

ORIGINAL

In the
Supreme Court of Ohio

TOLEDO CITY SCHOOL DISTRICT
BOARD OF EDUCATION, *et al*,

Appellees,

v.

STATE BOARD OF EDUCATION OF
OHIO, *et al*,

Appellants.

Case No. 14-1769

On appeal from the Franklin County
Court of Appeals,
Tenth Appellate District

Court of Appeals
Case Nos. 14AP-93
14AP-94
14AP-95

**MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANTS, THE OHIO DEPARTMENT OF EDUCATION,
STATE BOARD OF EDUCATION, AND DR. RICHARD ROSS**

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INTRODUCTION

The inquiry here—whether the General Assembly may retrospectively adjust the state dollars that flow to local school districts—poses substantial constitutional questions of public and great general interest. The inquiry has constitutional flavor because the school districts claim (and the lower courts agreed) that the Ohio Constitution’s Retroactivity Clause does not allow these adjustments. The inquiry has public and general-interest ingredients because it involves public money and a constant topic of general interest—local education.

The underlying dispute involves how to count students in local school districts because the number of students translates into the number of dollars. Previously, the Ohio Department of Education and some school districts had disagreed about the counting methodology and some districts sued to get more state money. That prior case reached this Court, but settled (a collateral attorney-fee issue from that case also reached this Court). After the settlement, the General Assembly sided with the Department, changed the funding statute, and passed another law declaring that no district that had not already sued could now sue over the old funding formula to recover more state funds. Several districts still sued about the old funding formula. The common pleas court rejected the Department’s motion to dismiss and declared the General Assembly’s bar to new litigation unconstitutional under the Retroactivity Clause. The Tenth District affirmed.

This Court should review the judgment below because it invalidates state law despite conceding that school districts have no “vested right” to the old funding formula. *Toledo City Sch. Dist. Bd. of Educ. v. State Bd. of Educ.*, 2014-Ohio-3741 ¶ 38 (attached as Ex. 2) (hereinafter “App. Op.”). Still, the Tenth District imposed tens of millions of dollars in liability (an amount that will surely grow if the decision below stands and other districts file copycat suits) on the State by concluding that the litigation bar was unconstitutional under the

Retroactivity Clause. It reached that holding relying almost exclusively on a single case that itself made no mention of the Retroactivity Clause. This Court should accept jurisdiction and reverse.

STATEMENT OF THE FACTS AND CASE

This appeal arises from the school funding system in place during fiscal years 2005 through 2007. As relevant here, the system was based on the total number of children in a school district who received a public education from traditional schools and “community schools” (Ohio’s name for charter schools). The total number of students receiving educational services from a school district’s traditional and community schools was known as the district’s Formula Average Daily Membership (“ADM”). In the first full week of October in each fiscal year, the school districts were required to count and report their view of the total number of students to the Ohio Department of Education. This was known as the “October Count.” The district would be paid a set amount for each student reported. *See* R.C. 3317.03(C)(2) (2005); R.C. 3314.08(L)(2) (2005). Set amounts for each community-school student residing in a district were later deducted from the district’s state funding and paid to the community schools based on monthly enrollment reports submitted by the community schools. That process was known as the Community School Average Daily Membership (“CSADM”).

Midway through fiscal year 2005, the Department noticed that many districts were reporting higher numbers of community-school students in their October Counts than the community schools themselves were reporting via their CSADM. Finding the CSADM, which was calculated based on actual month-by-month reports of student enrollment, to be more accurate than the one-time snapshot of students enrolled in community schools in the October Count, the Department recalculated the districts’ October Count using the CSADM figures. As a result, the Department concluded that some districts had been overpaid. Rather than claw back

funds already paid to the districts, it recouped the overpayments by reducing the remainder of the districts' fiscal year 2005 fund distributions. The adjusted fiscal year 2005 ADM was used to calculate funding for fiscal years 2006 and 2007 as well.

The Cincinnati School District sued over this funding adjustment. Cincinnati argued that statutes required the Department to use the October Count submissions, rather than CSADM, to count community-school students. The Department countered that former R.C. 3317.03(C)(2) and 3314.08(L)(2), read together, required the use of CSADM data. Cincinnati prevailed in the common pleas court and the First District. The Department appealed to this Court, which agreed to review the case. *See Cincinnati City Sch. Dist. Bd. of Educ. v. State Bd. of Educ.*, Oh. S. Ct. No. 2008-Ohio-0919. Before briefing, the parties settled the case and dismissed the appeal. An attorney-fee dispute stemming from the lower-court litigation later reached this Court on the merits after the school district won an appellate decision favoring fees. This Court reversed. *Cincinnati City Sch. Dist. Bd. of Educ. v. State Bd. of Educ.*, 122 Ohio St. 3d 557, 2009-Ohio-3628.

Even before litigation over the funding formula reached settlement, the General Assembly amended the statutes to make plain that the Department did indeed have authority to vary from a district's October Count submission when it believed the submission was inaccurate. *See* Am. Sub. H.B. 119 (127th G.A.), 2007 *Baldwin's Ohio Legislative Service Annotated*, No. 4, at L-832-3 and L-877. The General Assembly later codified this policy in the biennial budget. The budget provision said that, with the exception of litigation concluded by June 1, 2009, "a school district for which the formula ADM for fiscal year 2005 . . . was reduced based on enrollment reports for community schools" shall not "have a legal claim for reimbursement . . . and the state shall not have liability for reimbursement of the amount of such reduction"

Am. Sub. H.B. 1 (128th G.A.) at § 265.60.70. Identical provisions followed in the 2011 and 2013 budgets. *See* Am. Sub. H. B. 153 (129th G.A.) § 267.50.60; Am. Sub. H.B. No. 59 (130th G.A.) § 263.410 (collectively “the Budget Provisions”).

Despite the Budget Provisions barring any potential claims, the Cleveland, Dayton, and Toledo School Districts sued in 2011. They sought repayment of amounts claimed to be due as a result of the CSADM-based reductions to their fiscal year 2005, 2006, and 2007 funding. The Department sought judgment on the pleadings relying on the Budget Provisions. The trial court denied the motions and declared the Budget Provisions unconstitutional in violation of the Retroactivity Clause, of the Ohio Constitution (Art. II, Section 28). The trial court then certified the judgment for appeal, finding no reason to delay review. *See* Ohio R. Civ. P. 54(B).

The Department appealed to the Tenth District. That court first concluded that the trial court’s judgment was appealable because it affected “a substantial right.” App. Op. ¶ 21. As for the merits, the Tenth District agreed with the Department that the school districts’ “statutory right” to the disputed funds was “contingent,” not “absolute or vested.” *Id.* ¶ 36. The court nevertheless found a constitutional problem with the Budget Provisions because the districts had a “substantive right” to the disputed funds. *Id.* ¶ 42. The Tenth District reached this latter conclusion by interpreting a 1963 decision of this Court that never addressed the Constitution’s Retroactivity Clause. *Id.* at ¶¶ 40-43 (interpreting *State ex rel. Kenton City School Dist. v. State Bd. of Educ.*, 174 Ohio St. 257 (1963)).

The Department appeals to correct the Tenth District’s legal error, validate the General Assembly’s policy choice, and reverse the liability imposed on the State by the lower courts.

**THE CASE PRESENTS A SUBSTANTIAL CONSTITUTIONAL QUESTION
OF PUBLIC AND GREAT GENERAL INTEREST**

This Court should exercise jurisdiction over the question here because the Tenth District's holding (A) invalidates a valid law, (B) in a way inconsistent with this Court's precedent, (C) resulting in tens of millions in dollars in liability for the State. A, B, and C add up to the kind of case that merits this Court's review.

A. Review is warranted because the appellate court struck down a presumptively constitutional law.

This Court almost routinely accepts jurisdiction in cases in which a lower court declares a state statute unconstitutional. *See, e.g., State ex rel. Ohio Civ. Serv. Employee Ass'n v. State*, 139 Ohio St. 3d 1428, 2014-Ohio-2725 (accepting review); *State v. Mole*, 137 Ohio St. 3d 1473, 2014-Ohio-176 (same); *Sunset Estate Props., L.L.C. v. Lodi*, 138 Ohio St. 3d 1432, 2014-Ohio-889 (same as to local ordinance). That pattern of review makes sense because a "regularly enacted statute of Ohio is presumed to be constitutional and is therefore entitled to the benefit of every presumption in favor of its constitutionality." *State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142, 147 (1955); *cf. Bowen v. Kendrick*, 483 U.S. 1304, 1304 (1987) ("It has been the unvarying practice of this Court so long as I have been a Member of it to note probable jurisdiction and decide on the merits all cases in which a single district judge declares an Act of Congress unconstitutional.") (Rehnquist, C.J., in chambers). When the judiciary abrogates the General Assembly's majoritarian judgment, it should be for this Court, not a lower to court, to express the final word on that holding.

The general presumption favoring review when a state statute is declared unconstitutional is amplified here because the Tenth District's judgment invalidated an important state educational policy. "The General Assembly is the branch of state government charged by the Ohio Constitution with making educational policy choices for the education of our state's

children.” *State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Educ.*, 111 Ohio St. 3d 568, 2006-Ohio-5512 ¶ 34. That constitutional charge “reinforces the ordinary discretion reposed in the General Assembly in its enactment of legislation,” and means that the courts “should exercise great circumspection before declaring public school legislation unconstitutional.” *Bd. of Educ. of City Sch. Dist. of City of Cincinnati v. Walter*, 58 Ohio St. 2d 368, 385 (1979). The Tenth District axed the General Assembly’s policy choice; that action calls out for this Court’s review.

B. Review is needed because the judgment below conflicts with this Court’s precedents.

Review is appropriate not merely because the Tenth District invalidated a state law allocating education funding. Review is also appropriate because the Tenth District’s judgment conflicts with this Court’s precedents. That conflict is apparent in three ways.

First, the judgment conflicts with the longstanding principle that school districts and their property are regulated at the mercy of the General Assembly. This Court held long ago that school districts and their property “are creatures of the state which may be created and abolished at will by the Legislature.” *Ross v. Adams Mills Rural School Dist.*, 113 Ohio St. 466, 480 (1925). The General Assembly thus “may take without compensation such property, hold it itself, or vest it in other agencies.” *Avon Lake City Sch. Dist. v. Limbach*, 35 Ohio St. 3d 118, 121 (1988) (quoting *Hunter v. Pittsburgh*, 207 U.S. 161, 178 (1907)). “All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest.” *Id* (citation omitted). Contrary to these principles, the Tenth District’s decision immunizes school districts from the General Assembly’s choices about school funding. And that judgment raises serious questions about the General Assembly’s power to set statewide education policy. *See Congress*, 2006-Ohio-5512 ¶ 46 (“Section 3, Article VI does not give those [local] voters more power than the General Assembly to create policy and organize and

administer a system of public education throughout the state.”) (citation omitted). This Court should review the judgment below because it threatens the General Assembly’s prerogative to set education policy for the State, and it does so in a way at odds with this Court’s cases.

Second, the judgment below conflicts with this Court’s holdings that political subdivisions do not share the same constitutional rights as citizens. “A political subdivision, such as a school district, receives no protection from the Equal Protection or Due Process Clauses vis-à-vis its creating state.” *Avon Lake*, 35 Ohio St. 3d at 122. To be sure, “there may be occasions where a political subdivision may challenge the constitutionality of state legislation.” *Id.* And this Court has, without citing *Avon Lake*, applied the Retroactivity Clause to a school district. *See Cincinnati Sch. Dist. Bd. of Educ. v. Hamilton Cnty. Bd. of Revision*, 91 Ohio St. 3d 308, 317 (2001). That case, though, dealt with a statute that permitted “refiling of once-dismissed . . . complaints.” *Id.* Under those circumstances, any announced retroactivity principle, even if it had explicitly considered and rejected the *Avon Lake* barrier to school district constitutional rights, is limited to reopening closed cases. The key point is that, whatever lesson should be drawn from *Avon Lake* and *Cincinnati*, the answer should come from this Court.

Third, the Tenth District’s judgment conflicts with precedent establishing the principle that there are no vested rights in statutes. This Court has articulated that principle in one of the very cases that the Tenth District cited. *See App. Op.* ¶¶ 36-42 (discussing *Kenton*, 174 Ohio St. 257). *Kenton* reminded that “there is no vested right in an existing statute that will preclude the General Assembly from changing it.” 174 Ohio St. 257, 260. Although *Kenton* went on to conclude that a later statute did not divest a school district of rights it enjoyed under a prior statute, that was a *statutory*, not a *constitutional*, holding. The Tenth District misapplied *Kenton*

by reading it as establishing a *constitutional* right. At the least, the Court should grant review here to clarify what it meant by *Kenton*.

One last point. The Tenth District’s judgment also warrants review for a reason separate from its conflict with this Court’s cases. The Tenth District—as it acknowledged—reached a result *directly* at odds with the Missouri Supreme Court on the precise question presented. App. Op. ¶ 47 (citing *Savannah R-III Sch. Dist. v. Public Sch. Retirement Sys. of Mo.*, 950 S.W.2d 854 (Mo. 1997)). Opposite the Tenth District’s holding, the Missouri Supreme Court held that “the legislature may waive or impair the vested rights of school districts without violating the retrospective law prohibition.” *Savannah*, 950 S.W.2d at 858; *see also* 16A Corpus Juris Secundum, Constitutional Law, Section 565 (“The state may constitutionally pass retrospective laws waiving or impairing its own rights, or those of its instrumental subdivisions, or of the public generally.”). On a constitutional question of statewide importance, this Court, not the Tenth District, should decide if Ohio will break from holdings in other States on the precise question in this appeal.

