

IN THE SUPREME COURT OF OHIO

| | | |
|---|---|---|
| Toledo City School District Board of Education, et al., | : | Case No. 2014-1769 |
| | : | |
| Appellees, | : | 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. | : | 14AP-95 |
| | : | |

MERIT BRIEF OF APPELLEES – TOLEDO CITY, DAYTON CITY AND CLEVELAND METROPOLITAN SCHOOL DISTRICT BOARDS OF EDUCATION

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
jflint@bricker.com
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)
Hannah C. Wilson (0093100)
Matthew R. Cushing (0092674)
Todd R. Marti (0019280)
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
Telephone: (614) 466-8980
Facsimile: (614) 466-5087
eric.murphy@ohioattorneygeneral.gov
COUNSEL FOR APPELLANTS, 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
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
CO-COUNSEL FOR APPELLEE,
DAYTON CITY SCHOOL DISTRICT
BOARD OF EDUCATION

Wayne J. Belock (0013166)
CLEVELAND METROPOLITAN
SCHOOL DISTRICT
111 Superior Avenue E., Suite 1800
Cleveland, Ohio 44114
Telephone: (216) 838-0070
Facsimile: (216) 436-5064
wayne.j.belock@clevelandmetroschools.org
CO-COUNSEL FOR APPELLEE,
CLEVELAND METROPOLITAN
SCHOOL DISTRICT BOARD OF
EDUCATION

TABLE OF CONTENTS

| | <u>Page</u> |
|---|-------------|
| TABLE OF CONTENTS..... | i |
| TABLE OF AUTHORITIES | iv |
| INTRODUCTION | 1 |
| STATEMENT OF FACTS | 3 |
| A. The <i>Cincinnati</i> Decisions..... | 3 |
| B. The School Foundation Program | 4 |
| C. ODE Abandons the Statutory Formula..... | 5 |
| D. ODE Claws Back FY 05 Funds Already Distributed to the Districts, Unlawfully Reduces FY 06 and FY 07 Guarantee Funds, and Fails to Properly Increase Funding on Account of Add-In Students | 8 |
| E. Subsequent Legislation | 8 |
| F. Current Litigation..... | 9 |
| ARGUMENT | 10 |
| <u>Response to Appellants’ Proposition of Law: The School Districts have a substantive right to have their school foundation funding for Fiscal Years 2005, 2006 and 2007 calculated pursuant to statutory law, and legislation enacted in 2009 and thereafter to retroactively abolish School District claims for the recalculation of the same based on ODE’s unlawful substitution of CSADM for ADM violates Article II, Section 28 of the Ohio Constitution</u> | 10 |
| A. Rights granted school districts by statute, enforceable in court, cannot be divested by the legislature because such legislation is barred by the Retroactivity Clause..... | 11 |
| 1. The plain language of the Retroactivity Clause bars retroactive legislation, regardless of who is impacted by the legislation | 11 |
| 2. The framers’ purpose was to prohibit the legislature from enacting laws that circumvent the judicial process in favor of one party over another. They did not intend to protect some parties from such laws while leaving others exposed..... | 12 |
| a. <i>Connell v. Connell</i> and the context for the retroactivity prohibition | 12 |
| b. Powers formerly exercised by the legislature were reserved to the judiciary | 14 |
| c. The public/private distinction posited by ODE was neither inherent in the meaning of “retroactive law” nor discussed by the framers | 15 |

| | | |
|----|---|----|
| 3. | ODE’s “Home Rule” argument is inapposite | 19 |
| 4. | The legislature’s Article VI authority does not trump limitations on its powers set forth in Article II..... | 20 |
| 5. | In Ohio and elsewhere, it is well-established that political subdivisions, including school districts, are capable of enforcing rights against the state and its agencies | 22 |
| | a. Ohio..... | 22 |
| | b. Other states..... | 23 |
| 6. | This Court has afforded political subdivisions the protections of the Retroactivity Clause..... | 26 |
| 7. | The Districts also have third-party standing to invoke the Retroactivity Clause on behalf of the individual victims who are unable to seek relief | 30 |
| B. | The legislation first enacted in 2009 for the purpose of divesting the Districts’ causes of action that accrued in 2005, 2006, and 2007, violates the Retroactivity Clause..... | 31 |
| | 1. The rights in issue are of the type protected by the Retroactivity Clause..... | 32 |
| | a. The Districts had a right to funding calculated in accordance with law, and ODE had a clear legal duty to so calculate their funding..... | 32 |
| | b. There is and must be <i>finality</i> with respect to the school funding mandated by law | 35 |
| | c. Aside from the retroactive legislation, the Districts’ entitlement to recalculation of their funding has already been determined | 38 |
| | 2. The retroactive legislation did not “clarify” the FY 2005 foundation formula..... | 39 |
| | 3. The retroactive legislation did not implement “education policy” | 40 |
| | 4. ODE’s “form over substance” argument is factually and legally wrong..... | 41 |
| C. | The extralegal authority ODE seeks is completely at odds with existing law and would have harmful and chaotic consequences | 42 |
| | 1. Consequences for school districts..... | 42 |
| | 2. Broader consequences..... | 44 |
| D. | The retroactive legislation also violates the Uniformity Clause..... | 45 |
| E. | Even if constitutional, the retroactive legislation would not dispose of all the claims | 46 |

| | |
|---|----|
| 1. The retroactive legislation does not purport to bar the add-in claims..... | 46 |
| 2. The retroactive legislation preserves Dayton’s claims | 48 |
| SUMMARY AND CONCLUSION | 49 |
| CERTIFICATE OF SERVICE | 51 |

APPENDIX

Appx. Page

| | |
|--|----|
| Entry on Cross Motions For Summary Judgment, <i>Cincinnati, City Sch.</i> <i>Dist. Bd. of Edn. v. State Bd. of Edn.</i> , Hamilton C.P. No. A0603908 (Nov. 22, 2006) | 28 |
| Judgment Entry, <i>Cincinnati, City Sch.</i> <i>Dist. Bd. of Edn. v. State Bd. of Edn.</i> , Hamilton C.P. No. A0603908 (Jan. 5, 2007)..... | 28 |
| Am. Sub. H.B. 64, line item 200550..... | 30 |
| Current and former R.C. 3317.031 | 33 |

TABLE OF AUTHORITIES

| | <u>Page</u> |
|--|-------------|
| <u>CASES</u> | |
| <i>Abbeville County Sch. Dist. v. State</i> , 335 S.C. 58, 515 S.E.2d 535 (1999) | 25 |
| <i>Alternatives Unlimited-Special, Inc. v. Ohio Dept. of Edn.</i> , 168 Ohio App.3d 592, 2006-Ohio-4779, 861 N.E.2d 163 (10 th Dist.) | 38 |
| <i>Austintown Twp. Bd. of Trustees v. Tracy</i> , 76 Ohio St.3d 353, 667 N.E.2d 1174 (1996) | 45, 46 |
| <i>Avon Lake City School Dist. v. Limbach</i> , 35 Ohio St. 3d 118, 518 N.E.2d 1190 (1988) | 28 |
| <i>Bd. of Edn. Cincinnati Sch. Dist. v. Hamilton Cty. Bd. of Revision</i> , 91 Ohio St. 3d 308, 744 N.E.2d 751 (2001)..... | 27, 32 |
| <i>Bd. of Edn. v. McLandsborough</i> , 36 Ohio St. 227 (1880) | 28 |
| <i>Beifuss v. Westerville Bd. of Edn.</i> , 37 Ohio St.3d 187, 525 N.E.2d 20 (1988)..... | 43 |
| <i>Bielat v. Bielat</i> , 87 Ohio St.3d 350, 721 N.E.2d 28 (2000) | 31 |
| <i>Brigham v. State</i> , 166 Vt. 246, 692 A.2d 384 (1997) | 25 |
| <i>Campbell Cty. Sch. Dist. v. State</i> , 907 P.2d 1238 (Wyo. 1995)..... | 25 |
| <i>Canton v. Whitman</i> , 44 Ohio St.2d 62, 337 N.E.2d 766 (1975) | 19 |
| <i>Cave Creek Unified Sch. Dist. v. Ducey</i> , 233 Ariz. 1, 308 P.3d 1152 (2013) | 25 |
| <i>Chestnut v. Shane’s Lessee</i> , 16 Ohio 599 (1847)..... | 13 |
| <i>Cincinnati City Sch. Dist. Bd. of Edn. v. State Bd. of Edn. of Ohio</i> , 119 Ohio St.3d 1498, 2008-Ohio-5500; 895 N.E.2d 562 (2008)..... | 4 |
| <i>Cincinnati City Sch. Dist. Bd. of Edn. v. State Bd. of Edn.</i> , Hamilton C.P. No. A0603908 (Nov. 22, 2006) | 3, 4, 7 |
| <i>Cincinnati City Sch. Dist. Bd. of Edn.</i> , 176 Ohio App.3d 157, 2008-Ohio-1434 (1 st Dist.).. | 3, 7, 47 |
| <i>Cleveland v. Zangerle</i> , 127 Ohio St. 91, 186 N.E. 805 (1933)..... | 37 |
| <i>Cmte. For Educl. Equality v. Missouri</i> , 294 S.W.3d 477 (Mo. 2009) | 25 |
| <i>Coalition for Adequacy and Fairness in Sch. Funding, Inc. v. Chiles</i> , 680 So.2d 400 (Fla. 1996); | 25 |
| <i>Commissioners v. Rosche Bros.</i> , 50 Ohio St. 103, 33 N.E. 408 (1893)..... | 27, 32 |
| <i>Connell v. Connell</i> , 6 Ohio 353 (1834)..... | 12, 13 |

| | |
|---|--------|
| <i>Cuyahoga Falls City Sch. Dist. Bd. of Edn. v. Ohio Dept. of Edn.</i> , 118 Ohio App.3d 548, 693 N.E.2d 841 (10 th Dist. 1997)..... | 23 |
| <i>Dayton Bd. of Edn. v. Trs. of State of Ohio</i> , 10th Dist. Franklin No. 01AP-780, 2002 Ohio App. LEXIS 780 (Feb. 26, 2002)..... | 23 |
| <i>De Cordova v. Galveston</i> , 4 Tex. 470 (1849)..... | 17 |
| <i>DeRolph v. State</i> , 78 Ohio St. 3d 193, 677 N.E.2d 733 (1997) | 20, 42 |
| <i>DeRolph; Claremont Sch. Dist. v. Governor</i> , 138 N.H. 183, 635 A.2d 1375 (1993)..... | 24 |
| <i>DeRolph; State ex rel. Bd. of Commrs. of Williams Cty. v. Weir</i> , 6 Ohio St.3d 381, 453 N.E.2d 676 (1983)..... | 22 |
| <i>Desenco, Inc. v. Akron</i> , 84 Ohio St.3d 535, 706 N.E.2d 323 (1999)..... | 45 |
| <i>E. Liverpool v. Columbiana Cty. Budget Comm.</i> , 114 Ohio St.3d 133, 2007-Ohio-3759..... | 31 |
| <i>Eastland Jt. Voc. Sch. Dist. v. Dept. of Edn.</i> , 50 Ohio St.2d 91, 362 N.E.2d 654 (1977) | 22 |
| <i>Edgewood Indep. Sch. Dist. v. Kirby</i> , 777 S.W.2d 391 (Tex. 1989) | 25 |
| <i>Fordyce v. Godman</i> , 20 Ohio St. 1 (1870)..... | 11 |
| <i>Friedlander v. Gorman</i> , 126 Ohio St. 163, 184 N. E. 530, (1933)..... | 37 |
| <i>Good v. Zercher</i> , 12 Ohio 364 (1843)..... | 13, 26 |
| <i>Greater Heights Acad. v. Zelman</i> , 522 F.3d 678 (6th Cir. 2008) | 28 |
| <i>Greenaway’s Case</i> , 319 Mass. 121, 65 N.E.2d 16 (1946)..... | 26 |
| <i>Greenville Law Library Assn. v. Ansonia</i> , 33 Ohio St.2d 3, 292 N.E.2d 880 (1973)..... | 39 |
| <i>Hearing v. Wylie</i> , 173 Ohio St. 221, 180 N.E.2d 921 (1962)..... | 40 |
| <i>Helena Elem. Sch. Dist. No. 1 v. State</i> , 236 Mont. 44, 769 P.2d 684 (1989) | 25 |
| <i>Hill v. Higdon</i> , 5 Ohio St. 243 (1855)..... | 20 |
| <i>Hoke County Bd. of Edn. v. State</i> , 358 N.C. 605, 599 S.E.2d 365 (2004)..... | 25 |
| <i>Idaho Schools for Equal Educl. Opp. v. Evans</i> , 123 Idaho 573, 850 P.2d 724 (1993)..... | 24 |
| <i>Idaho Schools for Equal Educl. Opp. v. Idaho</i> , 140 Idaho 586, 591, 97 P.3d 453 (2004) | 24 |
| <i>In re Pursley</i> , U.S. Bankr. Ct. No. 13-61707, 2014 Bankr. LEXIS 314, (N.D. Ohio, Jan. 23, 2014) | 41 |
| <i>Infinite Sec. Solutions, L.L.C. v. Karam Props., II Ltd.</i> , Slip Opinion No. 2015-Ohio-1101 | 48 |

| | |
|--|--------|
| <i>Ironton City Sch. Dist. Bd. of Edn. v. Ohio Dept. of Edn.</i> , 4 th Dist. Lawrence No. CA92-39, 1993 Ohio App. LEXIS 3476 (Jun. 29, 1993) | 23 |
| <i>Johnson’s Markets, Inc. v. New Carlisle Dept. of Health</i> , 58 Ohio St.3d 28, 567 N.E.2d 1018 (1991) | 32, 36 |
| <i>Jones v. State Bd. of Elem. & Sec. Edn.</i> , 927 So. 2d 426 (La. App. 1 Cir. Nov. 4, 2005)..... | 25 |
| <i>Kelleys Island Caddy Shack, Inc. v. Zaino</i> , 96 Ohio St.3d 375, 775 N.E.2d 489 (2002) | 46 |
| <i>Kiser v. Coleman</i> , 28 Ohio St.3d 259, 503 N.E.2d 753 (1986) | 27 |
| <i>Kowalski v. Tesmer</i> , 543 U.S. 125 (2004) | 31 |
| <i>Kumler v. Silsbee</i> , 38 Ohio St. 445 (1882) | 29, 30 |
| <i>Lake View Sch. Dist. No. 25 v. Huckabee</i> , 351 Ark. 31, 91 S.W.3d 472 (2002)..... | 25 |
| <i>Lobato v. State</i> , 304 P.3d 1132 (Colo. 2013)..... | 25 |
| <i>Longbottom v. Mercy Hosp. Clermont</i> , 137 Ohio St.3d 103, 2013-Ohio-4068, 998 N.E.2d 419 (2013)..... | 16 |
| <i>Marbury v. Madison</i> , 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803)..... | 20 |
| <i>Marietta v. Fearing</i> , 4 Ohio 427 (1831) | 16 |
| <i>McDaniel v. Thomas</i> , 248 Ga. 632 (Ga. 1981) | 25 |
| <i>Meddock v. Williams</i> , 12 Ohio 377 (1843) | 13 |
| <i>Mentor Exempted Vill. Sch. Dist. Bd. of Edn. v. State Empl. Relations Bd.</i> , 76 Ohio App.3d 465, 602 N.E.2d 374 (11th Dist. 1991)..... | 28 |
| <i>Merrill v. Sherburne</i> , 1 N.H. 199 (1818) | 16, 17 |
| <i>Miller v. Korns</i> , 107 Ohio St. 287, 140 N.E. 773 (1923)..... | 41 |
| <i>N.Y. Life Ins. Co. v. Bd. of Commrs.</i> , 106 F. 127 (6th Cir. 1901)..... | 28 |
| <i>Nationwide Mut. Ins. Co. v. Kidwell</i> , 117 Ohio App.3d 633, 691 N.E.2d 309 (4 th Dist. 1996) | 40 |
| <i>New Orleans v. Clark</i> , 95 U.S. 644 (1877)..... | 29, 30 |
| <i>Osai v. A&D Furniture Co.</i> , 68 Ohio St. 2d 99, 428 N.E.2d 857 (1981) | 27 |
| <i>P.L.S. ex rel. Shelton v. Koster</i> , 360 S.W.3d 805, 813, (Mo.App.2011) | 25 |
| <i>Proprietors of Kennebec Purchase v. Laboree</i> , 2 Me. 275 (1823)..... | 16 |
| <i>Rose v. Council for Better Edn., Inc.</i> , 790 S.W.2d 186 (Ky. 1989)..... | 25 |

| | |
|---|----------------|
| <i>Rubbermaid, Inc. v. Wayne Cty. Auditor</i> 95 Ohio St.3d 358, 2002-Ohio-2338, 767 N.E.2d 1159..... | 32 |
| <i>Savannah R-III Sch. Dist. v. Public Sch. Retirement System of Missouri</i> , 950 S.W.2d 854 (Mo. 1997) | 25 |
| <i>Sch. Admin. Dist. No. 1 v. Commr., Dept. of Edn.</i> , 659 A.2d 854 (Me. 1995)..... | 25 |
| <i>Sch. Bd. of the Parish of Livingston, La., v. Louisiana State Bd. of Elem. & Sec. Edn.</i> , 830 F.2d 563 (5 th Cir. 1987), cert. denied 487 U.S. 1223 (1988) | 30 |
| <i>Seattle Sch. Dist. No. 1 of King Cty. v. State</i> , 90 Wash.2d 476, 585 P.2d 71 (1978) | 25 |
| <i>Shell v. Ohio Veterinary Med. Licensing Bd.</i> , 105 Ohio St.3d 420, 2005-Ohio-2423, 827 N.E.2d 766 (2005)..... | 36 |
| <i>Silliman v. Cummins</i> , 13 Ohio 116 (1844)..... | 13 |
| <i>Simmons-Harris v. Goff</i> , 86 Ohio St.3d 1, 711 N.E.2d 203 (1999)..... | 45, 46 |
| <i>Skeen v. State</i> , 505 N.W.2d 299 (Minn. 1993) | 25 |
| <i>Solomon v. Cent. Trust Co., N.A.</i> , 63 Ohio St.3d 35, 584 N.E.2d 1185 (1992)..... | 26 |
| <i>Spitzig v. State ex rel. Hile</i> , 119 Ohio St. 117, 162 N.E. 394 (1928)..... | 28 |
| <i>Stanley Miller Constr. Co. v. Ohio Sch. Facilities Commn.</i> , Court of Claims No. 2006-05632-PR, 2012-Ohio-3994..... | 22 |
| <i>State ex rel. Bates v. Trustees of Richland Twp.</i> , 20 Ohio St. 362 (1870)..... | 28 |
| <i>State ex rel. Bunch v. Indus. Comm.</i> , 62 Ohio St.2d 423, 406 N.E.2d 815 (1980)..... | 40 |
| <i>State ex rel. Canada v. Phillips</i> , 168 Ohio St. 191, 151 N.E.2d 722 (1958) | 19 |
| <i>State ex rel. Crotty v. Zangerle</i> , 133 Ohio St. 532, 14 N.E.2d 932 (1938)..... | 27, 32 |
| <i>State ex rel. Dept. of Mental Hygiene & Correction v. Eichenberg</i> , 2 Ohio App.2d 274, 207 N.E.2d 790 (9th Dist. 1965)..... | 28 |
| <i>State ex rel. Durbin v. Smith</i> , 102 Ohio St. 591, 133 N.E. 457 (1921)..... | 17 |
| <i>State ex rel. General Health Dist. of Columbiana Cty. v. Ohio Dept. of Health</i> , 10 th Dist. Franklin No. 87AP-538, 1988 Ohio App. LEXIS 3983 (Sept. 29, 1988)..... | 23 |
| <i>State ex rel. Kenton City Sch. Dist.</i> , 174 Ohio St. 257, 189 N.E.2d 72 (1963)..... | 22, 27, 32, 34 |
| <i>State ex rel. Mager v. State Teachers Ret. Sys. of Ohio</i> , 123 Ohio St. 3d 195, 199, 2009-Ohio-4908, 915 N.E.2d 320..... | 39 |
| <i>State ex rel. Midview Loc. Sch. Dist. Bd. of Edn. v. Ohio Sch. Facilities Commn.</i> , 9th Dist. Lorain No. 14CA010596, 2015-Ohio-435 | 22 |

| | |
|---|--------|
| <i>State ex rel. Ohio Cong. of Parents & Teachers v. State Bd. of Educ.</i> , 111 Ohio St.3d 568, 2006-Ohio-5512, 857 N.E.2d 1148..... | 20 |
| <i>State ex rel. Outcalt v. Guckenberger</i> , 134 Ohio St. 457, 17 N.E.2d 743 (1938)..... | 27, 37 |
| <i>State ex rel. Romans v. Elder Beerman Stores Corp.</i> , 100 Ohio St.3d 165, 2003-Ohio- 5363, 797 N.E.2d 82 (2003)..... | 17 |
| <i>State ex rel. Stacy v. Batavia Loc. Sch. Dist. Bd. of Edn.</i> , 97 Ohio St.3d 269, 2002-Ohio- 6322; 779 N.E.2d 216 (2002) | 38 |
| <i>State ex rel. Stanton v. Powell</i> , 109 Ohio St. 383, 142 N.E. 401 (1924) | 46 |
| <i>State ex rel. Sweeney v. Donahue</i> , 12 Ohio St.2d 84, 232 N.E.2d 398 (1967)..... | 27, 28 |
| <i>State ex rel. Zupancic v. Limbach</i> , 58 Ohio St.3d 130, 568 N.E.2d 1206 (1991)..... | 46 |
| <i>State of Ohio ex rel. Bd. of Trustees of Butler Twp. v. Ohio State Emp. Rel. Bd.</i> , 10 th Dist. Franklin No. 08-AP-163, 2008-Ohio-5617..... | 23 |
| <i>State of Ohio v. Kuhner & King, Partners</i> , 107 Ohio St. 406, 140 N.E. 344 (1923) | 27 |
| <i>State v. Babst</i> , 104 Ohio St. 167, 135 N.E. 525 (1922) | 16 |
| <i>State v. Bd. of Edn. City of Wooster</i> , 38 Ohio St. 3 (1882)..... | 28 |
| <i>State v. Hoffman</i> , 35 Ohio St. 435 (1880)..... | 30 |
| <i>State v. Rose</i> , 89 Ohio St. 383, 106 N.E. 50 (1914)..... | 11 |
| <i>State v. White</i> , 132 Ohio St.3d 344, 2012-Ohio-2583, 972 N.E.2d 534 | 27 |
| <i>Tenn. Small Sch. Systems v. McWherter</i> , 851 S.W. 2d 139 (Tenn. 1993) | 25 |
| <i>Town of E. Hartford v. Hartford Bridge Co.</i> , 51 U.S. 511, 13 L.Ed. 518 (1850)..... | 16 |
| <i>Trustees of Dartmouth College v. Woodward</i> , 17 U.S. 518, 4 L.Ed. 629 (1819)..... | 16 |
| <i>Van Fossen v. Babcock & Wilcox Co.</i> , 36 Ohio St.3d 100, 522 N.E.2d 489 (1988)..... | 18, 32 |
| <i>Vogel v. Wells</i> , 57 Ohio St.3d 91, 566 N.E.2d 154 (1991) | 32 |
| <i>Wayman v. Bd. of Edn.</i> , 5 Ohio St.2d 248, 215 N.E.2d 394 (1966) | 43 |

