

**IN THE SUPREME COURT OF OHIO**

Toledo City School District Board of Education, et al., :  
: Case No. 14-1769  
: Appellees, :  
: Appellees/Cross-Appellants, : On appeal from the Franklin County  
: Court of Appeals, Tenth Appellate District  
: v. :  
: Court of Appeals  
State Board of Education of Ohio, et al., : Case Nos. 14AP-93  
: 14AP-94  
Appellants/Cross-Appellees. : 14AP-95  
:

---

**APPELLEES'-TOLEDO CITY, DAYTON CITY AND CLEVELAND METROPOLITAN'S  
MEMORANDUM IN RESPONSE/OPPOSITION TO APPELLANTS/CROSS-APPELLEES'  
MEMORANDUM IN SUPPORT OF JURISDICTION**

---

Nicholas A. Pittner (0023159)  
James J. Hughes, III (0036754)  
Susan B. Greenberger (0010154)  
Jennifer A. Flint (0059587)  
BRICKER & ECKLER LLP  
100 South Third Street  
Columbus, Ohio 43215-4291  
Telephone: (614) 227-2300  
Facsimile: (614) 227-2390  
[jjhughes@bricker.com](mailto:jjhughes@bricker.com)  
[jflint@bricker.com](mailto:jflint@bricker.com)  
CO-COUNSEL FOR APPELLEES,  
TOLEDO CITY, DAYTON CITY AND  
CLEVELAND METRO. SCHOOL  
DISTRICT BOARDS OF EDUCATION

Michael DeWine (0009181)  
Attorney General of Ohio  
Eric E. Murphy (0083284)  
Counsel of Record  
Michael J. Hendershot (0081842)  
Ashon L. McKenzie (0087049)  
Todd R. Marti (0019280)  
30 East Broad Street, 17<sup>th</sup> Floor  
Columbus, Ohio 43215  
Telephone: (614) 466-8980  
Facsimile: (614) 466-5087  
[eric.murphy@ohioattorneygeneral.gov](mailto:eric.murphy@ohioattorneygeneral.gov)  
COUNSEL FOR APPELLANTS/CROSS-  
APPELLEES, STATE BOARD OF  
EDUCATION, OHIO DEPARTMENT OF  
EDUCATION, AND DR. RICHARD ROSS

Amy M. Natyshak (0043941)  
MARSHALL & MELHORN, LLC  
Four Seagate, Eighth Floor  
Toledo, Ohio 43604  
Telephone: (419) 249-7100  
Facsimile: (419) 249-7151  
[natyshak@marshall-melhorn.com](mailto:natyshak@marshall-melhorn.com)  
CO-COUNSEL FOR APPELLEE,  
TOLEDO CITY SCHOOL DISTRICT  
BOARD OF EDUCATION

Jyllian R. Guerriero (0088714)  
DAYTON CITY SCHOOL DISTRICT  
115 South Ludlow Street  
Dayton, Ohio 45402  
Telephone: (937) 542-3007  
Facsimile: (937) 542-3188  
[jrguerri@dps.k12.oh.us](mailto:jrguerri@dps.k12.oh.us)  
CO-COUNSEL FOR APPELLEE,  
DAYTON CITY SCHOOL DISTRICT  
BOARD OF EDUCATION

Wayne J. Belock (0013166)  
CLEVELAND METROPOLITAN  
SCHOOL DISTRICT  
1380 East Sixth Street  
Cleveland, Ohio 44114  
Telephone: (216) 574-8210  
Facsimile: (216) 574-8108  
[wayne.j.belock@cmsdnet.net](mailto:wayne.j.belock@cmsdnet.net)  
CO-COUNSEL FOR APPELLEE,  
CLEVELAND METROPOLITAN  
SCHOOL DISTRICT BOARD OF  
EDUCATION

