

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

DOE, ET AL.,	:	
	:	
PLAINTIFFS,	:	CASE NO. 2:91-CV-0464
	:	
v.	:	
	:	JUDGE JOHN D. HOLSCHUH
STATE OF OHIO, ET AL.,	:	
	:	
DEFENDANTS.	:	

BRIEF OF AMICUS CURIAE, THE OHIO COALITION FOR EQUITY & ADEQUACY OF SCHOOL FUNDING, IN SUPPORT OF PLAINTIFFS' AND PLAINTIFF CLASS'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

Nicholas A. Pittner (0023159)
Susan B. Greenberger (0010154)
C. Allen Shaffer (0077642)
BRICKER & ECKLER LLP
100 South Third Street
Columbus, Ohio 43215
Telephone: (614) 227-8815
Facsimile: (614) 227-2390
E-mail: npittner@bricker.com
E-mail: sgreenberger@bricker.com
E-mail: ashaffer@bricker.com

Attorneys for *Amicus Curiae*,
the Ohio Coalition for Equity &
Adequacy of School Funding

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS.....	i
SUMMARY.....	iii
INTRODUCTION.....	1
INTEREST OF AMICUS CURIAE.....	1
BACKGROUND.....	3
I. History of The DeRolph Litigation.....	3
II. For Many of Ohio's Children, School Funding Has Not Improved Since <i>DeRolph</i>	5
A. The Disparities In Funding Decried by the <i>DeRolph</i> Court Continue.....	6
B. The School Funding Crisis Has Cost Ohio's Public Schools Thousands of Teachers.....	9
C. The Adequacy Of Ohio's Funding System Cannot Be Assessed On the Basis of <i>Average</i> Performance On A Limited Set of Tests.....	10
D. School Buildings and Textbooks: Deprivation Continues For Many.....	12
E. Special Education Funding Shortfalls Remain.....	14
F. Community Schools Siphon Public Funds From Public Education.....	16
LAW AND ARGUMENT.....	18
III. Defendants Knowingly Deny School Children Throughout Ohio, Including Members of the Plaintiff Class, The Educational Entitlements Guaranteed By The Ohio Constitution And Repeatedly Declared By The Ohio Supreme Court.....	18
A. The <i>DeRolph</i> Mandate: "A Complete, Systematic Overhaul".....	18
B. Defendants' Stunning Disregard of the <i>DeRolph</i> Mandates.....	21

- IV. Defendants' Deliberate Failure To Remedy The School Funding System As Ordered In *DeRolph* Deprives Ohio's School Children of Interests Protected by The Fourteenth Amendment to the United States Constitution.....22
 - A. The Rights the Plaintiffs Here Seek To Vindicate are already the subject of remedial orders issued by the Ohio Supreme Court; The Right to Compel Compliance with those orders is Implicit in the Concept of Ordered Liberty.23
 - 1. Due Process Protects Plaintiffs' Right To The Remedy Ordered by the Ohio Supreme Court in *DeRolph*.24
 - 2. This Court Has Both the Right and Responsibility to Protect Plaintiffs – And All Of Ohio's School Children – From The Unlawful Educational Deprivation Inflicted By Defendants.27
 - 3. Due Process Protects *Meaningful* Access to The Courts28
 - B. Defendants' Refusal to Comply with the Decrees of the Ohio Supreme Court Shocks the Conscience.31
 - C. The Lack Of Enforcement Of The *DeRolph* Decrees Violates Equal Protection.....32
- V. Federal Judicial Intervention Is Warranted To Compel Defendants' Compliance With Law.34
- CONCLUSION.....35

SUMMARY

I. Introduction

This Amicus Brief supports and elucidates the third, fourth and fifth causes of action asserted in the Amended Complaint. It is filed for the purpose of demonstrating that the harm caused by Defendants' unlawful conduct, in violation of the Fourteenth Amendment to the United States Constitution, exceeds in scope that inflicted on the Plaintiff class, extending to all school children throughout Ohio whether disabled or not.

II. Interest Of Amicus Curiae

Amicus Curiae, the Ohio Coalition for Equity & Adequacy of School Funding, supported the plaintiffs who filed and litigated *DeRolph v. State*, a case in which the Ohio Supreme Court, on four occasions, declared Ohio's school funding system unconstitutional under the state constitution and issued comprehensive remedial orders. The Plaintiffs in the instant suit are a subset of the beneficiaries of the four *DeRolph* decisions.

III. Background

A. History of The *DeRolph* Litigation

The Ohio Constitution requires the general assembly to provide a "thorough and efficient efficient system of common schools throughout the state". Section 2 of Article VI of the Ohio Constitution. In a series of decisions, the Ohio Supreme Court declared the unconstitutionality of Ohio's school funding system and ordered state officials to implement comprehensive remedial orders as specified by the court. *DeRolph v. State*, 78 Ohio St.3d 193, 677 N.E.2d 733 (1997) ("*DeRolph I*"); *DeRolph v. State*, 89 Ohio St.3d 1, 728 N.E.2d 993 (2000) ("*DeRolph II*"); *DeRolph v. State*, 93 Ohio St.3d 309, 754 N.E.2d 1184 (2001) ("*DeRolph III*"); *DeRolph v. State*, 97 Ohio St.3d 434, 780 N.E.2d 529 (2002) ("*DeRolph IV*"). However, the court subsequently issued a writ of prohibition that effectively denied the plaintiffs access to Ohio's courts for the purpose of enforcing the judgment and remedial orders previously awarded them. *State v. Lewis*, 99 Ohio St. 3d 97 (2003).

B. For Many of Ohio's Children, School Funding Has Not Improved Since *DeRolph*.

In the years since the issuance of the *DeRolph* decisions, state officials, including the Defendants to this suit, have failed to implement the reforms ordered by the Ohio Supreme Court, and students throughout Ohio continue to be subjected to unconstitutionally underfunded educational programs and facilities, in a system that now teeters on the brink of financial collapse.

1. The Disparities In Funding Decried by the *DeRolph* Court Continue.

One of the primary structural flaws recognized in *DeRolph* is the extent to which local property taxes are relied on to provide funding for Ohio's pupils. The proceeds of local property taxes are a function of school district wealth and the disparities from district-to-district are vast. School districts have been forced to seek thousands of local property tax levies since the *DeRolph*

decisions and the passage rate of those levies is declining. Mounting school district deficits, reductions in the property tax base and declining state support combine such that many school districts unable to provide the services to which Plaintiffs and other students are entitled.

2. The School Funding Crisis Has Cost Ohio's Public Schools Thousands of Teachers.

Although the over-all public school population has increased only slightly, the population of pupils with disabilities have increased significantly in recent years. At the same time, Ohio has lost nearly 9,000 teachers and continues to be unable to attract sufficient numbers of qualified personnel, especially those qualified to serve the needs of pupils with disabilities, such as the Plaintiffs.

3. The Adequacy Of Ohio's Funding System Cannot Be Assessed On the Basis of Average Performance On A Limited Set of Tests.