STATUTES

| | |
|----------------------|----|
| R.C. 3313.17 | 42 |
| R.C. 3313.47 | 42 |
| R.C. 3316.02(A)..... | 43 |
| R.C. 3317.02(D)..... | 33 |

| | |
|--------------------------|-----------|
| R.C. 3317.02(D)(1)..... | 5 |
| R.C. 3317.022(A)..... | 6, 33 |
| R.C. 3317.022(A)(1)..... | 36 |
| R.C. 3317.022(K)..... | 39 |
| R.C. 3317.03..... | 9 |
| R.C. 3317.03(A)..... | 5, 33, 47 |
| R.C. 3317.03(F)(3)..... | 5, 47 |
| R.C. 3317.031..... | 6 |
| R.C. 3317.18..... | 44 |
| R.C. 4582.17..... | 44 |
| R.C. 4582.43..... | 44 |
| R.C. 4582.431..... | 44 |
| R.C. 5705.28..... | 43 |
| R.C. 5705.281..... | 43 |
| R.C. 5705.38(B)..... | 43 |
| R.C. 5705.391..... | 44 |
| R.C. 5705.41..... | 43 |
| R.C. 5705.412..... | 43 |
| R.C. 9.482..... | 44 |
| R.C. Chapter 3317..... | 4 |
| R.C. Chapter 3318..... | 44 |

CONSTITUTIONAL PROVISIONS

| | |
|---|------------|
| Article I, Ohio Constitution..... | 16 |
| Home Rule Amendment, Ohio Consitution..... | 19, 21 |
| Mo. Const. Art. XIII, Sec. 17 (1820)..... | 16 |
| Retroactivity Clause, Ohio Constitution..... | passim |
| Section 2, Article VI, Ohio Constitution..... | 40, 42, 44 |

| | |
|---|---------------|
| Section 26, Article II, Ohio Constitution | 45 |
| Section 28, Article II, Ohio Constitution | 3, 10, 20, 45 |
| Section 3, Article VI, Ohio Constitution | 21, 42, 45 |
| Section 3, Article XVIII, Ohio Constitution..... | 19 |
| Sections 1 and 2, Article 13, Ohio Constitution | 18 |
| Sections 2 and 3, Article VI, Ohio Constitution..... | 20, 40 |
| Tenn. Const. Art. 1, Sec. 20 (1834) | 16 |
| Tex. Const. Art 1, Sec. 14 (1845) | 16 |

OTHER AUTHORITIES

| | |
|---|----------------|
| J.V. Smith, <i>Report of the Debates of Proceedings of the Convention for the Revision of the Constitution of the State of Ohio</i> (1851) Vol. 1 | 13, 14, 15 |
| J.V. Smith, <i>Report of the Debates of Proceedings of the Convention for the Revision of the Constitution of the State of Ohio</i> (1851) Vol. 2 | 14, 15, 18, 21 |

INTRODUCTION

The Ohio Department of Education (“ODE”) has identified the issues as: (1) whether Ohio’s Retroactivity Clause is limited to protecting individuals and not political subdivisions like school districts; and (2) whether school districts have a vested right to state funding. ODE’s formulation of the issues omits two facts critical to the issues that are actually determinative.

First, ODE fails to acknowledge that it was ODE’s deliberate violations of the school funding laws that gave rise to these claims. The extent and consequence of ODE’s misconduct is not in dispute. As ODE has noted, the magnitude of the funding it unlawfully took or withheld from the Districts is *at least* \$40 million dollars. (ODE Ct. App. Brief at 13.) These are dollars the General Assembly appropriated for the benefit of the Districts—required by law to be paid to the Districts, but which ODE converted to other uses. It was not the General Assembly that “reallocated” state funds—it was ODE that took the funds allocated for the Districts (via the mandatory school funding formula enacted into law) and “reallocated” them, in violation of law.

Second, ODE ignores the determinative fact that led the lower courts to declare the law upon which it relies unconstitutionally retroactive. What ODE characterized as the General Assembly’s attempt to implement “statewide education-funding policy” and to “clarify pre-existing, ambiguous law” in fact consists *solely* of an uncodified provision inserted in subsequent budget bills that purports to cut off the Districts’ pre-existing claims to funds unlawfully taken from or denied them by ODE, in fiscal years that predate enactment of the uncodified provision. This is why the lower courts determined the provisions are unconstitutionally retroactive and do not bar to the Districts’ claims.

The issues are far narrower than stated by ODE. The General Assembly’s authority to allocate state funds, establish and change education policy, and otherwise modify school funding patterns and priorities within the parameters of Article VI, Section 2 of the Ohio Constitution is

not at issue. Few, if any, political subdivisions have been the subject of more legislation than Ohio public school districts. But this case is not about establishing or changing educational policy. It is about the obligation of ODE to follow the law established by the General Assembly.

The Districts' claims are based on the clear legislative mandate that ODE utilize "formula ADM" in the calculation of school foundation payments. The legislative direction to ODE created a concomitant right on the part of the Districts, the beneficiaries of that calculation, to have the calculations performed in accordance with statute. The relief sought is that ODE recalculate using the correct formula, and pay any difference. Both the claims and the relief sought are entirely consistent with established principles of law, and the legislature has given school districts the legal authority to pursue these claims.

ODE contends that the uncodified provision extinguishes the pre-existing claims of the Districts, also paradoxically arguing that the reason the provisions are not unconstitutionally retroactive is that the Districts' claims never actually existed, even prior to the uncodified provisions. ODE asserts that as political subdivisions, school districts never have a vested right to state funding. This is an astonishing assertion of incredible breadth and significance, and it is logically inconsistent with the single basis for ODE's motion for judgement on the pleadings—that the uncodified provisions did, in fact, extinguish the Districts' claims. How is this so, if the claims were never capable of assertion in the first place? And why, if school districts have no vested right to funding, did ODE settle, for millions of dollars, identical claims asserted by the Cincinnati City School District (and partially settle those of Appellee, Dayton City School District), prior to the enactment of the retroactive legislation?

The simple fact is that prior to these enactments, the Districts had a right to seek recovery from ODE of the funds wrongfully taken and withheld from them. Because they had that right

prior to the enactment, they could not be divested of it by the enactment. This is the essence of the constitutional prohibition against retroactive legislation.

The prohibition of Article II, Section 28 of the Ohio Constitution is absolute: “The General Assembly shall have no power to pass retroactive laws.” It makes no difference whether the retroactive laws strip the rights of widows to dower rights or the rights of school districts to have their revenues determined in accordance with law. The people of Ohio have denied the General Assembly that form of legislative power. The retroactive legislation here was beyond the reach of the General Assembly to enact, and it cannot bar the School Districts’ claims.

STATEMENT OF FACTS

A. The *Cincinnati* Decisions

The retroactivity issue before this Court has its origin in a different lawsuit, wherein the Cincinnati City School District Board of Education (“Cincinnati”) successfully sued ODE for the very same unlawful conduct at issue in the underlying case. *See, generally, Cincinnati City Sch. Dist. Bd. of Edn. v. State Bd. Edn.*, 176 Ohio App.3d 157, 2008-Ohio-1434 (1st Dist.); *Cincinnati City Sch. Dist. Bd. of Edn. v. State Bd. of Edn.*, Hamilton C.P. No. A0603908 (Nov. 22, 2006) (Appx. 1-27). The circumstances giving rise to the claims at issue here are identical to those in the *Cincinnati* case. ODE admittedly substituted lower, community school attendance numbers (CSADM), rather than using the formula average daily membership (“formula ADM”) numbers specified by law for use in calculating school foundation payments. Cincinnati filed suit against ODE, seeking recalculation of its school foundation payments for fiscal years (FY) 2005, 2006 and 2007. The trial court and the First District Court of Appeals found that ODE’s substitution of CSADM for formula ADM contravened law. *Id.* In accordance with the trial court’s decision, ODE recalculated the school foundation payments due Cincinnati, and ODE was ordered to pay

Cincinnati nearly \$6 million. *See Cincinnati City Sch. Dist. Bd. of Edn.* (Hamilton C.P., Jan. 5, 2007 Judgment Entry; Appx. 27-28).

ODE then sought, and was granted, review by this Court. *Cincinnati City Sch. Dist. Bd. of Edn. v. State Bd. of Edn.*, 120 Ohio St.3d 1416, 2008-Ohio-6166, 897 N.E.2d 651 (2008). Before briefs were filed; however, ODE settled the case and voluntarily dismissed its appeal, thus making the First District decision final and binding. *Cincinnati City Sch. Dist. Bd. of Edn. v. State Bd. of Edn. of Ohio*, 119 Ohio St.3d 1498, 2008-Ohio-5500; 895 N.E.2d 562 (2008). ODE later settled some, but not all of the same claims advanced by Appellee, Dayton City School District Board of Education (“Dayton”). *See Dayton Compl.* ¶ 48 (SD Supp. S-105; Dayton and Cincinnati settlement agreements att. to ODE’s motion for judgment on the pleadings (SD Supp. S-16-30). In all, ODE paid more than \$13 million to resolve or partially resolve the school district claims it now asserts are invalid.

Cincinnati established, as a matter of law, that ODE had a legal duty to utilize the statutorily-defined ADM methodology in calculating school foundation payments for FYs 05, 06, and 07 and that a school district has the right to have its school foundation payments recalculated for each of the three fiscal years. The Districts seek the same relief, based on the same circumstances, as existed there, save for the subsequent efforts of the General Assembly to turn back the clock and retroactively nullify ODE’s liability.

B. The School Foundation Program

Since 1935, the General Assembly has, pursuant to its constitutional mandate to provide a “thorough and efficient” system of public education, utilized a school foundation formula for the distribution of state revenue to Ohio’s public schools. *See generally* R.C. Chapter 3317; Article VI, Section 2, Ohio Constitution. The foundation program funnels state tax revenues from the state’s general revenue fund to ODE for distribution to Ohio’s public schools, where those funds,

combined with local property tax and other revenue, provide public educational opportunities for Ohio's school children. *See* Toledo Compl., ¶ 9 (ODE Supp. S-5).

The process commences with the passage of Ohio's biennial budget legislation, which appropriates funds to ODE which then distributes the funds to Ohio's school districts pursuant to a legislated distribution formula. The current state budget appropriated just over \$6.3 billion for distribution by ODE as school foundation funding. *See* Am.Sub. H.B. 64, line item 200550 (Appx. 32). The general goal of the foundation program is to distribute state funds to school districts in an inverse ratio to local school district wealth.

A key element of the foundation program is formula ADM. At the times relevant, formula ADM was determined by a count of students attending during the first week in October, together with certain other students entitled to attend. R.C. 3317.03(A) (as in effect at the time relevant to this lawsuit). Each district superintendent was required to annually certify the district's October count to the state superintendent of public instruction. *Id.*; *see also* Toledo Compl., ¶ 12-13 (ODE Supp. S-5). The number certified was defined in statute as the "formula ADM" for purposes of ODE's calculation of school foundation payments to districts. R.C. 3317.02(D)(1). Once established, formula ADM remained constant during the year and was not impacted by the arrival or departure of students after the October count, with one exception. The exception was that a district's formula ADM was *increased* for resident students attending community schools who were not included in the October count ("add-in" students). R.C. 3317.03(F)(3); *see also* Toledo Compl., ¶ 14 (ODE Supp. S-5).

C. ODE Abandons the Statutory Formula

Formula ADM becomes the basis for calculation of a school district's foundation funding for the fiscal year: "[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"—a

formula that specifically includes “formula ADM.” *See* R.C. 3317.022(A). Here, ODE initially used the Districts’ FY 05 certified formula ADM to calculate each District’s FY 05 state funding, just as it was required by law to do. *See* Toledo Comp. ¶ 31 (Supp. S-9). But ODE subsequently substituted figures derived from a completely separate reporting system known as community school average daily membership (“CSADM”). *See id.* ¶ 17, 32 (Supp. S-7, S-9).

Formula ADM and CSADM capture different information, utilize different reporting methodologies, and do not yield identical results with respect to students attending community schools. *Id.* ¶ 33 (Supp. S-10). The reporting of CSADM to ODE was done by the community school claiming entitlement to funding, and data was submitted to ODE pursuant to ODE guidelines. *Id.* ¶ 17 (Supp. S-7). When a student was reported as being in attendance at a community school, school foundation funds attributable to that student were deducted from funds otherwise payable to the traditional public school district the student was entitled to attend, and then paid to the community school instead. *Id.* ¶ 18.

ODE now asserts that the District “overestimated” their FY 2005 October counts. These new assertions are as offensive as they are wrong and unsupported by the record. Significantly, ODE had the authority to audit a school district’s ADM. *See* R.C. 3317.031 (Appx. 33-35). If ODE believed the Districts’ ADM certifications were “padded,” as ODE now appears to be claiming, it had the authority to conduct such an audit. ODE did not. Instead, ODE simply substituted CSADM in place of the certified formula ADM it was required by law to use and then sought to justify its “departure” from law, claiming CSADM was “more accurate.”

The *Cincinnati* decision considered and rejected the claim that CSADM was more reliable than formula ADM, noting that they were two entirely different systems for reporting

student attendance and determining funding based on those reports. *See Cincinnati*, Hamilton C.P. No. A0603908 (Nov. 22, 2006), p. 5 (Appx. 5).

ODE admitted that *Cincinnati* had advanced legitimate bases for disputing the accuracy of CSADM. *See Cincinnati*, 2008-Ohio-1434, ¶ 8 (1st Dist.). Among other flaws in the system, during FY 05, ODE's reporting system for CSADM permitted community schools to add to, modify and delete records of community school students from CSADM. *See Toledo Compl.* ¶ 21 (ODE Supp. S-8). *See Cincinnati*, Hamilton C.P. No. A0603908 (Nov. 22, 2006), p. 18 (Appx. 18) (nearly 1,500 enrollment records relating to *Cincinnati* deleted by community school employees prior to ODE's substitution of ADM for CSADM). Upon information and belief, a substantial number of records relevant to the Districts were deleted from the system by one or more community schools. *See Toledo Compl.* ¶ 21 (ODE Supp. S-8).

When a community school deleted a student record from CSADM, that record no longer existed in ODE's database. *Id.* ¶ 22. ODE's system made it impossible to reconcile the number and identity of students reported in CSADM with the number and identity of students reported as part of the District' formula ADM. *Id.* ¶ 28 (ODE Supp. S-9). With regard to ODE's claim that CSADM information was more accurate than the October count, Judge Fred Nelson stated:

* * * it is undisputed that [CSADM] records were deleted * * *. ODE "maintains no independent record" of this deleted information. * * * If it is not appropriate for an administrative agency to substitute an accounting of apples where a statute requires a count of oranges, the proposed substitution is not improved by an inability to verify or substantiate what the count of apples would be for the particular week in question.

Hamilton C.P. No. A0603908 (Nov. 22, 2006), p. 18 (Appx. 18). ODE changed the CSADM software after FY 05 to eliminate the ability of community schools to delete student records. *See Toledo Compl.* ¶ 25 (ODE Supp. S-8).

D. ODE Claws Back FY 05 Funds Already Distributed to the Districts, Unlawfully Reduces FY 06 and FY 07 Guarantee Funds, and Fails to Properly Increase Funding on Account of Add-In Students

ODE's unlawful use of CSADM in the school foundation formula was first applied to the funding calculation for FY 05 when, after several months of calculating and paying school foundation payments to the Districts (and Cincinnati), it began substituting lower CSADM numbers in lieu of the higher ADM numbers certified to it by the Districts' superintendents. *See Toledo and Cleveland Compls.*, ¶ 35, 38-39, 60, 68-69 (ODE Supp. S – 10, 14-15; SD Supp. S-86-87, 90-91); *Dayton Compls.*, ¶ 35, 38-39, 62, 70-71 (SD Supp. S – 103, 107-108). Asserting that it had “overpaid” the Districts for those months, ODE began to recoup (claw-back) the supposed overpayments. *Compls.* ¶ 35, 38, 39. The unlawful substitution of CSADM data reduced the student count by approximately 688 pupils for Dayton, 575 pupils for Cleveland and 561 pupils for Toledo, with a corresponding reduction in the amount of school foundation payments to the Districts. *Compls.* ¶ 34, 35 37.

For FY 06 and FY 07, school foundation payments were based on “guarantee” provisions designed to protect school districts from unanticipated losses of funding resulting from specified circumstances beyond the districts' control (“Guarantee”). *Id.* ¶ 15 (ODE Supp. S – 6-7). The Guarantee provisions provided districts a minimum level of funding, based on the districts' FY 05 school foundation payments, without regard to ADM in the years covered by the guarantee. *Id.* ¶ 15-16 (ODE Supp. S-7). In *Cincinnati*, ODE was ordered to recalculate Cincinnati's FY 06 and FY 07 foundation payments. *See Hamilton C.P.*, Jan. 5, 2007 Judgment Entry (Appx. 28-29). Likewise, the Districts here seek similar relief for the reductions to their FYs 06 and 07 guarantee funding based on their unlawfully lowered FY 05 funding. *See Compls.*, ¶ 44-47.

E. Subsequent Legislation

As part of its Facts section, ODE states that two laws passed by the General Assembly in reaction to the *Cincinnati* decision “clarified” the laws from which ODE “departed” in FY 05. ODE’s account of the two laws is not, however, quite factual. (ODE Brief at 6, 7.) First, ODE claims that when, in Am. Sub. H.B. 119, 127th G.A. (2007-2008), the General Assembly added subsection (K) to R.C. 3317.03, authorizing ODE to correct certain errors in the October count, the General Assembly simply “clarified” prior law. *Id.* But the evidence ODE cites for this characterization of legislative intent—an LSC analysis—makes no such characterization. *Id.*

The second legislative change, relied on by ODE as its “get out of jail free” pass, was enacted as part of another budget bill, Am. Sub. H.B. 1 (128th G.A.)—more than *four years* after ODE began the conduct that gave rise to the Districts’ claims. With a startling resemblance to historical figure referenced by ODE – Caligula, who “wrote his laws in a very small character, and hung them up upon high pillars, the more effectively to ensnare the people,” (*see* ODE Brief at 17)—the retroactive legislation enacted by the General Assembly was buried in uncodified language on page 2,835 of a 3,120-page budget bill. (ODE Appx.118-119). The intent of the retroactive legislation is clear. With respect to school foundation funding claims arising in fiscal years 2005, 2006 and 2007, “no school district * * * shall have a legal claim for reimbursement of the amount of such reduction in school funding or transitional aid funding, and the state shall not have liability for reimbursement of the amount of such reduction * * *.” *Id.*

F. Current Litigation

In 2011, the Districts, along with parents, students and employees of the respective Districts, filed three separate actions against ODE, seeking writs of mandamus or, in the alternative, declaratory judgments based on ODE’s unlawful calculation of the Districts’ respective formula ADM. The Districts seek an order that ODE calculate their formula ADM and school foundation funding in accordance with the law in effect at the relevant time, and they

ask for equitable restitution of the amounts wrongfully recouped and/or withheld by ODE. *See* Compls. (ODE Supp. S – 15-16; SD Supp. S-92, 108-109).

ODE moved for judgment on the pleadings on two grounds: (1) the retroactive legislation bars the District’ claims and insulates ODE from liability; and (2) the parents, students and employees lack standing. The plaintiffs responded by asserting the retroactive legislation is unconstitutional under Article II, Section 28, Ohio Constitution. On January 16, 2014, the trial court rejected ODE’s claim that the legislation bars the claims, finding it unconstitutionally retroactive. The trial court dismissed the individual plaintiffs for lack of standing.

ODE and the individual plaintiffs appealed to the Tenth District Court of Appeals. The Tenth District affirmed the trial court rulings, finding the legislation unconstitutionally retroactive and also finding that the individual plaintiffs lacked standing. ODE sought review from this Court of the appellate court’s decision on the retroactive legislation, and the District and individual plaintiffs sought review of the standing issue. This Court accepted ODE’s appeal but denied review on the issue of whether the individual plaintiffs have standing.

In this appeal, ODE again argues that the Districts, now the only parties remaining in the case, cannot assert the rights claimed as against the state. The individual Plaintiffs, having been found to lack standing, are gone. Thus, in addition to all of the other consequences that would attend a win for ODE, the agency would be free from challenge by *anyone* the next time it chooses to “depart” from the mandates of state law.