C. Review is appropriate because the appellate court’s decision involves tens of millions of dollars of public-school money.

Finally, review is appropriate because the Tenth District’s errors of law impose at least \$40,000,000 of liability on the Department of Education. That figure makes this case a matter of great general interest. *See, e.g., Ohio Trucking Ass’n. v. Charles*, 134 Ohio St. 3d 502, 2012-Ohio-5679 ¶ 7 (\$15 million yearly at issue); *cf. Beaver Excavating Co. v. Testa*, 134 Ohio St. 3d 565, 2012-Ohio-5776 ¶ 46 (how to distribute \$140 million in funds each year). That the \$40,000,000 liability here involves education dollars and that the plaintiffs are school districts makes this a matter of public interest as well.

The \$40,000,000 is simply the amount directly at play in this case. But the Tenth District's judgment—if permitted to stand—opens the door to far more liability. That is because, while this appeal involves only a few school districts, the Tenth District's judgment has statewide application. If left unreviewed, the Tenth District's decision may expose the Department to potential claims from each of Ohio's 609 school districts. The Department estimates that the logic of the Tenth District's judgment means that more than 300 of those districts would have a potential claim to additional funds.

Money aside, review is appropriate because the public policy at play here is school funding. Twice before, this Court has granted review over appeals stemming from the same underlying funding dispute. *See Cincinnati City*, Oh. S. Ct. No. 2008-Ohio-0919 (review of statutory question); *Cincinnati City*, 122 Ohio St. 3d 557, 2009-Ohio-3628 (review of attorney-fee question). The first case settled, and the second produced a merits opinion. The grants in those cases show that this case, too, involves an important question of public and great general interest. All three cases bloom from the same root disagreement between the General Assembly and local school districts about statewide funding allocations. Review is once again appropriate.

ARGUMENT

Appellant's Proposition of Law:

The General Assembly has constitutional authority to adjust local school funding retrospectively.

The Tenth District wrongly departed from this Court's retroactivity jurisprudence by concluding that the school districts had a constitutional right to avoid the statutory bar to their requests for funding under a repealed statute. Although this Court has used several different terms to describe the protections of the Retroactivity Clause, its core purpose protects legitimate expectations of finality by individual Ohioans. *See, e.g., State v. Cook*, 83 Ohio St. 3d at 404,

411 (1998) (“vested rights”); *Van Fossen v. Babcock & Wilcox Co.*, 36 Ohio St. 3d 100, paragraph three of the syllabus (1988) (“substantive rights”); *Gregory v. Flowers*, 32 Ohio St. 2d 48, paragraph three of the syllabus (1972) (“accrued substantive right[s]”). The common thread, the irreducible constitutional minimum for Retroactivity Clause protection, is “a reasonable expectation of finality.” *State ex rel. Matz v. Brown*, 37 Ohio St. 3d 279, 281 (1988). The school districts have no reasonable expectation of finality here for three reasons.

One. The districts fail the threshold question of whether school districts ever have rights to *funding* shielded by the Retroactivity Clause. Because school “districts and their property are creatures of the state which may be created and abolished at will by the Legislature,” *Ross*, 113 Ohio St. at 480, the Retroactivity Clause should not apply to district funding. Districts simply enjoy no expectation of finality as to their funding from the State.

Two. School districts’ funding levels change constantly, so any expectations are fleeting rather than a constitutional barrier to legislative action. That is true on both the macro and the micro levels.

At the macro level, change is frequent. Ohio has had no less than four different school funding models since fiscal year 2005. See *Ohio School Funding: Historic and Current Approaches* (Ohio House of Reps. 2012);¹ *Achievement Everywhere, Common Sense for Ohio’s Classrooms*.² Finality as to every dollar simply does not describe the landscape.

At the micro level, districts’ state funding almost always changes over the course of a school year because of events occurring after the October Count. In the years relevant to this

¹ Available at http://ealerts.ohioschoolboards.org/files/file/School%20funding%20Info%20Series%20Part%204-2012-5_2_12.pdf (last visited Oct. 10, 2014).

² Available at <http://www.governor.ohio.gov/PrioritiesandInitiatives/K12Education/AchievementEverywherePlan.aspx> (last visited Oct. 10, 2014).

suit, districts' state funding might have fluctuated if a family decided to take advantage of vouchers (R.C. 3310.08(C) (2005)), if a student secured an autism scholarship (Am Sub. H.B. 66 (126th G.A.) § 206.09.84), or if a student transferred from a district to a community school. R.C. 3314.08(C); *see also Community Schools in Ohio: Implementation Issues and Impact on Ohio's Educational System*, Vol. 1 at 32-33 (Legislative Office of Education Oversight, 2003) (“For example, if six students decide to leave the district and enroll in a community school after the start of the school year, the district will have approximately \$30,000 less in state funding.”).

The small and large scale fluctuations of school funding in Ohio make any claim of constitutionally protected “finality” untenable.

Three. The Tenth District dismissed points one and two (the first implicitly; the second explicitly) by relying on a single case. See App. Op. ¶¶ 39-50 (discussing *Kenton*, 174 Ohio St. 257). *Kenton* does not support the Tenth District’s judgment.

Critically, *Kenton* did not address the Retroactivity Clause at all; it dealt instead with the effects of a statutory repeal. That makes all the difference. When a statute is amended or repealed, a question often arises as to whether any benefits conferred by the old statute survived the repeal or amendment. The answer has long been found in a background canon of *statutory*—not *constitutional*—interpretation. Now codified at R.C. 1.58, that background principle preserves “privileges” under the old law unless the new law *explicitly* takes them away. In an analogous way, R.C. 1.48 sets a default rule that ambiguous laws should apply prospectively only. But neither provision sets a constitutional principle; the General Assembly can override them with an explicit command. *See, e.g., State v. White*, 132 Ohio St. 3d 344, 2012-Ohio-2583 ¶ 28 (statute “expressly indicate[d] the intention of the General Assembly” that it “apply retroactively”); *Woodward v. Eberly*, 167 Ohio St. 177, 179 (1958) (this Court has “consistently

held” that R.C. 1.58 and its predecessors operate as a savings clause for former statutes “in the absence of express provisions to the contrary”). Here—unlike *Kenton*—the General Assembly *explicitly* overrode the background principle. Indeed, the very *purpose* of the Budget Provisions was to change the privileges that school districts enjoyed under the old law. *Kenton* is of no help to the districts and the Tenth District committed error by treating a background *statutory* presumption as a *constitutional* command.

But even accepting the Tenth District’s error confusing statutory presumptions and constitutional limitations, *Kenton* does not support the judgment. For one thing, the background principle that *Kenton* applied covers only the “repeal” or “amendment” of a statute. See R.C. 1.58 (R.C. 1.20 and 1.21 at the time of *Kenton*). The Budget Provisions are neither; they blocked certain suits, but did not amend or repeal the funding formula. For another thing, *Kenton* involved “a statute which *guaranteed* a school district that in the event of a consolidation with another school district there would be a *certain minimum payment* to the consolidated district *for a period of three years.*” 174 Ohio St. at 262 (emphasis added). That is certainly not true of the statutes here. There was no guarantee of a particular amount: funds were to be distributed and the statute simply provided the guidepost for the distributions. The districts could expect no minimum payments. And, as explained above, the payments were subject to many variables. Without the kinds of guarantees present in *Kenton*, it offers no useful guidance to resolving this case.

* * * *

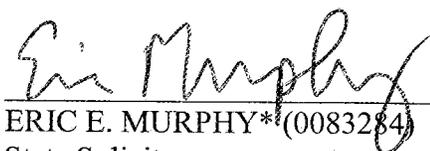
The Retroactivity Clause is no barrier to the General Assembly retrospectively adjusting school funding formulas. Perhaps that is why the Tenth District relied on a case that does not mention the Clause. The Tenth District's error should be corrected.

CONCLUSION

For these reasons, the Court should accept jurisdiction and reverse the decision below.

Respectfully submitted,

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State Board of Education, and Dr. Richard

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum in Support of Jurisdiction was served by regular U.S. mail this 10th day of October, 2014, upon the following counsel:

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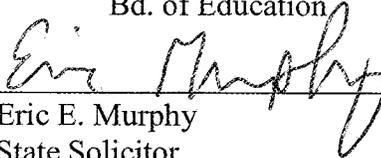
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Bd. of Education


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APPENDIX

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Toledo City School District :
Board of Education et al., :

Plaintiffs-Appellees/ :
[Cross-Appellants], :

v. :

State Board of Education et al., :

Defendants-Appellants/ :
[Cross-Appellees]. :

No. 14AP-93
(C.P.C. No. 11CV-14120)

(REGULAR CALENDAR)

Dayton City School District :
Board of Education et al., :

Plaintiffs-Appellees/ :
[Cross-Appellants], :

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State Board of Education et al., :

Defendants-Appellants/ :
[Cross-Appellees]. :

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(C.P.C. No. 11CV-11809)

(REGULAR CALENDAR)

Cleveland Metropolitan School District :
Board of Education et al., :

Plaintiffs-Appellees/ :
[Cross-Appellants], :

v. :

State Board of Education et al., :

Defendants-Appellants/ :
[Cross-Appellees]. :

No. 14AP-95
(C.P.C. No. 11CV-13689)

(REGULAR CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on August 28, 2014, having overruled appellants' sole assignment of error and having overruled cross-appellants' sole assignment of error, it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed. Costs shall be assessed against appellants.

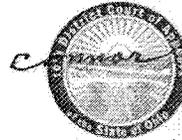
CONNOR, TYACK & BROWN, JJ.

/S/ JUDGE

Tenth District Court of Appeals

Date: 08-28-2014
Case Title: TOLEDO CITY SCHOOL DISTRICT BOARD EDUCATION -VS- OHIO STATE BOARD EDUCATION
Case Number: 14AP000093
Type: JEJ - JUDGMENT ENTRY

So Ordered



/s/ Judge John A. Connor

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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(C.P.C. No. 11CV-11809)

(REGULAR CALENDAR)

Cleveland Metropolitan School District :
Board of Education et al., :

Plaintiffs-Appellees/ :
[Cross-Appellants], :

v. :

State Board of Education et al., :

Defendants-Appellants/ :
[Cross-Appellees]. :

No. 14AP-95
(C.P.C. No. 11CV-13689)

(REGULAR CALENDAR)

D E C I S I O N

Rendered on

Bricker & Eckler LLP, Nicholas A. Pittner, James J. Hughes, III, Susan B. Greenberger and Jennifer A. Flint; Marshall & Melhorn, LLC, Keith Wilkowski and Amy M. Natyshak, for appellees [cross-appellants] Toledo City School District Board of Education.

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Michael DeWine, Attorney General, and Todd R. Marti, for appellants [cross-appellees].

APPEALS from the Franklin County Court of Common Pleas

CONNOR, J.

{¶ 1} In this consolidated appeal, defendants-appellants, State Board of Education of Ohio, State Superintendent of Public Instruction, and Ohio Department of Education (collectively "ODE"), appeal from a judgment entry of the Franklin County Court of Common Pleas in favor of plaintiffs-appellees, denying in part ODE's motion for judgment on the pleadings as to the claims asserted by Toledo City School District Board of Education, Dayton City School District Board of Education, and Cleveland Metropolitan School District Board of Education ("Districts"). Plaintiffs-appellees/cross-appellants, Bonnie Jo Herman, Christine Varwig, Keith Crosby, Ann Marie Snyder, Dessie M. and Christopher Saunders, Edith C. Britt and Angela Barnett (collectively "Individual Plaintiffs"), have filed a cross-appeal from the judgment entry granting in part ODE's motion for judgment on the pleadings as to the claims asserted by Individual Plaintiffs. For the reasons that follow, we affirm the judgment of the trial court.

A. Facts and Procedural History

{¶ 2} The three cases involved in this appeal arise out of a school funding dispute between the parties that began in fiscal year ("FY") 2005.¹ The statutory school funding system in place from FY 2005 through FY 2007, required ODE to provide public school districts with funding from the School Foundation based upon the Average Daily Membership ("ADM"). Simply stated, ADM is the number of full-time equivalent ("FTE") students receiving educational services from the school district plus the number of students within the district who chose to receive educational services from other sources, including community schools. In the first full week of October in each fiscal year, the school districts determine their ADM by making a single count of every student eligible to receive educational services in the district ("October Count"). R.C. 3317.03(A) requires the superintendent for each public school district to certify the October Count. Public school districts in this state receive School Foundation funding based exclusively on a formula utilizing the ADM ("Formula ADM").

{¶ 3} In contrast to the single-count employed by the public school districts in calculating ADM, community schools count and report their community school average daily membership ("CSADM") on a monthly basis. The CSADM is the number of students attending a particular community school each month, as reported by the community school. The community school receives funding at a predetermined rate per student for each student attending the school. ODE deducts community school funding from the public school funding in the district in which the community school is located.

{¶ 4} In *Cincinnati City School Dist. Bd. of Edn. v. State Bd. of Edn. of Ohio*, 176 Ohio App.3d 157, 2008-Ohio-1434 (1st Dist.),² the First District Court of Appeals explained the difference between statutory funding for public schools and community schools as follows:

There is an important distinction between the "snapshot" concept that public schools use to count pupils at one time early in the year and the monthly CSADM report. For school districts, once the Formula ADM has been certified, school-district funding is neither increased nor decreased by the enrollment or withdrawal of pupils after the October count. (The sole exception is the enrollment of a district student in a

¹ Under R.C. 9.34, a school district fiscal year begins on July 1 and ends on June 30 of the following year.