**TABLE OF CONTENTS**

	<u>Page</u>
TABLE OF CONTENTS.....	i
INTRODUCTION .....	1
STATEMENT OF THE CASE AND FACTS .....	2
THE OHIO DEPARTMENT OF EDUCATION’S APPEAL DOES NOT RAISE A SUBSTANTIAL CONSTITUTIONAL QUESTION OF PUBLIC OR GREAT GENERAL INTEREST.....	4
A.    The lower courts applied the correct retroactivity analysis to the Budget Provision and followed this Court’s precedent.....	4
B.    ODE’s liability has not yet been determined. All that has been determined is that the Budget Provision cannot bar suits against ODE that seek enforcement of state law .....	8
ARGUMENT IN RESPONSE TO THE OHIO DEPARTMENT OF EDUCATION’S PROPOSITION OF LAW .....	9
The Budget Provision, the sole purpose of which is to bar accrued causes of action that would otherwise be cognizable in the courts of Ohio, violates the Retroactivity Clause of the Ohio Constitution.....	9
CONCLUSION.....	13
CERTIFICATE OF SERVICE .....	15

## INTRODUCTION

ODE's appeal does not warrant review by this Court. ODE has advanced numerous "policy" arguments as to why review is warranted, but they are illusory at best. ODE's appeal is not about whether the General Assembly can set education policy by amending, repealing or adopting school funding statutes. The decisions below in no way limit the ability of the General Assembly to modify or change school funding legislation in the future. Indeed, the General Assembly, with regard to the school funding statutes at issue in the merits of Plaintiffs' claims, has since modified those substantive statutes—and Plaintiffs do not take issue with this.

Plaintiffs' claims have nothing to do with the current school funding statutes, as amended by the General Assembly. No court in this case has declared a school funding statute, past or present, unconstitutional. The "statute" at issue in ODE's attempted appeal—the one the lower courts found was unconstitutionally retroactive—did not amend, repeal or adopt a school funding statute. Indeed, this "statute" cannot be found in any codified section of the Ohio Revised Code, let alone in the school funding statutes contained in R.C. Chapter 3317. It is an uncodified provision buried in the massive budget bills from the last three biennia. And, all this uncodified provision purports to do is to serve, in ODE's own words, as a "litigation bar." (ODE's Jurisdictional Memorandum at p. 1.)

The sole purpose of this uncodified provision (hereafter, the "Budget Provision") is to insulate ODE from liability for failing to follow the substantive school funding statutes in effect in fiscal years 2005, 2006 and 2007. Quite simply, ODE broke the law, and it was successfully sued by the Cincinnati Public schools for doing so. *See Cincinnati City School Dist. Bd. of Edn. v. State Bd. of Edn. of Ohio*, Case No. A0603908 (C.P. Hamilton Cty. 2006); *Cincinnati City School Dist. Bd. of Edn. v. State Bd. of Edn. of Ohio*, 176 Ohio App.3d 157, 2008-Ohio-1434 (1<sup>st</sup>

Dist.). ODE thereafter sought amnesty against similar suits through the passage of the Budget Provision.

The courts below determined that a legislative provision that outright bars otherwise accrued causes of action violates Article 28, Section II of the Ohio Constitution (the “Retroactivity Clause”). ODE has shown no compelling reason for this Court to review that elementary conclusion.

### **STATEMENT OF THE CASE AND FACTS**

In Fiscal Year (FY) 2005, state funding for public school districts was determined and allocated under a formula established by law. That formula utilized a once-per-year measure of pupils attending school during the first week in October, the “October count,” as one of the primary factors in the distribution formula. The law further required each public school superintendent to report the October count, which was then utilized in the funding formula for that district as the “formula average daily membership, or “ADM” to determine state funding amounts for the fiscal year. Each of the factors in the funding formula, as well as the calculation process, was detailed in statute.

The mechanics of funding for community schools, on the other hand, was primarily determined by a process developed by ODE. Community School Average Daily Membership (CSADM) was determined by the number of pupils for whom funding requests were received on a monthly basis for each community school. Community school funds were deducted from the public school the pupil was otherwise entitled to attend and paid to the community school. Thus, ODE was administering two entirely different funding schemes, one determined by law for public school districts, and one established by ODE for community schools.

Public school district funding for FY 05 was initially determined and paid by ODE as required by law. However, at some point during that fiscal year ODE abandoned the statutory formula for the determination and payment of funds to the Plaintiff School Districts and began to use a different, lower ADM number. The three Plaintiff School Districts were denied funding for the equivalent of over 1800 pupils for FY 05, a loss compounded in FY 06 and FY 07. This resulted in both a reduction in funds paid after the change as well as additional reductions based on what ODE determined it had “overpaid” some of the districts during the earlier part of the year. The changes primarily impacted Ohio’s urban public school districts, including Cincinnati Public Schools and the three Plaintiff School Districts.