ARGUMENT

Response to Appellants’ Proposition of Law: The School Districts have a substantive right to have their school foundation funding for Fiscal Years 2005, 2006 and 2007 calculated pursuant to statutory law, and legislation enacted in 2009 and thereafter to retroactively abolish School District claims for the recalculation of the same based on ODE’s unlawful substitution of CSADM for ADM violates Article II, Section 28 of the Ohio Constitution.

A. Rights granted school districts by statute, enforceable in court, cannot be divested by the legislature because such legislation is barred by the Retroactivity Clause

ODE's theory of defense has changed over time. Initially, its defense was premised on the theory that the retroactive legislation eliminated the Districts' claims. When the Districts refuted that theory on grounds that included unconstitutionality under the Retroactivity Clause, ODE argued the Clause was not violated because the claims asserted never vested. Now, ODE's central argument is that school districts and other political subdivisions are *never* protected by the Retroactivity Clause. ODE is wrong, under both a plain reading of the Clause and in light of the framers' intent. The Retroactivity Clause bars *all* retroactive legislation that seeks to bar accrued, substantive rights—including those of political subdivisions.

1. The plain language of the Retroactivity Clause bars retroactive legislation, regardless of who is impacted by the legislation

The Retroactivity Clause states in its entirety:

The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties, and officers, by curing omissions, defects, and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this state.

The Clause is absolute in its prohibition. It does not carve out exceptions granting the legislature authority to pass retroactive laws against some parties. Given the clarity of the Clause, there is no reason to engage in the historical exercises urged by ODE. As this Court has stated,

Where there is no doubt, no ambiguity, no uncertainty as to the meaning of the language employed by the constitution-makers, there is clearly neither right nor authority for the court to assume to interpret that which needs no interpretation and to construe that which needs no construction.

State v. Rose, 89 Ohio St. 383, 387, 106 N.E. 50 (1914). *See also Fordyce v. Godman*, 20 Ohio St. 1, 14 (1870) (“We see no reason for interpreting this language in any other sense than that which lies upon the surface, and which the terms used naturally import. In such a sense we may

assume that it was understood by the body of the people, through whose votes it became a part of the constitution”).

If the historical context surrounding the adoption of the Retroactivity Clause is nevertheless considered, it confirms that the framers intended exactly what the Clause states. The legislature has *no power* to pass retroactive legislation—period.

2. The framers’ purpose was to prohibit the legislature from enacting laws that circumvent the judicial process in favor of one party over another. They did not intend to protect some parties from such laws while leaving others exposed

ODE argues the framers intended only to protect individuals, not political subdivisions such as school districts, from retroactive laws. But the framers never discussed a distinction between individuals and political subdivisions in relation to the Retroactivity Clause. Instead, their discussions focused on the need to limit the power of the legislature to enact “curative” laws—effectively, judicial-like decisions in favor of one party over another. The framers believed this kind of action should be reserved to the judicial branch. The Retroactivity Clause reflects this purpose, making no distinctions based on the identity of those potentially affected.

a. *Connell v. Connell* and the context for the retroactivity prohibition

The 1850-51 Constitutional Convention convened not long after a series of rulings by this Court involving retroactive legislation. In the early 1800s, Ohio statutory law required specific protections for married women releasing dower to property being transferred, and such protections were required to be acknowledged on deeds by affidavit of certain officials. *See Connell v. Connell*, 6 Ohio 353 (1834). But many officials were not executing acknowledgments that showed all protections had been provided. In 1834, this Court determined that one such noncompliant deed was invalid. *Id.* at 358.

The General Assembly, apparently fearing that countless deeds would thus be invalidated, passed a curative law in 1835 making such deeds valid despite incomplete acknowledgements. See J.V. Smith, *Report of the Debates of Proceedings of the Convention for the Revision of the Constitution of the State of Ohio* (1851) Vol. 1 (“Convention Vol. 1”), at 264-266, 275, 277.¹ Shortly thereafter, an incomplete deed acknowledgement came before the Court with facts similar to *Connell*. In *Good v. Zercher*, 12 Ohio 364, 367 (1843), the question was whether the 1835 Act could retroactively cure the deed’s acknowledged defects. At the time, the Ohio Constitution contained no express prohibition against retroactive legislation. This Court nonetheless ruled the 1835 Act unconstitutional. *Id.* at 367-368 (characterizing the law as “contrary to the fundamental principles of all free government”). In two subsequent cases, the 1835 Act was again declared unconstitutional. *Meddock v. Williams*, 12 Ohio 377 (1843); *Silliman v. Cummins*, 13 Ohio 116 (1844).

Such was the law until 1847, when new justices appointed by the legislature tipped the ideological scales. The Court overruled its four prior decisions and held the 1835 Act constitutional. See *Chestnut v. Shane’s Lessee*, 16 Ohio 599 (1847). The dissent was blistering, focusing on the separation of powers that should exist between the legislature and the judiciary:

To permit the same men or body of men to enact, construe, and execute laws of their own enactment, subjects all over whom such laws have control to the simple will of the law-maker without check or remedy, if wrong be inflicted. To have our rights depend upon the unrestrained will or judgment of another is absolute despotism.

Id. at 621.

It was on the heels of *Chestnut* that the Ohio Constitutional Convention met to discuss the respective roles of the legislature and the judiciary, leading to the inclusion of the Retroactivity Clause in the 1851 Ohio Constitution.

¹ Convention Vol. 1 available at: <http://babel.hathitrust.org/cgi/pt?id=umn.319510015674148>

b. Powers formerly exercised by the legislature were reserved to the judiciary

When the 1850-51 Constitutional Convention convened, it was clear that many had concerns about the powers of the legislature. This mistrust was particularly evident in the discussions of the proposed retroactivity prohibition, which was debated at length. *See* Convention Vol. 1, at 263-270, 273-284; J.V. Smith, *Report of the Debates of Proceedings of the Convention for the Revision of the Constitution of the State of Ohio* (1851) Vol. 2 (“Convention Vol. 2”), at 242-277, 590-593.² The 1835 curative act regarding the release of dower rights arose almost immediately, setting the context for the debate. Convention Vol. 1, at 264-265. One delegate characterized legislation “legalizing the acts of officers who have by neglect or design failed to do their duty” as the “most dangerous class of laws.” *Id.* at 277.

Ultimately, the discussion evolved towards giving the judiciary the power to “protect every right, legal and equitable, under the established forms of judicial proceedings,” as the legislature was “the most unsafe of all tribunals, to pass upon such an investigation, for in the very nature there must be an *ex parte* case.” *Id.* at 280. Significantly, the delegates recognized there may be circumstances in which it would be appropriate to cure defects in instruments and proceedings in order to conform them to the intent of the parties. Convention Vol. 2, at 596. For this reason, language was added to the Retroactivity Clause enabling the legislature to enact *general laws* by which the *judiciary* is given the power to “carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties, and officers, by curing omissions, defects, and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this state.” The added language is further evidence of the separation-of-powers concerns that gave rise to the Retroactivity Clause.

² Convention Vol. 2 available at: <http://babel.hathitrust.org/cgi/pt?id=umn.319510015674156>

c. The public/private distinction posited by ODE was neither inherent in the meaning of “retroactive law” nor discussed by the framers

In debating the Retroactivity Clause, the framers did not focus on whether the legislature could enact retroactive laws against some parties but not others, as ODE argues. The prohibition was discussed as an all-or-nothing proposition: either the legislature could pass retroactive laws to “cure” issues that had arisen, or the courts alone would have the equitable power to do so, with no apparent distinction based on the identity of the injured party.

ODE argues that the meaning of “retroactive laws” was established prior to Ohio’s 1850-51 Constitutional Convention and was such that a prohibition on such laws would not protect school districts and other political subdivisions. But ODE’s premise—that the meaning was well-established at the time—is flatly contradicted by the debates. In fact, one of the main arguments *against* the prohibition was the lack of settled definition. The record is replete with delegates asking questions about what “retroactive,” “curative,” or “retrospective” meant, and expressing concern precisely because the definition was *not* well-settled. *See, e.g.*, Convention Vol. 1 at 267, 268, 273; Convention Vol. 2 at 591. One delegate remarked that “retroactive” was so unclear in its meaning that the lawyers in the delegation should all vote for it based on their personal interest in creating a “fruitful source of litigation.” *Id.* at 273. Ultimately, the delegates came to a shared understanding that the legislature should not have the authority to act in a quasi-judicial manner by enacting legislation that changed the consequences of past events. This is consistent with the meaning attributed to “retroactive law” today.

For its claim that “retroactive laws” were commonly understood not to apply to political subdivisions, ODE relies on pre-1851 decisions from out-of-state jurisdictions. ODE’s reliance is misplaced. Of the four states cited by ODE that at the time had similar prohibitions in their constitutions, three put the language—not in the section about legislative powers and their limits,

as the framers did in Ohio—but instead placed the provision in their “Bill of Rights.” *See* Mo. Const. Art. XIII, Sec. 17 (1820); Tenn. Const. Art. 1, Sec. 20 (1834); Tex. Const. Art 1, Sec. 14 (1845). The fourth state, New Hampshire, did not organize its constitutional provisions, and so intent cannot be inferred from the placement of its prohibition.

By contrast, the Retroactivity Clause is found in Article II of the Ohio Constitution, which is entitled “Legislature” and addresses the scope of legislative authority. Article I, which is entitled “Bill of Rights,” is where guarantees of *personal* rights are found. *Compare Longbottom v. Mercy Hosp. Clermont*, 137 Ohio St.3d 103, 108-109, 2013-Ohio-4068, 998 N.E.2d 419 (2013) (discussing retroactivity prohibition as a prohibition on legislative encroachments) *with State v. Babst*, 104 Ohio St. 167, 169, 135 N.E. 525 (1922) (Article I is a Bill of Rights that guaranties personal rights).

Notably, the propositions for which ODE cites the pre-1851 cases are all found in dicta. For example, in *Merrill v. Sherburne*, 1 N.H. 199 (1818), the New Hampshire Supreme Court did refer to retroactive laws applying to the interests of individuals or private corporations, but no interests of public corporations or political subdivisions were at stake. The same is true in several other cases cited by ODE. *See, e.g., Proprietors of Kennebec Purchase v. Laboree*, 2 Me. 275, 294 (1823) (involving rights of private land owners); *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518, 4 L.Ed. 629 (1819) (involving rights of a private college, and not involving the retroactive application of a statute); *Town of E. Hartford v. Hartford Bridge Co.*, 51 U.S. 511, 13 L.Ed. 518 (1850) (involving rights of a private bridge company); *Marietta v. Fearing*, 4 Ohio 427 (1831) (involving rights of a private horse owner).

More importantly, the *Merrill* court’s focus and reasoning, like that of the framers of Ohio’s Retroactivity Clause, reflect a conviction that the legislature had no power to exercise

judicial authority, as the legislature would be doing if it enacted a law that interfered with existing interests—something the court said was “forbidden by first principles.” *Id.* at 215. When *Merrill* was briefly discussed by the Ohio delegates, it provoked no discussion regarding public versus private interests, but instead was considered in relation to the distinctions between legislative and judicial powers. Convention Vol. 1 at 269.

In *De Cordova v. Galveston*, 4 Tex. 470 (1849), the Texas Supreme Court’s reference to *Merrill* (for the proposition that the retroactivity prohibition extends only to the interests of individuals or private corporations) likewise appears in dicta. And there is no evidence *De Cordova* was considered or discussed by Ohio’s delegates such that it could be said to inform their intent on this issue. Compare *State ex rel. Durbin v. Smith*, 102 Ohio St. 591, 599, 133 N.E. 457 (1921) (relying on Oregon case law interpreting language that Ohio thereafter borrowed for its own constitution where “the debates * * * disclose that the decision of the highest court of Oregon * * * was fully considered by the Ohio Constitutional Convention”).

ODE cites to a number of other out-of-state cases predating Ohio’s 1851-52 Constitutional Convention for the proposition that only laws that take away *vested* rights were understood at the time to be impermissibly retroactive. (See ODE’s Brief at 13-14.) But neither the proposition nor the cited cases advance the analysis of *who* Ohio’s framers intended to protect from retroactive laws (as opposed to the nature of the interests that were to be protected). In any event, the cited cases have no value in light of more recent Ohio authority. See, e.g., *State ex rel. Romans v. Elder Beerman Stores Corp.*, 100 Ohio St.3d 165, 2003-Ohio-5363, 797 N.E.2d 82 (2003) (constitution prohibits retroactive substantive enactments that impair or destroy vested rights, affect accrued substantive rights, impose new burdens, duties, obligations or liabilities as to a past transaction, create a new right, or generate or eliminate the right to sue

or defend actions of law), citing *Van Fossen v. Babcock & Wilcox Co.*, 36 Ohio St.3d 100, 107, 522 N.E.2d 489 (1988).

ODE also points to references in the Ohio debates to “men” or “individuals” as evidence the delegates intended to limit the retroactivity prohibition to certain parties. But ODE’s references are to fleeting examples, without regard to context. Throughout the discussions, the cases used by the delegates to illustrate benefits and burdens of retroactive laws were cases that happened to involve individuals. The delegates often spoke in terms of these cases, or in terms of their own rights if they found themselves in the same position.

For its proposition that the delegates discussed a distinction between public and private corporations, ODE cites but a single statement made during the debates. According to ODE, a delegate “suggested that ‘no man is bold enough to assert’ that the charters of public corporations ‘may not be repealed by act of the Legislature.’” (ODE’s Brief at 18.) But the term “public corporations” is ODE’s; it was not used by the delegate to whom ODE attributes the distinction—and counsel cannot find *any* use of the term during the debates. In actuality, the delegate was referencing multiple types of corporations, both private and public, none of which is analogous to a modern-day school district. *See* Convention Vol. 2 at 270.

The delegate’s main point was that the legislature should not be granting specific charters to private corporations in the first place, a belief that gave rise to the addition of Article 13, Sections 1 and 2.³ Convention Vol. 2, at 270. These latter provisions, echoing the principle of separation of powers that underlies the retroactivity prohibition, eliminated the authority of the

³ Article 13, Section 1 of the 1851 Constitution read in its entirety, “The General Assembly shall pass no special act conferring special corporate powers.” Section 2 of the same Article read, “Corporations may be formed under general laws; but all such laws may, from time to time, be altered, or repealed.” A transcript of the 1851 Constitution is available at: http://textbook2.infohio.org/images/section8images/1851_Ohio_Constitution_Transcript.pdf

legislature to grant special corporate powers and instead permitted only general laws on the subject. No other delegate took up the comments regarding types of corporations in relation to the prohibition on retroactive laws, and no debates were held on that point, leaving ODE with *no* evidence that the framers intended to limit the types of parties to be protected by the prohibition.

3. ODE’s “Home Rule” argument is inapposite

ODE claims municipalities may have constitutional claims against the state due to the Home Rule Amendment, but school districts do not because there is no equivalent provision for school districts. This argument lacks merit.

The Home Rule Amendment was added to the Ohio Constitution in 1912. It provides: “Municipalities shall have the authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.” Article XVIII, Section 3, Ohio Constitution. This provision preserved the supremacy of the state in matters of police, sanitary and other similar regulations, while granting municipalities sovereignty in matters of local self-government. *Canton v. Whitman*, 44 Ohio St.2d 62, 65, 337 N.E.2d 766 (1975). The Home Rule Amendment concerns a municipality’s ability to *supersede* state law. *See State ex rel. Canada v. Phillips*, 168 Ohio St. 191, 151 N.E.2d 722 (1958) (under the Home Rule Amendment, in matters of local self-government, city charter provision prevails over conflicting state statute.)

The Districts are not attempting to challenge or supersede state law. Rather, they are seeking to *enforce* state law, violated by ODE, that mandated the methodology for calculating school funding. The Home Rule Amendment and the powers it grants to municipalities have no relation to the Districts’ ability to seek enforcement of these statutes. And, the existence of the Home Rule Amendment has no bearing on whether the separate Retroactivity Clause may be asserted by a school district.

4. The legislature's Article VI authority does not trump limitations on its powers set forth in Article II

ODE appears to suggest that the powers granted to the legislature in Article VI, Sections 2 and 3 of the Ohio Constitution override the limitations on the legislature's powers in the Retroactivity Clause. ODE's reading makes no sense.

While this Court is charged with harmonizing the various provisions of the Constitution, *Hill v. Higdon*, 5 Ohio St. 243 (1855), here there is no need for harmonization because there is no conflict. Article II, Section 28 clearly states that the Legislature has *no power* to pass retroactive laws, and there is nothing in Article VI granting such power in the context of educational policy (nor any reason that such power would be implicitly inherent). The fact that the constitution affords the General Assembly a measure of discretion to determine the means of achieving a goal mandated by the people does not mean that the General Assembly may ignore the fundamental limitations of its legislative power in doing so. *State ex rel. Ohio Cong. of Parents & Teachers v. State Bd. of Educ.*, 111 Ohio St.3d 568, 2006-Ohio-5512, 857 N.E.2d 1148, relied on by ODE, does not hold otherwise. In fact, this Court acknowledged that the discretion granted to the General Assembly regarding education is not without limits. *Id.* at ¶ 33.

Further, there is nothing in the framers' debates suggesting that *despite* the prohibition against retroactive legislation, the legislature *may* act in a judicial capacity in the specific area of education; their understanding was that this was a strong prohibition to enforce the separation of powers without regard to the topic at hand. *See* Section A.2., *supra*. It remains the duty of the General Assembly to enact constitutional laws, and, separately, the role of the courts to determine when that duty has been breached. *DeRolph v. State*, 78 Ohio St. 3d 193, 198, 677 N.E.2d 733 (1997), citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803).

To read Article VI as overriding Article II suggests two things. First, the General Assembly would acquire, by the stroke of a judicial pen, a measure of autocratic authority effectively unlimited by the Constitution, save that it be exercised in the name of education. The passage of retroactive laws, impairment of contracts and trampling of other constitutionally protected interests would all be fair game, as long as the legislation is passed under the umbrella of Article VI. Second, by the same logic, many *other* provisions of the Constitution should also override the limitations of legislative power in that article—a dangerous precedent to set that would allow the Legislature to sit as judge and jury on the laws that it enacts in a variety of circumstances unrelated to education. This is precisely the danger the Retroactivity Clause was meant to prevent, and is inconsistent with the rule of law.

ODE further argues that Article VI, Section 3 was added to ensure that the Home Rule Amendment would not “undercut the General Assembly’s unquestioned preeminence of the public-school system,” but this statement is not entirely accurate. While the framers were concerned that cities might, by way of home rule, pull their schools entirely out of the state’s purview, they also expressed the strong desire of both themselves and the population at large to maintain local control so that the school districts could continue to govern themselves and provide an education by the means they felt most appropriate. *See* 1912 Constitutional Convention of Ohio, Vol. 2, pages 1500-1509.⁴ The beliefs of the framers regarding the school districts and the relationship with the Legislature was much more complicated than ODE would lead this Court to believe, and any assertions regarding the Home Rule Amendment and its relationship with Article VI, Section 3 should not be read so broadly as to circumvent a proper historical analysis of that relationship if an argument is to be based upon it.

⁴ This resource is available online through this Court’s website at: <https://www.supremecourt.ohio.gov/LegalResources/LawLibrary/resources/1912Convention.asp>.

5. In Ohio and elsewhere, it is well-established that political subdivisions, including school districts, are capable of enforcing rights against the state and its agencies

a. Ohio

ODE's novel premise that political subdivisions have no legally protected rights against the state or any of its agencies stands in sharp contrast to many years of Ohio jurisprudence holding otherwise. The rights claimed arise from neither common law nor the Constitution, but from the school funding formula enacted into law by the General Assembly. For ODE to argue that these provisions of law convey no enforceable rights to the Districts is to argue that the General Assembly lacks the power to confer such rights in the first instance. This, too, is at odds with the fabric of our jurisprudence.

Ohio courts, including this Court, frequently adjudicate disputes between political subdivisions and state agencies, including ODE. *See, e.g., DeRolph; State ex rel. Bd. of Commrs. of Williams Cty. v. Weir*, 6 Ohio St.3d 381, 384, 453 N.E.2d 676 (1983) (mandamus lies to compel payment by state agency to county commissioners of assessment for county ditch improvements; *Eastland Jt. Voc. Sch. Dist. v. Dept. of Edn.*, 50 Ohio St.2d 91, 362 N.E.2d 654 (1977) (joint vocational school district challenged ODE's assignment of a school district to the JVS); *State ex rel. Kenton City Sch. Dist.*, 174 Ohio St. 257, 189 N.E.2d 72 (1963) (discussed *infra*); *State ex rel. Midview Loc. Sch. Dist. Bd. of Edn. v. Ohio Sch. Facilities Commn.*, 9th Dist. Lorain No. 14CA010596, 2015-Ohio-435 (common pleas court has subject matter jurisdiction over school district's mandamus/declaratory judgment action against state agency, seeking to enforce state agency's statutory duties); *Stanley Miller Constr. Co. v. Ohio Sch. Facilities Commn.*, Court of Claims No. 2006-05632-PR, 2012-Ohio-3994 (finding in favor of city school district on its third-party complaint against state agency for state's share of judgment); *State of*

Ohio ex rel. Bd. of Trustees of Butler Twp. v. Ohio State Emp. Rel. Bd., 10th Dist. Franklin No. 08-AP-163, 2008-Ohio-5617 (township sought writ of mandamus ordering SERB to issue stay of award); *Dayton Bd. of Edn. v. Trs. of State of Ohio*, 10th Dist. Franklin No. 01AP-780, 2002 Ohio App. LEXIS 780 (Feb. 26, 2002) (school board's court of claims suit against state seeking recovery of money from intentional tort fund); *Cuyahoga Falls City Sch. Dist. Bd. of Edn. v. Ohio Dept. of Edn.*, 118 Ohio App.3d 548, 693 N.E.2d 841 (10th Dist. 1997) (school district sued ODE seeking reimbursement for past wages court had ordered the district pay to tutors); *Ironton City Sch. Dist. Bd. of Edn. v. Ohio Dept. of Edn.*, 4th Dist. Lawrence No. CA92-39, 1993 Ohio App. LEXIS 3476 (Jun. 29, 1993) (school district sued ODE to enjoin enforcement of rules concerning district's use of particular motor coach for student transportation); *State ex rel. General Health Dist. of Columbiana Cty. v. Ohio Dept. of Health*, 10th Dist. Franklin No. 87AP-538, 1988 Ohio App. LEXIS 3983 (Sept. 29, 1988) (county health district sought writ compelling Ohio Department of Health grant district the power to administer federal aid program).