² We shall refer to this case as *Cincinnati* or *Cincinnati decision*.

community school after the October count, when such a student has not been included in the Formula ADM.) In contrast, funding for community schools is adjusted monthly based on the number of students reported in the CSADM report. Thus, funding may increase or decrease with the enrollment or withdrawal of a pupil in a community school. So, unlike public schools, community schools are paid for students upon enrollment, but public schools must absorb new students without commensurate additional funding.

Id. at ¶ 7, citing R.C. 3317.03(F)(3).

{¶ 5} ODE acknowledges that midway through FY 2005, it discovered that many districts had reported higher numbers of charter school students in their ADM than the charter schools had reported in the CSADM. ODE assumed the CSADM was a more accurate estimate of the number of students attending community schools in a particular district. Accordingly, ODE recalculated the districts' Formula ADM by substituting the CSADM's figures for those reported by the districts in their October Count. As a result of the recalculation, some districts realized a lower ADM for FY 2005 and a corresponding reduction in School Foundation funding.

{¶ 6} Because the public school districts had already received some FY 2005 funding based on the higher ADM, ODE determined that those districts had been overpaid. ODE then decided to recoup the claimed overpayment by reducing future payments to the affected districts. As a consequence of its recalculation of the districts' FY 2005 ADM, ODE reduced Dayton's FY 2005 ADM by approximately 688 FTE, Cleveland's by 575, and Toledo's by 561. After reducing the districts' FY 2005 ADM, ODE determined that Dayton's overpayment was approximately \$4,792,304.80, Cleveland's overpayment was approximately \$1,857,311, and Toledo's overpayment was approximately \$3,576,948. ODE began recouping these funds from Toledo in May 2006 and from Dayton and Cleveland in August 2006. The Districts allege that ODE's action was contrary to law.

{¶ 7} Additionally, the Districts contend that ODE is required to make an upward adjustment to a public school district's Formula ADM to account for community school students who are entitled to attend school in the public school district but who were not included in the District's ADM certified in October, regardless of whether such students were enrolled in a community school when the Districts made the October Count.

According to the Districts, ODE failed to adjust the Districts' Formula ADM in FY 2005 to account for these "add-in students."

{¶ 8} The Districts also allege that they are entitled to a number of "guarantee" funds in the event that an unanticipated loss of funding occurs due to certain specified circumstances beyond the Districts' control. The Districts now claim that they were entitled to receive additional School Foundation funding pursuant to one or more of the guarantee provisions, but that ODE did not provide such additional funding in FY 2005 through FY 2007.

{¶ 9} In 2008, the Cincinnati School District Board of Education ("CSD") filed an action against ODE in Hamilton County Court of Common Pleas disputing ODE's method of calculating funding to public school districts and seeking the return of the sums wrongfully recouped or withheld by ODE in FY 2005 through FY 2007. *See Cincinnati City School Dist. Bd. of Edn. v. State Bd. of Edn. of Ohio*, Hamilton C.P. No. A0603908 (Jan. 5, 2007).³ CSD alleged that the controlling school funding statutes required ODE to use a public school districts' October Count as the sole basis for determining Formula ADM, and that ODE violated law by employing the CSADM in recalculating the districts' FY 2005 ADM. The trial court granted relief to CSD, and ODE appealed to the Hamilton County Court of Appeals.

{¶ 10} In *Cincinnati*, the question for the court of appeals was whether the trial court erred when it found that ODE utilized the wrong data in calculating the number of students attending community schools in CSD during FY 2005 and in subsequent years, resulting in reduced funding for CSD during FY 2006 and FY 2007. *Id.* at ¶ 1. The court of appeals held that the ADM certified by the CSD Superintendent as a result of the October Count was the only method by which ODE could calculate the amount of general public education funding to which a district was entitled, and that Ohio law did not permit ODE to adjust ADM in order to reflect the numbers in the monthly CSADM. The court further determined that ODE could employ the CSADM only when making the appropriate deductions from public school funding and when making payment to community schools. *Id.*, citing R.C. 3317.022(A) and 3317.03(A).

³ Appellee Dayton City School District was also a party to that litigation.

{¶ 11} After the Supreme Court of Ohio agreed to review the case in *Cincinnati School Dist. Bd. of Edn. v. State Bd. of Edn.*, 119 Ohio St.3d 1498, 2008-Ohio-5500, the parties settled their dispute and dismissed the appeal. *See Cincinnati School Dist. Bd. of Edn. v. State Bd. of Edn.*, 122 Ohio St.3d 557, 2009-Ohio-3628, ¶ 3. According to each of the complaints in this consolidated action, ODE paid CSD a total of \$5.9 million in settlement of the CSD litigation, and it paid Dayton City School District more than \$7.1 million in partial settlement of their claims in that case.

{¶ 12} In 2009, the General Assembly responded to the *Cincinnati* decision by enacting the following law as part of the biennial budget:

Except as expressly required under a court judgment not subject to further appeals, or a settlement agreement with a school district executed on or before June 1, 2009, in the case of a school district for which the formula ADM for fiscal year 2005, as reported for that fiscal year under division (A) of section 3317.03 of the Revised Code, was reduced based on enrollment reports for community schools, made under section 3314.08 of the Revised Code, regarding students entitled to attend school in the district, which reduction of formula ADM resulted in a reduction of foundation funding or transitional aid funding for fiscal year 2005, 2006, or 2007, no school district, except a district named in the court's judgment or the settlement agreement, shall have a legal claim for reimbursement of the amount of such reduction in foundation funding or transitional aid funding, and the state shall not have liability for reimbursement of the amount of such reduction in foundation funding or transitional aid funding.

Am.Sub.H.B. No. 1, Section 265.60.70.⁴

{¶ 13} In 2011, the Districts brought suit against ODE seeking a writ of mandamus ordering ODE to calculate and pay the Districts' School Foundation funds for FY 2005, FY 2006, and FY 2007 in accordance with law.⁵ In the alternative, the Districts sought a declaration that Ohio law requires ODE to calculate and pay the Districts' School Foundation payments for FY 2005, FY 2006, and FY 2007 on the basis of FY 2005 ADM

⁴ The General Assembly enacted identical language in the State Budget Provisions for 2011-2012 and 2013-2014. *See* Am.Sub.H.B. No. 153, Section 267.50.60; Am.Sub.H.B. No. 59, Section 263.410.

⁵ Each of the three Districts separately filed a petition in the common pleas court for their respective county. Each of the three cases were subsequently transferred to the Franklin County Court of Common Pleas and then consolidated into case No. 11 CV-11809 by order dated January 31, 2012.

as certified by the Districts' superintendents, and to calculate and pay for add-in students as required by law. The Districts further seek equitable restitution of the funds wrongfully recouped or withheld by ODE. In total, the complaint estimates the loss of funding to the Districts in FY 2006 and FY 2007 at \$23,630,000, not including losses due to the add-in claims.

{¶ 14} On April 27, 2012, ODE filed a motion for judgment on the pleadings pursuant to Civ.R. 12(C), arguing that the relevant provisions of the 2009 Budget Bill bar any claim for relief the Districts may have had against ODE. ODE set forth the additional grounds for judgment in its favor as to the claims of Individual Plaintiffs, arguing that they did not have standing to assert claims against ODE. On January 16, 2014, the trial court issued a judgment entry granting ODE's motion, in part, as to the claims of the Individual Plaintiffs. The trial court held that the Individual Plaintiffs did not have standing to assert a claim against ODE. However, the trial court denied ODE's motion as it relates to the 2009 Budget Bill. The trial court held that the relevant provision of the 2009 Budget Bill is void and unenforceable inasmuch as it retroactively abolished vested rights of the Districts in violation of the Ohio Constitution, Article II, Section 28.

{¶ 15} Although the trial court's decision did not dispose of all of the claims of the parties, the trial court expressly certified that there was "no just cause for delay." Accordingly, ODE sought an immediate review of the trial court's judgment by filing a notice of appeal to this court on February 7, 2014. The Individual Plaintiffs filed a cross-appeal.⁶

B. Assignments of Error on Appeal

{¶ 16} Defendants-appellants assign the following as error:

The Trial Court erred in holding that Sub. H. B. 1 (128th G.A) § 265.60.70; Am. Sub. H. B. 153 (129th G.A.) §267.50.60; and Am. Sub. H.B. No. 59 (130th G.A.)§263.410 violate Art. II, § 28 of Ohio's Constitution. Doc. No. 141. pp. 16-23.

{¶ 17} For their cross-appeal, cross-appellants assign the following as error:

The trial court erred in dismissing the Individual Plaintiffs, on a motion for judgment on the pleadings, for lack of standing

⁶ On February 19, 2014, we sua sponte consolidated case Nos. 14AP-93, 14AP-94 and 14AP-95.

as the Complaint(s) allege that the Individual Plaintiffs suffered injuries resulting from ODE's unlawful actions.

C. Standard of Review

{¶ 18} A party may file a motion for judgment on the pleadings under Civ.R. 12(C), "[a]fter the pleadings are closed but within such time as not to delay the trial." *Franks v. Ohio Dept. of Rehab. & Corr.*, 95 Ohio App.3d 114, 2011-Ohio-2048, ¶ 5. In ruling on a motion for judgment on the pleadings, the court is permitted to consider both the complaint and answer. *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St.3d 565, 570 (1996). When presented with such a motion, a trial court must construe all the material allegations of the complaint as true, and must draw all reasonable inferences in favor of the nonmoving party. *Id.*, citing *Peterson v. Teodosio*, 34 Ohio St.2d 161, 165 (1973); *Whaley v. Franklin Cty. Bd. of Commrs.*, 92 Ohio St.3d 574, 581 (2001). The court will grant the motion if it finds, beyond doubt, that the plaintiff can prove no set of facts in support of the claim(s) that would entitle him or her to relief. *Pontious* at 570. A judgment on the pleadings dismissing an action is subject to a de novo standard of review in the court of appeals. *RotoSolutions, Inc. v. Crane Plastics Siding, L.L.C.*, 10th Dist. No. 13AP-1, 2013-Ohio-4343, ¶ 13, citing *Franks* at ¶ 5.

{¶ 19} With respect to the appeal, we note that an appellate court reviewing a declaratory judgment matter should apply a de novo standard of review in regard to the trial court's determination of legal issues in the case. *Nelson v. Mohr*, 10th Dist. No. 13AP-130, 2013-Ohio-4506, ¶ 9, citing *Arnott v. Arnott*, 132 Ohio St.3d 401, 2012-Ohio-3208, ¶ 1. An appellate court must also apply the de novo standard of review when examining the constitutionality of a statute. *Crigger v. Crigger*, 10th Dist. No. 04AP-288, 2005-Ohio-519, citing *Liposchak v. Admr., Bur. of Workers' Comp.*, 138 Ohio App.3d 368, 385 (10th Dist.2000), citing *Ohio Historical Soc. v. State Emp. Relations Bd.*, 66 Ohio St.3d 466, 471 (1993).

{¶ 20} As for the cross-appeal, we note that "[s]tanding is a threshold test that, if satisfied, permits the court to go on to decide whether the plaintiff has a good cause of action, and whether the relief sought can or should be granted to plaintiff." *Tiemann v. Univ. of Cincinnati*, 127 Ohio App.3d 312, 325 (10th Dist.1998) (abrogated in part on other grounds). Lack of standing challenges the capacity of a party to bring an action, not

the subject-matter jurisdiction of the court. *State ex rel. Ralkers, Inc. v. Liquor Control Comm.*, 10th Dist. No. 04AP-779, 2004-Ohio-6606, ¶ 35. When an appellate court is presented with a standing issue, it is generally a question of law, and we apply a de novo standard of review. *See Cleveland Elec. Illuminating Co. v. Pub. Util. Comm.*, 76 Ohio St.3d 521, 523 (1996).

D. Legal Analysis

1. Final Appealable Order

{¶ 21} Ordinarily a decision denying a motion for judgment on the pleadings is not a final appealable order. *Ohio Bur. of Workers' Comp. v. Shaffer*, 10th Dist. No. 13AP-67, 2013-Ohio-4570, ¶ 10. Thus, the first question for this court is whether the trial court's decision denying ODE's motion for judgment on the pleadings constitutes a final appealable order. In this regard, "[a] trial court's order is final and appealable only if it meets the requirements of R.C. 2505.02 and, if applicable, Civ.R. 54(B)." *Kopp v. Associated Estates Realty Corp.*, 10th Dist. No. 08AP-819, 2009-Ohio-2595, ¶ 6; *Denham v. New Carlisle*, 86 Ohio St.3d 594, 596 (1999), citing *Chef Italiano Corp. v. Kent State Univ.*, 44 Ohio St.3d 86, 87 (1989). Pursuant to R.C. 2505.02(B)(1) "[a]n order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is * * * [a]n order that affects a substantial right in an action that in effect determines the action and prevents a judgment." A "'[s]ubstantial right' means a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect." R.C. 2505.02(A)(1). In denying ODE's motion for judgment on the pleadings, the trial court ruled that the retroactive application of Am.Sub.H.B. No. 1, Section 265.60.70, violates Ohio Constitution, Article II, Section 28. Accordingly, even though the trial court denied ODE's motion for judgment on the pleadings, the trial court's ruling affects a substantial right.