The magnitude of the harm resulting from ODE’s unauthorized abandonment of the statutory funding formula was amplified by the fact that funding for FY 06 and FY 07 was primarily based on the funding received by the district during FY 05. Thus, the FY 05 reduction also triggered funding reductions for FY 06 and FY 07. With respect to the Plaintiffs, ODE represents that the total amount at issue is about \$40 million.

Cincinnati sued to recover the amounts wrongfully withheld and won its case in the trial court. ODE appealed, and lost again. ODE sought review by this Court, but elected to settle Cincinnati’s claims for \$5.9 million. ODE later paid Dayton Public Schools, one of the Plaintiffs here, over \$7.1 million in partial settlement of Dayton’s claims. The claims of the Plaintiffs here are based on the same circumstances as those in the *Cincinnati* case.

In 2009, after losing twice in court and paying over \$13 million in settlement, ODE obtained the addition of uncodified language to the 2009 budget bill (Section 265.60.70, Am. Sub. H.B. No. 1, 128<sup>th</sup> Gen. Assembly). ODE contends that the 2009 Budget Provision

extinguished the claims of all school districts, including the Plaintiff School Districts, to recover the funds unlawfully withheld from them in FYs 05, 06 and 07.

Both the trial court and the court of appeals held that the Budget Provision does not bar the claims advanced by the Plaintiffs, because it violates the Retroactivity Clause.

**THE OHIO DEPARTMENT OF EDUCATION'S APPEAL DOES NOT RAISE A  
SUBSTANTIAL CONSTITUTIONAL QUESTION OF PUBLIC  
OR GREAT GENERAL INTEREST**

ODE advances three reasons why its appeal should be heard: (1) the Tenth District's holding invalidates a presumptively constitutional law; (2) the Tenth District's holding conflicts with this Court's precedent; and (3) the Tenth District's decision results in tens of millions of dollars in liability for ODE. ODE's first and second assertions are incorrect. The third assertion is irrelevant.

**A. The lower courts applied the correct retroactivity analysis to the Budget Provision and followed this Court's precedent.**

There is nothing to suggest the courts below failed to afford the Budget Provision the due presumption of constitutionality. Both decisions reflect careful consideration of all issues raised. Both decisions applied the well-established, two-step inquiry applicable when a statute's retroactivity is questioned. That ODE does not agree with the result does not warrant review.

On its face, the Budget Provision was intended to reach back in time and abolish the claims of certain school districts to recover funds wrongfully taken from them by ODE. There was no question of retroactive application. The lower courts extensively analyzed ODE's claim that the Retroactivity Clause does not apply to the School Districts because they have no vested or substantive rights to state funding. Both courts soundly rejected that claim—based on this Court's precedent.

Indeed, the lower courts' judgments do not conflict with this Court's precedent. They follow it. Neither *Ross v. Adams Mills Rur. Sch. Dist.*, 113 Ohio St. 466, 149 N.E. 634 (1925) nor *Avon Lake v. Limbach*, 35 Ohio St.3d 118, 518 N.E.2d 1190 (1988) addressed the General Assembly's authority to set educational policy. Not one of the cases cited by ODE concluded that the Constitution's prohibition against retroactive legislation may not inure to the benefit of a political subdivision.

In fact, on no less than five occasions this Court has analyzed whether state laws violate the Retroactivity Clause—as asserted by political subdivisions. See *Hamilton Cty. Commrs. v. Rosche Bros.*, 50 Ohio St. 103, 33 N.E. 488 (1893); *Cleveland v. Zangerle*, 127 Ohio St. 91, 186 N.E. 805 (1933); *State ex rel. Crotty v. Zangerle*, 133 Ohio St. 532, 14 N.E.2d 932 (1938); *State ex rel. Outcalt v. Guckenberger*, 134 Ohio St. 457, 17 N.E.2d 743 (1938); and *Hamilton Cty. Bd. of Revision*, 91 Ohio St.3d 308, 2001-Ohio-46, 744 N.E.2d 751. This Court never determined that the protections of the Retroactivity Clause may not be asserted by a political subdivision. Instead, this Court analyzed whether the laws at issue—laws concerning the funding of political subdivisions—violated the Retroactivity Clause.