Defendants' efforts to portray improved academic performance by citing test score averages from the National Assessment of Educational Progress are misleading. In fact, the results cited by Defendants portray shockingly low performance for Ohio's poor and minority population a problem acknowledged, but effectively ignored, by Defendants. Other indicia of performance, such as high school graduation rates and percentages of graduates requiring remedial courses, demonstrate that statewide academic improvement is yet to be achieved.

4. School Buildings and Textbooks: Deprivation Continues For Many.

Despite the creation of the Ohio School Facilities Commission and the construction of a substantial number of new school buildings, many pupils today continue to attend school in buildings that are unsafe and educationally inappropriate. Additionally, the lack of basic school supplies, textbooks and equipment today are reminiscent of pre-DeRolph shortages.

5. Special Education Funding Shortfalls Remain.

State special education funding fails to ensure sufficient revenue to provide the services that Plaintiffs are entitled to receive. Rather than funding by need, the Defendants' system allocates funds based on the property wealth of the district. Full funding is denied to all, as the maximum amount available is only 90% of what the State formula determines is necessary. Catastrophic cost assistance is illusory, as only a portion of the identified amount is actually funded by the State. Local school districts are required to make up the difference to the extent they are able, through local property taxes. The loss of Medicaid funding further exacerbates the harm to Plaintiffs, many of whom are eligible for Medicaid-funded services

6. Community Schools Siphon Public Funds From Public Education.

While Defendants ignore their constitutional obligation to fund public schools, they divert hundreds of millions to largely private, substantially unregulated charter schools while giving the appearance of having provided the same funds to public schools. Increased voucher funding

further diverts funding from Ohio's public schools resulting in harm to the Plaintiffs. Unfunded mandates, such as the No Child Left Behind Act, further impoverish Ohio's public schools.

IV. Law and Argument

A. Defendants Knowingly Deny School Children Throughout Ohio, Including Members of the Plaintiff Class, The Educational Entitlements Guaranteed By The Ohio Constitution And Repeatedly Declared By The Ohio Supreme Court.

1. The DeRolph Mandate: "A Complete, Systematic Overhaul"

The Ohio Supreme Court declared that the system of public education in Ohio is a state system. The State was ordered to conduct a "complete, systematic overhaul" of that system and, in doing so, to address and remedy the structural defects identified by the court. The mandates were sweeping in scope and were intended to bring about profound changes in the system, to the benefit of the Plaintiffs and other students.

2. Defendants' Stunning Disregard of the DeRolph Mandates

The Defendants have ignored the sweeping reform mandates directed by the Ohio Supreme Court and have failed even to suggest that they have complied or intend to do so in the future. Rather, Defendants have sought to trivialize the nature of their responsibility to the Plaintiffs.

B. Defendants' Deliberate Failure To Remedy The School Funding System As Ordered In DeRolph Deprives Ohio's School Children of Interests Protected by The Fourteenth Amendment to the United States Constitution.

Education has long been recognized as a primary responsibility of government, as well as one of the primary interests implicit in the concept of ordered liberty. The Defendants' deliberate disregard of the educational rights afforded Plaintiffs under the Ohio Constitution as well as the lack of any judicial remedy to enforce those rights in the Ohio courts invokes protection under the Fourteenth Amendment to the United States Constitution. Whether characterized as "property" or "liberty" the interests of Plaintiffs in the education system guaranteed them by the Ohio Constitution is one deserving of federal protection.

1. The Rights the Plaintiffs Here Seek To Vindicate are already the subject of remedial orders issued by the Ohio Supreme Court; The Right to Compel Compliance with those orders is Implicit in the Concept of Ordered Liberty.

All of Ohio's public school pupils are entitled to a constitutionally compliant public education system. Plaintiffs, as pupils with disabilities, enjoy a greater level of entitlement.

a. Due Process Protects Plaintiffs' Right To The Remedy Ordered by the Ohio Supreme Court in DeRolph.

Defendants have deprived Plaintiffs of rights protected by Due Process in two ways; by the lack of meaningful access to the Ohio court system to remedy rights four-times declared by the Ohio Supreme Court, and by the deprivation of their right to a constitutional system of public education. Whether the Court applies the “shocks the conscience” test or the “implicit in the concept of ordered liberty” test, substantive due process protection should be afforded the Plaintiffs for the vindication of their rights.

b. This Court Has Both the Right and Responsibility to Protect Plaintiffs – And All Of Ohio's School Children – From The Unlawful Educational Deprivation Inflicted By Defendants.

No one is above the law, including the Defendants. Federal courts have long recognized the duty to afford a meaningful remedy for the violation of constitutionally protected rights. But for the active intervention of the courts, our schools could well remain racially segregated today. Neither the difficulty of enforcement nor the magnitude of the deprivation should deter this Court from its right and obligation to remedy the harm to Plaintiffs.

c. Due Process Protects Meaningful Access to The Courts

Access to the courts contemplates much more than the ability to file suit, it also contemplates a remedy for the deprivation of adjudicated rights. Plaintiffs have no expectation of a remedy in the state courts. In light of given the Defendants’ total lack of response to *DeRolph* and the unavailability of state judicial process their Due Process rights have been violated.

2. Defendants' Refusal to Comply with the Decrees of the Ohio Supreme Court Shocks the Conscience.

The United States Supreme Court has utilized the “shocks the conscience” analysis to remedy egregious violations of rights by governmental entities and others. That analysis is appropriate here in view of the significance of the rights at issue and the extent to which the Defendants have knowingly and intentionally violated those rights. The passage of time serves only to exacerbate the harm, and Defendants cannot justify the deprivation of Plaintiffs’ educational rights by having so long and so often inflicted that deprivation. Defendants’ conduct calls into question the vitality of the rule of law in Ohio.

C. The Lack Of Enforcement Of The *DeRolph* Decrees Violates Equal Protection

Ohio affords judicial process to its citizens, including an expectation of a judicially enforceable remedy for the violation of adjudicated rights. However, the right to a constitutionally compliant system of public education is not enforceable in the courts of Ohio. In that respect, the Plaintiffs here represent a distinct minority for whom the Ohio judicial process is unavailable. By singling out Plaintiffs, and other students in this manner Defendants violate the Equal Protection of Law.

D. Federal Judicial Intervention Is Warranted To Compel Defendants' Compliance With Law.

School funding litigation is presently under way in a great number of states other than Ohio, and in many cases, the plaintiffs in those cases, like the *DeRolph* plaintiffs are seeking court-ordered remedies. If Defendants can successfully avoid their responsibility for compliance with orders of the Ohio Supreme Court, then other state officials in those states can do likewise and the rule of law will cease to have meaning. Accordingly, it is both appropriate and necessary for this Court to hold Defendants accountable for their knowing and intentional violation of the Plaintiffs' rights as declared in *DeRolph*.

V. Conclusion

INTRODUCTION

In their Memorandum Contra Defendants' Motion to Dismiss or for Summary Judgment ("Memorandum Contra"), Plaintiffs have clearly and forcefully articulated both the harm suffered by the Plaintiff class and the conduct of Defendants that has caused that harm, in violation of federal law. The purpose of this Amicus Brief is to put Plaintiffs' claims and Defendants' conduct in a larger context. The scope of the harm Defendants have caused by the unlawful conduct described in the Amended Class Action Complaint for Declaratory and Injunctive Relief ("Amended Complaint"), vastly exceeds that inflicted on Plaintiffs and the Plaintiff class. Public school children throughout Ohio, whether disabled or not, are daily deprived of their state constitutional entitlement to education as a consequence of Defendants' disregard of law and legal process that is so comprehensive, so knowing, so consequential, and so utterly irremediable in the state courts as to violate the Fourteenth Amendment to the United States Constitution.