{¶ 22} The requirements of Civ.R. 54(B), are as follows: "[w]hen more than one claim for relief is presented in an action * * * or when multiple parties are involved, the court may enter final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay." Although the trial court's judgment entry did not dispose of the Districts' claims for monetary and equitable relief, Civ.R. 54(B) permitted the trial court to enter a final

judgment "upon an express determination that there is no just reason for delay." As noted above, the trial court expressly made that determination.

{¶ 23} For the foregoing reasons, we find that the judgment of the trial court is a final appealable order and that we have jurisdiction of this appeal.

2. Retroactive Application of 2009 Budget Bill

{¶ 24} In ODE's sole assignment of error, ODE contends that the relevant provisions of the 2009 Budget Bill legislatively nullify the *Cincinnati* decision and that the Districts are legally barred from asserting any legal claims against the State for reimbursement of School Foundation funds for FY 2005 through FY 2007. The Districts argue that the relevant provisions of the 2009 Budget Bill are void and unenforceable because they violate the constitutional prohibition against retroactive laws.

{¶ 25} Ohio Constitution, Article II, Section 28, states that "[t]he General Assembly shall have no power to pass retroactive laws." The trial court, relying on the first district decision in *Cincinnati*, determined that the Districts had a vested right to School Foundation funding pursuant to the Formula ADM as determined by the October Count, and that the provision in the 2009 Budget Bill that would abrogate the Districts' right to such funding, violated the constitutional prohibition against retroactive laws.

{¶ 26} In making the determination whether retroactive application of a statute violates the Retroactivity Clause of State Constitution, a court is required to engage in a two-step analysis. *State v. White*, 132 Ohio St.3d 344, 2012-Ohio-2583, ¶ 27, *reconsideration denied*, 132 Ohio St.3d 1535, 2012-Ohio-4381, *cert. denied*, *White v. Ohio*, 133 S.Ct. 1495. "First, the court must determine whether the General Assembly intended that the statute apply retroactively." *Id.* Second, "[i]f the General Assembly has expressly indicated its intention that the statute apply retroactively, the court must determine whether the statute is remedial, in which case retroactive application is permitted, or substantive, in which case retroactive application is forbidden." *Id.* There is no question in this case that the General Assembly intended retroactive application of the relevant provisions of the 2009 Budget Bill inasmuch as the statute expressly applies to school funding for FY 2005 through FY 2007. Thus, the question for this court is whether the nature of the statute is remedial or substantive.

{¶ 27} A statute is "substantive," for purposes of retroactivity analysis, when it impairs or takes away vested rights; affects an accrued substantive right; imposes new or additional burdens, duties, obligations, or liabilities as to a past transaction; creates a new right out of an act that gave no right and imposed no obligation when it occurred; creates a new right; or, gives rise to or takes away the right to sue or defend actions at law. *Id.* at ¶ 35. In contrast, "[r]emedial laws are those that substitute a new or different remedy for the enforcement of an accrued right, as compared to the right itself, * * * and generally come in the form of 'rules of practice, courses of procedure, or methods of review.'" *State ex rel. Kilbane v. Indus. Comm.*, 91 Ohio St.3d 258, 260 (2001). A purely remedial law "does not violate Section 28, Article II of the Ohio Constitution, even when it is applied retroactively." *Beilat v. Beilat*, 87 Ohio St.3d 350, 2000-Ohio-451.

a. Vested right analysis

{¶ 28} A vested right is "a completed, consummated right for present or future enjoyment; not contingent; unconditional; absolute." *Black's Law Dictionary* 1557 (9th Ed.2011). The Supreme Court of Ohio provided further insight into what it means for someone to have a "vested" right in *State ex rel. Jordan v. Indus. Comm.*, 120 Ohio St.3d 412, 2008-Ohio-6137, ¶ 9:

A "vested right" can "be created by common law or statute and is generally understood to be the power to lawfully do certain actions or possess certain things; in essence, it is a property right." *Washington Cty. Taxpayers Assn. v. Peppel* (1992), 78 Ohio App.3d 146, 155, 604 N.E.2d 181. It has been described as a right "which it is proper for the state to recognize and protect, and which an individual cannot be deprived of arbitrarily without injustice." *State v. Muqdady* (2000), 110 Ohio Misc.2d 51, 55, 744 N.E.2d 278. A vested right is one that "'so completely and definitely belongs to a person that it cannot be impaired or taken away without the person's consent.'" *Harden v. Ohio Atty. Gen.*, 101 Ohio St.3d 137, 2004-Ohio-382, 802 N.E.2d 1112, ¶ 9, quoting *Black's Law Dictionary* (7th Ed.1999) 1324. A right also cannot be characterized as vested "unless it constitutes more than a 'mere expectation or interest based upon an anticipated continuance of existing laws.'" *Roberts v. Treasurer* (2001), 147 Ohio App.3d 403, 411, 770 N.E.2d 1085, quoting *In re Emery* (1978), 59 Ohio App.2d 7, 11, 13 O.O.3d 44, 391 N.E.2d 746.

{¶ 29} ODE contends that the 1938 opinion of the court in *State ex rel. Outcalt v. Guckenberger*, 134 Ohio St. 457 (1938) requires us to find that the Districts' rights to School Foundation funding at the statutory rate is contingent or conditional in nature. We disagree.

{¶ 30} In *Outcalt*, the General Assembly had passed the Whittemore Acts under which a delinquent taxpayer, by paying all current taxes and agreeing to discharge the delinquent taxes in installments, would be relieved of the payment of past penalties and interest. The Hamilton County Prosecutor brought an action against the County Auditor, seeking a court order compelling the County Auditor to charge and collect penalties and interest under the prior law. The Supreme Court of Ohio held that the provisions of the Acts, which authorize the remission of the penalties, interest and other charges on unpaid delinquent taxes, do not violate the retroactivity clause. *Id.* at 461. ODE argues that, employing the logic of the *Outcalt* case, the retroactivity clause does not prevent the General Assembly from enacting legislation which diverts unpaid School Foundation funds.

{¶ 31} However, as the Districts have pointed out, the court in *Outcalt* also held that penalties previously paid in discharging tax obligations cannot be refunded through legislative enactment because, after payment into the public treasury, they become a part of the taxes collected and distributed to the subdivisions of the state. *Id.* at 459. Here, the School Foundation funds at issue are part of ODE's general revenue fund; a fund comprised of property taxes previously levied and collected along with lottery commission profits. All that remains for ODE to do is to distribute the funds to the Districts pursuant to the statutory formula. In short, School Foundation funds awaiting distribution are not the legal equivalent of uncollected taxes, penalties and interest. Consequently, to the extent that the *Outcalt* decision applies to the facts of this case, it arguably supports the position taken by the Districts.

{¶ 32} ODE also relies on the 1933 opinion of the Supreme Court of Ohio in *Cleveland v. Zangerle*, 127 Ohio St. 91 (1933), in support of its contention that the Districts' right to School Foundation funds is not a vested right. In *Zangerle*, the city of Cleveland sought an order enjoining Cuyahoga County from distributing Intangible Tax Act revenues to public libraries and township park districts pursuant to newly enacted Am.Sub.S.B. No. 239. The General Assembly had enacted the Intangible Tax Law in

January 1, 1933, but the Supreme Court of Ohio ruled that certain "distributive features" of the Act were unconstitutional. *Id* at 92, citing *Friedlander, County Treas., v. Gorman Pros. Atty.*, 126 Ohio St. 163 (1933). The General Assembly responded by enacting new legislation requiring the distribution of Intangible Tax Act revenue to libraries and parks. After much of the Intangible Tax revenue had been collected, but before any of the revenue was distributed, the city of Cleveland sought a court order compelling Cuyahoga County to distribute the revenue according to prior law. The city of Cleveland alleged that Am.Sub.S.B. No. 239 violated Ohio Constitution, Article II, Section 28. The Supreme Court of Ohio concluded that the enactment was not unconstitutionally retroactive for the following reason:

No governmental subdivision of the state has any vested right, at least until distribution is made, in any taxes levied and in the process of collection. Until such distribution is made, the Legislature of Ohio is fully competent to divert the proceeds among those local subdivisions as it deems best to meet the emergencies which it finds to exist. So far as any political subdivision of the state is concerned, there can be no vested right, although a case might arise where private interests might intervene and be so affected as to give rise to a vested interest. The provisions of Amended Senate Bill No. 239, so far as they relate to the future distribution of the proceeds of the taxes, are not retroactive, but prospective, in character, and it is not violative of section 28 of article II of the Constitution; nor can it be said that the city had any contractual obligation with the state which was impaired by the passage of Amended Senate Bill No. 239.

(Emphasis added.) *Id.* at 92-93.

{¶ 33} ODE seizes upon the highlighted language in the *Zangerle* opinion in arguing that the Districts' right to School Foundation funding at the level dictated by Formula ADM never "vested," because ODE chose to distribute School Foundation funds pursuant to a different formula in FY 2005 through FY 2007. The Districts argue that their right to School Foundation funding at the level dictated by the General Assembly vested when ODE paid some of the Districts' FY 2005 School Foundation funding pursuant to the Formula ADM, before making the decision to recoup the alleged overpayment.

{¶ 34} ODE acknowledges that it initially paid a portion of the Districts' FY 2005 School Foundation funding pursuant to the Formula ADM as determined by the October Count. There is no question that ODE subsequently determined that there had been an overpayment to the Districts and that ODE recouped those funds out of future payments beginning in FY 2006. The *Cincinnati* case holds that such recoupment is unlawful.

{¶ 35} The Districts argue that under the rule of law in *Zangerle*, their right to the alleged overpayment of School Foundation funds vested when the funds were initially paid. The Districts argue that the 2009 Budget Bill, which absolves the State of Ohio from any liability to the Districts for the sums unlawfully recouped by ODE, effectively abolished a vested right. According to the Districts, it follows that the 2009 legislation violates the retroactivity clause of the Ohio Constitution. We disagree.

{¶ 36} The problem with the Districts' argument is that a statutory right cannot be characterized as vested "unless it constitutes more than a 'mere expectation or interest based upon an anticipated continuance of existing laws.'" *Roberts v. Treasurer*, 147 Ohio App.3d 403, 411 (2001), quoting *In re Emery*, 59 Ohio App.2d 7, 11 (1st Dist.1978). Indeed, the Supreme Court of Ohio has stated "that there is no vested right in an existing statute that will preclude the General Assembly from changing it." *State ex rel. Kenton City School Dist. v. State Bd. of Edn.*, 174 Ohio St. 257 (1963). In our view, the fact that ODE had the statutory right to control all distributions of School Foundation payments to the Districts in a given fiscal year, including the authority to recoup overpayments out of future distributions, requires us to conclude that the Districts' statutory right to School Foundation funds is conditional or contingent rather than absolute or vested.

{¶ 37} Moreover, even if we were to hold that the 2009 Budget Bill is unconstitutionally retroactive as it pertains to the funds that were paid to the Districts but unlawfully recouped, the Districts also seek to recover School Foundation funds that remained unpaid by ODE in FY 2005 through FY 2007. As noted above, the Districts contend that the recalculation of their ADM in FY 2005 resulted in an additional loss of School Foundation funds in the remainder of FY 2005 and over the next two fiscal years.

{¶ 38} In short, we cannot agree with the Districts' contention that the 2009 Budget Bill is unconstitutionally retroactive because it impairs or takes away a vested right.

b. Substantive Right analysis

{¶ 39} Even though we agree with ODE that the Districts' right to the disputed School Foundation funds was not a vested right, a statute may still be "substantive" in nature, for purposes of a constitutional retroactivity, if it affects an accrued substantive right. *Cook* at ¶ 35. Indeed, the Districts have cited to the decision of the Supreme Court of Ohio in *Kenton*, in support of their contention that the right to School Foundation funding at the statutory level is a substantive right that accrued under existing law. The Districts argue that the 2009 Budget Bill is unconstitutionally retroactive because it impairs an accrued substantive right. We agree.

{¶ 40} The *Kenton* case addressed a public school district's rights under the version of R.C. 3317.02, in effect in 1960, which guaranteed a school district certain minimum payments for three years in the event of a consolidation with another school district. In 1960, the Kenton City School District qualified for such guarantees by virtue of its consolidation with another district. However, in 1961, the General Assembly amended the statute in a manner that disqualified Kenton from receiving future guarantees.

{¶ 41} In *Kenton*, the court reiterated the general rule: "[t]hat there is no vested right in an existing statute which will preclude the General Assembly from changing it." *Id.* at 260. However, having made that statement, the court went on to determine the true nature of the district's "right" to guaranteed funding under the 1960 law. In so doing, the court stated:

To be guaranteed a minimum amount of money would be a substantive right, whether the guarantee is to a political subdivision or to an individual.

Here we have a statute which guaranteed a school district that in the event of a consolidation with another school district there would be a certain minimum payment to the consolidated district for a period of three years. Inasmuch as the statute was in force at the time of the consolidation in the present case, a right accrued to the consolidated district which, if the statute had not been amended, could have beyond question been enforced by a writ of mandamus. There was nothing discretionary about such provision.

Id. at 261-62.

{¶ 42} Applying the logic of the *Kenton* case herein, we find that the Districts had a substantive right to School Foundation funds that accrued under the statutory law in

place for FY 2005 through FY 2007. The Districts seek to enforce their accrued statutory right in this litigation. The *Cincinnati* decision holds that ODE does not have discretion to deviate from the Formula ADM in determining public school funding and that the right of a public school district to such funding is enforceable by a writ of mandamus. Accordingly, to the extent that the 2009 Budget Bill nullifies the Districts' statutory right to School Foundation funding in FY 2005 through FY 2007, the Budget Bill affects a substantive right belonging to the Districts. As such, the relevant portion of the 2009 Budget Bill is unconstitutionally retroactive in violation of the Ohio Constitution, Article II, Section 28.