In some of these cases, the political subdivisions were successful in challenging the constitutionality of state law based on the Retroactivity Clause. In each of those cases, as in this case, the laws were analyzed based on: (1) whether they were or were not prospective in nature; and (2) whether they were “substantive” as opposed to “remedial” in nature. None of the cases stands for ODE's sweeping statement that political subdivisions can *never* have a vested right in state funds. If that were the case, this Court would have had no need to engage in the retroactivity analysis.

Indeed, *Outcalt* and *Cleveland* make it clear that public funds *can* and *do* vest in political subdivisions. And once they vest, the legislature may not thereafter take such funds away. *Cleveland* involved legislation that revised the methodology for the distribution of tax dollar distributions. The city of Cleveland objected to the new distribution formula, which was enacted to replace a prior formula, claiming the new law was unconstitutionally retroactive. The Court held the statute was not retroactive because it controlled *future* distributions of tax proceeds, to which subdivisions have no vested right.

*Outcalt* involved legislation that, in part, alleviated certain taxpayers' obligations to pay penalties for the nonpayment of taxes. This Court determined this part of the legislation did not violate retroactivity because it was prospective in nature; it merely changed a remedy versus impaired a vested right. *Id.* at 462-463. This Court found, however, that another piece of the same legislation was unconstitutionally retroactive because it *did* impair political subdivisions' vested rights. *Id.* at 465.

Perhaps realizing that Ohio law does not support its sweeping assertions, ODE continues to urge our courts to follow one Missouri state court decision, *Savanah R-III Sch. Dist. v. Pub. Retirement Sys. of Mo.*, 950 S.W.2d 854 (1997). This case is neither informative nor controlling. The decision is based on what appears to be long-standing precedent under Missouri case law treating school districts and the state as one-and-the-same. The court recognized that the Missouri legislature is permitted to pass retrospective laws that waive the rights of the state (and its parallel political subdivisions). But Ohio is not Missouri. And Ohio law affords political subdivisions the opportunity to invoke Ohio's Retroactivity Clause, when appropriate. This Court's precedent establishes that political subdivisions *do* have vested rights to laws and *can* seek enforcement of those laws.

A cause of action to recover funds unlawfully denied school districts is no less protected from retroactive divestment than are the funds themselves, once paid. *See Van Fossen v. Babcock & Wilcox Co.*, 36 Ohio St.3d 100, 107, 522 N.E.2d 489 (1988). The reality is that political subdivisions have the authority and standing to prosecute legal claims seeking compliance with state laws or declarations of their rights under state law—including against the state and including claims relating to funding. Contrary to ODE’s assertions that Ohio’s public school districts are ephemeral entities that merely exist from day-to-day at the whim of the legislature, the General Assembly has crafted an extensive body of laws consistent with the declaration it enacted into law:

(A) \* \* \* it is hereby declared to be the public policy and a public purpose of the state *to require fiscal integrity of school districts so that they can educate children*, pay when due principal and interest on their debt obligations, meet financial obligations to their employees, vendors, and suppliers, and provide for proper financial accounting procedures, budgeting, and taxing practices. The failure of a school district to so act is hereby determined to affect adversely the health, safety, and welfare not only of the people of the school district but also of other people of the state.

(B) The intention of the general assembly, under this chapter, is to enact procedures, provide powers, and impose restrictions *to assure fiscal integrity of school districts* as set out in division (A) of this section.

R.C. 3316.02; emphasis added.

In furtherance of that policy, the General Assembly has authorized school districts to litigate when necessary to enforce their rights under the law. *See R.C. 3313.17*. In light of the massive amounts unlawfully taken from these urban school districts by ODE, they would have been remiss had they failed to seek recovery.

Indeed, the right of school districts to enforce payment of obligations imposed by law was addressed by this Court in *State ex rel. Kenton City Sch. Dist. Bd. of Edn. v. State Bd. of Edn.*, 174 Ohio St. 257, 189 N.E.2d 72 (1963). In *Kenton*, this Court recognized that school

districts have substantive, accrued rights to state funding mandated by statute and can enforce those statutes by way of mandamus. *Id.* at 261-62. *Kenton* also recognized the obvious—that the legislature from time-to-time amends school funding statutes. The salient point of *Kenton*, however, is that if a school funding statute confers a “benefit” on a school district, the benefit conferred while that statute is in effect does not disappear by subsequent amendment or repeal of the former statute. Contrary to ODE’s assertions, the court of appeals’ consideration of *Kenton* was not inappropriate and does not provide a valid reason for review.