The retroactive legislation *cuts off* the *claims* asserted here. Clearly, then, the legislature believed that school districts *do* have rights that can give rise to claims to be funded in accordance with law. Otherwise, there would have been no need for an enactment *divesting* districts of such rights.

b. Other states

ODE cites so-called modern authority, involving a mere eight states in an effort to support its proposition that political subdivisions are not protected from retroactive laws. Yet even these cherry-picked states do not uniformly support ODE's contentions. For example, in an Idaho case subsequent to the one cited by ODE, the state supreme court directly addressed the

argument that school districts cannot sue the state. *Idaho Schools for Equal Educl. Opp. v. Evans*, 123 Idaho 573, 850 P.2d 724 (1993) (“*ISEEO I*”). The argument was soundly rejected.

[T]he State cites us to authority which holds that a school district cannot sue its creator, the State. * * * This Court, to the contrary, has already held that the “sue or be sued” clause in I.C. § 33-301 was intended to allow the school districts to “prosecute any actions they might deem necessary for the protection and preservation of the school funds and property.” This “unqualified grant of power * * * carries with it all powers that are ordinarily incident to the prosecution and defense of a suit at law or in equity.” *Independent School Dists. v. Common School Dists.*, 56 Idaho 426, 55 P.2d 144 (1936). As the school districts allege they are being deprived of the funds they are entitled to under art. 9, § 1, they have the authority under I.C. § 33-301 to maintain this suit.

Id. at 585. A decade later, following two more unsuccessful appeals by the state, the Idaho legislature passed a bill that purported to curtail the ability of the school districts to continue their suit against the state. The state supreme court found that the legislation was a special law, aimed at this particular litigation, and as such was violative of the state constitution. In disposing of the legislation as a bar to the suit, the court stated as follows:

The State made similar arguments in *ISEEO I* as it does now, arguing that a school district cannot sue its creator. However, this Court upheld the school districts’ right to seek relief when they allege they are being deprived of funds they are entitled to, and that right cannot be legislatively withdrawn when it is based not only on a statutory grant of standing but a constitutional mandate over the Legislature as well to fulfill this very duty.

* * * The State’s assertion that it has the power legislatively to remove *ISEEO* as a party by revoking its standing at this point in the litigation is in error. The standing of the plaintiffs is upheld.

Idaho Schools for Equal Educl. Opp. v. Idaho, 140 Idaho 586, 591, 97 P.3d 453 (2004).

In another three of the eight states referenced by ODE—New Hampshire, Tennessee, and Texas—plaintiff school districts likewise succeeded in prosecuting school funding suits, as have districts in other states not referenced by ODE (including Ohio). *See, e.g., DeRolph; Claremont Sch. Dist. v. Governor*, 138 N.H. 183, 635 A.2d 1375 (1993); *Tenn. Small Sch. Systems v.*

McWherter, 851 S.W. 2d 139 (Tenn. 1993); *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989); *Cave Creek Unified Sch. Dist. v. Ducey*, 233 Ariz. 1, 308 P.3d 1152 (2013); *Lake View Sch. Dist. No. 25 v. Huckabee*, 351 Ark. 31, 91 S.W.3d 472 (2002); *Rose v. Council for Better Edn., Inc.*, 790 S.W.2d 186 (Ky. 1989) (explicitly rejecting the argument that school districts cannot sue the state); *Helena Elem. Sch. Dist. No. 1 v. State*, 236 Mont. 44, 769 P.2d 684 (1989); *Hoke County Bd. of Edn. v. State*, 358 N.C. 605, 599 S.E.2d 365 (2004) (explicitly permitting school boards to remain as plaintiffs in case); *Abbeville County Sch. Dist. v. State*, 335 S.C. 58, 515 S.E.2d 535 (1999); *Brigham v. State*, 166 Vt. 246, 692 A.2d 384 (1997); *Seattle Sch. Dist. No. 1 of King Cty. v. State*, 90 Wash.2d 476, 585 P.2d 71 (1978); *Campbell Cty. Sch. Dist. v. State*, 907 P.2d 1238 (Wyo. 1995).

In still other states, including at least two of those relied upon by ODE (Louisiana and Missouri), school districts have been able to litigate school funding claims, although they ultimately did not prevail on the merits. *See, e.g., Lobato v. State*, 304 P.3d 1132 (Colo. 2013); *Coalition for Adequacy and Fairness in Sch. Funding, Inc. v. Chiles*, 680 So.2d 400 (Fla. 1996); *McDaniel v. Thomas*, 248 Ga. 632 (Ga. 1981); *Jones v. State Bd. of Elem. & Sec. Edn.*, 927 So. 2d 426 (La. App. 1 Cir. Nov. 4, 2005); *Sch. Admin. Dist. No. 1 v. Commr., Dept. of Edn.*, 659 A.2d 854 (Me. 1995); *Skeen v. State*, 505 N.W.2d 299 (Minn. 1993); *Cmte. For Educl. Equality v. Missouri*, 294 S.W.3d 477 (Mo. 2009). (The significance of ODE's Missouri authority has also been questioned by a lower court in Missouri, as the Tenth District noted. *See* Tenth Dist. Aug. 28, 2014 Decision, ¶ 47, note 8 (quoting *P.L.S. ex rel. Shelton v. Koster*, 360 S.W.3d 805, 813, [Mo.App.2011]); *Savannah R-III Sch. Dist. v. Public Sch. Retirement System of Missouri*, 950 S.W.2d 854 (Mo. 1997). These suits provide evidence that elsewhere in the nation, school

districts are regularly afforded the right to challenge the state and its agencies in connection with funding.

Finally, ODE's Massachusetts case is inapposite, as it is cited only for the proposition that a state may waive its *own* ability to pursue claims, a proposition not disputed here. *See Greenaway's Case*, 319 Mass. 121, 123, 65 N.E.2d 16 (1946) (right to receive the payments belonged to the commonwealth and could be waived in whole or in part).

The point is not that out-of-state authority invariably supports the Districts. But neither does it uniformly support ODE. If school districts in Ohio continue, as in the past, to have the capacity to sue the state and its agencies to remediate violations of law, including funding statutes, and if the General Assembly is precluded by the Ohio Constitution from retroactively divesting the districts of such claims, Ohio will remain aligned with its own legal traditions *and* with the jurisprudence of many other states.

More fundamentally, it is not the custom of this Court to decide cases by tallying the positions of other states. As long ago as 1843, declaring legislation unconstitutional that retroactively divested women of certain rights, this Court stated as follows: “[i]t is said the courts of Pennsylvania have supported laws of this character. It is our duty to keep within the light of our own Constitution, and to know of no authority beyond its letter and spirit.” *Good*, 12 Ohio at 369. More recently, this Court expressed the same sentiment: “[w]hile out-of-state cases may be instructive, no court in this state is bound by a decision of another state court applying that state's own law.” *Solomon v. Cent. Trust Co., N.A.*, 63 Ohio St.3d 35, 41, 584 N.E.2d 1185 (1992). *See also ISEEO I* at 585 (declining to follow Michigan decision).

6. This Court has afforded political subdivisions the protections of the Retroactivity Clause

ODE discounts prior decisions of this Court applying the protections of the Retroactivity Clause to Ohio's political subdivisions, characterizing the decisions as "drive-by" rulings that failed to address, as a threshold issue, whether such entities have the right to invoke the Clause. (Appellant's Brief at 33.) *See, e.g., Commissioners v. Rosche Bros.*, 50 Ohio St. 103, 33 N.E. 408 (1893) (statute providing retroactive recovery of taxes not enforceable against county); *State ex rel. Crotty v. Zangerle*, 133 Ohio St. 532, 14 N.E.2d 932 (1938) (refund of interest and penalties on unpaid taxes barred by Retroactivity Clause); *State ex rel. Kenton City Sch. Dist. Bd. of Edn.*, (statutory amendment cannot remove vested right to guaranteed payment by ODE); *State ex rel. Outcalt v. Guckenberger*, 134 Ohio St. 457, 17 N.E.2d 743 (1938) (county retroactive refund of tax penalties barred by Retroactivity Clause); *Bd. of Edn. Cincinnati Sch. Dist. v. Hamilton Cty. Bd. of Revision*, 91 Ohio St. 3d 308, 744 N.E.2d 751 (2001) (legislation reviving previously dismissed tax valuation appeal barred by Retroactivity Clause). None of these decisions are appropriately characterized as "drive-by" decisions. Instead, they reflect this Court's long history of applying the Retroactivity Clause to political subdivisions, consistent with the language and history of the Clause as well as with the statutory rights and responsibilities of political subdivisions.

ODE falsely claims this Court has confirmed that political subdivisions do not have vested rights that are protected by the Retroactivity Clause, citing *e.g., State of Ohio v. Kuhner & King, Partners*, 107 Ohio St. 406, 140 N.E. 344 (1923); *Kiser v. Coleman*, 28 Ohio St.3d 259, 503 N.E.2d 753 (1986); *State v. White*, 132 Ohio St.3d 344, 2012-Ohio-2583, 972 N.E.2d 534; *State ex rel. Sweeney v. Donahue*, 12 Ohio St.2d 84, 232 N.E.2d 398 (1967); and *Osai v. A&D Furniture Co.*, 68 Ohio St. 2d 99, 428 N.E.2d 857 (1981). But none of these cases passed on the question of whether a political subdivision can have statutorily-created rights protected by the

Retroactivity Clause. In fact, the status of the claimant was not relevant to the outcome in any of these cases. *See, e.g., Sweeney* (which, contrary to ODE’s assertion, involved an enactment that impaired the rights of a retired state employee—not the state).

Other cases ODE relies on are of little value because this Court found the legislation at issue was not retroactive in operation. *See Bd. of Edn. v. McLandsborough*, 36 Ohio St. 227 (1880); *State ex rel. Bates v. Trustees of Richland Twp.*, 20 Ohio St. 362 (1870); *State v. Bd. of Edn. City of Wooster*, 38 Ohio St. 3 (1882), syllabus (act not in conflict with the constitution); *State ex rel. Dept. of Mental Hygiene & Correction v. Eichenberg*, 2 Ohio App.2d 274, 276, 207 N.E.2d 790 (9th Dist. 1965) (General Assembly did not create a new duty or impose a new obligation by the enactment so legislation not retroactive); *Spitzig v. State ex rel. Hile*, 119 Ohio St. 117, 162 N.E. 394 (1928) (“the inhibitions in the Constitution against the enactment of retroactive laws have no application in [this] case.”); and *N.Y. Life Ins. Co. v. Bd. of Commrs.*, 106 F. 123, 127 (6th Cir. 1901) (statute enacted to raise taxes to pay for moral obligations based on past transactions are not retroactive). Thus, these cases did not turn on the status of the party claiming a violation of the retroactivity clause.

Other cases cited by ODE provide that political subdivisions cannot sue states for violation of *federal* law, including the Fourteenth Amendment. *See, e.g., Avon Lake City School Dist. v. Limbach*, 35 Ohio St. 3d 118, 122, 518 N.E.2d 1190 (1988); *Mentor Exempted Vill. Sch. Dist. Bd. of Edn. v. State Empl. Relations Bd.*, 76 Ohio App.3d 465, 469, 602 N.E.2d 374 (11th Dist. 1991); and *Greater Heights Acad. v. Zelman*, 522 F.3d 678, 680 (6th Cir. 2008). The Districts are not invoking federal constitutional protections. Moreover, in one of these cases, this Court expressly stated that “there may be occasions when a political subdivision may challenge the constitutionality of state legislation.” *Avon Lake* at 122. This Court not only recognized a

school district's ability to challenge legislation but also acknowledged the possibility that such a challenge could be premised on the constitution.

Finally, ODE relies heavily on *Kumler v. Silsbee*, 38 Ohio St. 445 (1882), but misses the lesson of that case. In *Silsbee*, the city of Cincinnati approved an ordinance that authorized Silsbee to lay pipes in the city streets to supply the public with heat and power. Subsequently, the legislature enacted a law stating that such ordinances were “valid and binding as if the power in all such municipal corporations to so grant such use of its streets, avenues, alleys, and public places had been expressly enumerated in the general municipal corporation act now in force.” *Id.* at 446. At a taxpayer's instigation, the ordinance was challenged on the ground that it was unauthorized when passed and not cured by the subsequent legislation, because the latter was unconstitutionally retroactive. This Court rejected the challenge.

ODE contends this Court rejected that argument because the Retroactivity Clause protects private people, not state subdivisions. But this Court's explanation of its holding, quoted in full below, tells a different story:

The claim is made, however, that the statutory provision in question is retroactive, and hence within the constitutional prohibition on that subject. Art. 2, § 28. But “the constitutional inhibition does not apply to legislation *recognizing or affirming the binding obligation* of the state, or any of its subordinate agencies, with respect to past transactions. It is designed to prevent retrospective legislation injuriously affecting individuals, and thus protect vested rights from invasion.” *New Orleans v. Clark*, 95 U.S. 644, 655; Rev. Stats. 99, note; *State v. Hoffman*, 35 Ohio St. 435.

Id. at 447 (emphasis added).

The clear implication is that this Court believed that even *prior* to the retroactive legislation, Cincinnati had incurred a binding obligation to Silsbee, which the later legislation merely recognized or affirmed. Similarly, in *New Orleans v. Clark*, 95 U.S. 644 (1877), cited by *Silsbee* in support of this holding, the United States Supreme Court ruled that a state or a

subordinate agency of a state can be required by subsequent legislation to honor obligations it intentionally—if possibly unlawfully—entered into. “A law requiring a municipal corporation to pay a demand which is without legal obligation, but which is equitable and just in itself, being founded upon a valuable consideration received by the corporation, is not a retroactive law, -- no more so than an appropriation act providing for the payment of a pre-existing claim.” *Id.* at 655. Moreover, it is evident from far more recent cases that, whatever the intent of *New Orleans* in 1877, present-day political subdivisions in Louisiana are capable of asserting rights as against the state. *See, e.g., Sch. Bd. of the Parish of Livingston, La., v. Louisiana State Bd. of Elem. & Sec. Edn.*, 830 F.2d 563 (5th Cir. 1987), cert. denied 487 U.S. 1223 (1988).

Here, it is the Districts—and their students, parents and employees—who have been wronged by ODE’s unlawful conduct. *Silsbee* would be a proper analogy if, for example, the legislature passed a law subsequent to ODE’s wrongdoing designed to further make the Districts whole for the harms they suffered—for example, by requiring ODE to pay the District’s attorneys’ fees. Instead, the legislature retroactively *exonerated* ODE, *relieving* the agency of liability. In both *Silsbee* and *New Orleans*, the legislature acted to impose liability on public entities in order to achieve equitable outcomes. *See also State v. Hoffman*, 35 Ohio St. 435, 443 (1880) (“Where the public, through its agents, wrongs an individual, it ought, upon the plainest principles of justice, to be required to make reparation”). Here, the legislature sought to do the opposite, validating the harms unlawfully perpetrated by ODE instead of holding the agency accountable.

7. The Districts also have third-party standing to invoke the Retroactivity Clause on behalf of the individual victims who are unable to seek relief

This Court has held that political subdivisions have standing to assert claims on behalf of their constituents where the political subdivision suffers its own injury in fact and possesses a

sufficiently close relationship with the constituents, if there is a hindrance that stands in the way of the constituents seeking relief. *See E. Liverpool v. Columbiana Cty. Budget Comm.*, 114 Ohio St.3d 133, 2007-Ohio-3759, ¶ 22, citing *Kowalski v. Tesmer*, 543 U.S. 125, 129-130 (2004).

Here, the Districts have suffered an injury in fact (similar to the direct injury to the city's treasury in *E. Liverpool*), and the Districts and their students, parents, and employees have an interdependent interest in the districts' respective treasuries and the negative impact the retroactive legislation has thereon. There is now no question that the individual plaintiffs are hindered from seeking relief, as the lower courts determined they lack standing, and this Court declined to accept their appeal. Thus, if the Districts do not have the right to invoke the protections of the Retroactivity Clause in their own right, they have the right to do so as third-party plaintiffs.

B. The legislation first enacted in 2009 for the purpose of divesting the Districts' causes of action that accrued in 2005, 2006, and 2007, violates the Retroactivity Clause

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.* If this threshold requirement is met, the court determines whether the statute is substantive as opposed to merely remedial. *Id.* at 354. The legislation here is plainly intended to apply, and can only be applied, retroactively. The effective date of the first enactment is June 1, 2009, but the language cuts off all claims of school districts for statutory funding violations in fiscal years 2005, 2006 and 2007.

The second prong of the retroactivity analysis is also satisfied. Laws affecting methods and procedure by which rights are recognized, protected and enforced are remedial, while those that affect the rights themselves are substantive. *Id.* A substantive law is one that impairs or

takes away a vested 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 court of appeals distinguished between a “vested” and a “substantive” right, but this Court has utilized both terms (and others) to describe the kinds of interests protected from retroactive legislation. *See Vogel v. Wells*, 57 Ohio St.3d 91, 99, 566 N.E.2d 154 (1991), quoting *Van Fossen* at 107.

The legislation here is a classic illustration of unconstitutionally retroactive legislation. Its *sole* intent and effect is to take away vested rights of school districts by eliminating accrued causes of action to enforce the statutory school funding formula. *See, e.g., Rubbermaid, Inc. v. Wayne Cty. Auditor* 95 Ohio St.3d 358, 2002-Ohio-2338, 767 N.E.2d 1159 (statutory amendments that retroactively permitted refileing of tax valuation complaints previously dismissed as having been improperly filed violate the statutory right of county officials to rely on statutes in effect at the time of dismissal); *see also Bd. of Edn. Cincinnati Sch. Dist. v. Hamilton Cty. Bd. of Revision; Rosche Bros.*; and *Crotty*.

1. The rights in issue are of the type protected by the Retroactivity Clause

a. The Districts had a right to funding calculated in accordance with law, and ODE had a clear legal duty to so calculate their funding

According to ODE, as between itself and Ohio school districts, ODE’s powers on the critical matter of school district funding are unconstrained by the mandatory distribution formula of the school foundation program. But ODE is not the state of Ohio, and its powers, like those of all state agencies are constrained by law. *See Johnson’s Markets, Inc. v. New Carlisle Dept. of Health*, 58 Ohio St.3d 28, 36, 567 N.E.2d 1018 (1991).

This Court has recognized that school districts have substantive, accrued rights under the school foundation program. *State ex rel. Kenton City Sch. Dist. Bd. of Edn.*, 174 Ohio St. 257.

Kenton involved a statute that guaranteed minimum payments to consolidated school districts for a period of three years. The guarantee provision was in effect at the time the Kenton City School District consolidated with another school district. The statute was subsequently amended and did not provide guarantee minimum payments to Kenton. Kenton asserted its rights were governed by the former version of the statute which provided the guaranteed minimum payments.

This Court held that the statute in effect at the time of the consolidation “conferred a right” to the guaranteed minimum payments, which right was not nullified by subsequent changes to the statute. *Id.* at 261-262. This Court also recognized that statutory rights can be conferred on both individuals and school districts,”[t]o be guaranteed a minimum amount of money would be a substantive right, whether the guarantee is to a political subdivision or to an individual.” *Id.* at 261. This Court concluded that Kenton City Schools had an accrued statutory right to enforce, by way of mandamus, the statute in effect at the time of the consolidation.

The analysis here is no different. R.C. 3317.022(A) mandated the formula to be used in calculating districts’ state foundation funding. A critical factor in the formula was formula ADM. Formula ADM was statutorily defined in R.C. 3317.02(D) as “* * * the number reported pursuant to division (A) of section 3317.03 of the Revised Code * * *.” When the Districts certified their ADM pursuant to R.C. 3317.03(A), and that certification was accepted without audit by the superintendent of public instruction, the Districts attained a vested right to have their school foundation payments calculated using formula ADM, rather than the number ODE liked better.

ODE argues *Kenton* has no application because there the Court did not engage in a constitutional retroactivity analysis. But the salient conclusion in *Kenton* is that school districts have *substantive* rights by way of school funding statutes, and subsequent changes to such

statutes do not—and cannot—impact rights accrued under the earlier version of such statutes. The method by which subsequent legislation seeks to take away such substantive right is of no import. In *Kenton*, the method was via an amendment to the funding statute itself. Here, the method was via uncodified law that expressly divested school districts of their right to assert a claim accruing under the funding statutes in effect at the relevant times. *Kenton* teaches that the right taken from the Districts was *substantive*—something the Retroactivity Clause forbids.

ODE had a clear duty to fund the Districts in accordance with law. This it did not do. Now, ODE seeks to defend its conduct on the ground that its intentions were good, telling the Court it “read state law as permitting it to depart from” the statutory methodology for funding the Districts. ODE goes on to describe at length why it believes the unauthorized methodology it used for determining the Districts’ funding was better than the methodology mandated by statute. But whether or not ODE recognized its “departure” from law as illegal is not relevant to the agency’s obligation to follow the law or, failing that, to correct the wrongs it perpetrated. As the cliché goes, “ignorance of the law is no excuse.” ODE’s victims are tens of thousands of urban school children—and counting—who have been deprived of educational resources to which they are entitled by law. ODE’s lack of understanding at the time that it was required to adhere to law, if true, is stunning. That ODE appears to still not understand that it is unlawful to “depart” from law can only be regarded as hubris in the extreme.