This Amicus Brief expresses the perspective of that larger community of public school children, of which the Plaintiff class is but one part. It supports and elucidates the third, fourth and fifth causes of action asserted in the Amended Complaint, which concern rights possessed by *all* of Ohio's public school children that are systematically denied by Defendants on a daily basis, in violation of established principles of federal law.

INTEREST OF AMICUS CURIAE

Amicus Curiae, the Ohio Coalition for Equity & Adequacy of School Funding (the "Coalition"), was organized in 1990 as a council of governments pursuant to Chapter 167 of the Ohio Revised Code for the purpose of challenging the constitutionality of the Ohio school funding system. The Coalition is governed by a Steering Committee of 90 school district representatives. Though most of the members are superintendents, some treasurers, school board

members and administrators also serve. Over 50 ex-officio members also serve on the Steering Committee, and they serve without stipend or expense reimbursement from the Coalition.

The Coalition supported the plaintiffs who filed and litigated *DeRolph v. State*. The Ohio Supreme Court ruled in favor of those plaintiffs on March 24, 1997; May 11, 2000; September 6, 2001; and December 11, 2002. Those and related decisions, in order of issuance, are reported at *DeRolph v. State*, 78 Ohio St.3d 193, 677 N.E.2d 733 (1997) ("*DeRolph I*"); *DeRolph v. State*, 78 Ohio St.3d 419, 678 N.E.2d 886 (1997) ("*DeRolph I* on reconsideration"); *DeRolph v. State*, 89 Ohio St.3d 1, 728 N.E.2d 993 (2000) ("*DeRolph II*"); *DeRolph v. State*, 93 Ohio St.3d 309, 754 N.E.2d 1184 (2001) ("*DeRolph III*"); *DeRolph v. State*, 97 Ohio St.3d 434, 780 N.E.2d 529 (2002) ("*DeRolph IV*"). The Coalition continues its efforts to secure high quality educational opportunities for all Ohio public school children.

The plaintiffs in *Doe v. State* are, as Ohio public school pupils, a subset of the plaintiffs who prevailed in the four *DeRolph* decisions and who are entitled to the benefits of "the complete, systematic overhaul" of Ohio's school funding system as ordered by *DeRolph I* and subsequent decisions. The educational deprivation described by the *Doe* plaintiffs in the Amended Complaint would not have occurred or be ongoing had Defendants complied with the mandates of *DeRolph*.¹ However, the Plaintiffs, along with all of Ohio's public school children, are still suffering under the system of school funding that has been declared unconstitutional four times over the last decade. The interest of the Amicus is simple and straightforward – to encourage this honorable Court to deny Defendants' Memorandum in Support of Motion for Dismissal and Partial Summary Judgment ("Defendants' Memorandum") and to allow *Doe v. State* to proceed.

¹ "*DeRolph*" is generally used herein to refer collectively to *DeRolph IV* and the two earlier decisions reinstated by *DeRolph IV* (*DeRolph I* and *II*).

BACKGROUND

I. History of The DeRolph Litigation

Section 2, Article VI of the Ohio Constitution provides in relevant part that: "The general assembly shall make such provisions, by taxation, or otherwise, as . . . will secure a thorough and efficient system of common schools throughout the state" In 1991, the *DeRolph* Plaintiffs initiated a lawsuit in the Perry County Court of Common Pleas ("trial court") against the State of Ohio and its educational agencies challenging the constitutionality of Ohio's elementary and secondary public school funding system under this and other provisions of the Ohio Constitution. The *DeRolph* Plaintiffs asserted that overreliance on revenue from local property taxation had yielded profound inequities across Ohio's school districts in everything from school facilities to supplies and curriculum, resulting in constitutionally inadequate levels of educational opportunity being available to many of Ohio's public school pupils. The complaint sought a declaration that Ohio's system of funding public education was unconstitutional and injunctive relief requiring the State of Ohio to remedy the unconstitutional shortcomings in the system.

The Supreme Court of Ohio confirmed on March 24, 1997 that the State had failed in its constitutional duty to provide a thorough and efficient system of public education. *DeRolph I*. Citing "overwhelming" evidence that Ohio's schools "desperately lack the resources necessary to provide students with a minimally adequate education," the Supreme Court of Ohio declared Ohio's system of funding public schools unconstitutional. *Id.* at 197, 210.² The court directed that "Ohio's public school financing scheme must undergo a "complete systematic overhaul" and ordered the legislature to eliminate four specific elements of the funding system "which contribute to the unworkability of the system." *Id.* at 212.

² The Court concluded that schools were "starved for funds, lacked teachers, buildings, and equipment, and had inferior educational programs, and that their pupils were being deprived of educational opportunity." *Id.* at 205.

The Supreme Court of Ohio stayed the effective date of its decision to permit the enactment of remedial legislation. On May 11, 2000, the Supreme Court of Ohio again declared that the State remained in violation of its constitutional mandate to provide a thorough and efficient system of public schools. *DeRolph II*. The Court reiterated its earlier remedial order that the General Assembly undertake a "complete systematic overhaul" of school funding. *Id.* at 17. Additionally, the Court explained and clarified its earlier remedial orders, expanding the list of elements within the funding system that required attention from the legislature. *Id.* at 37. The court again stayed the effective date of its decision, this time retaining direct jurisdiction to review the legislation enacted in response to its remedial orders.

On September 6, 2001, the Supreme Court of Ohio issued its third *DeRolph* decision, again holding that the State had failed to provide a school funding system compliant with the Ohio Constitution. *DeRolph III*. This time, however, the Court determined that the legislation before it "would be" constitutional if specific changes were made. Rather than make those changes, the State moved the Court for reconsideration. That motion was granted, and months of unsuccessful mediation efforts followed. Finally, on December 11, 2002, the Supreme Court of Ohio issued *DeRolph IV*, on reconsideration wherein it reiterated for the fourth time that "the current school-funding system is unconstitutional." *DeRolph IV* at 435. The court vacated *DeRolph III* and declared *DeRolph I* and *II* as the law of the case. *Id.* The court's remedial order was comprehensive: "we direct the General Assembly to enact a school-funding scheme that is thorough and efficient, as explained in *DeRolph I*, *DeRolph II*, and the accompanying concurrences." *Id.* at 435.