The singular purpose of the Budget Provision was to absolve ODE of any responsibility for its failure to follow the law by purporting to preclude lawsuits asserting claims that had *already accrued* under the substantive school funding statutes in effect prior to passage of the uncodified provision. That such an uncodified provision was ruled unconstitutionally retroactive by the lower courts is not groundbreaking. The lower courts’ ruling does not alter, or in any meaningful manner disturb, the General Assembly’s authority to set education policy in this state. If anything, it reinforces such policy by permitting suits that seek enforce of the education laws enacted by the General Assembly.

**B. ODE’s liability has not yet been determined. All that has been determined is that the Budget Provision cannot bar suits against ODE that seek enforcement of state law.**

Finally, ODE argues that review is required because of the magnitude of its wrongdoing. Reminiscent of the “too big to fail” claims of certain banks in 2007, ODE appears to suggest that its wrongdoing is of such a magnitude as to warrant amnesty and urges this Court to review for that reason. ODE, like the School District Plaintiffs, is a creature of statute and is obliged to follow the dictates of the General Assembly. This year alone, ODE was entrusted by the General Assembly with the distribution of over \$7 billion in state tax revenue for public school districts.

The import of the decisions below is that ODE, like all other state agencies, is bound to follow the law as enacted by the General Assembly, and is answerable for its failure to do so. That result is consistent with both law and policy and does not require further review.

In short, ODE's appeal does not involve issues of constitutional magnitude or of public or great general interest. This Court should not accept jurisdiction over ODE's appeal.

**ARGUMENT IN RESPONSE TO THE OHIO DEPARTMENT OF EDUCATION'S  
PROPOSITION OF LAW**

**The Budget Provision, the sole purpose of which is to bar accrued causes of action that would otherwise be cognizable in the courts of Ohio, violates the Retroactivity Clause of the Ohio Constitution.**

Article II, Section 28 of the Ohio Constitution provides that “[t]he General Assembly shall have no power to pass retroactive laws \* \* \*.” This Court has set forth a two-part test to determine whether a statute is unconstitutionally retroactive. *Bielat v. Bielat*, 87 Ohio St.3d 350, 353, 721 N.E.2d 28 (2000). First, the court determines whether the General Assembly specifically intended the statute to apply retroactively. *Id.* This is because, absent a clear pronouncement otherwise, a statute may be applied prospectively only. *See State v. Lasalle*, 96 Ohio St.3d 178, 2002-Ohio-4009, 772 N.E.2d 1172, paragraph one of the syllabus. If the statute is intended to have retroactive application, then the court determines whether the statute is substantive, as opposed to remedial, which will render the statute *unconstitutionally* retroactive. *Id.* at 181.

The Budget Provisions are plainly intended to apply, and can only be applied, retroactively. The effective date of the first Budget Provision is June 1, 2009, but it purports to cut off all claims for violations of statutes in effect, and for violations occurring, in FYs 05, 06 and 07, all long-prior to the effective date of the Budget Provision(s).

The second prong turns on whether the statute is remedial or substantive. Laws affecting the methods and procedure by which rights are recognized, protected and enforced are remedial, while those that affect the rights themselves are substantive. *See Bielat* at 354. A substantive law is one that:

- impairs or takes away a vested right;
- affects an accrued substantive right;
- imposes new or additional burdens, duties, obligations or liabilities as to a past transaction; *or*
- gives rise to or takes away the right to sue or defend actions at law.

*Van Fossen*, 36 Ohio St.3d at 107 (citations omitted).

The Budget Provision is a substantive law. Its sole purpose is to take away Plaintiffs' claims against ODE for statutory violations that accrued and were otherwise cognizable long prior to the enactment of the Budget Provision.

ODE's reliance on *Ross*, *supra*, is misplaced. ODE claims *Ross* stands for the proposition that where state funds are concerned, a school district can never have an expectation of finality because its property can be abolished at will by the legislature. But *Ross* held nothing of the sort. *Ross* did not address the issue of a school district's property rights vis-à-vis the state. If anything, *Ross* recognized that school district "property" (including real property and funds generated from taxes) vests in the board of education. 113 Ohio St. at 476.