{¶ 43} ODE attempts to distinguish *Kenton* on the basis that it addressed the amendment of a statute whereas the General Assembly, in this case, enacted separate legislation without amending or repealing prior law. In terms of the retroactivity clause of the Ohio Constitution, this is a distinction without a difference.

{¶ 44} In the context of statutory rights, the retroactivity analysis under R.C. 1.58(A)(2) mirrors the constitutional retroactivity analysis under Ohio Constitution, Article II, Section 28. *Zempter v. Ohio State Grange Mut. Ins. Co.*, 4th Dist. No. 95-CA-2326 (Sept. 6, 1995). Indeed, R.C. 1.58(A)(2) prohibits the General Assembly from amending a statute in such a way as to affect substantive rights accrued under the prior version of the law. *Id.*⁷ Although R.C. 1.58(A)(2) does not apply in this case because the 2009 Budget Bill did not expressly amend the relevant school funding laws, the 2009 Budget Bill is unconstitutionally retroactive, nonetheless, because it affects a substantive right of the Districts that accrued under statutory law. As noted above, the *Kenton* case is instructive because it establishes that a public school district's right to School Foundation funding under existing law is a substantive right. Because the statutory right is substantive in nature, the retroactivity clause in the Ohio Constitution, Article II, Section 28 prohibits the General Assembly from enacting a law that reaches back in time to take away that right.

⁷R.C. 1.58 provides in relevant part as follows:

"(A) The reenactment, amendment, or repeal of a statute does not, except as provided in division (B) of this section: (1) Affect the prior operation of the statute or any prior action taken thereunder; (2) Affect any validation, cure, right, privilege, obligation, or liability previously acquired, accrued, accorded, or incurred thereunder * * *"

{¶ 45} ODE next contends that the Retroactivity Clause of the Ohio Constitution does not apply in this case because the Districts are political subdivisions of this State and, consequently, the General Assembly is empowered to retroactively waive or impair their rights without violating the Ohio Constitution, Article II, Section 28. In making this argument, ODE relies, in large part, on a decision of the Supreme Court of Missouri in *Savannah R-III School Dist. v. Public School Retirement Sys. of Missouri*, 950 S.W.2d 854 (Mo.1997).

{¶ 46} In *Savannah R-III*, a group of retired school teachers sought to block application of an amendment to the statute governing contributions to state teachers' retirement system. *Id.* at 857. The amended law nullified a prior decision in a class action brought by school districts against the retirement system that required the retirement system to refund certain past contributions. *Id.* In ruling that the amendment was constitutional, the Supreme Court of Missouri reasoned that Missouri's constitutional ban on retroactive laws was intended to protect citizens not political subdivisions, and that the Missouri legislature may pass laws waiving the rights of the state or its political subdivisions. *Id.* at 858, citing Missouri Constitution, Article I, Section 13. Therein, the court stated:

Because the retrospective law prohibition was intended to protect citizens and not the state, the legislature may constitutionally pass retrospective laws that waive the rights of the state. All of the representative plaintiffs are school districts. "School districts are bodies corporate, instrumentalities of the state established by statute to facilitate effectual discharge of the General Assembly's constitutional mandate to establish and maintain free public schools * * *" As "creatures of the legislature," the rights and responsibilities of school districts are created and governed by the legislature. *Id.* Hence, the legislature may waive or impair the vested rights of school districts without violating the retrospective law prohibition. The analysis of this constitutional claim would be different had any one of the named parties been a teacher.

(Citations omitted.)(Emphasis added.)

{¶ 47} ODE argues that we should adopt the reasoning of the Supreme Court of Missouri in *Savannah R-III* in ruling on the retroactivity issue in this case. However, the pertinent case law in Ohio, including *Zangerle* and *Outcalt*, holds that the retroactivity

clause prohibits the General Assembly from enacting laws that retroactively impair vested rights of political subdivisions. *See Hamilton Cty. Commrs. v. Rosche*, 50 Ohio St. 103 (1893); *State ex rel. Crotty v. Zangerle, Aud.*, 133 Ohio St. 532 (1938). Thus, Ohio law is directly at odds with Missouri law on this issue. Similarly, as the Supreme Court stated in *Kenton*, a public school district's guaranteed statutory right to School Foundation funding is an accrued substantive right "whether the guarantee is to political subdivision or an individual." *Id.* at 262. Thus, to the extent that *Savannah R-III* exemplifies Missouri's approach to the issue of constitutional retroactivity, Ohio has not adopted that approach in reviewing similar issues under Ohio Constitution, Article II, Section 28.⁸

{¶ 48} Finally, we disagree with ODE's contention that a victory by the Districts in this litigation comes at the expense of Ohio Constitution, Article VI, Section 2, which provides that "the General Assembly shall make such provisions * * * [to] secure a thorough and efficient system of common schools." Contrary to ODE's assertion, the question whether it is more thorough and efficient to use the CSADM in determining public school funding is not a question raised in this litigation.⁹ Moreover, the *Cincinnati* decision represents Ohio law on the statutory school funding issue in this case.

{¶ 49} In the *Cincinnati* decision, the first district held that ODE's conduct in using the CSADM to adjust Formula ADM violated the only methodology authorized by the General Assembly for determining School Foundation funding for public school districts in Ohio. *Id.* at ¶ 23-29. The clear purpose of the 2009 Budget Bill is to legislatively nullify the Districts cause of action against the State for reimbursement of School Foundation funds either wrongfully recouped or withheld by ODE in FY 2005 through FY 2007. Because the legislation purports to take away the Districts accrued substantive right to School Foundation payments in FY 2005 through FY 2007, the relevant provision in the 2009 Budget Bill violates Ohio Constitution, Article II, Section 28.

⁸ We note that at least one appellate district in Missouri has declined to extend *Savannah R-III* to a public school district's claim against the State Legal Expense Fund. *P.L.S. ex rel. Shelton v. Koster*, 360 S.W.3d 82005, 813, (Mo.App.2011) "[A] school district is not an 'agency of the state' in the same way that we understand a department or a division of the machinery of state government to be." *Id.* at 819-20.

⁹As the first district noted in the *Cincinnati* decision, when the General Assembly amended the relevant sections of the Revised Code in 2007, it chose "not to amend the definition of Formula ADM or to alter the two different reporting and payment systems for Formula ADM and CSADM." *Id.* at ¶ 28.

{¶ 50} Based upon the foregoing, we hold that the trial court did not err when it denied ODE's motion for judgment on the pleadings, and we overrule ODE's sole assignment of error.

E. Cross-appeal

{¶ 51} The trial court granted judgment on the pleadings in favor of ODE as to the claims asserted by the Individual Plaintiffs in this case based upon its determination that the Individual Plaintiffs did not have standing to assert the claims alleged in the complaint. We agree with the trial court.

{¶ 52} In *League of United Latin Am. Citizens v. Kasich*, 10th Dist. No. 10AP-639, 2012-Ohio-947, we set forth the general standing rules as follows:

Under the doctrine of standing, a litigant must have a personal stake in the matter he or she wishes to litigate. *Tiemann* at 325. Standing requires a litigant to have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for the illumination of difficult * * * questions." *Id.* at 325, quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962). In order to have standing, a plaintiff must demonstrate some injury caused by the defendant that has a remedy in law or equity. *Id.* The injury is not required to be large or economic, but it must be palpable. *Id.* Furthermore, *the injury cannot be merely speculative, and it must also be an injury to the plaintiff himself or to a class. Id. An injury that is borne by the population in general, and which does not affect the plaintiff in particular, is not sufficient to confer standing. Id.*, citing *Allen v. Wright*, 468 U.S. 737 (1984). See also *State ex rel. Masterson v. Ohio State Racing Comm.*, 162 Ohio St. 366, 368 (1954) ("private citizens may not restrain official acts when they fail to allege and prove damage to themselves different in character from that sustained by the public generally."). (Citation omitted.)

(Emphasis added.) *Id.* at ¶ 21.¹⁰

{¶ 53} At the outset, we note that the primary argument made by Individual Plaintiffs in this case is that they have standing to bring this action on their own behalf, rather than as representatives of the Districts. In this regard, we note that "a litigant must

¹⁰ *Tiemann v. Univ. of Cincinnati*, 127 Ohio App.3d 312, 325 (10th Dist.1998) (abrogated in part on other grounds).

assert its own rights instead of the claims of third parties, and third-party standing is not favored." *Settlers Bank v. Burton*, 4th Dist. No. 12CA36, 2014-Ohio-335, citing *State v. Sturbois*, 4th Dist. No. 10CA48, 2011-Ohio-2728, ¶ 33. "Third-party standing may, however, be granted when a claimant (1) suffers its own injury in fact, (2) possesses a sufficiently close relationship with the person who possesses the right, and (3) shows some hindrance to seeking relief that stands in the way of the person possessing the right." *Id.*

{¶ 54} Even if we were to find that the Individual Plaintiffs have alleged facts which permit an inference of an injury in fact and, even though the allegations of the petition establish a close relationship between the Individual Plaintiffs and the Districts in which they live and work, we have previously determined that the 2009 Budget Bill does not hinder the Districts' right to seek relief. Consequently, in order for the Individual Plaintiffs to have standing in this case, they must allege sufficient facts which, if taken as true, establish a personal stake in the outcome of this litigation.

{¶ 55} In our view, the facts alleged in the petition fail to establish damage to the Individual Plaintiffs that is different in character from that sustained by others living in the school district. In each of the three cases consolidated herein, the Individual Plaintiffs allege that: they are Ohio taxpayers; that they live in one of the districts, that they own real property within that district; and that they are parents of children who attend public schools within that district. The Individual Plaintiffs in the Dayton City School District additionally allege that the district employs them as public school teachers. Finally, Christopher Sanders, one of the Individual Plaintiffs in the Cleveland City School District, alleges that he is a "certified physical education teacher who is currently employed by Cleveland as an instructional aid and not as a physical education teacher due to reduction in force and school closings in the district." (R. 53.)

{¶ 56} In *Brown v. Columbus City School Dist. Bd. of Edn.*, 10th Dist. No. 08AP-1067, 2009-Ohio-3230, taxpayers and residents of the City brought suit against ODE seeking a declaration that the current per-pupil school funding system was unconstitutional. In affirming the trial court's determination that the taxpayers did not have standing to assert claims against ODE we stated:

As for private standing, appellants clearly have no private standing in this matter. Appellants have no direct personal

stake in the outcome of the controversy. Appellants have not suffered and are not threatened with any direct and concrete injury in a manner or degree different from that suffered by the public in general. Appellants alleged only that they were taxpayers in the city of Columbus. Appellants do not allege they are students in the Columbus City Schools system or are parents of students in the school system. If the merits of their action were to be unsuccessful, they could show no personal harm or damage that would result as separate from any harm suffered by the general taxpaying public.

Id. at ¶ 13.

{¶ 57} Under the *Brown* decision, it is clear that the Individual Plaintiffs do not have standing based solely upon their status as taxpayers who own real property within the Districts. The Individual Plaintiffs argue that the *Brown* decision stands for the proposition that taxpayers in a public school district have standing to sue ODE if they allege that they are parents of public school students in the District. While we agree that a taxpayer who has a child attending school in the District may have a greater interest in public school funding issues than the general public, this fact alone does not tip the scales in favor of the Individual Plaintiffs.

{¶ 58} While the Individual Plaintiffs in this case have alleged that there have been budget cuts and school closings in their respective Districts, as the trial court noted, none of the Individual Plaintiffs have alleged that their children have been denied specific educational opportunities due to ODE's failure to fund their district at the statutory rate or that they lost their jobs as a result of ODE's conduct as alleged in the complaint. Although Individual Plaintiff Christopher Sanders claims that he is "not as a physical education teacher due to reduction in force and school closings in the district," Sanders does not allege that he lost a position as a physical education teacher due to a reduction in force and school closings in the district, nor does he state that the district offered him such a position but did not hire him due to a reduction in force and school closings in the district.

{¶ 59} Without additional operative facts which would support a reasonable inference that ODE's conduct as alleged in the complaint caused or threatened the Individual Plaintiff's with a specific harm different than that suffered by the public in general, the allegations are nothing more than unsupported legal conclusions. As noted

above, an injury in fact "cannot be merely speculative." *League of United Latin Am. Citizens* at ¶ 21, citing *Allen v. Wright*, 468 U.S. 737 (1984).

{¶ 60} Unsupported legal conclusions are not admitted when determining a motion for judgment on the pleadings. See *JP Morgan Chase Bank v. Belden Oak Furniture Outlet, Inc.*, 5th Dist. No. 2010 CA 00049, 2010-Ohio-4444; *Amrhein v. Telb*, 6th Dist. No. L-06-1170, 2006-Ohio-5107. Accordingly, we hold that the trial court did not err when it granted judgment on the pleadings in favor of ODE as to the claims asserted by the Individual Plaintiffs. Accordingly, we overrule the sole assignment of error set forth in the cross-appeal.

E. Conclusion

{¶ 61} Having overruled appellants' sole assignment of error and having overruled cross-appellants' sole assignment of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

TYACK and BROWN, JJ., concur.