On March 4, 2003, the *DeRolph* plaintiffs filed a motion for a compliance conference in the trial court to ascertain when and how the State intended to comply with the Supreme Court of

Ohio's *DeRolph IV* orders and the prior directives of the trial court. The State responded by filing an original action in the Supreme Court of Ohio requesting a writ of prohibition to bar the trial court from entertaining the Plaintiffs' motion. Ultimately, on May 16, 2003, the Supreme Court of Ohio entered a judgment granting the State's request for a writ of prohibition against the trial court, stating, "[w]e now grant a peremptory writ and end any further *DeRolph* litigation in *DeRolph v. State*." *State ex. rel. State v. Lewis*, 99 Ohio St. 3d 97, 2003-Ohio-2476, at ¶34. At the same time, the Court in *Lewis* acknowledged that the responsibility to remedy the funding system continued. "The duty now lies with the General Assembly to remedy the educational system that has been found by the majority in *DeRolph IV* to still be unconstitutional" *Id.* at ¶35. Thus, while recognizing the ongoing unconstitutionality of Ohio's school funding system the Ohio Supreme Court barred the *DeRolph* plaintiffs from access to *any* state court for remediation.

II. For Many of Ohio's Children, School Funding Has Not Improved Since *DeRolph*.

The following presents to the Court the current state of K-12 public education in Ohio. Amicus recognizes that the portrayal draws from materials that may not be before the Court as evidence but which nonetheless constitute an overview of what can reasonably be expected to be submitted to the Court as evidence when this case proceeds, as it should, to trial.³

The portrayal is stark. "Unless the General Assembly gives it their undivided attention," said the Court in *DeRolph II*, the problem will "only increase in magnitude" – and so it has. In four short years, six of the eight named Plaintiffs in this case (along with the majority of Ohio

³ Much of the following is drawn from the same types of sources the Defendants have urged the Court to receive by judicial notice. Defendants' Memorandum at 42, fn 5.

public school children) will likely attend school districts in fiscal emergency.⁴ Children in Cleveland, one of the school districts referenced frequently in *DeRolph*, will attend a district projecting \$340 million in debt, while in Akron and in Columbus, the deficits are estimated to be \$130 to \$150 million.⁵ The combined deficits for all Ohio public schools will grow to over nine **billion** dollars by 2010 – roughly four billion dollars more than the State support expected to be distributed through the foundation program during fiscal year 2006.⁶ By every measure, Ohio's schools are more desperate today than at any time in history.⁷ Even the Ohio Department of Education has publicly acknowledged the effects of the continuing failure to comply with the *DeRolph* mandates:

Right now, the deck is stacked against schools. Because of phantom revenue, unrealistic inflation assumptions and inadequate resources for the needs of economically disadvantaged and special-education students, districts have no choice but to rely heavily on going to the ballot for more revenue.⁸

A. The Disparities In Funding Decried by the *DeRolph* Court Continue.

One of the structural flaws emphasized in the *DeRolph* cases, and the primary source of funding disparity is the school funding system's overreliance on local property taxes.⁹ Huge differences exist between the property tax valuation of various districts, causing vast disparities in the amount of funding one mill of levied property tax will raise. The impact of these

⁴ Ohio's schools are under an oversight mechanism that declares fiscal "watch," "caution," or "emergency," depending on defined shortfalls, chief among which is a deficit of 2, 8 and 15%, respectively. Each status triggers certain procedures, with "fiscal emergency" triggering the creation of a "super board of education" that takes over operation of the district. These provisions are codified as Chapter 3316 of the Ohio Revised Code.

⁵ Ohio Department of Education, Five-Year Forecast Data, 2005-2010.

⁶ Ohio Department of Education, FY2006 District SF-3 Reports State Total.

⁷ Amended Complaint at ¶¶ 296, 304-311, 288-290.

⁸ J.C. Benton, ODE Spokesperson, in Columbus Dispatch, "Levies Only Option For Many Schools, Some Observers Say," February 6, 2005, page 1D.

⁹ Amended Complaint at ¶¶ 285, 291, 292, 326.

disparities has adversely affected the *Doe* plaintiffs, many of whom are deprived of services they are entitled to receive due to lack of revenue.¹⁰

In College Corner Local School District, for example, one mill of property tax today raises \$8,997.97. In Columbus Public Schools, the same one mill presently raises over 9 million dollars – or approximately 1,000 times more.¹¹ Viewed from another angle, there are huge disparities when comparing the amount of funding one mill raises per pupil; one mill of local property tax currently raises \$36.87 for a pupil living in the Southern Local School District in Perry County; in Cuyahoga Heights, the district can raise \$585.88 per pupil with that same one mill of tax.¹² Thus, even if the residents of the Southern Local School District levy the same number of mills as the citizens of Cuyahoga Heights, they would raise less than one-fifteenth the amount of funding per pupil educated by the district.

Even huge operating levies cannot assure the financial relief that property-poor school districts require to continue operating at their current levels – let alone to improve operations – and so school districts must continually seek additional property tax levies. Since March of 1997, when *DeRolph I* first declared school funding unconstitutional in part due to overreliance on local property taxation, school districts have been forced back to the ballot 4,060 times seeking property tax levies.¹³ In each successive year since 2000, the passage rate of these levies has dropped.¹⁴ In the same time period, the number of requested levies reached an all time high.¹⁵ In the last 5 years, 1,484 operating levies (including all types of operating levies)

¹⁰ Amended Complaint at ¶¶ 25, 35, 47, 60, 70, 94, 109, 111, 113, 132, 138, 143, and 151.

¹¹ Ohio Department of Taxation, Calendar Year 2004 Property Values and Taxes from DTE 13-14 (used as basis of revenue calculations).

¹² Ohio Department of Taxation, Calendar Year 2004 Property Values and Taxes from DTE 13-14 (used as basis of revenue calculations).

¹³ Ohio Department of Education, Election Results (calculated), includes all issues and levies.

¹⁴ *Id.*

¹⁵ *Id.*

appeared on ballots in Ohio, and only 765 (or 51.55%) passed.¹⁶ In 2004, the last year for which complete data was available, the passage rate reached a low of 42.6%.¹⁷

In recent times, however, the lack of accountability has permitted the State to progressively reduce its level of support for public schools in Ohio. State support, as a percentage of the total revenue of schools, increased a few percentage points after the initial *DeRolph* decision and during the times the case was actively before the Ohio Supreme Court. Most recently, however, that support has slid below 45% for the first time since the 2000-2001 school year.¹⁸ Further, the percentage of the State budget dedicated to K-12 public education, 27.9% in 2002, has dropped by more than 1% since *DeRolph IV*.¹⁹

A review of the most recent Five-Year Financial Forecasts that school districts are required to file with the Ohio Department of Education shows mounting deficits with each passing year. By the end of the current school year, 58 districts are projected to show a negative fund balance. In 2007, the number is 152, and in 2008, 313 districts – more than half of all school districts in the state – are projected to be in deficit. By 2009, 465 of the State's school districts – over 75% of all school districts in Ohio – are forecasting a deficit in operating revenue.²⁰ In one of the districts where two of the named Plaintiffs here live, that deficit increases \$8 million dollars between one school year and the next.²¹

While Ohio's public schools are thus increasingly starved for funds, the State, incredibly, chooses to *reduce* both income and property taxes. The State income tax is being reduced by 21% over the next four years – a loss of \$2 billion in annual revenue when fully implemented.²²

¹⁶ Ohio Department of Education, Election Results, operating levies only.

¹⁷ Ohio Department of Education, Election Results 2004, includes all issues and levies.