ODE attempts to divert the Court’s attention from its wrongdoing by casting blame on the Districts. Let us be clear: there is *no* evidence that the Districts did anything improper, with the spurious exception of acting in accordance with a law that ODE, in its wisdom, believed to be flawed. Had there been any evidence of wrongdoing by the Districts, ODE had lawful tools for

dealing with the same, and a legal duty to use those tools. ODE never did so in relation to the events that gave rise to the Districts' claims because there was no evidence of wrongdoing.

b. There is and must be *finality* with respect to the school funding mandated by law

In FY 05, the Districts' funding initially *was* calculated and paid as required. But later, ODE substituted for the statutorily mandated school funding methodology a different methodology of its own design, not premised on law. ODE's methodology predictably produced less funding for the urban districts, leading ODE to conclude that it should recover from the districts the difference between the statutory amounts already paid and the lower amounts produced by ODE's method of calculating funding. Four years later, after ODE paid over \$13 million to settle or partially settle claims by Cincinnati and Dayton for its unlawful conduct, the legislature first enacted the retroactive law that ODE now asserts as a defense to the Districts' claims.

ODE argues that even if school districts are protected by the Retroactivity Clause, the retroactive legislation could validly divest the Districts of their claims because school funding is not a vested right protected from retroactive impairment until the funding is actually received. However, a portion of the Districts' claims relate to funding that *was* received by them but later clawed back by ODE, via set-off against future payments due the Districts—something that amounted to a blatantly unlawful misappropriation of the Districts' funds.

More fundamentally, while it would undoubtedly be convenient for ODE if it could prevent funding rights from ever vesting by the simple expedient of illegally withholding funds from school districts, ODE plainly does not have such power. The relevant section of the statute provided: “[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 ***.” R.C.

3317.022(A)(1); emphasis added. ODE simply was not free to fail to pay the Districts as mandated by law. *See Shell v. Ohio Veterinary Med. Licensing Bd.*, 105 Ohio St.3d 420, 2005-Ohio-2423, 827 N.E.2d 766, ¶ 32 (2005) (an administrative body may exercise only the powers and authority conferred by the General Assembly); *Johnson's Markets, Inc.* 58 Ohio St.3d at 36 (agency's acts may not exceed powers granted by legislature, nor be in direct conflict with specific powers granted to state agencies for statewide regulatory control). When ODE failed to act in conformance with the statutory mandate, the Districts' vested rights were violated, giving rise to a cause of action.

ODE challenges the Districts' "expectation of finality" on the ground that even under the legislatively mandated formula, school funding amounts are impacted by many variables. But the Districts are not claiming an entitlement to any specific amount; they are only asking that their school foundation funds be calculated according to law, which they surely *did* have a right to expect. *See Toledo Compl.*, ¶ 49, 50, 65, 66 (ODE Supp. S-12, 15).

The foundation formula calculates funding based on a one-time count during the first week of October, which determines each district's formula ADM for the entire year. The fact that there are other variables in the statutory school funding system that impact the financial outcome for any school district is immaterial. These other variables do *not* permit ODE's intentional abandonment of a *known* factor—that of the certified formula ADM. Similarly, the fact that the legislature may revise the foundation formula from year-to-year is neither relevant nor in dispute. School districts are entitled to rely on the faithful execution by ODE of the statutory formula for so long as the statutes remain in effect. ODE knew exactly what the formula ADM was for each of the Districts; it even utilized formula ADM in FY 05 before

substituting other figures, not permitted by statute. The only uncertainty here was introduced by ODE's abandonment of the law.

ODE's finality argument misperceives the nature of the Districts' claims. The Districts do not assert rights to an undistributed fund of money as was the case in *Cleveland v. Zangerle*, 127 Ohio St. 91, 186 N.E. 805 (1933). *Cleveland* involved the distribution of some of the proceeds of a statewide intangibles tax previously declared unconstitutional in *Friedlander v. Gorman*, 126 Ohio St. 163, 184 N. E. 530, (1933). The plaintiff-city sought the proceeds of the taxes collected, but not yet distributed under the prior, unconstitutional law. This Court held the statute was not retroactive because it controlled *future* distributions of tax proceeds, to which subdivisions have no vested right. *Cleveland* at 93. As the court of appeals aptly recognized, school foundation funds awaiting distribution are not the legal equivalent of uncollected taxes, penalties and interest. (Decision, ¶ 31, ODE Appx. 19.)

Likewise, *State ex rel. Outcalt* upheld a depression-era law that forgave uncollected penalties and interest on property taxes. At the same time, the Court held that the portion of the law that addressed penalties already paid *did* retroactively violate the rights of the plaintiffs and could not be enforced. 134 Ohio St. at 465. In each of these cases, it was the nature of the claim asserted—not the governmental status of the plaintiff—that determined the outcome.

Ironically, one of the rationales ODE advances for its claim that Ohio school districts are entitled to no finality with respect to their funding is that the state cannot be exposed to the fiscal uncertainty of liability to the Districts. But the idea of “uncertainty” in this context is a fiction. There never has been uncertainty as to what is owed to the Districts. At any time, ODE has had the ability to calculate, precisely and correctly, the harm it inflicted when it abandoned the school funding formula it was required by law to implement. ODE's exposure has always been

the difference between what it paid the Districts and what the statutes mandated. ODE had only to faithfully apply the statutes to know what was owed. It was not “uncertainty” the retroactive legislation eliminated, but the certainty of liability.

c. Aside from the retroactive legislation, the Districts’ entitlement to recalculation of their funding has already been determined

The Districts’ claims are identical to those before the court in the *Cincinnati* litigation. *See, e.g.*, Toledo Compl., p. 2; ODE’s motion for judgment on the pleadings, p. 3, 8 (ODE Supp. S-2; SD Supp. S-3, 8). The same defendants were named in that case as in this one. The *Cincinnati* courts determined that ODE violated statutory law, and ODE was ordered to recalculate Cincinnati’s FYs 2005, 2006 and 2007 funding in accordance with law. *See Cincinnati* decisions. After ODE dismissed its appeal to this Court, the First District’s judgment became final against ODE.

But for the difference in the plaintiff school districts, there would be complete identity of parties and issues. In such circumstances, the doctrine of issue preclusion bars ODE from asserting that the Districts had no substantive rights prior to enactment of the retroactive legislation. An issue that was fairly, fully, and necessarily litigated and determined in a prior action, may not be drawn into question in a subsequent action between the same parties or their privies. *See State ex rel. Stacy v. Batavia Loc. Sch. Dist. Bd. of Edn.*, 97 Ohio St.3d 269, 2002-Ohio-6322; 779 N.E.2d 216 (2002). Issue preclusion has been applied against ODE. *See Alternatives Unlimited-Special, Inc. v. Ohio Dept. of Edn.*, 168 Ohio App.3d 592, 2006-Ohio-4779, 861 N.E.2d 163 (10th Dist.), ¶ 38.

But for the subsequent enactment of the retroactive legislation, ODE’s liability to the Districts for unlawfully substituting CSADM for ADM would be established as a matter of law. The applicability of the Retroactivity Clause is the *only* issue before the Court. If the Court

upholds the court below and finds the legislation on which ODE relies violative of the Retroactivity Clause, ODE's liability for its "departure" from the statutory school funding formula has already been determined, as a matter of law.

2. The retroactive legislation did not "clarify" the FY 2005 foundation formula

When ODE abandoned the use of formula ADM for FY 2005, it had no authority to do so. Thereafter, in 2007, the General Assembly modified the law, adding subsection (K) to R.C. 3317.022. The authority of the General Assembly to modify the statute to adjust school funding prospectively is not in issue. ODE characterizes the amendment as *clarifying* prior law by giving ODE the authority "to correct errors in the district's October Count for [FY 2005]." (ODE Brief at 6.) But the amendment did not "clarify" law; it changed it, *prospectively*. Moreover, it underscores the absence of ODE's authority at the time it reduced the Districts' funding for FY 2005. See *State ex rel. Mager v. State Teachers Ret. Sys. of Ohio*, 123 Ohio St. 3d 195, 199, 2009-Ohio-4908, 915 N.E.2d 320 ("When an existing statute is repealed and a new statute upon the same subject is enacted to include an amendment, as in this case, it is presumed that the Legislature intended to change the effect and operation of the law to the extent of the change in the language thereof"), quoting *Greenville Law Library Assn. v. Ansonia*, 33 Ohio St.2d 3, 6, 292 N.E.2d 880 (1973).

ODE claims that two years later, the General Assembly passed the retroactive legislation eliminating the Districts' claims in order to give retroactive effect to the 2007 "clarification." (ODE Brief at 7.) ODE's speculation is irrelevant. It is plain that the purpose of the 2009 legislation was to eliminate substantive rights that predated either of the two bills.

Moreover, had ODE intended the 2007 legislation to apply retroactively, that too, would have been unconstitutional. The legislature has the authority to clarify its prior acts, but where such clarification substantially alters substantive rights, any attempt to make the clarification

retroactive violates the Retroactivity Clause. *See Nationwide Mut. Ins. Co. v. Kidwell*, 117 Ohio App.3d 633, 642-643, 691 N.E.2d 309 (4th Dist. 1996), citing *Hearing v. Wylie*, 173 Ohio St. 221, 224, 180 N.E.2d 921 (1962). ODE relies on *State ex rel. Bunch v. Indus. Comm.*, 62 Ohio St.2d 423, 406 N.E.2d 815 (1980) but fails to mention that *Bunch* did not involve retroactively impaired claims. Rather, it upheld legislation that affirmed the rights of relators to receive benefits free of contested setoff reductions. None of ODE’s authorities supports the conclusion that the legislation here is anything other than an attempt to retroactively destroy vested rights.

3. The retroactive legislation did not implement “education policy”

ODE argues that Article VI, Sections 2 and 3 of the Ohio Constitution gives the General Assembly control over statewide education policy, and this mandate precludes application of the Retroactivity Clause. But the retroactive legislation is not an expression of legislative educational policy, save for the desire to remove the consequences of ODE’s wrongdoing.

The most troubling aspect of ODE’s argument is the apparent confusion between what the legislature does, by statute, and what ODE does, as an administrative arm of state government. Despite the fact that ODE had no authority to either appropriate or spend tax dollars for public education other than as directed by law, ODE states, “[e]fficiency sometimes requires reallocation of resources that individual districts disagree with. Allowing those districts to negate statewide policy decisions—the effective result of the decision below—would make it exceedingly difficult for the legislature to change policy to address inefficiencies.” (ODE Ct. App. Brief at 36.) But it is ODE that subverted state educational policy by abandoning the General Assembly’s distribution formula. For ODE to seek to elevate its violations of law to the status of “state education policy” is fanciful indeed.

Article VI, Section 2 of the Ohio Constitution requires the General Assembly to provide a “thorough and efficient system” of common schools. Ironically, the unauthorized reductions in

school funding imposed by ODE—without any statutory support whatever—violates the basic principles announced by the Ohio Supreme Court in a seminal decision relied upon by ODE, “[a] thorough system could not mean one in which part or any number of the school districts of the state were starved for funds.” *Miller v. Korns*, 107 Ohio St. 287, 140 N.E. 773 (1923). In *Miller*, this Court upheld a school funding statute that provided for a “per pupil” distribution of funds as well as a greater allocation of funds to needy school districts. Here, ODE unlawfully disregarded the policy choices enacted into law by the legislature, taking funds legislatively mandated for the Districts, some of the neediest in Ohio, and instead using them elsewhere.

Contrary to ODE’s assertion, striking down the retroactive legislation does not constitute an encroachment on state policy making authority. Rather, it recognizes that ODE must conform its actions to statute, and the legislature must conform its actions to the Ohio Constitution.

4. ODE’s “form over substance” argument is factually and legally wrong

ODE argues that the General Assembly could have avoided the constitutional issues by simply legislating prospective reductions in the Districts’ future school funding in amounts equivalent to their claims. The legislature might have taken that approach, rather than cavalierly ignoring the limitations of the Constitution. Instead, it chose to act in an unconstitutional manner, additionally avoiding the light of public scrutiny by burying the provision in uncodified law in the massive budget bill. See *In re Pursley*, U.S. Bankr. Ct. No. 13-61707, 2014 Bankr. LEXIS 314, (N.D. Ohio, Jan. 23, 2014), at 5-6 (purpose of codification is to put all laws and regulations in one place to allow individuals to easily find all relevant law).

Had the legislature instead considered a stand-alone bill—or even a codified provision in the budget bill—reducing school foundation payments to three of Ohio’s neediest urban school districts by a total of \$40 million, debate would have been certain and lively. In contrast, there is

no indication the uncodified provision was ever publicly debated or even considered as part of the legislative hearing process. Had the legislature proceeded in a constitutionally permissible manner—via *prospective* legislation—the likelihood that such legislation could have passed would likely have been slim. Sometimes proper form yields a different substantive outcome.

ODE’s “form over substance” argument, as a justification for unconstitutional legislation also must be rejected. If there is a constitutional path for the General Assembly to accomplish a desired result, let it use it. The suggestion that the legislature can simply dispense with constitutional compliance on the ground that it does not matter is outrageous.

C. The extralegal authority ODE seeks is completely at odds with existing law and would have harmful and chaotic consequences

1. Consequences for school districts

Ohio has, by Constitution, made the provision of public education the specific responsibility of the General Assembly. Article VI, Section 2, Ohio Constitution; *DeRolph*. The Constitution also incorporates the concept of school districts into the mandated framework for the “organization, administration and control of the public school system of the state * * *.” *See* Article VI, Section 3, Ohio Constitution. Pursuant to those constitutional mandates, the General Assembly has created the state system of public schools, governed by school district boards of education. These boards are vested with the power and responsibility to manage and control the schools over which they exercise jurisdiction. R.C. 3313.47. *See also* R.C. 3313.17 (“[t]he board of education of each school district shall be a body politic and corporate, and, as such, capable of suing and being sued, contracting and being contracted with, acquiring, holding, possessing, and disposing of real and personal property * * *.”) Courts have long recognized that boards of education can litigate claims and are subject to suit. *See Wayman v. Bd. of Edn.*, 5 Ohio St.2d

248, 215 N.E.2d 394 (1966); *Beifuss v. Westerville Bd. of Edn.*, 37 Ohio St.3d 187, 525 N.E.2d 20 (1988).

School foundation funding is integral to the ability of districts to carry out their statutory obligations. The foundation program creates the mechanism by which state tax revenue is allocated to Ohio's public school districts in accordance with the formula enacted by the General Assembly. Formula ADM determines, for the entire year, the level of funding the district is entitled to receive. While other factors in the formula also had an impact, formula ADM was by far the most critical component in FY 05. Once ADM was determined and certified to ODE by the Districts, as required by law, the Districts were then entitled to budget, contract, encumber, and otherwise act in reliance on the receipt of the amounts statutorily mandated for them.

Significantly, General Assembly has declared as a matter of state public policy that school district fiscal integrity is a high priority. R.C. 3316.02(A) states:

[I]t 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.

(Emphasis added.) Consistent with this public policy, the legislature has enacted a comprehensive system to ensure the certainty of school district financial commitments. Districts are required to annually approve tax budgets or alternative documents setting forth receipts and expenditures for the fiscal year. R.C. 5705.28; 5705.281. Districts must appropriate funds before they expend them. R.C. 5705.38(B). Before entering into contracts involving expenditures, they must also certify the availability of the funds. R.C. 5705.41; 5705.412. School districts also must annually adopt a five-year forecast of revenues and expenditures and

certify the forecasts to ODE. R.C. 5705.391. ODE’s suggestion that districts have no reasonable expectation of finality to funding is untenable. If true, the districts would be unable to satisfy these statutory duties.

The statutes that make up the school funding formula are at the heart of the legislature’s response to the constitutional mandate for a “thorough and efficient” school system. Article 2, Section VI. A rule of law that would permit ODE to abandon the legislature’s methodology for calculating and distributing essential funding in favor of the kind of arbitrary and unlawful reductions that occurred here would render the system *less* thorough and *less* efficient.

2. Broader consequences

Allowing state agencies to ignore their statutory payment obligations to political subdivisions would yield fiscal anarchy. Ohio has 169 state agencies, many of which, like ODE, have the responsibility to calculate and distribute funds to political subdivisions according to a legislated formula. If ODE can abandon its responsibility to undertake this duty in accordance with law, presumably other agencies can do the same. And according to ODE, neither the political subdivisions nor the ultimate beneficiaries of the funds owed them—here, the students—would have legal recourse. Such a result is incompatible with the rule of law.

It would also upend contractual relationships between political subdivisions and state agencies, for which there is significant statutory authority. *See, e.g.*, R.C. Chapter 3318, (Ohio Facilities Commission); R.C. 4582.17, 4582.43, 4582.431 (port authority authorization to contract with the state, state agencies and others); R.C. 9.482 (political subdivision authority to contract with each other and with state agencies); R.C. 3317.18 (ODE guarantee of school district indebtedness). If statutory obligations of ODE can be retroactively eliminated by a subsequent act of the legislature, presumably contractual obligations of state agencies could be likewise nullified—notwithstanding the constitution’s prohibition on impairment of contracts,

also found in Article II, Section 28. The threat of state agency repudiation would haunt every state agency contract with a political subdivision, deterring those who would enter into, or otherwise act in reliance on, such contracts.

D. The retroactive legislation also violates the Uniformity Clause

Article II, Section 26 of the Ohio Constitution (“Uniformity Clause”) requires that “[a]ll laws, of a general nature, shall have a uniform operation throughout the state.” Compliance is determined through a two-part test: (1) whether the statute is a law of a general or special nature; and (2) whether the statute operates uniformly throughout the state. *See Desenco, Inc. v. Akron*, 84 Ohio St.3d 535, 541, 706 N.E.2d 323 (1999).

The first prong relates to the *subject matter* of the legislation. If the subject matter of the legislation does or may exist in, and affect the people of, every county or locality in the state (including school districts), it is of a general nature. *Id.*; *Simmons-Harris v. Goff*, 86 Ohio St.3d 1, 12, 711 N.E.2d 203 (1999). Here, this prong is satisfied. The subject matter of the retroactive legislation is the funding system for public education throughout Ohio, a responsibility enjoined upon the General Assembly by Article VI, Section 3, Ohio Constitution. There is no part of the state in which the subject matter of school funding does not exist. *See Simmons-Harris*, 86 Ohio St.3d at 12 (applying the Uniformity Clause to the School Voucher Program because schools are a subject of general nature).

The second inquiry is whether the legislation operates uniformly in all parts of the state. *See Austintown Twp. Bd. of Trustees v. Tracy*, 76 Ohio St.3d 353, 356, 667 N.E.2d 1174 (1996). Here, the legislation creates two categories of school districts: one consisting of districts able to recover funding unlawfully withheld in FYs 2005, 2006, and 2007; the other consisting of districts stripped of the identical entitlement. Because the status of each district is determined by conditions existing as of a date in the past, there is no possibility that a district presently in one

category can, in the future, move to the other. The fixed nature of a district’s status under the legislation is the classic indicator of unconstitutional non-uniformity. *See Simmons-Harris*, 86 Ohio St.3d at 12-13 (voucher program limited to “one school district that, as of March 1995” was under federal court-ordered state supervision, was unconstitutional “because it can only apply to one school district, whereas amended voucher program, limited to “school districts that are or have ever been” under such court-ordered supervision was constitutional because it “does not prohibit similarly situated school districts from inclusion in the School Voucher Program in the future”). *See also Kelleys Island Caddy Shack, Inc. v. Zaino*, 96 Ohio St.3d 375, 378, 775 N.E.2d 489 (2002); *Austintown*, 76 Ohio St.3d at 359; *State ex rel. Zupancic v. Limbach*, 58 Ohio St.3d 130, 138, 568 N.E.2d 1206 (1991).

The non-uniform impact of the retroactive legislation is not incidental. The very purpose of the legislation is to divest certain school districts, of rights retained by other districts, with the only distinction between districts being the one created by the legislation itself. *Compare State ex rel. Stanton v. Powell*, 109 Ohio St. 383, 385-386, 142 N.E. 401 (1924) (“[I]n some counties of the state there is only one judge while in other counties there are two or more judges. This is a condition which has prevailed for many years, and this act which is now before us for construction has nothing to do with creating those unequal conditions.”).

E. Even if constitutional, the retroactive legislation would not dispose of all the claims

If this Court were to determine that the retroactive legislation bars the Districts’ ADM claims, there are still issues yet to be adjudicated, which must be addressed on remand.

1. The retroactive legislation does not purport to bar the add-in claims

The Districts have maintained throughout this litigation that the retroactive legislation seeks to preclude, albeit unconstitutionally, only one subset of their claims—those relating to ODE’s *reduction* of the Districts’ funding based on the unlawful substitution of CSADM for

Formula ADM; it does not preclude the Districts' add-in claims. The legislation does not address directly or by implication claims based on ODE's unlawful failure to *increase* ADM—the subject of the add-in claims. The add-in claims arise under subsection (F)(3) of R.C. 3317.03, an entirely different provision of law, nowhere mentioned in the retroactive legislation.

R.C. 3317.03(F)(3) mandates that ODE adjust a district's ADM *upward* for each community school student who was “not included in the ADM certified for the first full school week of October[.]” This provision, which ODE failed to implement, is the basis for the add-in claims. By its express terms, the retroactive legislation solely bars claims related to *reductions* arising under former R.C. 3317.03(A).

The significance of the add-in mandate was described by the court of appeals in the *Cincinnati* case:

R.C. 3317.03(C)(2) and (F)(3) were added to address the issue of students who enroll in community schools after the October count, but were not included in the resident school district's Formula ADM for funding purposes. * * * When this had happened prior to H.B. 364, the public school district had money deducted from its foundation payments for that student without being credited with state funds to offset the transfer. R.C. 3317.03(F)(3) corrected this problem by providing that if a student attending a community school was not included in the Formula ADM, “the department of education shall adjust the [F]ormula ADM of that school district to include the student in accordance with division (C)(2) of this section.”

Cincinnati, 2008-Ohio-1432, ¶ 27.