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CIVIL DIVISION

| | | |
|-----------------------------------|---|----------------------|
| Dayton City School District | : | |
| Board of Education, et al., | : | |
| | : | |
| Plaintiffs, | : | Case No. 11 CV 11809 |
| | : | |
| v. | : | Judge Beatty |
| | : | |
| State Board of Education, et al., | : | |
| | : | |
| Defendants. | : | |

| | | |
|--|---|----------------------|
| Cleveland Metropolitan School District | : | |
| Board of Education, et al., | : | |
| | : | |
| Plaintiffs, | : | Case No. 11 CV 13689 |
| | : | |
| v. | : | Judge Beatty |
| | : | |
| State Board of Education, et al., | : | |
| | : | |
| Defendants. | : | |

| | | |
|-----------------------------------|---|----------------------|
| Toledo City School District | : | |
| Board of Education, et al., | : | |
| | : | |
| Plaintiffs, | : | Case No. 11 CV 14120 |
| | : | |
| v. | : | Judge Beatty |
| | : | |
| State Board of Education, et al., | : | |
| | : | |
| Defendants. | : | |

**DECISION AND ENTRY GRANTING IN PART AND DENYING IN PART
DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS**

I. BACKGROUND

Plaintiffs filed petitions for a writ of mandamus, or alternatively, for declaratory judgment regarding the calculation of School Foundation Payments to the schools for fiscal years 2005 through 2007. Plaintiffs request that the Court order Defendants to recalculate the funding owed to the schools in order to comply with state law. Alternatively, Plaintiffs request that the Court declare that Defendants unlawfully calculated and reduced the payments made to the schools for those years.

Plaintiffs are comprised of three school district boards, Dayton City, Cleveland Metropolitan, and Toledo City, along with a number of individuals who have children in the school districts or who are employees of the school districts. In Plaintiff Dayton City's complaint, the two individual plaintiffs bring their action in their capacity as individuals and as parents and "next friends" of children enrolled in the Dayton City school system. (Dayton Compl. at Intro.) The four individual plaintiffs from Cleveland Metropolitan also appear to be bringing their action in their capacity as individuals and parents of children enrolled in the district. (Cleveland Compl. ¶3.) All four are also employed with the district in some capacity as administrators, a principal, or as an instructional aid. (Cleveland Compl. ¶3.) Plaintiff Sanders alleges that she is currently employed as an instructional aid and not as a physical education teacher due to a reduction in force and school closings in the district because of the reduction in funding. (Cleveland Compl. ¶3.) Finally, three individuals from the Toledo City school district assert claims against Defendants in their capacity as individuals and parents of students enrolled in the school district. (Toledo Compl. ¶¶3-4.) All of the individual plaintiffs appear to suggest that they have standing to bring their claims as citizens, tax payers, and employees of the school district. (Dayton Compl. ¶¶3-4; Cleveland Compl. ¶3; Toledo Compl. ¶¶3-4.)

In Ohio, school districts are funded primarily through local tax revenue and state funding. State funding is determined and distributed under the School Foundation Program, administered by Defendants. That funding is determined, in part, by the number of students enrolled in the district, known as the Formula ADM. The schools report both the number of students enrolled in the district school and the number of students eligible to enroll in the district school but who have elected to enroll elsewhere, such as in a community school.¹ (Toledo Compl. ¶12.)² The combination of those two numbers makes up the Formula ADM. According to Plaintiffs, the school districts are required to report their attendance numbers for the year in October. (Toledo Compl. ¶13.) After October, the enrollment numbers are not changed except that the district must adjust numbers to reflect students who are enrolled in community schools but who were not included in the district's original count (called "add-in students"). (Toledo. Compl. ¶¶13-14.) The School Foundation Program also contains guarantee provisions that provide a minimum level of funding to a district regardless of the Formula ADM. (Toledo Compl. ¶15.)

Ohio's community schools also receive state funding based upon the number of students who attend each school. (Toledo Compl. ¶17.) The community schools self-report their attendance numbers to the state through an electronic submission form known as CSADM. (Toledo Compl. ¶19.) Plaintiffs allege that for fiscal year 2005, the community schools had the ability to adjust their attendance numbers, and even delete student records, throughout the year, not just in October. (Toledo Compl. ¶¶20-23.) When a student attends a community school instead of his district's public school, the funds attributable to that student are deducted from the School Foundation funds that the district receives and are instead given to the community school. (Toledo Compl. ¶18.)

¹ Community schools are more commonly known as charter schools.

² The general allegations in the three complaints are largely similar. Unless specified, the Court's citation to one specific complaint represents the allegations asserted in all three complaints.

For fiscal year 2005, Plaintiffs allege that Defendants improperly recalculated their School Foundation funding after substituting the enrollment data received from the community schools for that submitted by the district. (Toledo Compl. ¶32.) Due to the discrepancy between the numbers reported by the community schools and the district, which totaled approximately 561 students, Defendants decided that the Toledo City school district was overpaid over \$3.5 million and began deducting amounts from the district's School Foundation payments in order to recoup the overpayment. (Toledo Compl. ¶¶34-39.) Defendants reduced Dayton City school district's enrollment by 688 students, which resulted in Defendants' determination that they overpaid the district nearly \$4.8 million. (Dayton Compl. ¶¶37-38.) Defendants reduced Cleveland Matropolitan's enrollment by 575 students, resulting in an apparent overpayment of over \$1.8 million. (Cleveland Compl. ¶¶27-38.) Likewise, Plaintiffs contend that Defendants failed to adjust and recalculate enrollment numbers to account for add-in students, resulting in an additional loss of funding. (Toledo Compl. ¶¶41-43; Dayton Compl. ¶¶41-43; Cleveland Compl. ¶¶41-43.)

For fiscal years 2006 and 2007, Plaintiffs' funding was based partially on the guarantee provisions. (Toledo Compl. ¶44; Dayton Compl. ¶44; Cleveland Compl. ¶44.) Those provisions, however, base the amount of the guarantee in part on each district's fiscal year 2005 payments. (Toledo Compl. ¶44.) Due to the allegedly improper reduction in the fiscal year 2005 funding and Defendants' failure to count add-in students, Plaintiffs contend that their funding for fiscal years 2006 and 2007 was too low. Plaintiff Toledo City alleges underpayments totaling nearly \$4.2 million each year for fiscal years 2006 and 2007. (Toledo Compl. ¶¶46-47.) Plaintiff Dayton City alleges underpayments of nearly \$4.5 million for fiscal year 2006 and nearly \$1.5 for fiscal year 2007. (Dayton Compl. ¶¶46-47.) Plaintiff Cleveland Metropolitan

alleges underpayments of over \$4.6 million each year for fiscal years 2006 and 2007. (Cleveland Compl. ¶¶46-47.)

The relevant statutes in effect for the period of time at issue in Plaintiffs' complaints are R.C. 3317.022, 3317.02, and 3317.03.

II. DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

On April 27, 2012, Defendants filed a Motion for Judgment on the Pleadings on all of Plaintiffs' claims against them. Defendants admit that they recalculated the districts' Formula ADM based upon the community schools' CSADM reports, which resulted in reduced state funding for fiscal year 2005. (MJP at 3.) Defendants also admit that the funding for fiscal years 2006 and 2007 were reduced due to the fiscal year 2005 ADM. (MJP at 3.)

Defendants contend that the plaintiff school districts' claims are barred by legislative enactment. (MJP at 3-4, 8-9, 10-12.) The Ohio 2009 Budget Bill addressed districts whose 2005 ADM, and therefore funding, was reduced based on enrollment reports from community schools. It provides that no such district "shall have a legal claim for reimbursement ... and the state shall not have liability for ... such reimbursement." Am. Sub. H.B. 1 (128th G.A.) §265.60.70. The 2011 Budget Bill includes the same provision. Am. Sub. H.B. 153 (129th G.A.) §265.60.70. Defendants contend that Plaintiffs' claims based upon failure to recalculate enrollment numbers based upon add-on students are also precluded by this legislative enactment. The add-ins are reported through the same methods as the community schools general enrollment reports. Failure to account for these students results in a reduction in the ADM based upon enrollment reports, thus making these claims covered by the budget bills. (MJP at 11-12.)

Not only are the districts' claims barred, but Defendants also contend that the budget bills insulate the State from any liability on all Plaintiffs' claims. (MJP at 5, 14-15.) The budget bills

provide that “the state shall not have liability for reimbursement of the amount of such reduction in ... funding.” Am. Sub. H.B. 1 (128th G.A.) §265.60.70.

Additionally, Defendants argue that the individual plaintiffs’ claims fail because such plaintiffs lack standing. The individual plaintiffs, Defendants contend, are not the real parties in interest in this action as there is nothing in the relevant statutes underlying their claims that would provide individual standing to bring this action. (MJP at 12-13.)

A. Plaintiffs’ Opposition Memorandum

Plaintiffs filed a joint memorandum in opposition to the Motion for Judgment on the Pleadings. Plaintiffs contend that the provisions in the uncodified budget bills are unconstitutionally retroactive and cannot apply to extinguish their vested rights. (Memo. Opp. at 4-5, citing Ohio Const., Art. II, Sec. 28, and *Bielat v. Bielat*, 87 Ohio St. 3d 350, 353 (2000).) Because the budget bills purport to terminate a cause of action to enforce a right that already vested, Plaintiffs argue that the bills are substantive in nature. (Memo. Opp. at 5-7.) As such, their retroactive application is unconstitutional.

Next, Plaintiffs argue that the provisions in the budget bills violate the Uniformity Clause in Ohio’s Constitution. (Memo. Opp. at 8, citing Ohio Const., Art. II, Sec. 26.) Specifically, Plaintiffs argue that the bills do not operate uniformly throughout the state because they create two categories of school districts while eliminating any possibility that a particular school district can change its categorization. (Memo. Opp. at 9.) The two categories of school districts are (1) districts that remain entitled to recover funding unlawfully withheld in fiscal years 2005 through 2007, and (2) districts that are not allowed to challenge such funding. (Memo. Opp. at 9.)

In addition, Plaintiffs contend that the budget bills do not purport to bar Plaintiffs’ add-in claims. (Memo. Opp. at 10.) Plaintiffs point to the bills’ language precluding claims based upon

a *reduction* in funding as a result of substituting the community school enrollment reports for the districts' reports. Plaintiffs' add-in claims, however, challenge Defendants' failure to *increase* a district's ADM due to add-in students. (Memo. Opp. at 10.) Likewise, Plaintiffs contend that the bills only discuss funding reductions under R.C. 3317.03(A), whereas the provision regarding add-in figures is contained in R.C. 3317(F)(3). (Memo. Opp. at 10.)

The individual plaintiffs argue that they have standing because of their particularized interests and because of the direct harm they have suffered as parents, students, and employees of the plaintiff school districts. In particular, the individual plaintiffs allege that they have suffered direct harm in the form of (1) diminution of real property values and additional real estate taxes due to the decrease in funding, (2) reassignment to lower-paying positions, positions not in their respective specialties, and diminished operational resources, and (3) as parents and on behalf of their children, loss of funds for education. (Memo. Opp. at 2-3.)

Finally, Plaintiff Dayton City argues that the Dayton's partial settlement excludes its claims from falling under the preclusion provisions in the budget bills. (Memo. Opp. at 12.) The budget bills include an exception for those claims "expressly required under ... a settlement agreement with a school district executed on or before June 1, 2009...." Dayton City entered into a partial settlement agreement with the State before June 1, 2009. (Dayton Compl. ¶48.) Dayton City contends that the agreement specifically provides that it has the right to legally pursue any claims that the parties were not able to settle. (Memo. Opp at 12.)

B. Defendants' Reply

In their reply, Defendants respond that the budget bills are not unconstitutionally retroactive because the districts do not have a vested interest in public funds until they actually receive such funds. (Reply at 4, citing *State ex rel. Columbus v. Thatcher*, 57 N.E. 2d 305, 312

(10th Dist. 1941).) Furthermore, Defendants argue, the budget bills have uniform application because they apply to all districts that lost funding due to ADM adjustments. (Reply at 5-6.) According to Defendants, it is sufficient that a law that is reasonable and nonarbitrary operates uniformly on all the districts that qualify to satisfy the Constitution's Uniformity Clause; uniform application as to all districts is not required. (Reply at 6, citing, inter alia, *Austintown Twp. Bd. of Trustees v. Tracy*, 76 Ohio St. 3d 353, 356 (1996); *Miller v. Korn*s, 107 Ohio St. 287, 305 (1923).) Defendants provide two reasons why the legislation is reasonable, despite creating a distinction among districts: (1) to eliminate fiscal uncertainty from claims from districts with adjusted ADMs; and (2) to ratify the Ohio Department of Education's decision to treat the community schools' enrollment figures as more accurate than the districts' figures. (Reply at 7.)

Next, Defendants argue that the individual plaintiffs, who may have suffered a sufficient injury to meet basic standing requirements, cannot also show that they meet the additional requirement of being a real party in interest. (Reply at 8-9.) According to Defendants, the Court must look to the substantive law creating the rights being sued upon to determine if a particular party is the real party in interest. (Reply at 9, citing *Shealy v. Campbell*, 20 Oho St. 3d 23, 25 (1985).) Here, the statutes upon which Plaintiffs base their action do not provide for any individual rights from which the individual plaintiffs can invoke standing. (Reply at 10.)

As to Dayton City's claim that it is excluded from the budget bills due to its partial settlement agreement with the State, Defendants contend that the exemption provided in the budget bills only applies if a *payment* is expressly required by a settlement agreement. Because Dayton City is not asserting any claims related to payments required by the parties' partial settlement agreement, its claims are precluded by the budget bills. (MJP at 12; Reply at 3.)