¹⁸ Amended Complaint at ¶ 287.

¹⁹ Ohio Office of Management and Budget, Financial Reports, FY 1995 – FY 2005.

²⁰ Ohio Department of Education, 5-Year Forecast Data, 2005-2010

²¹ *Id.*, Springfield City Schools 5-Year Forecast, 2009-2010.

²² Amended Complaint at ¶¶ 157, 314, 288-290.

Additionally, Ohio's phase-out of tangible personal property tax, the tax paid by industry and business on equipment, machinery, inventory and furnishings, represents yet another dilution of the local property tax base and an additional loss of school district revenue.²³

Further, the loss of the tangible personal property tax reduces the local tax base valuation. In Marysville, for example, a mill will generate 32% less in the future than it does today, and the tax burden will be shifted from commercial taxpayers to residential and agricultural payers as tangible personal property taxes are phased out. Rather than moving away from reliance on property taxation, the State has thus increased that reliance – and the accompanying disparities in educational opportunity.²⁴ By any measure, current forecasts predict a complete collapse of school finances in Ohio.

B. The School Funding Crisis Has Cost Ohio's Public Schools Thousands of Teachers.

Between 2001-2002 and 2004-2005, Ohio's student enrollment increased by 1.5%, while 8,700 teaching positions were lost from Ohio's public school districts.²⁵

For individual districts, this translates into a significant loss in the ability to provide an education. For example, in the four years from 2000-2004,

- the Dayton City School District lost 339 teachers
- the Lordstown Local School District lost 49.73% of their teachers
- the Crestline Exempted Village Local School District lost 38.84% of their teachers
- the Cleveland Municipal School District lost 32.15% of their teachers
- the Chippewa Local School District lost 25.79% of their teachers

In the last report available on teacher supply and demand in Ohio, the Department of Education made the direst predictions for the future of staffing Ohio schools. Under their

²³ Amended Complaint at ¶¶326, 291.

²⁴ Amended Complaint at ¶¶25, 35, 47, 60, 70, 94 for individual effects on Plaintiffs, for systemic reduction in opportunities, Complaint at ¶¶157, 202, 203, 212, 235, 273, 274, 285, 322, 323, 326, 314.

²⁵ Ohio Department of Education, Interactive Local Report Cards, Power User Reports, Teacher Counts by District and Enrollment (State Average)

projections, rural districts with high poverty will experience a 10% loss of teachers, and major cities will experience a 14% loss. The report states that reductions-in-force (RIFs, or layoffs) will further accelerate the decline, and it projects a further loss of 4,577 teachers because of financial crisis.²⁶

The same report shows that certain segments of the educational program suffer more than others from the lack of funding, including shortages in skilled personnel necessary to provide the services critical to the *Doe* Plaintiffs. For example, in Fall, 2003, there were 35.2% fewer special education teachers than were required to operate Ohio's schools. Despite that unmet need, only 10.6% of the graduating teachers that year were qualified as special education teachers.²⁷ Critical shortages may be directly tied to lack of sufficient funding. One out of five Ohio school districts pay starting teachers with a bachelor's degree less than \$25,000 per year; and *half* of the teachers who start with a master's degree are paid less than \$30,000 per year.²⁸

C. The Adequacy Of Ohio's Funding System Cannot Be Assessed On the Basis of Average Performance On A Limited Set of Tests.

Defendants attempt to justify their failure to provide a constitutional school funding system by asserting "academic performance has improved." Defendants' Memorandum at 36, fn 4. In support of that contention, Defendants cite increases in Ohio student performance on the 4th and 8th grade reading and math results from the National Assessment of Educational Progress ("NAEP"). However, policy analysts have pointed out many problems in using nationwide, voluntary and grade-specific achievement test results to describe an entire state system. The NAEP tests cited by Defendants are voluntary, which means that those taking them had some

²⁶ Amended Complaint at ¶¶ 79, 86, 109, 111, 145-147, 151, 312, 313.

²⁷ *Id.*

²⁸ Ohio Education Association, Research Division, Report on NCLB projected costs, 2003.

reason to do so – presumably because they believed that they would do well.²⁹ Conversely, those that elected not to participate may have opted out in the belief that their students would not perform well. These tests amount to "samplings" of certain student demographics, and there is extensive debate about what the results mean and how they should be used.³⁰ They also suffer from the fact that they attempt to measure student performance with but one test, and there are many curricula left untested.³¹

Leaving aside the startlingly overlooked limits of such tests, however, these academic performance statistics are misleading aggregates, averaging together the experiences of students in Ohio's wealthiest and best-funded districts with those whose academic environments are radically diminished by economic disadvantage and the effect of funding disparities.³² The reality of the educational experiences of the *Doe* Plaintiffs can only be seen when the data is *disaggregated*.

For example, when the nationwide NAEP data is viewed with the caution the test designers and educational researchers consider appropriate,³³ and not in the misleading aggregate as used in Defendants' Memorandum, it is apparent that in 2005, only 7% of Ohio's African-American eighth-grade students scored at the proficient level in reading, compared to 38% of Caucasian students.³⁴ In the same test and year, there was a 25% gap between economically

²⁹ Bracey, Gerald, "Bail me Out: Handling Difficult Data and Tough Questions about Public Schools," Corwin Press, 2000.

³⁰ National Center for Educational Statistics, "Analytic Issues in the Assessment of Student Achievement," Publication Number NCES 2000050, July 3, 2001.

³¹ Bracey, *Id.*

³² Gerald Bracey, a nationally known education policy analyst, warns against the use of averages in educational policy in this way: "an average score of any kind – mean, median or mode – can be misleading when taken alone. Just because the flood waters averaged 2 feet in depth and the citizens averaged 6 feet in height, doesn't mean that nobody drowned."

³³ National Center for Educational Statistics, "Analytic Issues in the Assessment of Student Achievement," Publication Number NCES 2000050, July 3, 2001, pg.103.

³⁴ National Center for Education Statistics, Ohio Grade 8 Public Schools Reading 2005 Snapshot Report.

disadvantaged students and their non-disadvantaged peers.³⁵ Both these gaps have widened over time; the average reading score of an African-American eighth-grader was a full 10 points lower than the average score of a Caucasian eighth-grader in 2005 than it was in 1992, while the average score for economically disadvantaged eighth-grade students fell three points between 2002 and 2005 in comparison to the average score for non-disadvantaged peers.³⁶ The Ohio Department of Education has acknowledged that Ohio's African-American, Hispanic, Native American and multi-racial children significantly lag in academic performance, and it admits that Ohio "has yet to deliver" on the promise of equal opportunities in education.³⁷ Ohio Department of Education data also indicates that in every racial or ethnic group, Ohio's economically disadvantaged students perform at lower levels than their non-disadvantaged peers.³⁸

As just a glimpse at outcomes - the high school graduation rate in Cleveland Municipal School District in 2003-2004 was 50.2%, and the Ohio Board of Regents recently announced that 41% of Ohio's high school graduates who enter college require remedial courses before they can attempt college-level work. Yet, Defendants ask this Court to believe that a system that leaves four out of every ten college-bound graduates unprepared, and half the students in Ohio's largest school district without a high school diploma is "thorough and efficient."

