in no way tailored to protect school children. First, R.C. 3319.391 impairs the contractual rights of individuals, such as Petitioner, who show themselves to be valuable assets to the school. Petitioner has consistently received positive evaluations, denoting his skills as "accomplished." Second, the Statutes affect individuals like Petitioner who have little or no contact with children. Finally, Ohio Adm.Code 3301-20-01 irrationally prevents individuals from proving that they have been rehabilitated even when they pose no threat to children.

Petitioner's case clearly shows that the Statutes are unreasonable. Petitioner got in trouble as a young man and ultimately was convicted of Unlawful Sale of Narcotic Drugs on November 11, 1976. After serving three years in prison, however, Petitioner chose to turn his life around. He obtained a college education and specialized training to combat drug abuse. Petitioner had his conviction expunged and became "a model citizen." In 1997, more than twenty years after his conviction, CPS hired Petitioner as a Safe & Drug Free School Specialist, and Petitioner utilized his past experiences to help Cincinnati's youth avoid drugs.

Prior to the passage of R.C. 3919.391, Petitioner was promoted to a Due Process Hearing Specialist and worked in an administrative capacity with minimal direct contact with children. In his eleven-year career with CPS, Petitioner received commendable job evaluations. In sum, Petitioner had little contact with children, did a good job, and was uniquely qualified for his position based on his life experiences and training. Moreover, Petitioner posed no threat to children as evidenced by more than a decade of service at CPS without any issues. Yet, the Statutes required the substantial impairment of his contract, namely his unconditional termination.

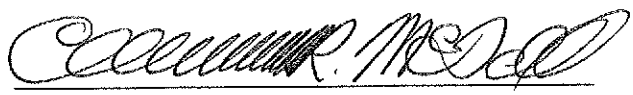
The General Assembly or ODE could have created a reasonable statutory scheme that protected children by limiting the Statutes in numerous ways. First, the General Assembly could have limited the Statutes' reach to convictions within a certain number of years or to employees who had only worked in schools for a limited amount of time. Thus, the legislation would not have unconstitutionally impaired the contracts of individuals who had shown rehabilitation either through an extended time period without convictions or an extended time period of safe interaction with children. Second, the General Assembly could have carved out an exception to the termination provision for convictions that did not involve violence or child-victims, or the Legislature could have permitted these individuals to show rehabilitation. In fact, ODE has acknowledged the unreasonableness of the Statutory Scheme by revising Ohio Adm.Code 3302-20-01. Now, the possibility of rehabilitation is open to individuals such as Petitioner when his or her conviction is far removed in time and/or did not involve children or violence. See Ohio Adm.Code 3301-20-01, 2008-2009 Ohio Monthly Reports pam. #2 (R-E), eff. August 27, 2009.

For these reasons, the Statutes substantially and unreasonably impair the contract between Petitioner and CPS and should be held unconstitutional.

CONCLUSION

For the reasons discussed above, this case involves substantial constitutional questions and matters of public and great general interest. Petitioner requests that this Court accept jurisdiction in this case so that these constitutional questions will be answered.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "Preliminary Memorandum of Petitioner John Doe" was served upon the following via ordinary U.S. mail postage pre-paid this 8th day of December, 2009:

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APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

JOHN DOE,

Plaintiff,

v.

MARY RONAN,

and

CINCINNATI PUBLIC SCHOOLS,

and

OHIO DEPARTMENT OF EDUCATION,

Defendants.

Case No. 1:09cv243

Judge Michael R. Barrett

ORDER CERTIFYING STATE LAW QUESTIONS TO THE SUPREME COURT OF OHIO AND STAYING PROCEEDINGS PENDING RESOLUTION OF THE STATE LAW QUESTIONS

This matter is before this Court pursuant to Plaintiff John Doe's Motion to Certify State Law Questions to the Supreme Court of Ohio (Doc. 23). Defendants Ronan and Cincinnati Public Schools oppose this motion (Doc. 27). The Ohio Department of Education does not take a position (Doc. 26). Plaintiff requests that this Court issue a certification order pursuant to Rule XVIII of the Supreme Court of Ohio Rules of Practice for the following questions of Ohio state law:

I. Does Ohio Revised Code § 3319.391 and Ohio Administrative Code § 3301-20-01 violate the Retroactivity Clause of Article II, Section 28 of the Ohio Constitution?

II. Does Ohio Revised Code § 3319.391 and Ohio Administrative Code § 3301-20-01 violate the Contract Clause of Article II, Section 28 of the Ohio Constitution?

Having duly considered all of the relevant documents including Plaintiff's Amended Complaint and Plaintiff's Motion, Plaintiff's Motion to Certify State Law Questions to the Supreme Court of Ohio and stay proceedings is hereby GRANTED. The Court finds that these questions of Ohio law may be determinative of the proceedings and further finds that there is no controlling precedent in the decisions of the Supreme Court of Ohio.

1. Background Information[1]

Plaintiff has been an employee of Cincinnati Public Schools ("CPS") for over eleven years. (Doc. 11, ¶ 7.) He was first employed as a "Safe & Drug Free School Specialist" in 1997 and then as a "Due Process Hearing Specialist" beginning in 2002 to the present. (Id.) Plaintiff now works in an administrative capacity and does not have direct interaction with students except at administrative hearings where parents and/or guardians are present. (Id. at ¶ 9.) On July 14, 2008, the parties entered into a contract whereby Plaintiff would continue to be employed as a hearing officer for the 2008-2009 school year. (Id. at ¶ 11.)

On November 24, 2008, Defendants informed Plaintiff that he would be terminated after he had used all his sick leave. (Id. at ¶ 12.) CPS stated that his continued employment was barred due to O.R.C. § 3319.39, § 3319.391, and H.B. 190. (Id. at ¶ 13.) This new statute requires that any current employees who have a conviction for certain enumerated offenses must be released from employment. (Id. at ¶¶ 14-18.) See also

[1] The following facts are taken from the Court's Order Denying Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction. (Doc. 10, pgs. 1-2.)

O.A.C. 3301-20-01. Plaintiff was convicted of Unlawful Sale of Narcotic Drugs on November 11, 1976. (Doc. 11, ¶ 19.) Plaintiff served over three years in a correctional facility where he became rehabilitated. (Id. at ¶ 20.) Plaintiff obtained his bachelor's degree in 1983 and has become a Licensed Social Worker and Certified Chemical Dependency Counselor. (Id. at ¶¶ 22-23.) This conviction has been expunged, and he has been a model citizen since being released from jail. (Id. at ¶¶ 22-27).

2. Pending Motions

There are currently two other motions currently pending before this court, Defendants Ronan and Cincinnati Public Schools Board of Education's motion for judgment on the pleadings (Doc. 19) and Defendant Ohio Department of Education's motion to dismiss (Doc. 17). Both of these motions are DENIED at this time. Defendants should refile the motions after the stay is lifted.

3. Questions of Law to Be Answered

I. Does Ohio Revised Code § 3319.391 and Ohio Administrative Code § 3301-20-01 violate the Retroactivity Clause of Article II, Section 28 of the Ohio Constitution?

II. Does Ohio Revised Code § 3319.391 and Ohio Administrative Code § 3301-20-01 violate the Contract Clause of Article II, Section 28 of the Ohio Constitution?

4. Parties

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IT IS SO ORDERED.

s/Michael R. Barrett
United States District Judge