On November 21, 2013, the Court held a hearing on the record on Defendants’ Motion for Judgment on the Pleadings. Before the hearing, Plaintiffs and Defendants submitted supplemental case law in support of their respective positions on the motion. Defendants’ Motion for Judgment on the Pleadings is now before the Court.

III. MOTION FOR JUDGMENT ON THE PLEADINGS STANDARD

Civ.R. 12(C) provides, “After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings.” In considering a motion for judgment on the pleadings, the trial court may consider only the complaint and the answer and must construe as true all of the material allegations of the complaint, drawing all reasonable inferences in favor of the nonmoving party. *Chenault v. Ohio Department of Job & Family Servs.*, 194 Ohio App.3d 731, 2011-Ohio-3554, ¶9 (10th Dist.).

IV. LAW & ANALYSIS

A. The Individual Plaintiffs - Standing

“It is well established that before an Ohio court can consider the merits of a legal claim, the person seeking relief must establish standing to sue.” *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 469 (1999), citing *Ohio Contractors Assn. v. Bicking*, 71 Ohio St.3d 318, 320 (1994). Under Ohio’s common law, standing generally requires that the person bringing the action allege a “personal stake” in the outcome of the action, which generally requires that the plaintiff suffer an actual and concrete injury. *Id.* (citations omitted); *Bicking*, 71 Ohio St.3d at 320; *Cleveland v. Shaker Hts.*, 30 Ohio St. 3d 49, 51 (1987) (“Whether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy is what has traditionally been referred to as the question of standing to sue. Where the party does not rely upon any specific statute authorizing invocation of the judicial process,

the question of standing depends on whether the party has alleged ... a “personal stake in the outcome of the controversy.”); *League of United Latin Am. Citizens v. Kasich*, 10th Dist. No. 10AP-639, 2012-Ohio-947 (Mar. 6, 2012). “The injury is not required to be large or economic, but it must be palpable.” *League of United Latin Am. Citizens* at ¶21 (citations omitted). In addition, the injury cannot be speculative. *Id.* Rather, “a party must be able to demonstrate that it has suffered or will suffer a specific injury traceable to the challenged action that is likely to be redressed if the court invalidates the action or inaction.” *Brown v. Columbus City Schools Bd. of Educ.*, 10th Dist. No. 08AP-1067, 2009-Ohio-3230, ¶6 (citation omitted). An injury that is shared by the population in general is not sufficient to confer standing. *Sheward*, 86 Ohio St.3d at 469-470 (citations omitted) (“[i]n order to have standing to attack the constitutionality of a legislative enactment, the private litigant must generally show that he or she has suffered or is threatened with a direct and concrete injury in a manner or degree different from that suffered by the public in general, that the law in question caused the injury, and that the relief requested will redress the injury.”).

Separate from common law standing requirements, Civil R. 17(A) requires that all actions be “prosecuted in the name of the real party in interest.” The Ohio Supreme Court has clarified that standing is a jurisdictional issue, whereas the real party in interest requirement in Civil R. 17(A) is a “procedural requirement” that concerns proper party joinder. *Fed. Home Loan Mortg. Corp. v. Schwartzwald*, 134 Ohio St. 3d 13, 2012-Ohio-5017, ¶¶31, 33. “Civ. R. 17(A) does not address standing; rather, the point of the rule is that ‘suits by representative plaintiffs on behalf of the real parties in interest are the exception rather than the rule and should only be allowed when the real parties in interest are identifiable and the res judicata scope of the judgment can be effectively determined.’” *Id.* at ¶33, quoting *Lincoln Property Co. v. Roche*,

546 U.S. 81, 90 (2005). The test for determining the real party in interest is: “Who would be entitled to damages?” *Cross Country Inns, Inc. v. Habegger Corp.*, 10th Dist. No. 94AEP01-41, 1995 Ohio App. LEXIS 985, *26 (Mar. 16, 1995); *see also Latimore v. Hartford Life & Accident Ins. Co.*, 5th Dist. No. 2011CA00227, 2012-Ohio-447, ¶31 (Jan. 30, 2012); *Maloof v. Squire, Sanders & Dempsey, LLP*, 8th Dist. No. 82406, 2003-Ohio-4351, ¶30 (Aug. 14, 2003). “If a party to a suit is not the real party in interest, that party lacks standing to pursue the cause.” *Brown v. Columbus City Schools Bd. of Educ.*, 10th Dist. No. 08AP-1067, 2009-Ohio-3230, ¶6 (June 30, 2009) (“A true party in interest is able to demonstrate injury in fact.”)

The individual plaintiffs here contend that their position as parents and teachers in the school districts confers standing under *Brown v. Columbus City Schools Bd. of Educ.*, 10th Dist. No. 08AP-1067, 2009-Ohio-3230 (June 30, 2009). In that action, individuals challenged Ohio’s school funding system, as well as the district’s system for allocating funds among its schools. The individuals alleged that they were taxpayers and residents of the city and school district. The trial court dismissed the action finding, *inter alia*, that the plaintiffs lacked standing because they failed to allege facts showing that they would suffer a direct and concrete injury from the funding allocation that was different from the injury suffered by the public in general. *Brown* at ¶7. The Tenth District upheld that determination, stating:

As for private standing, appellants clearly have no private standing in this matter. Appellants have no direct personal stake in the outcome of the controversy. Appellants have not suffered and are not threatened with any direct and concrete injury in a manner or degree different from that suffered by the public in general. Appellants alleged only that they were taxpayers in the city of Columbus. Appellants do not allege they are students in the Columbus City Schools system or are parents of students in the school system. If the merits of their action were to be unsuccessful, they could show no personal harm or damage that would result as separate from any harm suffered by the general taxpaying public. ...

Brown at ¶13. The Tenth District also agreed with the trial court that taxpayer and “public right” standing did not exist. *See id.* at ¶¶7-14.

Defendants contend that the individual plaintiffs do not have standing because they cannot show *both* that they have suffered a sufficient injury and that they are the real party in interest. (Reply at 8; MJP at 12.)

Upon review of the allegations in the Complaint, the Court finds that the individual plaintiffs have not met the requirements to establish that they have standing in this action. Specifically, the individual plaintiffs fail to demonstrate that they have suffered a “specific injury traceable to the challenged action that is likely to be redressed if the court invalidates the action or inaction.” As part of this analysis, the Court considers who will benefit if Plaintiffs are granted the requested relief, i.e. who is entitled to the damages or restitution if it is determined that funds were improperly withheld from the districts? The individual plaintiffs would not receive a direct benefit if Defendants were ordered to pay restitution for funds improperly withheld. Rather, the Plaintiff Districts would benefit from the relief requested. The individual plaintiffs make no allegations that they would receive promotions or reassignments in their employment if the districts receive additional funding, nor do they allege that the students would receive any tangible or direct benefit if the districts receive additional funding. At most, the Court is left to speculate about what, if any, benefit the parents, employees, or students in each district receive with additional funding. Furthermore, the language in *Brown* that Plaintiffs use as a basis for their argument does not automatically confer standing on the individual plaintiffs in this action. The *Brown* Court did not find it sufficient for plaintiffs to simply allege that they are students or parents without still showing that they meet the standing requirement of a direct

injury in fact. Undertaking a full standing analysis, the Court finds that the individual plaintiffs here do not have private standing to bring their action.

1. Taxpayer & Citizen Standing

Under the common law, a plaintiff does not have standing to challenge a legislative enactment simply because he is a taxpayer or citizen. Rather, the Ohio Supreme Court has set forth the following rule with respect to taxpayer or citizen standing:

[A]part from statute, a taxpayer cannot bring an action to prevent the carrying out of a public contract or the expenditure of public funds unless he has some special interest therein by reason of which his own property rights are put in jeopardy. In other words, private citizens may not restrain official acts when they fail to allege and prove damage to themselves different in character from that sustained by the public generally.

State ex rel. Masterson v. Ohio State Racing Comm., 162 Ohio St. 366, 368 (1954) (citations omitted).

Here, Plaintiffs' complaints suggest that the individual plaintiffs are bringing their claims as citizens and taxpayers. Although the parties have not made arguments specifically regarding whether the individual plaintiffs have taxpayer standing, the Court will still analyze the issue to the extent such standing is invoked from the Complaint. Taxpayer standing requires some form of individual or particularized harm separate from every other taxpayer. *Masterson*, 162 Ohio St. at 368. But the Court finds no allegations of any harm to the individual plaintiffs here that is distinct from that which could be alleged by every other taxpayer in the named school districts. Thus, Plaintiffs do not have taxpayer standing to bring this action.

2. Statutory Standing

In addition to the common law, a plaintiff may also have standing pursuant to a state statute. Where a statute specifically confers standing on certain individuals or classes of people, common law standing requirements generally do not apply. *See Ohio Valley Associated Builders*

and Contractors v. Kuempel, 192 Ohio App.3d 504, 2011-Ohio-756, ¶22 (2d Dist.); *Ohio Valley Associated Builders and Contractors v. Rapier Electric, Inc.*, 192 Ohio App.3d 29, 2011-Ohio-160, ¶20 (12th Dist.). Nonetheless, the Ohio Supreme Court has made it clear “[n]ot every statute is to be read as an abrogation of the common law.” *Bresnik v. Beulah Park Ltd. Partnership, Inc.*, 67 Ohio St.3d 302, 304, 617 N.E.2d 1096 (1993). Instead, “[s]tatutes are to be read and construed in the light of and with reference to the rules and principles of the common law in force at the time of their enactment, and in giving construction to a statute the legislature will not be presumed or held, to have intended a repeal of the settled rules of the common law unless the language employed by it clearly expresses or imports such intention.” *Id.* (emphasis in original) (citations omitted). In determining whether a statute confers standing and to whom a statute confers standing, the Court applies general principles of statutory construction. *See, e.g., Kuempel*, 2011-Ohio-756; *Rapier Electric, Inc.*, 2011-Ohio-160. “[T]he words used in the statute are to be taken in their usual, normal, and customary meaning.” *Rapier Electric, Inc.*, 2011-Ohio-160, ¶24.

Kuempel and *Rapier Electric, Inc.*, provides an example of a statute that confers statutory standing. The statute at issue, R.C. 4115.16, said: “... the interested party may file a complaint in court of common pleas of the county in which the violation is alleged to have occurred.” R.C. 4115.16(B). The definitions section of the statute then specifically defined the four types of individuals or organizations that could qualify as an “interested party.” *See* R.C. 4115.03(F). The *Kuempel* and *Rapier Electric, Inc.* courts thus did not have to determine whether the statute conferred statutory standing, as that was explicit, but instead only had to determine if the plaintiffs met one of the definitions of an “interested party.”

Defendants argue that the statutes governing funding calculations and allocations, R.C. 3317.02, 3317.022(A), and 3317.03, precludes the individual plaintiffs in this action from having standing because the statutes do not explicitly mention individuals or grant any individuals substantive rights. (MJP at 12-13.) Plaintiffs respond that the failure to list individuals in the statutes is not fatal to the individual plaintiffs' claims because "there is no rule that every action to enforce a statute can be brought only by persons indentified therein." (Memo. Opp. at 3.) Rather, Plaintiffs contend that the violation of the statute gives rise to a right of action to those parties who have sustained an actual injury due to the violation. (Memo. Opp. at 4.)

Although this issue of whether the individual plaintiffs have statutory standing is moot based upon the Court's common law standing analysis, the Court will address Defendants' argument. The Court finds that the funding statutes at issue in the consolidated action are not the sole basis upon which the parties may have standing. Accordingly, the failure to identify a specific party in the language of the statutes does not preclude such party from challenging the statutes *if* that party meets the general, common law standing requirements. The statutes at issue cannot be read to abrogate common law standing principles.

Having determined that the individual plaintiffs in the consolidated action lack standing to pursue their claims against Defendants, the Court **GRANTS IN PART** Defendants' Motion for Judgment on the Pleadings. The Court dismisses, for lack of standing, all claims raised by the following individuals in the consolidated action: (1) Keith Cosby, individually and as parent and next friend of John Doe, a student enrolled in the Dayton City School District; (2) Ann Marie Snyder, individually and as parent and next friend of Jane Doe, a student enrolled in the Dayton City School District; (3) Dessie M. and Christopher Sanders, individually and as parents

and next friends of Jane and John Doe, students enrolled in the Cleveland Metropolitan School District; (4) Edith C. Britt, individually and as parent and next friend of Jane Doe, a student enrolled in the Cleveland Metropolitan School District; (5) Angela Barnett, individually and as a parent and next friend of Jane Doe, a student enrolled in the Cleveland Metropolitan School District; (6) Bonnie Jo Herrmann, individually and as parent and next friend of John Doe, a student enrolled in the Toledo City School District; (7) Christine Varwig, individually and as parent and next friend of Jane Doe, a student enrolled in the Toledo City School District; and (8) Charles L. Hilyard, Jr., individually and as parent and next friend of John Doe, a student enrolled in the Toledo City School District.

A. Constitutionality of The Budget Bills

The substantive issue of whether Defendants were allowed to use the community schools' enrollment data instead of the school districts' data, and adjust funding to the districts based upon such data, was litigated previously in Hamilton County. There, the court found that the school funding statutes prohibited the State from adjusting funding to the school districts based upon enrollment data provided by community schools. That decision was upheld on appeal, and Plaintiffs ultimately seek a similar determination here. *See Cincinnati School District Bd. of Educ. v. State Bd. of Educ.*, 176 Ohio App. 3d 157, 2008-Ohio-1434 (1st Dist.) After the appellate court issued its decision in the *Cincinnati* case, though, the Ohio legislature included a provision in its 2009 budget bill to address Plaintiffs' claims. The validity and effect of that provision, and a similar 2011 provision, is at issue in Defendant's Motion for Judgment on the Pleadings.