ODE's attempt to distinguish *Kenton* and fault the court of appeals for relying on it, is nonsensical. The facts and issues here are not fundamentally different from those in *Kenton*, and the analysis employed by this Court in *Kenton* is on point. In *Kenton*, the state board of education claimed that a board of education, as a political subdivision of the state, has no vested right in a "public law" that establishes how a school district is to be funded. *Id.* at 260. In

rejecting this notion, this Court recognized that school districts have substantive, accrued rights to state funding mandated by statute and can enforce those statutes by way of mandamus. *Id.* at 261-62. As cogently observed by the Court of Appeals:

\* \* \* [t]he *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.

*Toledo City Sch. Dist. Bd. of Edn. v. State Bd. of Edn.*, 2014-Ohio-3741, ¶ 44. The court of appeals also characterized ODE's attempt to distinguish *Kenton* from the case at bar as "a distinction without a difference." *Id.* at ¶ 43.

Here, at the relevant time periods, the statutes mandated a formula to be used in calculating public school districts' state foundation funding: "[t]he department of education *shall* compute and distribute state base cost funding to each school district for the fiscal year *in accordance with the following formula \* \* \*.*" See former R.C. 3317.022(A)(1); emphasis added. A critical component of this mandated formula was Formula ADM. Formula ADM was statutorily defined as "\* \* \* the number reported [by each district's superintendent] pursuant to division (A) of section 3317.03 of the Revised Code \* \* \*." See former R.C. 3317.02(D). ODE departed from this statutory mandate and substituted different numbers, resulting in a substantial reduction in funding for each district. The School Districts and some of their students, parents and employees filed suit to seek enforcement of the statutes. *Kenton* says that the School Districts have the substantive right to make these claims.

ODE claims the School Districts do not have a substantive or vested right to make these claims, arguing that Ohio's public school districts can never have an expectation of finality because their funding levels change "constantly." ODE supports this argument by pointing out

the different funding models that have been in place over the years as well as the various scenarios that can cause a district's funding to change in the course of year. These arguments are immaterial to whether the Budget Provision is unconstitutionally retroactive. That the General Assembly has the authority to *prospectively* alter the school funding system is not challenged here. Neither do Plaintiffs in this case challenge laws that permit the diversion of school foundation funds from traditional school districts to other educational institutions under the voucher, autism scholarship or community school programs.

The school foundation formula in effect for FY 05 was an extremely complex body of legislation with many "moving parts," all of which could have some impact on the final amount received by any school district. But the lynchpin of that system was the student count—the Formula ADM that ODE admittedly, and unlawfully, changed. While other issues may have been uncertain at various points in the process, the October count Formula ADM was not. Neither was the amount of funding due these urban districts under the formula enacted by the General Assembly, which required utilization of Formula ADM. The statutory formula abided no discretion in ODE to depart from its requirements.

ODE's argument that the Budget Provision's bar against advancing these claims is constitutional because the School Districts never actually had such a claim in the first place is unsupported by the case law, which has manifestly rejected that notion. If ODE were correct (which it is not), then there was no need for the Budget Provision. Also, if ODE were correct, then why did it spend over \$13 million in tax dollars to settle identical claims (and partial claims) in the Cincinnati and Dayton matters prior to the enactment of the first Budget Provision?

The simple fact is that prior to the Budget Provision, Plaintiffs had a right to seek recovery from ODE of the funds wrongfully taken and withheld. ODE seems to concede as

much when it states in its jurisdictional memorandum that “the very purpose of the Budget Provisions was to change the privileges that school districts enjoyed under the old law.” (ODE Jurisdictional Memorandum at p. 12.) The “privilege” the districts enjoyed before the Budget Provision was the ability to seek enforcement of statutory rights. Because Plaintiffs had that right prior to the Budget Provision, they could not be divested of it by Budget Provision. This is the essence of the constitutional prohibition against retroactive legislation.

The Budget Provision does not pass constitutional muster, and the courts below correctly determined as such. There is nothing novel, complex or far reaching in the lower courts’ conclusion. Nor has ODE demonstrated any other reason why review should be accepted. ODE’s request that this Court accept jurisdiction over its appeal should be denied.