ODE's failure to credit the Districts with add-in funding gave rise to distinct claims entitling the Districts to relief. The lower courts never addressed these add-in claims under the retroactive legislation because they found the legislation unconstitutional. If, however, this Court were to determine that the Districts may not invoke the Retroactivity Clause or that the legislation does not violate that Clause, it remains to be determined, on remand, whether the

retroactive legislation has any bearing on the Districts' add-in claims. *See Infinite Sec. Solutions, L.L.C. v. Karam Props., II Ltd.*, Slip Opinion No. 2015-Ohio-1101, ¶33.

2. The retroactive legislation preserves Dayton's claims

The retroactive legislation prefaces language extinguishing claims with “except as expressly required under * * * a settlement agreement with a school district executed on or before June 1, 2009 * * *.” Dayton entered into just such a settlement agreement with ODE, prior to June 1, 2009, that preserves Dayton's claims. *See* Dayton Complaint, ¶ 48; ODE's motion for judgment on the pleadings (SD Supp. S-23-30, 105).

Section 3 of the Agreement provides that “if the Parties have not reached an agreement as to the Remaining Dispute, each Party shall have the right to pursue any lawful remedy, including but not limited to litigation, in order to resolve any claim(s) arising out of the Remaining Dispute.”⁵ *Id.* In section 5, the parties further acknowledged and agreed that the very legislation now at issue would have no “effect whatsoever on the claims and obligations * * * [relating to the] Agreement as it pertains to FY 05, 06, and 07 school foundation payments to Dayton.” *Id.* Additionally, section 10 waives the right of either party to challenge the “legality or enforceability” of the Agreement itself. *Id.*

Below, ODE argued that the retroactive legislation nonetheless bars the claim ODE contractually agreed to preserve. That argument not only is inconsistent with the plain terms of the Agreement, it is also nonsensical. If the retroactive legislation language is read as ODE suggests, *i.e.*, that a settlement must “expressly require” *payment* of specific amounts rather than “expressly require” the allowance of a claim for such amounts, the statutory exception is superfluous. A claim seeking payment of sums expressly owed under a settlement agreement

⁵ “Remaining Dispute” refers to “the amount that Dayton believes it is still owed.”

would be for breach of contract, not for statutory reimbursement. And this is so even if the contract sums were the result of settlement of a claim for statutory reimbursement.

In short, Dayton's claim for reduction in its formula ADM based on community school enrollment reports survives as a result of the Agreement, whether or not the legislation on which ODE relies is found to be unconstitutionally retroactive.

SUMMARY AND CONCLUSION

ODE's arguments constitute a "house of cards" that fails to stand up to analysis. First, ODE invites the Court to ignore the plain language of the Ohio Constitution and construe it to mean what it plainly does not. The phrase "shall have no authority to pass retroactive laws" is unambiguous, and the plain meaning is exactly as intended by the framers. ODE's elaborate argument to the contrary is neither accurate nor credible.

The second branch of ODE's argument is even more elaborate and less credible. To suggest that a political subdivision of the state has no right to require an agency of the state to comply with clear statutory mandates is to ignore well-established principles of law and invite chaos in the governmental affairs of Ohio. ODE broke the law. It had no authority and no discretion to do so. Harm was done, not only to the Districts but, more importantly, to the students they serve. The retroactive law enacted years later had one purpose only: to retroactively abolish the claims arising out of ODE's misconduct. If ODE gets a free pass, every other state agency will expect the same, and the rights of political subdivisions and the rule of law will be irreparably harmed.

This Court need not create new law in order to rule in favor of the Districts. As the courts below recognized, a ruling in the Districts' favor is fully compatible with existing law. Otherwise stated, if the Court rules for the Districts, nothing changes in Ohio law. If, on the other hand, the Court rules for ODE, the changes that will reverberate throughout Ohio law

will be massive and unpredictable. Both law and policy support affirmance of the court of appeals decision.

Respectfully submitted,

/s Jennifer A. Flint

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
jflint@bricker.com
COUNSEL FOR APPELLEES, TOLEDO
CITY, DAYTON CITY, AND CLEVELAND
METROPOLITAN SCHOOL DISTRICT
BOARDS OF EDUCATION

/s Jyllian R. Guerriero

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
CO-COUNSEL FOR APPELLEE,
DAYTON CITY SCHOOL DISTRICT
BOARD OF EDUCATION

/s Amy M. Natyshak

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
CO-COUNSEL FOR APPELLEE,
TOLEDO CITY SCHOOL DISTRICT
BOARD OF EDUCATION

/s Wayne J. Belock

Wayne J. Belock (0013166)
CLEVELAND METROPOLITAN
SCHOOL DISTRICT
1111 Superior Avenue E., Suite 1800
Cleveland, Ohio 44114
Telephone: (216) 838-0070
Facsimile: (216) 436-5064
wayne.belock@clevelandmetroschools.org
CO-COUNSEL FOR APPELLEE
CLEVELAND METRO. SCHOOL
DISTRICT BOARD OF EDUCATION

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Merit Brief was served on the following
by electronic mail and Regular U.S. Mail, this 1st day of September, 2015:

Eric E. Murphy, Esq.
Eric.Murphy@ohioattorneygeneral.gov
Michael J. Hendershot, Esq.
Michael.Hendershot@ohioattorneygeneral.gov
Hannah C. Wilson, Esq.
Hannah.Wilson@ohioattorneygeneral.gov
Matthew R. Cushing, Esq.
Matthew.Cushing@ohioattorneygeneral.gov
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
COUNSEL FOR APPELLANTS,
STATE BOARD OF EDUCATION, et al.

/s Jennifer A. Flint

Jennifer A. Flint



COMMON PLEAS COURT
HAMILTON COUNTY, OHIO

| | | |
|--|---|-------------------------------|
| Cincinnati City School District | : | CASE NO: A0603908 |
| Board of Education | : | |
| Plaintiff, | : | Judge Nelson |
| | : | |
| v. | : | |
| | : | Entry On Cross Motions |
| | : | For Summary Judgment |
| State Board of Ed, et al. | : | |
| Defendants. | : | |

This case involves a dispute over one relatively narrow aspect of the statutory mechanisms by which Ohio provides certain state funding to public school districts. More precisely, the case is brought by Plaintiff the Cincinnati City School District Board of Education (“Cincinnati”) to contest efforts by Defendants the State Board of Education of Ohio (“the Board”) and the Ohio Department of Education (“ODE”) to recoup what Defendants now believe to have been overpayments made to Cincinnati in fiscal year 2005 and to reduce anticipated payments for fiscal years 2006 and 2007 under a guarantee provision of Ohio’s School Foundation funding program as established in Revised Code Chapter 3317. The statutory provisions at issue are intricate and at times opaque, *cf. State ex rel. Ohio Congress of Parents and Teachers v. State Board of Ed.* (Ohio Supreme Court, October 25, 2006), 2006-Ohio-5512 (“[f]unding formulas for traditional and community schools are complex”). The court can understand why the local and state bodies charged with executing these terms disagree as to how the legislature has directed them to proceed.



The controversy is presented to the court on cross motions for summary judgment, and counsel for both sides have stated in argument that the matter is ripe for full determination (or, put more appropriately, for a determination as complete as this court has jurisdiction to render) on that basis. The court has reviewed the pleadings, briefs and other submissions of the parties and has read all of the evidentiary materials presented; the court also has considered the supplemental responses of the parties made in answer to the court's inquiry about a particular statutory subsection that had not initially been the focus of argument by either side. In deciding the motions, the court is mindful that summary judgment may be granted only when, with the evidence construed most strongly in favor of the non-moving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Civ. R. 56(C).

Undisputed facts: a truncated overview

The detailed Joint Stipulation presented by the parties sets forth the context of the case in considerable, necessary detail.

In brief synopsis, the controversy between these parties began in February 2006, when ODE announced, in effect, that it was altering a 2005 student reporting statistic submitted by Cincinnati pursuant to statute, with the result that state guarantee payments to Cincinnati for FY 2006 would be reduced. Stipulation ¶ 26. Representatives for ODE and Cincinnati met over the issue on February 15, 2006. During that discussion, "ODE acknowledged that it had mistakenly calculated the guarantee" reduction, in that the law then required that 2006 guarantee payments be based on amounts "actually received" by Cincinnati from ODE in FY 2005. Stipulation ¶ 29. Counsel for the parties further sought to resolve their reporting statistic dispute and to settle guarantee payment numbers

for FY06 and FY07 (as those years are linked by statute); counsel for ODE in fact thought that these issues had been fully resolved, and counsel for Cincinnati (and for the Dayton public schools as well) “undertook to draft a settlement agreement” memorializing “the matters agreed upon.” Stipulation ¶¶ 30-31. The state then in March and April 2006 made certain guarantee payments to Cincinnati based on the FY05 payments rather than on the ODE recalculations. Stipulation ¶ 33.

While the draft settlement agreement was under review, however, the legislature enacted statutory amendments providing that FY06 payments were to be based on monies “actually received *for*” (rather than “in”) FY05, “as determined based on the final reconciliation of data by the Department.” Stipulation ¶ 34, citing H.B. 530. ODE then proceeded with its payment reduction plan for FY06 and FY07, and the draft settlement agreement was not executed. Stipulation ¶¶ 36-37. ODE also declared its intent to recoup what it contends were overpayments made to Cincinnati in FY05. Stipulation 38. Cincinnati responded with this action alleging, among other things, breach of a settlement agreement (Complaint Claim 1), “unlawful reduction of guarantees” (Complaint Claim 4), and “arbitrary and capricious” calculation of the FY05 figures (Complaint Claim 6), and seeking certain declaratory and injunctive relief.

At the heart of the parties’ dispute is a statutorily mandated funding calculation that depends significantly on a variable referred to as “formula ADM.” R.C. 3317.022. “Formula ADM” is a defined term. As set forth in R.C. 3317.02 (“Definitions”), “‘Formula ADM’ means ... the number *reported pursuant to division (A) of section 3317.03* Beginning in fiscal year 2006, ... for the months of July through December, formula ADM means the number *reported* in October of that year, and for the months of

January through June, formula ADM means the average of the numbers *reported* in the previous October and in February.” R.C. 3317.02(D) (emphasis added).

Division (A) of R.C. 3317.03, in turn, specifies both who is to report “the number” and how that number is to be determined. “*The superintendent of each city ... school district ... shall ... certify to the state board of education on or before the fifteenth day of October in each year for the first full school week in October the formula ADM. Beginning in fiscal year 2006, each superintendent also shall certify to the state board ... the formula ADM for the third full week in February.*” Among other specified components, “[t]he formula ADM shall consist of the average daily membership *during such week* of the sum of ... (1) On an FTE [full time equivalency] basis, the number of students ... receiving any educational services from the district [and] (2) On an FTE basis, the number of students entitled to attend school in the district ..., but receiving educational services ... from ... (a) A community school ...”. R.C. 3317.03(A) (emphasis added). (In addition to the overall formula ADM number, the superintendent is required to “report separately” various student counts for that “October count” week, including total average daily membership in classes under the superintendent’s supervision and the number of children enrolled in a community school. R.C. 3317.03(B).) The state superintendent of public instruction shall prescribe for the local superintendents “such standardized reporting forms and accounting procedures as are essential to the businesslike operations of the public schools of the state.” R.C. 3301.12(A)(2).

Thus, the text of Chapter 3317 provides that “formula ADM” is a function of the “average daily membership” (“ADM”) both in traditional public schools during the count

week and in community schools (also known in the vernacular as “charter schools”) during the count week. The parties all purport to agree with that understanding of the statute, stipulating that “R.C. 3317.03(A) requires each public school district to make a count of its students during the first week of October each year and to report that number, together with the number of district residents attending community schools, to ODE. The resulting report is commonly known as the ‘October Count,’ which becomes part of the basis for the school district’s ADM for that year.” Stipulation ¶ 52.

The state funding determinations for community schools are not based on the same calculation involving “formula ADM.” Rather, community schools receive state funding based in part on regularly changing enrollment figures as reported monthly by community schools through a web-based system under ODE guidelines calling for Community school average daily membership (“CSADM”). *See*, R.C. 3314.08; Stipulations ¶ 2, 9. “CSADM records are cumulative and subject to change each month. For community schools, funding is calculated for the year and adjusted monthly, based on changes in student enrollment as reported by community schools.” Stipulations ¶¶ 8-9. The state payments to community schools are deducted from the state funding for the public school district in which the pupil resides. Stipulation 3.

During FY05, ODE permitted community school personnel to delete electronic CSADM records for students who earlier that year the community school had reported as enrolled. Stipulation ¶ 13. For that year, “1,466 records of CSADM enrollment of [Cincinnati] pupils attending community schools were deleted from ODE’s computer system by community school employees.” Stipulation ¶ 14. The record of enrollment for such pupils no longer exists in ODE’s database: “The Department of Education

maintains no independent record of information deleted from its CSADM files by community school personnel [and] ODE does not maintain a separate record of pupil records deleted by a community school employee.” Stipulations ¶¶ 13, 15. Although ODE subsequently changed its software to prevent such deletions, the “FY05 CSADM data files were ‘open’ for the addition, modification or deletion of records until September 30, 2005.” Stipulation ¶ 15.

Cincinnati “calculated its FY05 formula ADM pursuant to R.C. 3317.03. [Cincinnati’s] FY05 formula ADM as certified to ODE was 42,491.51 based on its October Count [Cincinnati] actually received school foundation funds for FY05 from ODE in the net amount of \$107,241,411 based on the ADM of 42,491.51 after \$42,895,557 was deducted and paid to community schools as CSADM funding for 6,530 community school FTE pupils. ... ODE used the formula ADM of 42,491.51 from [Cincinnati’s] FY05 October Count, as adjusted for community school pupils not included in the October count, to calculate the amount” paid to Cincinnati during FY05. Stipulations ¶¶ 21-22. The 2005 fiscal year ran from July 1, 2004 through June 30, 2005. Stipulation 54. Hence, the October Count for FY 2005 was by statute to have been made in October 2004. *See also* R.C. 3317.03.

The parties stipulate that “[o]n or about September 30, 2005, ODE personnel began using the FY05 CSADM numbers, rather than the FY05 ADM numbers [as reported by district superintendents for community school students], in calculating the state foundation funding each district was entitled to in FY05, which corresponded to the 2004-2005 school year.” Stipulation ¶ 54. More precisely with regard to time, “[t]he reduction in FY05 ADM is based on the net difference between the ADM reported by

and credited to Plaintiff for FY05 ... and the number of CSADM pupils reported by community schools as being in attendance in community schools and also resident in the Cincinnati City School District on September 30, 2005,” Stipulation ¶ 42; *see also*, deposition of ODE Data Strategist James Daubenmire at 125 (Q. – “At what point in time do you measure or identify the CSADM to determine the number of overpayment to Cincinnati for fiscal year ‘05?” A. – “I believe they waited till September of ‘05 when CSADM closed to get the final CSADM data. Then when that was run, then they knew what the final deduction was going to be for ‘05”).

That recalculation, based as it was on different inputs, led to the February 2006 announcement that ODE was revising Cincinnati’s formula ADM to 41,920.32, “which is 571.19 FTEs less than that reported in [Cincinnati’s certification] based on its FY05 October Count.” Stipulation ¶ 26. That ODE determination triggered the February 15, 2006 meeting referenced above that in turn provided grist for the never executed settlement agreement drafted by Cincinnati’s counsel. *See* Stipulations ¶¶ 28-32, 37. ODE subsequently revised its calculations again to reduce to 542.92 the difference between Cincinnati’s formula ADM and ODE’s (lower) version based on CSADM numbers. Stipulation 38 and Appendix H.

Because statute ties guarantee payments for FY 2006 and FY 2007 to FY05 payments, *see* Stipulation 55 and H.B. 530 and H.B. 66, ODE’s recalculation of the FY05 figures means a change in FY06 and FY07 funding as well. Some Ohio school districts found their financial situation improved by ODE’s shift to a CSADM-based calculation: “[t]he results were mixed; some districts were entitled to more state funding and some were entitled to less.” Stipulation ¶ 55. For Cincinnati, the revision means a reduction in

state funding of \$2,281,740 for FY06 and “likely ... a similarly sized decrease in guarantee payments ... during FY07.” Stipulation ¶ 56. ODE also seeks to recover (over time) more than two million dollars paid out for FY05. See Stipulation ¶ 38 and Appendix I. The court has been advised that the intended reductions have been placed “on hold” pending resolution of this litigation. See, e.g., Cincinnati’s Motion at n. 6.

There is no final, binding settlement agreement, and the doctrine of promissory estoppel does not apply against the state.

Both sides in effect seek summary judgment on Cincinnati’s claim that the February 15, 2006 meeting generated a settlement agreement that has become binding on Defendants. The undisputed facts reflect that Defendants are entitled to summary judgment on Cincinnati’s claim for breach of a settlement agreement (Complaint claim 1) and on Cincinnati’s related promissory estoppel claim (Complaint claim 2).

Cincinnati argues that some agreement (albeit an agreement not necessarily identical with the unexecuted draft prepared by its counsel) took effect when, in March and April 2006, ODE made foundation payments for FY 2006 based on foundation monies “actually received” by Cincinnati in FY05. See Cincinnati’s Motion at 34, 57 (citing payments referenced at Stipulation ¶ 33). The unexecuted draft explicitly contemplated signature by Ohio’s Superintendent of Public Instruction, Defendant Zelman, as well as by the Superintendent and Treasurer for the Cincinnati and Dayton School Districts. Stipulation ¶ 31 and Appendix E at 4. As drafted, the document acknowledged that “a complete reconciliation of pupil ADM and CSADM for FY 05 is impossible;” it tracked statutory law current as of the settlement discussions in specifying that FY06 and FY07 guarantee payments would be based on the sums already paid and received (in specified amounts) in FY05; and it stated that Cincinnati agreed to “the FY

05 reduction in ADM of up to ... 300 CPS pupils and deductions from School Foundation payments in future years that reflect those ADM reductions,” with “[a]ny such deductions [to] be made in equal monthly payments spread over a period of five years commencing in FY 07 ... [and] based on ... \$5,169 per pupil” (for a total recoupment of \$1,550,700). Stipulation 31 and Appendix E at 2. The round figure of a 300 pupil proposed reduction in ADM was the result of “split the difference” negotiation rather than application of some accounting or reporting principle. *See, e.g.*, Geoghegan Depo. at 106-07.

The document as communicated to Defendants bore no signatures, *id.*, and “has never been signed by the Superintendent of Public Instruction,” Stipulation ¶ 37. Furthermore, Cincinnati admits that “ODE is correct that Cincinnati did not approve, by formal resolution, the Agreement pursuant to R.C. 3313.33, which requires board approval of contracts.” Cincinnati Memorandum Contra Defendants’ Motion at 9.

Cincinnati’s position here is that the Defendant state agencies can become contractually (as opposed to statutorily) obligated for the payment of appropriated funds absent any formalities other than negotiations at the legal counsel/Associate Superintendent level. The court does not understand that proposition (so apparently at odds with principles of accountability and openness in government) to be correct as a matter of Ohio law.

R.C. 126.07 recites that: “No contract, agreement, or obligation involving the expenditure of money chargeable to an appropriation ... shall be valid and enforceable unless the director of budget and management first certifies that there is a [sufficient] balance in the appropriation not already obligated to pay existing obligations The

director shall not approve payment to be made if the director finds ... that the payment is not for a valid claim against the state, that is legally due ...". Cincinnati argues that R.C. 126.07 is not applicable because the claimed contractual obligation at issue here somehow does not involve an "expenditure," which Cincinnati defines as "a payment of money for goods or services." See Cincinnati's Memo Contra Defendants' Motion at 5; Reply in Support of Cincinnati's Motion at 10. The proposed settlement involved a changed method of calculation, Cincinnati explains; "the fact that the resulting calculation resulted in increased foundation payments was a necessary result, but it was not the subject of the Agreement." Cincinnati's Memo Contra at 1-2.

To the extent that Cincinnati asserts that the claimed settlement agreement compels the state to pay money that it otherwise would not be required to pay – to the extent, that is, that the settlement agreement is said to provide a basis for judgment apart from the mandates of the funding statutes themselves – Cincinnati's argument regarding R.C. 126.07 is wrong. Such an agreement certainly would "involve" – the statutory test – the "expenditure" (that is, the "disbursing, or laying out," see *Black's Law Dictionary* [Fifth Edition, 1979] and OED definition cited in Cincinnati's Memo Contra at 5, n. 5) of money from appropriated funds. The statute is not restricted to what parties might deem to be the "subject" of an agreement, but rather is directed to what Cincinnati concedes is, under its argument here, a "necessary result" involving the obligation of the payment of money: it is precisely the "result" and not the title of the agreement with which the statute is concerned. Unquestionably, proposed payments from the Department of Education to a school board involve "funds to be expended," see *State v. Akron Education Ass'n* (1976), 47 Ohio St.2d 47, 50, and should such obligations be compelled

by agreement rather than statute, R.C. 126.07 would apply. *See also, e.g., Williams v. State* (10th Dist. 1986), 34 Ohio App.3d 361 (predecessor statute “essentially involves special contracts where public funds are *disbursed* or expended,” but does not apply to payment of wages to employees) (emphasis added). The statute means what it says, and the agreement claimed by Cincinnati is not valid and enforceable. *Cf. Miller v. Guthery* (1932), 125 Ohio St. 603; *State v. Kuhner* (1923), 107 Ohio St. 406.

Moreover, under basic principles of mutuality of obligation, any settlement agreement would be binding on Defendants only if binding on Cincinnati as well. *See, e.g., Strasser v. Fortney & Weyandt, Inc.* (8th Dist. App. 2001), 2001 WL 1637502 (“Without mutuality of obligation, a contract cannot be enforced”). R.C. 3313.33(B) provides that: “no contract shall be binding upon any board unless it is made or authorized at a ... meeting of the board.” Cincinnati admits that “ODE is correct that Cincinnati did not approve, by formal resolution, the Agreement” Cincinnati Memo Contra at 9.