Specifically, the 2009 budget bill states:

(A) Except as expressly required under a court judgment not subject to further appeals, or a settlement agreement with a school district executed on or before

June 1, 2009, in the case of a school district for which the formula ADM for fiscal year 2005, as reported for that fiscal year under division (A) of section 3317.03 of the Revised Code, was reduced based on enrollment reports for community schools, made under section 3314.08 of the Revised Code, regarding students entitled to attend school in the district, which reduction of formula ADM resulted in a reduction of foundation funding or transitional aid funding for fiscal year 2005, 2006, or 2007, no school district, except a district named in the court's judgment or the settlement agreement, shall have a legal claim for reimbursement of the amount of such reduction in foundation funding or transitional aid funding, and the state shall not have liability for reimbursement of the amount of such reduction in foundation funding or transitional aid funding.

(B) As used in this section:

(1) "Community school" means a community school established under Chapter 3314. of the Revised Code.

(2) "Entitled to attend school" means entitled to attend school in a school district under section 3313.64 or 3313.65 of the Revised Code.

(3) "Foundation funding" means payments calculated for the respective fiscal year under Chapter 3317. of the Revised Code.

(4) "Transitional aid funding" means payments calculated for the respective fiscal year under Section 41.37 of Am. Sub. H.B. 95 of the 125th General Assembly, as subsequently amended; Section 206.09.39 of Am. Sub. H.B. 66 of the 126th General Assembly, as subsequently amended; and Section 269.30.80 of Am. Sub. H.B. 119 of the 127th General Assembly.

Am. Sub. H. B. 1 (128th G.A.) §265.60.70; Am. Sub. H.B. 153 (129th G.A.) §267.50.60 (emphasis added). Notably, the budget bills did not change how school funding allocations were to be calculated under the school funding statute or affect the validity of the substantive analysis in the *Cincinnati* case. Rather, the bills removed the districts' claims of improper calculations made in previous funding decisions.

Under the Ohio Constitution, Ohio's legislature has "no power to pass retroactive laws." Ohio Const. Art. II Sec. 28. The Ohio Supreme Court has found that retroactive laws affecting substantive rights, as compared to laws that are only remedial in nature, are unconstitutional.

See, e.g., Gregory v. Flowers, 32 Ohio St. 2d 48, 52-53 (1972). To determine if a law is unconstitutionally retroactive, courts must engage in a two-part analysis:

- (1) Did the General Assembly specifically intend that the statute apply retroactively?
- (2) Is the statute “substantive, rendering it unconstitutionally retroactive, as opposed to merely remedial”?

Bielat v. Bielat, 87 Ohio St. 3d 350, 353 (2000). “[A] retroactive statute is substantive—and therefore *unconstitutionally* retroactive—if it impairs vested rights, affects an accrued substantive right, or imposes new or additional burdens, duties, obligations, or liabilities as to a past transaction.” *Id.* at 354, citing *State v. Cook*, 83 Ohio St. 3d 404, 411 (1985). Remedial laws, on the other hand, are “those that ‘merely substitute a new or more appropriate remedy for the enforcement of an existing right.’” *Id.*, quoting *State v. Cook*, 83 Ohio St. 3d at 411. Put another way, “[l]egislation is remedial, and therefore permissibly retroactive, when the legislation seeks only to avoid ‘the necessity for multiplicity of suits and the accumulation of costs [or to] promote the interests of all parties.’” *Id.*, quoting *Rairden v. Holden*, 15 Ohio St. 207, 211 (1864).

There is no dispute that the 2009 and 2011 budget bills apply retroactively. Under the terms of the provisions, they only target school funding decisions made between 2005 and 2007. The central issue is whether the laws are substantive or remedial in nature.

Defendants primarily rely upon *Cleveland v. Zangerle*, 127 Ohio St. 91 (1933), and *Outcalt v. Guckenberger*, 134 Ohio St. 457 (1938), in support of their argument that the 2009 and 2011 budget bills are not substantive. Plaintiffs, on the other hand, rely upon *State ex rel. Kenton City School Dist. Bd. of Educ. v. State Bd. of Educ.*, 174 Ohio St. 257 (1963), to support their argument that they had a vested right to receive the funds and the budget bills took away that substantive right.

In *Zangerle*, the city of Cleveland sought to enjoin certain officials from distributing tax revenue collected under the Intangible Tax Law. The Ohio Supreme Court had previously invalidated, on constitutional grounds, certain distribution provisions of the Intangible Tax Law. In response, the legislature passed a bill directing that the taxes collected under the law be distributed to public libraries and park districts. Some of the tax revenue had already been collected, some had not, but none of the revenue had yet been distributed. The city argued that the new bill was unconstitutionally retroactive. The Supreme Court, however, disagreed, stating:

No governmental subdivision of the state has any vested right, at least until distribution is made, in any taxes levied and in the process of collection. Until such distribution is made the Legislature of Ohio is fully competent to divert the proceeds among those local subdivisions as it deems best to meet the emergencies which it finds to exist.

Zangerle at 93.

In *Outcalt*, the State sought to compel officials to charge penalties and interest on certain overdue and delinquent property taxes. The State challenged the constitutionality of recent legislative enactments that provided for the remission of penalties, interest, and charges on delinquent taxes if the taxes were paid within a certain time frame. In analyzing the issue, the Supreme Court clarified that it was not dealing with the constitutionality of a taxing provision because penalties and interest charges are not taxes. The Court then found that the remission provisions were not unconstitutionally retroactive

for the reason that the acts are prospective in character -- they do not interfere with vested rights acquired under existing laws, impose a new duty, attach a new disability, or create a new obligation with respect to transactions or considerations already past *** the subdivisions of the state have no vested rights in unpaid penalties, interest and charges on uncollected delinquent taxes *** by the Whittemeore Acts, the Legislature has merely provided a different remedy for the collection of such taxes, there is no question of the right of the state to change the remedy, and, in doing so, vested rights remain unaffected.

Outcalt at 462.

The case upon which the districts rely here, *State ex rel. Kenton City School Dist. Bd. of Educ. v. State Bd. of Educ.*, 174 Ohio St. 257 (1963), did not directly implicate the constitutional prohibition against retroactive laws. Rather, the action involved Ohio's Savings Statute, which provided that the repeal of a statute does not affect "any rights or liabilities which exist, have accrued, or have been incurred" by that statute. See R.C. 1.21. In *Kenton*, the school district filed a mandamus action against the Board of Education to compel the Board to apportion funding in accordance with a school funding statute that was in effect in 1960. In that year, the Hardin Central Local School District was consolidated with the Kenton City School District. Under the school funding statute that was in effect at the time, school funding was not to be "reduced on account of such consolidation during the next succeeding three years." Before the expiration of that three year period, however, the legislature amended the statute, effective January 1, 1962, and limited the minimum grants awarded to certain consolidated districts. The effect of the amendment was to reduce the funding that would be awarded to Kenton. The parties disputed whether the district had any vested rights under the previous statute that would entitle it to receive the guaranteed minimum funding originally provided by that statute.

The Supreme Court found that the school district did accrue rights under the previous version of the statute, stating:

To be guaranteed a minimum amount of money would be a substantive right, whether the guarantee is to a political subdivision or to an individual.

Here we have a statute which guaranteed a school district that in the event of a consolidation with another school district there would be a certain minimum payment to the consolidated district for a period of three years. Inasmuch as the statute was in force at the time of the consolidation in the present case, a right accrued to the consolidated district which, if the statute had not been amended, could have beyond question been enforced by a writ of mandamus. There was nothing discretionary about such provision.

Clearly, a substantive right accrued to the consolidated school district

Kenton at 261-262. Finding that the “rights of the relator [arose] at the time of the consolidation,” the Supreme Court issued the writ of mandamus. *Kenton* at 263.

All three cases upon which the parties rely are distinguishable, in part, from the present case. In *Zangerle*, none of the tax revenue had been distributed yet. The distribution provision of the applicable statute was invalidated and the legislature passed a new bill directing the distribution of those tax proceeds. In contrast, in the present action, Plaintiffs allege that some of the school funding was already distributed when Defendants decided to recalculate the amount of funding owed to the districts.

Furthermore, unlike in *Zangerle*, the legislature here did not enact a new law redirecting distribution of tax proceeds before Defendants changed the way that they calculated funding or adjusted the amount of funding due to the districts. Rather, Defendants took action and then, several years later, the legislature passed the budget bills. Those bills did not change the way that school funding allocations were to be calculated and distributed, nor did they amend or repeal the school funding laws. Instead, the budget bills purported to remove Plaintiffs’ claims under laws that were valid and in force when the distribution decisions were made.

Outcalt, too, is distinguishable from the present case. Unlike here, *Outcalt* involved new legislation that had prospective, not retroactive application. *Outcalt* also involved penalties that were not yet collected, whereas Plaintiffs here allege that some distributions were already made before Defendants recalculated enrollment figures. Finally, the *Kenton* case did not address the issue of retroactive application of a statute.

Under the general principles outlined by the Supreme Court, however, and accepting as true the facts asserted in the complaints, the Court finds that the 2009 and 2011 budget bills do

not preclude the plaintiff school districts from asserting their claims. Rather, the budget bills are unconstitutionally retroactive because they affect a substantive right. First, even under the standard set forth in *Zangerle*, the school districts had a vested right because they actually received some of the funding before Defendants recalculated the enrollment figures and decided that the districts had been overpaid. As alleged in the complaints, Defendants decided that the Toledo school district was overpaid over \$3.5 million and began deducting amounts from the district's School Foundation payments in order to recoup the overpayment. (Toledo Compl. ¶¶34-39.) As to Dayton City school district, Defendants determined that it overpaid the district nearly \$4.8 million. (Dayton Compl. ¶¶37-38.) Finally, Defendants decided that they overpaid the Cleveland school district over \$1.8 million. (Cleveland Compl. ¶¶27-38.) Because funds were actually distributed, a vested right to those funds existed.

Likewise, under the principles set forth in *Kenton*, the school districts had a substantive right to the funding under the law as it existed for fiscal years 2005 through 2007. The school funding statutes mandated a procedure by which enrollment figures were to be calculated and then addressed calculation and distribution of school funding based upon those enrollment figures. The statutes then expressly guaranteed that the districts would receive some minimum amount of funding based upon previous years' funding allocations. Consequently, the districts' guaranteed funding allocations were reduced as a result of reductions in the districts' 2005 funding allocations. (See Toledo Compl. ¶¶44-47; Dayton Compl. ¶¶44-47; Cleveland Compl. ¶¶44-47.) Because certain minimum amounts of funding were guaranteed, the amount of which the districts allege was improperly reduced, a substantive right accrued.

The Court is further compelled to reach this determination because the budget bills did not change the substantive law under which school funding was calculated; nor did the budget

bills simply *divert* the school funding tax proceeds. One court has already determined that Defendants' recalculation of enrollment statistics using community school data was improper. *See Cincinnati School District Bd. of Educ. v. State Bd. of Educ.*, 176 Ohio App. 3d 157, 2008-Ohio-1434 (1st Dist.) Defendants cannot fail to perform an obligation required by a statute, namely calculating and distributing school funding allocations in accordance with a statutory mandate, and then simply have the legislature include a provision in a budget bill that removes the districts' right to enforce that previously existing obligation.

Based upon the Court's determination on this issue, the Court need not address whether the 2009 and 2011 Budget Bills also violate the Uniformity Clause, whether the add-in claims are precluded by the budget bills, or whether the partial settlement involving the Dayton City school district exempts that district from the preclusion provisions in the budget bills.

Having determined that the provisions in the 2009 and 2011 Budget Bills that purport to remove the plaintiff school districts' claims are unconstitutionally retroactive, the Court **DENIES IN PART** Defendants' Motion for Judgment on the Pleadings.

The Court finds that its decision on Defendants' Motion for Judgment on the Pleadings affects substantial rights of the parties. As such, the Court finds that its decision herein is a final appealable order for which there is no just reason for delay. Civ. R. 54(B).

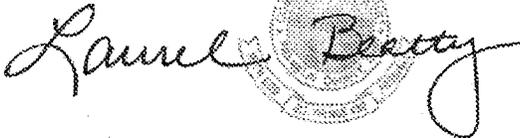
Copies to:
Todd Marti (electronically)
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James Hughes, Susan Greenberger, Jennifer Flint & Nicholas Pittner (electronically)
Counsel for Plaintiffs

Franklin County Court of Common Pleas

Date: 01-16-2014
Case Title: TOLEDO CITY SCHOOL DISTRICT BOARD EDUCATION -VS- OHIO STATE BOARD EDUCATION
Case Number: 11CV014120
Type: DECISION/ENTRY

It Is So Ordered.


The image shows a handwritten signature in cursive that reads "Laurel Beatty". The signature is written in black ink and is positioned over a circular, embossed seal. The seal is partially obscured by the signature but appears to be the official seal of the court.

/s/ Judge Laurel A. Beatty

Court Disposition

Case Number: 11CV014120

Case Style: TOLEDO CITY SCHOOL DISTRICT BOARD
EDUCATION -VS- OHIO STATE BOARD EDUCATION

Final Appealable Order: Yes

Motion Tie Off Information:

1. Motion CMS Document Id: 11CV0141202012-04-2799980000
Document Title: 04-27-2012-MOTION FOR JUDGMENT ON
PLEADINGS
Disposition: MOTION GRANTED IN PART