D. School Buildings and Textbooks: Deprivation Continues For Many.

In the original *DeRolph* case, the Ohio Supreme Court was presented with truly shocking and widespread circumstances in which school buildings were not warm, safe or dry. Noting that the Superintendent of Public Instruction himself had described Ohio's schools as "dirty, depressing places" and as "a decayed carcass from an era long passed," the Court opined that

³⁵ *Id.*

³⁶ *Id.*

³⁷ Ohio Department of Education, Statewide Performance Index Trend by Race/Ethnicity, 2000-2004 pg. 33.

³⁸ Grade 3 Reading Performance by Economic Status and Race/Ethnicity 2004. Data from EMIS 2004.

"state funding of school districts cannot be considered adequate if the districts lack sufficient funds to provide their students a safe and healthy learning environment." *DeRolph I* at 205-210. As part of the legislative responses to the *DeRolph* case, the Ohio School Facilities Commission ("OSFC") was formed, \$3.5 billion has been pumped into the system over the past 15 years, and hundreds of building projects were completed. Yet today, the very same kinds of problems that were brought to the court in *DeRolph* are still to be found. The following stories are just a sample of those that have run in Ohio's major newspapers in just the last two years:

- 9,000 students in the Cincinnati metropolitan area, and 3,500 students in the Columbus City Schools are in temporary classrooms³⁹
- Trimble Local Schools has a high school roof that is patched with plastic placemats and rubber cement⁴⁰
- Waverly, Adena, Chillicothe, Frontier, Gibsonburg, Meigs, Morgan, Alexander, and Fort Frye have extensive post-construction defects in new school facilities; Northwestern Ohio Building and Construction Trades Council has documented problems in at least 30 of the OSFC's projects⁴¹
- Newark elementary students are taught in a hallway because of roof leaks and air quality issues⁴²
- Cleveland has broken restroom facilities and roof leaks in multiple buildings⁴³

Some schools may have new facilities built with OSFC funds but find themselves with no funds to operate those facilities. In just the last 12 months, Ohio newspaper readers were frequently told of students in districts similar to those attended by the Plaintiffs who were making do with antiquated textbooks, broken or missing equipment and a lack of the most basic school supplies, in examples that could well have been lifted straight from the briefs in the original *DeRolph* case in 1991:

³⁹ "No room at the schoolhouse," Cincinnati Enquirer, January 23, 2006 page 1A. This report totaled students from Cincinnati City Schools as well as surrounding districts in the immediate Cincinnati Metro area including small contiguous parts of Northern Kentucky.

⁴⁰ "Bare minimums; As Taft calls for more math and science, Trimble schools hurt for textbooks and supplies", Columbus Dispatch, January 29, 2006, page 1C.

⁴¹ "School Defects Raise Questions; Critics push for changes in agency that oversees construction projects," Columbus Dispatch, May 15, 2005, page 1C.

⁴² "Leaky roof cause for concern at elementary," Newark Advocate, October 9, 2005, page 3A.

⁴³ "A day in Cleveland's schools," Cleveland Plain-Dealer, April 27, 2005, page A1.

- Trimble Local School teachers forage in trash for art supplies and use textbooks so old they do not mention the Vietnam war⁴⁴
- Swanton Local School District parents are engaged in a fundraising campaign to buy construction paper, art supplies, pens and pencils for K-12 teachers⁴⁵
- Cincinnati teachers are using broken furniture for art supplies due to lack of canvas⁴⁶
- Fostoria is using textbooks more than 10 years old⁴⁷
- Fremont is using textbooks over 13 years old⁴⁸
- Walnut Township Local is using textbooks 17 years old⁴⁹
- Cleveland has no hand soap in restrooms and no library books newer than 2000⁵⁰

E. Special Education Funding Shortfalls Remain.

The number of public school students identified as in need of special education services has grown far faster than total public school enrollment. Special education students like the Plaintiffs increased in number by 7.3% from 2002 to 2004, while regular enrollment increased only 0.6%.⁵¹ Although all of the Plaintiffs are entitled to receive all of the components of a free, appropriate public education regardless of cost, state funds for those pupils are allocated based on the relative reported property wealth of each district.⁵² Of the stated funds allocated, only 90% are actually paid by the State⁵³. Thus, as in the case of their non-disabled counterparts, the funding for the educational programs for the Plaintiffs is also heavily reliant on local property taxes. School districts are required to report to the Ohio Department of Education the amounts that they spend on educational programs for disabled pupils. Based on the most recent

⁴⁴ "Bare minimums; As Taft calls for more math and science, Trimble schools hurt for textbooks and supplies", Columbus Dispatch, January 29, 2006, page 1C.

⁴⁵ "Swanton parents raising money for school supplies," Toledo Blade, April 22, 2004, page B4.

⁴⁶ "No art canvas? Use chairs," Cincinnati Enquirer, September 25, 2004, page 1B.

⁴⁷ "Board cuts jobs, puts levy on ballot in Fostoria," Toledo Blade, May 18, 2004, page B2.

⁴⁸ "\$170,000 grant focus of panel discussion," The News-Messenger (Fremont, OH), December 14, 2005, page 3A.

⁴⁹ "Bloom-Carroll levies tank," Lancaster Eagle Gazette, May 4, 2005, page 1A.

⁵⁰ "A day in Cleveland's schools," Cleveland Plain-Dealer, April 27, 2005, page A1.

⁵¹ Legislative Service Commission, Ohio Facts Dec. 2004, Ohio's K-12 Schools.

⁵² Amended Complaint at ¶¶ 181, 200, 203, 232-233, 314.

⁵³ Ohio Revised Code 3317.013 states that in 2004, the amount calculated per student is to be multiplied by 0.88, and in 2005-2007, by 0.90.

Department of Education reports, Ohio school districts spent an average of **10.9 mills** of local property tax revenue in excess of State funding for special education.⁵⁴

Another example of under-funded special education needs is the "catastrophic aid" provision for special education students. In theory, funding for students with especially complicated and debilitating conditions that necessitate educational expenditures in excess of a statutorily-defined "catastrophic amount" are underwritten by both the State and the school district, with the State paying the entire first half of such amount and a share of the remaining costs. In actuality, however, the General Assembly allocates a total statewide annual amount for catastrophic aid – and regardless of the amount of the catastrophic needs of these pupils in a given year, that is all the funding the State will contribute. Thus, in FY 05, for example, the Ohio Department of Education informed treasurers as follows:

We have processed all special education Catastrophic Aid requests and the reimbursement will be included in the June #1 settlement. While the appropriation for this item is \$15 million, the total requests exceeded \$32 million. For this reason, we will pay **45.73 percent** of **all approved** request totals.⁵⁵

The State's "smoke and mirrors" approach to funding the educational needs of its most seriously impaired children are consistent with its overall approach to school funding. That is, it creates an appearance of having addressed the needs while, at the same time, shifting the funding burden to local school districts. Today's circumstances demonstrate that most of these districts are unable to bear that burden. As a result, the Plaintiffs, and other public school children throughout Ohio, are deprived of necessary services to which they are entitled.