Cincinnati’s argument that “this Court ... should overlook the formalities imposed by R.C. 3313.33 and recognize the agreement ratified by ODE,” *id.* at 11, is unpersuasive. Cincinnati urges the court to manufacture an exception to the statute where “two public bodies are involved,” but the plain terms of R.C. 3313.33 preclude such an exemption: “no contract” means “no contract.” *Cf. Walker v. Lockland City School District Board* (1st Dist. 1980), 69 Ohio App.2d 27, 29 (“There was no meeting at which the board contracted The representations of the superintendent, even if based on conversations with individual board members do not, as a matter of law, meet the statutory requirements”). The case of *Board of Co. Commrs. v. Board of Twp. Trustees*

(Jeff. Co. 1981), 3 Ohio App.3d 336, upon which Cincinnati relies involved a quantum meruit issue unrelated to R.C. 3313.33 and is entirely inapposite. Here, the undisputed facts establish that the proposed 300 student reduction in ADM that Cincinnati proposed as part of the attempted settlement agreement, designed to allow the state to recoup more than one and a half million dollars in FY05 payments, came from “split the difference” negotiation that would have required board approval to be effective.

Distilled to their essence, Cincinnati’s principal arguments for its contract claim as based on the purported settlement agreement are but slightly veiled variations of its arguments for the promissory estoppel claim. The law against that position is long established. As our Supreme Court recently reaffirmed: “‘It is well-settled that, as a general rule, the principle of estoppel does not apply against a state or its agencies in the exercise of a government function.’” *Hortman v. City of Miamisburg* (2006), 110 Ohio St.3d 194, 199, quoting *Ohio State Bd. of Pharmacy v. Frantz* (1990), 51 Ohio St.3d 143, 145-46. Otherwise, in this context, the various statutory provisions requiring significant formalities in public contracting would be eviscerated.

Defendants are entitled to summary judgment on Plaintiff’s first claim for relief (“Breach of Settlement Agreement”), on Plaintiff’s second claim for relief (“Promissory Estoppel”), and on Plaintiff’s third claim for relief (“Unlawful Retroactive Application of H.B. 530”) to the extent that such claim is premised upon the existence of a valid settlement agreement (and the court notes that Cincinnati now states that it “does not invoke H.B. 530 as the source of a claim,” but cites it only for the purpose of refuting arguments by Defendants, *see* Cincinnati’s Reply in support of its motion at 3).

Correspondingly, Plaintiff's motion for summary judgment on the first three claims in the Complaint must be denied.

Defendants have no basis in the law to depart from the statutorily mandated definition of "formula ADM" when calculating foundation payments for traditional schools.

Both sides, in their own ways, also ask the court to decide on summary judgment the issue of the statutory propriety on these facts of ODE's substitution of CSADM figures for the school district's October ADM count of community school students as ODE makes its "formula ADM" funding calculation. Cincinnati argues that "ODE's Retroactive Reduction In Plaintiff's Foundation Funding Violates The Legislatively Established Methodology For Determining School District Funding Levels." Cincinnati Motion at 40. Defendants argue that in calculating state funding for traditional schools, ODE "had to choose between conflicting data about the same basic fact – how many children are attending community schools – generated by two reporting systems. ... ODE chose the data submitted by the community schools because that data ... appears to be more accurate." Defendants' Motion at 4.

Thus, in Defendants' view, "[t]his case arises from a disagreement about ODE's attempt to reconcile a conflict between the data generated by two statutorily mandated systems" Defendants' Motion at 6. In sum, Defendants submit that "ODE had a rational basis for using CSADM data in the distribution of public funds" because the statutory scheme is flawed: "one law [in specifying 'formula ADM'] required traditional schools to give their best estimate of the number of community school students residing in their districts, ADM, while another tied the payments to community schools to enrollment data they submitted via CSADM." Defendants' Motion at 30-31. Here,

Defendants' argument seems to be much more with Ohio's legislature than with Cincinnati.

The court has attempted to describe the statutory regime in some detail above. Importantly, the relevant statutes in this case relate to foundation payments to traditional schools pursuant to R.C. 3317; this case does not directly involve state payments to community schools made pursuant to R.C. 3314.08 (in amounts then deducted from payments to the traditional schools). Defendants cite no legal principle that would compel the legislature to require that payments to traditional schools and community schools be made according to the same formulas and calculations, and the fact that the legislature has established two different systems for calculating funding for the two different categories of schools does not necessarily mean that the two systems are "conflicting." *Compare* Defendants' Motion at 6 ("The problem: conflicting systems for calculating the number of community school students") *with* Stipulation ¶ 4 ("Since the inception of community schools, ODE has maintained two separate reporting and payment systems for the distribution of state foundation funds to public school districts and to community schools"). This court is not authorized to make a policy determination as to which system is more sensible, but rather is limited to an analysis of what the law requires.

Defendants attempt to rationalize ODE's substitution of CSADM inputs for the relevant ADM component required under formula ADM by urging that "CSADM data was more current, being updated every month, while the traditional schools data was based on a one time snapshot. That is relevant because of the high mobility of students in urban school districts." Defendants' Motion at 9. The legislature, however, has

mandated specifically that formula ADM be calculated on the basis of a ‘snapshot’ developed over one particular week: “The superintendent of each city ... school district ... shall ... certify to the state board of education on or before the fifteenth day of October in each year *for the first full school week in October* the formula ADM. The formula ADM shall consist of the average daily membership *during such week*” of the sum of traditional and community school students for the district. R.C. 3317.03(A) (emphasis added). That statutory provision is clear. *See also, e.g., Harmony Community School v. ODE* (2003 Ct. Claims), 125 Ohio Misc.2d 42, 45 (“The October count, known as the Average Daily Membership (‘ADM’), determines traditional public school funding for the entire school year. R.C. 3317.03”); *Baldwin’s Ohio School Law* (December 2003), Hastings, Manoloff, Sheeran & Stype at 39:16 (“The formula ADM consists of the average daily membership for the first week of October of the sum of [numbers including the] ... number of students ... receiving educational services in grades kindergarten through twelve from certain community schools”). Nothing in the statute governing payments to community schools obviates the legislature’s “formula ADM” directive with regard to foundation payments to traditional schools.

Defendants present ODE’s CSADM substitution as a “rational” policy choice, but it is not a policy choice that the law permits under the undisputed and significantly stipulated facts presented here to the court. As our Supreme Court has observed: “all powers of governmental agencies are legislatively granted, ... and the acts of such agency may not exceed such authority or be in direct conflict with the exercise of specific powers granted to state departments for statewide regulatory control.” *Johnson’s Markets, Inc. v. New Carlisle Dep’t of Health* (1991), 58 Ohio St.3d 28, 36.

Defendants urge that the statutory “formula ADM” requirements in effect are trumped by the power given to the State Superintendent of Public Instruction to “prescribe and require the preparation and filing of such financial and other reports from school districts, officers, and employees as are necessary and proper [and to establish] such standardized reporting forms and accounting procedures as are essential to the businesslike operations of the public schools of the state,” and also to undertake “analysis of data.” *See* Defendants’ Reply in support of Defendants’ motion at 17-18, citing R.C. 3301.12(A)(2) and 3301.12.(A)(3). Nothing in those sections, however, overrides, contradicts, or invalidates the specific statutory mandates that: (a) establish “formula ADM” as a major component of the state’s traditional school foundation funding regime, *see* R.C. 3317.022; (b) define “formula ADM” as “the number reported pursuant to division (A) of section 3317.03,” *see* R.C. 3317.02(D); and (c) specify that “the superintendent of each city ... school district” shall report to the state board the formula ADM consisting of October (and now February) count week numbers including the number of community school students from that district in that week, *see* R.C. 3317.03(A)(2)(a).

Moreover, Defendants stipulate that Cincinnati “calculated its FY05 formula ADM pursuant to R.C. 3317.03,” and that the state made FY05 payments on that basis. Stipulation ¶¶ 21-22. Defendants point to nothing in the record indicating that the State Superintendent in fact “prescribe[ed] and require[ed]” any method of reporting by Cincinnati’s superintendent of its formula ADM that would have included the use of CSADM figures for the October count week. Rather, Defendants do not conceal that ODE itself “chose [and substituted] the data submitted by community schools” precisely

because “[i]t is updated monthly, whereas the traditional schools submit a single annual snapshot based on one week in October.” Defendants’ Motion at 4; *but see, e.g., Baldwin’s, supra* at 39:15 (“foundation payments to boards of education are based on statistics that the boards and superintendents must certify to the state board of education”), 39:16 (“While formula ADM for almost all districts will be determined during the first week of October, schools can receive the benefit of increased funding if their formula ADM increases significantly between the first school week in October and the first full school week in February”).

Here, the undisputed facts demonstrate that ODE elected to reconcile a perceived statutory “conflict” by disregarding statutory mandates including what report is to govern formula ADM (“the number reported pursuant to division (A) of section 3317.03,” *see* R.C. 3317.02(D), who is to submit the report (“the superintendent of each city ... school district,” under ODE direction and review, *see* R.C. 3317.03), and what the relevant time frame for reporting is (“the first full school week in October,” *see* R.C. 3317.03(A)). Indeed, Defendants stipulate that the rolling total CSADM figure it used reflects “the number of CSADM pupils reported by community schools as being in attendance in community schools and also resident in the Cincinnati City School District on September 30, 2005” – almost one year after the FY05 October count week and a full three months after the close of the FY05 fiscal year. Stipulation ¶ 42; *see also* Stipulation ¶ 54 (“The 2005 fiscal year began on July 1, 2004 and ended on June 30, 2005. On or about September 30, 2005, ODE personnel began using the FY05 CSADM numbers, rather

than the FY05 ADM numbers, in calculating the state foundation funding each district was entitled to in FY05, which corresponded to the 2004-2005 school year”).¹

Further still, Defendants have stipulated that 1,466 records of FY05 CSADM enrollment for Cincinnati community school students -- records that existed at one time -- were deleted from ODE’s computer system prior to compilation of the September 30, 2005 CSADM figure that ODE used to reduce calculated foundation payments to Cincinnati. Stipulations ¶¶ 13, 14, 15, 54. That is to say, it is undisputed that records were deleted for approximately three times as many enrollments as are now at issue in the reductions. Stipulation ¶ 38. ODE “maintains no independent record” of this deleted information. Stipulation ¶ 13. *Cf.* Daubenmire Depo. at 48 (ODE data strategist testifies that under ODE’s current approach for FY05, a student reported as a community school pupil by both the public school October count and the community school CSADM, and who then reenrolled in the traditional public school system and was removed from CSADM by the community school would not be counted so as to provide funding for the public school district); DeMaria Depo. at 118-122. If it is not appropriate for an administrative agency to substitute an accounting of apples where a statute requires a count of oranges, the proposed substitution is not improved by an inability to verify or substantiate what the count of apples would be for the particular week in question.

¹ Defendants’ representatives concede that the CSADM figures they used to reduce the calculation for Cincinnati’s FY05 foundation funding could not be expected to reflect an accurate assessment of the October count week statistic sought by R.C. 3317.03(A). *See, e.g.,* Casterline Depo. at 35 (ODE information technology supervisor: “it’s a very small window [in time] in which these two could match”), 37 (Q. – “So if you took the CSADM for September of ’05 and compared it with the October count in October of ’04 ... they wouldn’t reconcile?” A. – “You switched years ..., so they would never reconcile. And then even if you stayed with the same year of ’05 in both cases, they wouldn’t reconcile either”), 138.

Defendants argue vociferously that Cincinnati is not entitled to summary judgment on the issue of ODE's departure from the statutorily mandated definition of formula ADM because Cincinnati's Complaint "nowhere alleges that ODE's use of CSADM to calculate the community school component of a district's ADM violates R.C. 3317.03" Defendants' Memo in Op. at 3-4; Defendants' Reply in support of their motion at 16-17. This position appears somewhat inconsistent with Defendants' statement in their own motion for summary judgment that, "Plaintiff's sixth claim asserts that the decision to use CSADM data to calculate the portion of traditional schools' state foundation payment attributable to community school students is arbitrary and capricious." Defendants' motion at 29. It appears even more inconsistent with Defendants' own expressed understanding as to what this case is all about: "This case arises from a disagreement about ODE's attempt to reconcile a conflict between the data generated by two statutorily mandated systems." Defendants' Motion at 6. It overlooks various allegations of Cincinnati's Complaint. *See Verified Complaint at p. 1 and ¶¶ 10* ("School Foundation funding is determined and paid through a formula described in Revised Code Chapter 3317 [and] is primarily determined by the number of pupils attributable to the formula ('ADM') ..."), 23 (ODE's "CSADM reporting scheme made it impossible to reconcile the number and identity of pupils reported as part of community school CSADM with the number and identity of pupils reported as part of Plaintiff School District's ADM"), 36 (regarding threatened reductions), 55 ("Defendants have now commenced unlawful reductions in School Foundation payments to Plaintiff"), 60 ("unlawful reductions"), 92-98 ("Fourth Claim for Relief – Unlawful Reduction of Guarantees"), 103-110 ("Sixth Claim for Relief – Defendants' Calculation of Plaintiff's

FY 05 Transitional Aid is Arbitrary and Capricious”). It ignores the liberal principles of notice pleading. See Civil Rule 8(A); *Illinois Controls v. Langham* (1994), 70 Ohio St.3d 512, 526 (“A party is not required to plead the legal theory of recovery or the consequences which naturally flow by operation of law from the legal relationships of the parties”); *Samonas v. St. Elizabeth Health Center* (7th Dist. App. 2006), 2006 WL 338366. And it raises no issues of fairness or due notice when reviewed in the context of the significant depositions filed in this case. (When the issue was raised at oral argument, Defendants’ counsel demurred when asked whether he wanted further opportunity to pursue or present additional materials on the statutory formula ADM issue.)

The court notes finally on the subject of “formula ADM” that well after the submission and argument of the summary judgment motions, the court inquired of counsel as to whether R.C. 3317.03(C)(2) has any particular implication for this case. Neither side had raised that statutory subsection as relevant here, and upon consideration (and not surprisingly, given the enormous expertise of all the parties), the court concludes that the subsection is essentially inapposite to the issues presented in this case. It reads: “A student enrolled in a community school ... shall be counted in the formula ADM ... of the school district in which the student is entitled to attend school ... for the same proportion of the school year that the student is counted in the enrollment of the community school for purposes of section 3314.08 of the Revised Code.” The court’s question to counsel was whether this language displaces the “snapshot” October count week approach of “formula ADM” as set forth in R.C. 3317.03(A)(2) and incorporates through its reference to R.C. 3314.08, including 3314.08(L)(2) (providing pro rata payment for community schools based on a pupil’s attendance for a portion of the school

year), an open-ended, rolling count concept with which the use of September 30, 2005 CSADM figures for purposes of calculating formula ADM would be consistent.

Again, the legislative language that establishes Ohio's school funding systems is, to use the Supreme Court's euphemism on the subject, "complex." But Defendants' new position, adopted only after court inquiry, that R.C. 3317.03 "actually *requires* use" of CSADM data in the context presented here flies in the face of Defendants' extensive earlier argument that ODE acted to address "a conflict between the data generated by two statutorily mandated systems." Compare Defendants' 10/13/06 Supplemental Memo at 2 with Defendants' Motion for Summary Judgment at 6 and *passim*. More significantly, perhaps, the express language of R.C. 3317.03(C)(2) does not alter the R.C. 3317.02(D) definition of "formula ADM" as meaning "the number reported [by the district superintendent] pursuant to *division (A)* of section 3317.03 [and, for 2006 on,] for payments in which formula ADM is a factor, for the months of July through December, formula ADM means the number *reported in October* of that year, and for the months of January through June, formula ADM means the average of the numbers *reported in the previous October* and in February." This definitional provision, reinforcing the salience of the district superintendents' October count, was amended effective 2005. And R.C. 3317.03(A) still (and for FY 2006 and on, again) explicitly commands the October count week approach, mandating that "formula ADM shall consist of the average daily membership *during such week* of the sum of" numbers including traditional and community school ADM.

"A basic rule of statutory construction requires that 'words in statutes should not be construed to be redundant, nor should any words be ignored.' Statutory language

‘must be construed as a whole and given such interpretation as will give effect to every word and clause in it. No part should be treated as superfluous unless that is manifestly required, and the court should avoid that construction which renders a provision meaningless or inoperative.’” *D.A.B.E., Inc. v. Toledo-Lucas Co. Bd. of Health* (2002), 96 Ohio St.3d 250, 256 (citations omitted). The question thus becomes whether there is a natural reading of subsection 3317.03(C)(2) that still gives full, natural effect to the October count week language of 3317.03(A) regarding payment to traditional schools on the basis of formula ADM as defined. Plaintiff’s Supplemental Comment on R.C. 3317.03 and Other Changes Made by H.B. 364 Regarding Community School Data and Funding provides a logical exegesis.

The key on this score is found in R.C. 3317.03(F)(3), which reads (with emphasis added): “If a student attending a community school ... is not included in the formula ADM certified for the school district in which the student is entitled to attend school ..., the department of education shall adjust the formula ADM of that school district to include the community school student *in accordance with division (C)(2) of this section*, and shall recalculate the school district’s payments under this chapter for the entire fiscal year on the basis of that adjusted formula ADM. This requirement applies regardless of whether the student was enrolled ... in the community school during the first full school week in October.”

This subsection both (1) reaffirms the concepts of formula ADM certification and the general applicability of the October count week concept, while (2) referencing one particular aspect of traditional school funding for which an “adjusted,” CSADM-type running count conducted over the course of the school year is appropriate under the

statutory scheme. It establishes that if a student enrolls in a community school without having been included in the October count week (and thereby causes a deduction to be made from the payments that otherwise would have gone to the district, *see* Stipulation ¶ 3), the district is given a countervailing formula ADM credit, but only to the extent under subsection (C)(2) of the proportion of the school year for which the student was enrolled in the community school. Reading (C)(2) to have particular application to this defined circumstance appears to be the only natural reading of section 3317.03 that gives full effect to all of its provisions.

Indeed, as Cincinnati observes, the parties have stipulated to this effect. “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 district pupils in a community school after the October count, in which case the pupils, if not previously included in ADM, are required to be added to ADM by R.C. 3317.03(F)(3).” Stipulation ¶ 7. *See also* [ODE’s] DeMaria Depo. at 58 (“And then for students not in October count week at all, there is computed the FTE associated with those students. And that, too, is then added into the ADM computation at the beginning of the Foundation payment computation”); 112 (“And so a portion of House Bill 364 addressed that issue by determining that for students that were present in the community school outside of October count week, thereby generating payment to the community school but no positive funding flow to the traditional district, that that would be rectified”). Not for the first time, the court’s inquiry has proved to be a red herring.

For the reasons set forth above, Cincinnati is entitled to summary judgment on the central issue implicated by claims 4 and 6 of its Complaint: Defendants’ effort to reduce

the foundation funding amounts calculated for FY05 (and hence for FY06 and FY07 to the extent that those figures are tied to the FY05 calculation) by substituting September 30, 2005 CSADM for a statutorily mandated element of the defined “formula ADM” lacks a basis in law. Defendants’ Motion for Summary Judgment on the issue of Plaintiff’s fourth and sixth claims correspondingly must be denied.²

H.B. 530 does not affect these conclusions with regard to issues of the claimed settlement agreement, promissory estoppel, and the statutorily specified definition of “formula ADM.”

Although it was featured to some extent in the earlier restraining order hearing, and to a much lesser degree in the summary judgment briefing, nothing in H.B. 530 alters the analysis set forth above. Uncodified H.B. 66 had required that guarantee payments for 2006 be based on the amount that a district “actually received *in* fiscal year 2005.” Stipulation ¶¶ 29, 34. H.B. 530 revised that guarantee by clarifying that the link is to monies “actually received *for* fiscal year 2005, as determined based on the final reconciliation of data by the Department.” Stipulation ¶ 34. Defendants characterize the effect of this change by stating that the bill requires that 2006 funding “be based on the amount of funding that *should have been received* during FY 2005,” rather than on any amounts actually but inappropriately received that should not have been credited to FY05. Answer at p.5; *see also* Memorandum in Support of Defendants’ Motion at 15 (bill requires that 2006 aid “be based on the amount of state aid that should have been received during FY 2005”), 26 (“H.B. 530 changed the law; it made the amount properly

² In reaching these determinations, the court gives no weight at all to Cincinnati’s submission of materials showing that the State Board of Education has requested enactment of legislation to provide that “ODE have the clear statutory authority to make data corrections to adjust the computation for formula ADM when ODE has reason to believe that the district-reported data is inaccurate.” *See* Plaintiff’s Motion for Leave to Supplement.

due a district the appropriate consideration [and authorized changes based on a final reconciliation of data] ...after the close of the fiscal year”). In other words, if a final reconciliation of data demonstrated that payments “actually made” in FY05 were inappropriate under the calculations specified by the statutory funding formula, including the component of formula ADM, ODE no longer was bound to replicate that error for 2006.

That amendment had relevance to the facts of this case during the parties’ settlement discussions in early 2006: prior to the bill’s enactment, ODE conceded that regardless of its desire to revisit the FY05 figures, it appeared obligated for FY06 and FY07 by what already actually had been paid during the 2005 calendar year. Stipulation 29. After the bill’s enactment, the FY06 and FY07 obligations hinged on “what should have been received during FY 2005,” to use the Defendants’ language. Because ODE believed (based on an approach the court finds not warranted in the law) that monies received by Cincinnati in 2005 had been paid improperly, it walked away from the potential agreement that would have bound it by contract to pay for FY06 and FY07 based on that FY05 sum. Consequently, the draft settlement agreement was not pursued or made final.