### **CONCLUSION**

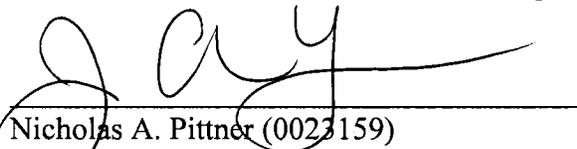
ODE has failed to demonstrate any valid reason why this Court should accept its appeal. ODE’s callous violation of law resulted in the deprivation of substantial resources intended by the General Assembly for distribution to these urban School District Plaintiffs for the education of their students. Its facile reliance on the Budget Provision is no excuse because in Ohio, even the General Assembly cannot turn back the clock. The day before the Budget Provision’s passage, the School District Plaintiffs, according to ODE, had claims worth over \$40 million. The next day argues ODE, they had nothing. That is exactly what the Retroactivity Clause forbids.

The overarching concern is, and should be, the utilization of tax dollars for the education of students. ODE’s wrongdoing has already caused the expenditure of substantial amounts in litigation costs to the Plaintiffs. Rejection of ODE’s attempted appeal of what is an elementary

issue will go far in helping secure a conclusion to this litigation, ending the further expense of tax dollars on both sides of the case.

If, however, the Court decides that further review is appropriate, it should also accept for review the appeal of the Individual Plaintiffs, whose claims were wrongfully dismissed by the trial court and court of appeals.

Respectfully submitted,



Nicholas A. Pittner (0023159)  
James J. Hughes, III (0036754)  
Susan B. Greenberger (0010154)  
Jennifer A. Flint (0059587)  
BRICKER & ECKLER LLP  
100 South Third Street  
Columbus, Ohio 43215-4291  
Telephone: (614) 227-2316  
Facsimile: (614) 227-2390  
[jjhughes@bricker.com](mailto:jjhughes@bricker.com)  
[jflint@bricker.com](mailto:jflint@bricker.com)  
CO-COUNSEL FOR APPELLEES,  
TOLEDO CITY, DAYTON CITY AND  
DAYTON CITY SCHOOL DISTRICT

/s/ Amy M. Natyshak [per email auth.]  
Amy M. Natyshak (0043941)  
MARSHALL & MELHORN, LLC  
Four Seagate, Eighth Floor  
Toledo, Ohio 43604  
Telephone: (419) 249-7100  
Facsimile: (419) 249-7151  
[natyshak@marshall-melhorn.com](mailto:natyshak@marshall-melhorn.com)  
CO-COUNSEL FOR APPELLEE,  
TOLEDO CITY SCHOOL DISTRICT  
BOARD OF EDUCATION

/s/ Jyllian R. Guerriero [per email auth.]  
Jyllian R. Guerriero (0088714)  
DAYTON CITY SCHOOL DISTRICT  
115 South Ludlow Street  
Dayton, Ohio 45402  
Telephone: (937) 542-3007  
Facsimile: (937) 542-3188  
[jrguerri@dps.k12.oh.us](mailto:jrguerri@dps.k12.oh.us)  
CO-COUNSEL FOR APPELLEE,  
DAYTON CITY SCHOOL DISTRICT  
BOARD OF EDUCATION

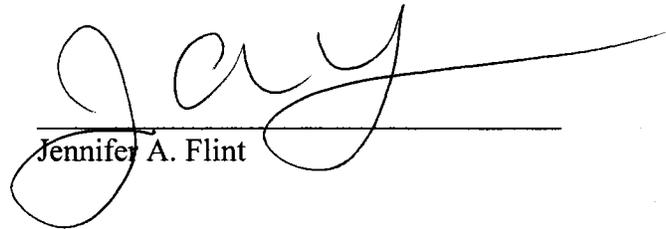
/s/ Wayne J. Belock [per email auth.]  
Wayne J. Belock (0013166)  
CLEVELAND METROPOLITAN  
SCHOOL DISTRICT  
1380 East Sixth Street  
Cleveland, Ohio 44114  
Telephone: (216) 574-8210  
Facsimile: (216) 574-8108  
CO-COUNSEL FOR APPELLEE,  
CLEVELAND METRO. SCHOOL  
DISTRICT BOARD OF EDUCATION

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing was served on the following by regular

U.S. mail, this 10<sup>th</sup> day of November, 2014:

Eric E. Murphy, Esq.  
30 East Broad Street, 17<sup>th</sup> Floor  
Columbus, Ohio 43215  
COUNSEL FOR APPELLANTS/  
CROSS-APPELLEES, STATE BOARD  
OF EDUCATION, et al.

  
Jennifer A. Flint