The State's failure to properly administer millions in Medicaid funding has recently led to the loss of additional millions of dollars that local school districts historically used to provide

⁵⁴ Amended Complaint at ¶¶ 109, 186-203; Ohio Department of Education, Statewide Special Education Funding Report.

⁵⁵ ODE Treasurers Newsletter (April 21, 2005).

required services to disabled students, enabling the districts to cope with catastrophic medical needs not fully funded by the State.⁵⁶ The loss of these federal dollars with little to no replacement from the State imposes an additional funding shortfall on districts.

F. Community Schools Siphon Public Funds From Public Education.

In the same time period during which the State of Ohio has underfunded its traditional public schools, as described above, the State has also established a massive parallel system of privately-operated but publicly-funded charter schools, known in Ohio as "community schools." These schools are funded with monies that are both part of the State's education budget and also credited in the first instance to school districts, before those funds are then diverted from such districts to the community schools.⁵⁷ The amount of funding thus siphoned from traditional public schools to community schools is staggering. Last fiscal year (FY05), more than \$421 million dollars was deducted from public school districts to support community schools⁵⁸. The diversion of these funds impacts the ability of the Plaintiffs to receive the free and appropriate public education to which they are entitled.⁵⁹

Under the State's community school funding methodology, students are counted as members of the school district in which they live, and the State's support for each of those children is credited to that "district of residence" – a city, local or exempted village school district – and then deducted and paid to the community school that pupil attends. This methodology allows the State to claim, for example, that it paid Dayton City Schools \$74 million

⁵⁶ Amended Complaint at ¶¶241-248.

⁵⁷ See Ohio Revised Code §3314.08.

⁵⁸ Ohio Department of Education, Community School Payment Report, FY05 Final.

⁵⁹ Amended Complaint at ¶¶ 334, 336-337.

in foundation support in FY05 when in fact nearly \$42 million was taken back by the State and spent instead for the support of community schools.⁶⁰

Although it is true that a given school district may not educate as many students as it would if there were no community schools, any marginal savings from the decrease in enrollment will not offset the loss in funding; typically, a district loses an unpredictable number of students to community schools each year from classes the district continues to operate, with the same staffing and overhead costs as would be incurred without the loss of students. The children who remain in the traditional school districts, like Plaintiffs, are at a further disadvantage in that they are now educated with fewer funds.⁶¹

In addition to the community school problem, the voucher program in Cleveland will soon redirect even more money away from public education statewide due to the Educational Choice Scholarship Pilot Program enacted this year.⁶² Cleveland's voucher program redirected \$11 million dollars away from Cleveland Metropolitan schools in 2003, exclusive of administrative and transportation costs.⁶³ Because of changes related to the proposed expansion of the voucher program announced only days ago, the potential statewide costs to public schools have not yet been projected.

Additional financial pressures drive the system even further toward collapse. For example, the unfunded mandates of the No Child Left Behind Act are projected to cost every school district in Ohio the equivalent of an additional 6.54 mills, at a time when the unaddressed problems of property tax based school funding have ripened into disaster.⁶⁴ In sum, the

⁶⁰ Ohio Department of Education, SF-3 Report, Dayton City Schools, FY05 Final #1.

⁶¹ Amended Complaint at ¶¶ 338-340.

⁶² Amended Complaint at ¶¶ 341-350.

⁶³ See National Education Association, "School Vouchers: the emerging track record," (visited April 17, 2006) <<http://www.nea.org/vouchers/02voutrack.html>>.

⁶⁴ Ohio Department of Education Study, Implementation Costs of NCLB, 2003.

foregoing demonstrates that the thorough and systematic change called for in the four *DeRolph* decisions is as far away today as it was fifteen years ago for all Ohio schoolchildren – including but not limited to the Plaintiffs and the Plaintiff class.

LAW AND ARGUMENT

III. Defendants Knowingly Deny School Children Throughout Ohio, Including Members of the Plaintiff Class, The Educational Entitlements Guaranteed By The Ohio Constitution And Repeatedly Declared By The Ohio Supreme Court.

A. The *DeRolph* Mandate: "A Complete, Systematic Overhaul"

Ohio's 1.8 million public school pupils, both disabled and non-disabled, receive their education pursuant to a system of school funding laws that has been declared unconstitutional by the Supreme Court of Ohio on four separate occasions. The declarations of unconstitutionality, and the accompanying remedial orders, have been sweeping in scope, mandating changes that can fairly be said to exceed in reach and significance anything ever ordered by that court, before or since. But the remedial orders remain empty promises as Defendants continue their intentional disregard of declared rights, without shame and, apparently, without fear of being called to account.

Almost ten years ago, in its first decision in the case of *DeRolph v. Ohio*, the Supreme Court of Ohio acknowledged the vast implications of its undertaking:

Today, Ohio stands at a crossroads. We must decide whether the promise of providing to our youth a free, public elementary and secondary education in a "thorough and efficient system" has been fulfilled. The importance of this case cannot be overestimated. It involves a wholesale constitutional attack on Ohio's system of funding public elementary and secondary education. Practically every Ohioan will be affected by our decision: the 1.8 million children in public schools and every taxpayer in the state. For the 1.8 million children involved, this case is about the opportunity to compete and succeed.

DeRolph I at 197.

The Ohio Supreme Court clearly acknowledged that which the Ohio Constitution had declared since 1851: that the responsibility for public education in Ohio is a *state responsibility*:

The responsibility for maintaining a thorough and efficient school system falls upon the state. When a district falls short of the constitutional requirement that the system be thorough and efficient, it is the state's obligation to rectify it.

[w]e admonish the General Assembly that it must create an entirely new school financing system. In establishing such a system, *the General Assembly shall recognize that there is but one system of public education in Ohio. It is a statewide system, expressly created by the state's highest governing document, the Constitution.* Thus, the establishment, organization and maintenance of public education are the state's responsibility.

DeRolph I at 209-210, 213 (Emphasis added). The court directed a wholesale change to the way Ohio funds public education:

By our decision today, we send a clear message to lawmakers: the time has come to fix the system. Let there be no misunderstanding. Ohio's public school financing scheme must undergo a complete systematic overhaul. The factors which contribute to the unworkability of the system and which must be eliminated are (1) the operation of the School Foundation Program, (2) the emphasis of Ohio's school funding system on local property tax, (3) the requirement of school district borrowing through the spending reserve and emergency school assistance loan programs, and (4) the lack of sufficient funding in the General Assembly's biennium budget for the construction and maintenance of public school buildings. The funding laws reviewed today are inherently incapable of achieving their constitutional purpose.

DeRolph I at 212.

The remedial orders issued in *DeRolph I* and its progeny potentially affect every classroom, every teacher, and every student in the state. Clearly, *DeRolph* was intended to alter forever the educational landscape in Ohio. As noted by Justice Douglas, concurring, "[T]he time has come to end the fact that, in too many cases, the quality of a child's education in Ohio is dependent on the vicissitudes of geography – that is, the place of the child's birth or residence."

DeRolph I at 214. Even the dissent was clear as to the sweeping nature of the change called for by the court:

The majority opinion and the syllabus law of the case eliminate all vestiges of the current system by which the State provides its funds to public school districts – all are declared to be unconstitutional.