Because the court determines that there is no binding settlement agreement, arguments alleging an improper retroactive application of H.B. 530 to “impair” that claimed contract have no continued significance with regard to these motions. The court does not understand either side in this case to argue that the H.B. 530 amendment regarding FY06 guarantees somehow changed the underlying statutory formula by which FY05 foundation payments were to have been calculated, and the bill nowhere displaces

the “formula ADM” definition set forth at R.C. 3317.02(D), or the October count requirements established by R.C. 3317.03(A), or the statutory funding formula for FY’05 using “formula ADM” and recited in R.C. 3317.022. The parties have thoroughly rehearsed the formula issues in their briefs, and the court already has been overly long in stating its conclusions based on the materials presented.

Cincinnati has abandoned any residual claim, beyond its contract argument, contained within the Complaint’s Third Claim for Relief (“Unlawful Retroactive Application of H.B. 530”), and Cincinnati also has abandoned its Fifth Claim for Relief (“Impairment of Contracts”).

Cincinnati’s Reply brief in support of its summary judgment motion makes clear that “Cincinnati ... does not invoke H.B. 530 as the source of a claim” and that “this bill is not the basis for Cincinnati’s claims.” Cincinnati’s Reply at 2, 4, 9.

Cincinnati’s Treasurer and Chief Financial Officer testified in deposition that no existing contracts between Cincinnati and third parties have been impaired as a result of the matters complained of in this action. Geoghegan Depo. at 123. Cincinnati has dropped its impairment of contracts claim.

Defendants are entitled to summary judgment on the Third and Fifth claims of the Complaint.

Conclusion

In sum, with regard to the central issues of this case, the court finds for purposes of summary judgment that: (1) the parties did not enter into a binding settlement agreement in the spring of 2006, and (2) under the undisputed facts of this case, and contrary to the position advanced by Defendants in this litigation, ODE is without legal authority in seeking to deviate from the “October count,” formula ADM approach dictated by statute for the calculation of Cincinnati’s FY05 foundation funding (a

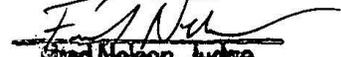
calculation that by statute informs funding levels for FY06 and FY07 as well). The court will rule accordingly on the various summary judgment issues as outlined in this Entry.

The court previously has advised all counsel that it lacks any mandamus jurisdiction in this matter, however couched. The Complaint, of course, is not one for money damages. Therefore, the court will ask counsel to confer and to determine what further action, if any, they seek here. In keeping with local rule, the court also requests that counsel present the court with a proposed judgment entry consistent with the various determinations recited above.

SO ORDERED

ENTERED

NOV 22 2006



~~Fred Nelson, Judge~~

Fred Nelson,
Judge

IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO



CINCINNATI CITY SCHOOL DISTRICT :
BOARD OF EDUCATION, :

Plaintiff, :

v. :

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

Defendants. :

Case No. A 0603908

Judge Nelson



JUDGMENT ENTRY

For the reasons stated in the decision On Cross Motions For Summary Judgment rendered herein on November 22, 2006, the Court grants summary judgment to Defendants on the First, Second, Third and Fifth claims in Plaintiff's Complaint, and grants summary judgment to Plaintiff on the Fourth and Sixth claims in Plaintiff's Complaint. The Court denies summary judgment to Plaintiff on the First, Second, Third and Fifth claims in Plaintiff's Complaint, and denies summary judgment to Defendants on the Fourth and Sixth claims in Plaintiff's Complaint.

Defendants have recalculated School Foundation payments due to Plaintiffs for Fiscal Years ("FY") 2006 and 2007 in the manner directed by the decision in this case. Pursuant to such recalculation, the Parties have stipulated that Plaintiffs are entitled to the receipt of additional School Foundation funds for each of those years in the amount of \$ 2,729,699.91 for FY 2006 and \$ 1,968,508.17 for FY 2007. The amount due for FY 2007 is subject to adjustment with respect to changes resulting from the February 2007 ADM count and other statutory adjustments. Any such adjustments shall be made to payments

on or after January 1, 2007, including payments made in subsequent fiscal years. In the event such adjustment results in payment less than \$1,968,508.17, Defendants shall provide Plaintiff with a detailed explanation in writing for such reduction. Accordingly, Defendants are directed to pay to Plaintiff, as restitution for funds wrongfully withheld, the amount of \$ 2,729,699.91 for FY 2006 and \$ 1,968,508.17 for FY 2007, pro-rated through December 31, 2006. Remaining payments to Plaintiff for FY 2007 shall reflect the additional amounts due by reason of the decision in this case. All subsequent school foundation payments shall be made consistent with Ohio law as explained in the decision to the extent that such law remains in effect. Defendants shall not deduct from Plaintiff's school foundation payments any amount claimed as an "overpayment" in or for FY 2005 based on the reductions in FY 2005 average daily membership that were the subject of this case. The parties are in agreement that the above entry is consistent with the Court's November 22, 2006 entry on Cross Motions for Summary Judgment and with the jurisdiction of this Court.

Costs to Defendants.

SO ORDERED **ENTERED**

JAN 05 2007

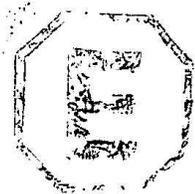
Fred Nelson, Judge
Fred Nelson, Judge

Approved:

Todd Marti 131 464 0173
 JIM PETRO
 Attorney General
 TODD R. MARTI
 Assistant Attorney General
 Education Section
 E-mail: tmarti@ag.state.oh.us
 Trial Attorney for Defendants

James J. Hughes, III
 James J. Hughes, III (0036754)
 Bricker & Eckler LLP
 100 South Third Street
 Columbus, OH 43215-4291
 Telephone: (614) 227-2300
 Facsimile: (614) 227-2390
 Trial Attorney for Plaintiff

COURT OF COMMON PLEAS
 ENTER
Fred Nelson
 FRED NELSON, Judge
 THE CLERK SHALL SERVE NOTICE
 TO PARTIES PURSUANT TO CIVIL
 RULE 58 WHICH SHALL BE TAXED
 AS COSTS HEREIN.



AN ACT

To amend sections 1.05, 9.312, 9.333, 9.83, 9.833, 9.90, 9.901, 102.02, 102.022, 103.412, 105.41, 109.57, 109.572, 109.77, 109.79, 113.06, 113.07, 118.023, 118.04, 119.04, 119.12, 121.03, 121.04, 121.22, 121.36, 121.372, 121.40, 122.17, 122.171, 122.174, 122.175, 122.177, 122.64, 122.68, 122.85, 122.87, 122.942, 122.95, 122.951, 123.10, 123.28, 123.281, 124.11, 124.14, 124.15, 124.152, 124.181, 124.34, 124.382, 124.392, 125.02, 125.04, 125.041, 125.05, 125.07, 125.08, 125.081, 125.082, 125.10, 125.11, 125.112, 125.13, 125.27, 125.28, 125.31, 125.36, 125.38, 125.39, 125.42, 125.43, 125.45, 125.49, 125.51, 125.58, 125.601, 125.607, 125.609, 125.76, 125.901, 126.32, 128.021, 128.40, 128.54, 128.55, 128.57, 131.09, 131.15, 131.34, 131.35, 131.43, 131.44, 133.01, 133.04, 133.05, 133.07, 133.34, 135.01, 135.04, 135.14, 135.144, 135.145, 135.18, 135.181, 135.35, 135.353, 135.354, 135.37, 135.74, 140.01, 141.04, 145.114, 145.116, 145.56, 145.571, 149.04, 149.43, 153.08, 153.70, 156.01, 156.02, 156.04, 167.06, 173.47, 173.48, 173.522, 173.523, 173.543, 173.544, 173.545, 174.02, 187.03, 191.04, 191.06, 305.31, 306.35, 319.63, 321.24, 323.13, 325.03, 325.04, 325.06, 325.08, 325.09, 325.10, 325.11, 325.14, 325.15, 339.06, 340.03, 340.034, 340.04, 340.05, 340.07, 340.12, 340.15, 341.34, 343.01, 349.01, 349.03, 349.04, 349.06, 349.07, 349.14, 355.02, 355.03, 355.04, 505.101, 505.24, 505.701, 505.86, 507.09, 507.11, 517.07, 517.15, 717.01, 718.01, 718.04, 718.05, 718.07, 718.37, 731.59,

103.66, and 103.67 of the Revised Code are hereby repealed.

SECTION 125.13. Sections 125.10, 125.11, and 125.12 of this act take effect January 1, 2018.

SECTION 201.10. Except as otherwise provided in this act, all appropriation items in this act are appropriated out of any moneys in the state treasury to the credit of the designated fund that are not otherwise appropriated. For all appropriations made in this act, the amounts in the first column are for fiscal year 2016 and the amounts in the second column are for fiscal year 2017.

SECTION 203.10. ACC ACCOUNTANCY BOARD OF OHIO

Dedicated Purpose Fund Group

| | | | | | | |
|--|--------|--------------------------|----|-----------|----|-----------|
| 4J80 | 889601 | CPA Education Assistance | \$ | 325,000 | \$ | 325,000 |
| 4K90 | 889609 | Operating Expenses | \$ | 1,052,714 | \$ | 1,074,173 |
| TOTAL DPF Dedicated Purpose Fund Group | | | | | | |
| | | | \$ | 1,377,714 | \$ | 1,399,173 |
| TOTAL ALL BUDGET FUND GROUPS | | | | | | |
| | | | \$ | 1,377,714 | \$ | 1,399,173 |

SECTION 205.10. ADJ ADJUTANT GENERAL

General Revenue Fund

| | | | | | | |
|--------------------------------|--------|-------------------------|----|-----------|----|-----------|
| GRF | 745401 | Ohio Military Reserve | \$ | 12,308 | \$ | 12,308 |
| GRF | 745404 | Air National Guard | \$ | 3,095,606 | \$ | 3,095,606 |
| GRF | 745407 | National Guard Benefits | \$ | 400,000 | \$ | 400,000 |
| GRF | 745409 | Central Administration | \$ | 2,682,098 | \$ | 2,682,098 |
| GRF | 745499 | Army National Guard | \$ | 3,689,871 | \$ | 3,689,871 |
| TOTAL GRF General Revenue Fund | | | | | | |
| | | | \$ | 9,879,883 | \$ | 9,879,883 |

Dedicated Purpose Fund Group

| | | | | | | |
|------|--------|--|----|-----------|----|-----------|
| 5340 | 745612 | Property Operations Management | \$ | 534,304 | \$ | 534,304 |
| 5360 | 745605 | Marksmanship Activities | \$ | 128,600 | \$ | 128,600 |
| 5360 | 745620 | Camp Perry and Buckeye Inn Operations | \$ | 978,846 | \$ | 978,846 |
| 5370 | 745604 | Ohio National Guard Facilities Maintenance | \$ | 62,000 | \$ | 62,000 |
| 5LY0 | 745626 | Military Medal of Distinction | \$ | 5,000 | \$ | 5,000 |
| 5QP0 | 745629 | Patriot Inn Lodging Operations | \$ | 200,000 | \$ | 200,000 |
| 5RV0 | 745630 | Ohio Military Facilities Support | \$ | 2,500,000 | \$ | 2,500,000 |
| 5U80 | 745613 | Community Match Armories | \$ | 350,000 | \$ | 350,000 |

SECTION 261.10. OBD OHIO BOARD OF DIETETICS

Dedicated Purpose Fund Group

| | | | | | |
|------------------------------|------------------------------|----|---------|----|---------|
| 4K90 860609 | Operating Expenses | \$ | 362,872 | \$ | 371,779 |
| TOTAL DPF | Dedicated Purpose Fund Group | \$ | 362,872 | \$ | 371,779 |
| TOTAL ALL BUDGET FUND GROUPS | | \$ | 362,872 | \$ | 371,779 |

SECTION 263.10. EDU DEPARTMENT OF EDUCATION

General Revenue Fund

| | | | | | |
|------------|--|----|---------------|----|---------------|
| GRF 200321 | Operating Expenses | \$ | 13,967,708 | \$ | 14,267,708 |
| GRF 200408 | Early Childhood Education | \$ | 60,268,341 | \$ | 70,268,341 |
| GRF 200420 | Information Technology Development and Support | \$ | 3,841,296 | \$ | 3,841,296 |
| GRF 200421 | Alternative Education Programs | \$ | 10,753,998 | \$ | 10,753,998 |
| GRF 200422 | School Management Assistance | \$ | 3,000,000 | \$ | 3,000,000 |
| GRF 200424 | Policy Analysis | \$ | 428,558 | \$ | 428,558 |
| GRF 200425 | Tech Prep Consortia Support | \$ | 260,542 | \$ | 260,542 |
| GRF 200426 | Ohio Educational Computer Network | \$ | 16,200,000 | \$ | 16,200,000 |
| GRF 200427 | Academic Standards | \$ | 3,800,000 | \$ | 3,800,000 |
| GRF 200437 | Student Assessment | \$ | 60,241,438 | \$ | 59,830,050 |
| GRF 200439 | Accountability/Report Cards | \$ | 4,897,310 | \$ | 4,897,310 |
| GRF 200442 | Child Care Licensing | \$ | 1,822,500 | \$ | 1,822,500 |
| GRF 200446 | Education Management Information System | \$ | 6,833,070 | \$ | 6,833,070 |
| GRF 200447 | GED Testing | \$ | 324,000 | \$ | 324,000 |
| GRF 200448 | Educator Preparation | \$ | 1,689,237 | \$ | 1,689,237 |
| GRF 200455 | Community Schools and Choice Programs | \$ | 3,651,395 | \$ | 3,731,395 |
| GRF 200457 | STEM Initiatives | \$ | 150,000 | \$ | 0 |
| GRF 200465 | Education Technology Resources | \$ | 3,170,976 | \$ | 3,170,976 |
| GRF 200502 | Pupil Transportation | \$ | 567,723,920 | \$ | 603,486,409 |
| GRF 200505 | School Lunch Match | \$ | 9,100,000 | \$ | 9,100,000 |
| GRF 200511 | Auxiliary Services | \$ | 144,254,342 | \$ | 149,909,112 |
| GRF 200532 | Nonpublic Administrative Cost Reimbursement | \$ | 65,165,374 | \$ | 67,719,856 |
| GRF 200540 | Special Education Enhancements | \$ | 162,871,292 | \$ | 162,871,292 |
| GRF 200545 | Career-Technical Education Enhancements | \$ | 11,922,418 | \$ | 11,947,418 |
| GRF 200550 | Foundation Funding | \$ | 6,398,844,920 | \$ | 6,655,755,799 |
| GRF 200566 | Literacy Improvement | \$ | 750,000 | \$ | 750,000 |
| GRF 200572 | Adult Diploma | \$ | 3,750,000 | \$ | 5,000,000 |
| GRF 200573 | EdChoice Expansion | \$ | 23,500,000 | \$ | 31,500,000 |
| GRF 200574 | Half-Mill Maintenance Equalization | \$ | 18,750,000 | \$ | 19,250,000 |



Page's Ohio Revised Code Annotated
Copyright © 2015 Matthew Bender & Company, Inc., a member of the LexisNexis Group.
All rights reserved.

*** Current through Legislation passed by the 131st General Assembly and filed with the
Secretary of State through file 24 (HB 238) with a gap including file 11 (HB 64) ***

Title 33: Education -- Libraries
Chapter 3317: Foundation Program

Go to the Ohio Code Archive Directory

ORC Ann. 3317.031 (2015)

§ 3317.031 Membership record; penalty for noncompliance.

A membership record shall be kept by grade level in each city, local, exempted village, joint vocational, and cooperative education school district and such a record shall be kept by grade level in each educational service center that provides academic instruction to pupils, classes for pupils with disabilities, or any other direct instructional services to pupils. Such membership record shall show the following information for each pupil enrolled: Name, date of birth, name of parent, date entered school, date withdrawn from school, days present, days absent, and the number of days school was open for instruction while the pupil was enrolled. At the end of the school year this membership record shall show the total days present, the total days absent, and the total days due for all pupils in each grade. Such membership record shall show the pupils that are transported to and from school and it shall also show the pupils that are transported living within one mile of the school attended. This membership record shall also show any other information prescribed by the state board of education.

This membership record shall be kept intact for at least five years and shall be made available to the state board of education or its representative in making an audit of the average daily membership or the transportation of the district or educational service center.

The state board of education may withhold any money due any school district or educational service center under this chapter until it has satisfactory evidence that the board of education or educational service center governing board has fully complied with all of the provisions of this section.

Nothing in this section shall require any person to release, or to permit access to, public school records in violation of *section 3319.321 of the Revised Code*.

HISTORY:

RC § 3317.02.1, 125 v 603; 126 v 288 (Eff 1-1-56); 131 v H 950 (Eff 8-16-65); *RC § 3317.03.1*, 136 v S 170 (Eff 8-29-75); 136 v S 367 (Eff 8-24-76); 144 v S 195 (Eff 4-16-93); 146 v H 117 (Eff 9-29-95); 147 v H 650. Eff 7-1-98; 151 v H 66, § 101.01, eff. 6-30-05; 152 v H 119, § 101.01, eff. 9-29-07; 153 v H 1, § 101.01, eff. 7-17-09; 2011 HB 153, § 101.01, eff. June 30, 2011.



PAGE'S OHIO REVISED CODE ANNOTATED
Copyright (c) 2005 by Matthew Bender & Company, Inc
a member of the LexisNexis Group
All rights reserved.

*** ARCHIVE MATERIAL ***

* CURRENT THROUGH LEGISLATION PASSED BY THE 126TH OHIO GENERAL
ASSEMBLY *

* AND FILED WITH THE SECRETARY OF STATE THROUGH DECEMBER 18, 2005 *
* ANNOTATIONS CURRENT THROUGH OCTOBER 1, 2005 *

TITLE 33. EDUCATION -- LIBRARIES
CHAPTER 3317. FOUNDATION PROGRAM

ORC Ann. 3317.031 (2005)

§ 3317.031. Membership record; penalty for noncompliance

A membership record shall be kept by grade level in each city, local, exempted village, joint vocational, and cooperative education school district and such a record shall be kept by grade level in each educational service center that provides academic instruction to pupils, classes for handicapped pupils, or any other direct instructional services to pupils. Such membership record shall show the following information for each pupil enrolled: Name, date of birth, name of parent, date entered school, date withdrawn from school, days present, days absent, and the number of days school was open for instruction while the pupil was enrolled. At the end of the school year this membership record shall show the total days present, the total days absent, and the total days due for all pupils in each grade. Such membership record shall show the pupils that are transported to and from school and it shall also show the pupils that are transported living within one mile of the school attended. This membership record shall also show any other information prescribed by the state board of education.

This membership record shall be kept intact for at least five years and shall be made available to the state board of education or its representative in making an audit of the average daily membership or the transportation of the district or educational service center. The membership records of local school districts shall be filed at the close of each school year in the office of the educational service center superintendent.

The state board of education may withhold any money due any school district or educational service center under *sections 3317.022 [3317.02.2] to 3317.0211 [3317.02.11], 3317.11, 3317.16, 3317.17, or 3317.19 of the Revised Code* until it has satisfactory evidence that the board of education or educational service center governing board has fully complied with all of the provisions of this section.

Nothing in this section shall require any person to release, or to permit access to, public school records in violation of *section 3319.321 [3319.32.1] of the Revised Code*.

HISTORY: *RC* § 3317.02.1, 125 v 603; 126 v 288 (Eff 1-1-56); 131 v H 950 (Eff 8-16-65); *RC* § 3317.03.1, 136 v S 170 (Eff 8-29-75); 136 v S 367 (Eff 8-24-76); 144 v S 195 (Eff 4-16-93); 146 v H 117 (Eff 9-29-95); 147 v H 650. Eff 7-1-98; 151 v H 66, § 101.01, eff. 6-30-05.

Appx. 34



PAGE'S OHIO REVISED CODE ANNOTATED
Copyright (c) 2004 by Matthew Bender & Company, Inc
a member of the LexisNexis Group
All rights reserved.

*** ARCHIVE MATERIAL ***

*** CURRENT THROUGH LEGISLATION APPROVED THROUGH DECEMBER 15, 2004 ***
*** ANNOTATIONS CURRENT THROUGH OCTOBER 1, 2004 ***

TITLE 33. EDUCATION -- LIBRARIES
CHAPTER 3317. FOUNDATION PROGRAM

ORC Ann. 3317.031 (2004)

§ 3317.031. Membership record; penalty for noncompliance

A membership record shall be kept by grade level in each city, local, exempted village, joint vocational, and cooperative education school district and such a record shall be kept by grade level in each educational service center that provides academic instruction to pupils, classes for handicapped pupils, or any other direct instructional services to pupils. Such membership record shall show the following information for each pupil enrolled: Name, date of birth, name of parent, date entered school, date withdrawn from school, days present, days absent, and the number of days school was open for instruction while the pupil was enrolled. At the end of the school year this membership record shall show the total days present, the total days absent, and the total days due for all pupils in each grade. Such membership record shall show the pupils that are transported to and from school and it shall also show the pupils that are transported living within one mile of the school attended. This membership record shall also show any other information prescribed by the state board of education.

This membership record shall be kept intact for at least five years and shall be made available to the state board of education or its representative in making an audit of the average daily membership or the transportation of the district or educational service center. The membership records of local school districts shall be filed at the close of each school year in the office of the educational service center superintendent.

The state board of education may withhold any money due any school district or educational service center under *sections 3317.022 [3317.02.2] to 3317.0212 [3317.02.12], 3317.11, 3317.16, 3317.17, or 3317.19 of the Revised Code* until it has satisfactory evidence that the board of education or educational service center governing board has fully complied with all of the provisions of this section.

Nothing in this section shall require any person to release, or to permit access to, public school records in violation of *section 3319.321 [3319.32.1] of the Revised Code*.

HISTORY: RC § 3317.02.1, 125 v 603; 126 v 288 (Eff 1-1-56); 131 v H 950 (Eff 8-16-65); RC § 3317.03.1, 136 v S 170 (Eff 8-29-75); 136 v S 367 (Eff 8-24-76); 144 v S 195 (Eff 4-16-93); 146 v H 117 (Eff 9-29-95); 147 v H 650. Eff 7-1-98.