Id. at 276 (Moyer, CJ, Dissenting).

The court's sweeping pronouncements in *DeRolph I* fell on deaf ears. So, on May 11, 2000, the court again re-stated its mandate to the General Assembly to fix the system, this time specifying those specific aspects of the school funding system that contributed to its unconstitutionality.⁶⁵

The expanded enumeration of issues to be addressed was concisely summarized in paragraph 3 of the syllabus:

A thorough system means that each and every school district has enough funds to operate. An efficient system means one in which each and every school district in the state has an ample number of teachers, sound buildings that are in compliance with state building and fire codes, and equipment sufficient for all students to be afforded an educational opportunity.

DeRolph II.

The Ohio Supreme Court's mandates were again re-stated on December 11, 2002, when, vacating its decision in *DeRolph III*, the court declared, "*DeRolph I* and *II* are the law of the case, and the current school-funding system is unconstitutional." *DeRolph IV* at 434. The court once again directed the General Assembly to "[e]nact a school–funding scheme that is thorough and

⁶⁵ The areas requiring scrutiny and further action by the legislature were: (1) the continued overreliance on local property taxes as a primary means to fund Ohio's schools; (2) structural deficiencies in the basic aid formula; (3) "the mechanism implemented to fund the construction of new school facilities and to repair older, decaying school buildings, until the task is complete"; (4) reevaluation of the legislatively enacted School Solvency Assistance Fund; (5) the necessity to address and immediately fund "unfunded mandates"; (6) the elimination of "[t]he phenomenon known as phantom revenue"; and (7) the development and rigorous enforcement of "[s]trict, statewide academic guidelines." *DeRolph II* at 37.

efficient as explained in *DeRolph I* and *DeRolph II*, and the accompanying concurrences." *DeRolph IV* at 435.

B. Defendants' Stunning Disregard of the *DeRolph* Mandates

Defendants make no pretense of compliance with *DeRolph*. Instead, in their motion, they essentially tell the Court that the school funding system they oversee is imperfect but good enough: disadvantageous to some, but not overly so (Defendants' Memorandum at 37); reliant upon local taxes but not utterly irrational (Defendants' Memorandum at 40-3); perpetuating wealth-based disparities, but in the service of local control and as an accommodation to historical interests (Defendants' Memorandum at 43-44) – in sum, sufficient to pass what Defendants characterize as an "undemanding test" (Defendants' Memorandum at 45).

Defendants' arrogance is astounding. It has already been conclusively determined that Ohio's school funding system is subject to a far more demanding test than Defendants acknowledge. Defendants essentially ask this Court to immunize a system of school funding that has repeatedly been declared, by the state's highest court, to have failed the mandates of the state constitution – an interpretation of state law to which deference must be accorded. But as the United States Supreme Court has stated in the lesser context of the construction of a state statute,

We have no authority to construe the language of a state statute more narrowly than the construction given by that State's highest court. "The power to determine the meaning of a statute carries with it the power to prescribe its extent and limitations as well as the method by which they shall be determined." *Smiley v. Kansas*, 196 U.S. 447, 455, 49 L. Ed. 546, 25 S. Ct. 289 (1905).

City of Chicago v. Morales, 527 U.S. 41, 61 (1999).

IV. Defendants' Deliberate Failure To Remedy The School Funding System As Ordered In *DeRolph* Deprives Ohio's School Children of Interests Protected by The Fourteenth Amendment to the United States Constitution.

The Ohio Supreme Court's *DeRolph* orders have been deliberately disregarded by all three branches of government in Ohio, as Plaintiffs have alleged in the Amended Complaint and demonstrated in their Memorandum Contra. But the Due Process Clause of the Fourteenth Amendment does not permit the Defendants to perpetuate this deprivation of declared educational rights or to disregard the remedy ordered by the Ohio Supreme Court. Defendants' failure to conform to the law of the state, as declared by the state's highest court, cannot be reconciled with historical traditions or notions of ordered liberty. Moreover, when Ohio's legislative, executive, and judicial branches of government selectively repudiate the educational rights and remedies declared in *DeRolph* while complying with and enforcing those of all other prevailing litigants, basic principles of equal protection are offended.

The fact that the rights Plaintiffs assert in their third, fourth, and fifth causes of action emanate in the first instance from a *state* source of law – the Ohio Constitution, as interpreted and applied by *DeRolph* – is not inconsistent with Plaintiffs' claim to the protections of the Fourteenth Amendment of the United States Constitution. The United States Supreme Court has made it clear that such protection is not solely extended to interests created by federal law but may include interests created by state law – which the Ohio Constitution is, in its highest form. For example, with respect to "property" interests, the Court has observed:

"Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law -- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."

Board of Regents v. Roth, 408 U.S. 564, 577 (1972). Similarly, the Supreme Court has declined to narrowly constrain the notion of "liberty" as an interest protected by Due Process. The rights

to attend the public schools and to "acquire knowledge" each have been recognized as liberty interests of sufficient societal importance to merit Due Process protection.⁶⁶

The facts as set forth in the Amended Complaint assert both procedural and substantive deprivations of Due Process. The procedural deprivation arises from Ohio's denial of a meaningful state judicial remedy for the deprivation of Plaintiffs' educational rights as declared in *DeRolph*. The substantive deprivation flows from the Defendants' knowing and intentional deprivation of both the state-created entitlement to education and right of meaningful access to the state courts to enforce that entitlement of those rights. As analyzed in greater detail below, notwithstanding the fact that the source of the rights is the Ohio constitution, well-established principles of federal constitutional law compel the conclusion that these rights are of such significance as to carry a "legitimate claim of entitlement" to substantive Due Process protection. See *Memphis Light, Gas and Water Div. v. Craft*, 436 U.S.1 (1978); *Town of Castle Rock v. Gonzales*, 545 U.S. ___, 125 S. Ct. 2796 (2005).

A. The Rights the Plaintiffs Here Seek To Vindicate are already the subject of remedial orders issued by the Ohio Supreme Court; The Right to Compel Compliance with those orders is Implicit in the Concept of Ordered Liberty.

While Plaintiffs have cast this as a suit that concerns their special entitlements as disabled students, they have other, basic educational rights in common with all Ohio public school children; as discussed *supra*, these rights have already been declared by, and are the subject of

⁶⁶ *Goss v. Lopez*, 419 U.S. 565 (1975); see *Board of Regents v. Roth*, 408 U.S. at 572 (1972) ("While this Court has not attempted to define with exactness the liberty . . . guaranteed [by the Fourteenth Amendment], the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.' *Meyer v. Nebraska*, 262 U.S. 390, 399. In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed. See, e.g., *Bolling v. Sharpe*, 347 U.S. 497, 499-500; *Stanley v. Illinois*, 405 U.S. 645.").

remedial orders issued by, the Ohio Supreme Court in *DeRolph*. Defendants' continuing deprivation of the *DeRolph* rights and disregard of the *DeRolph* orders harms *all* Ohio public school children, including but not limited to the subset represented by the Plaintiffs.

1. Due Process Protects Plaintiffs' Right To The Remedy Ordered by the Ohio Supreme Court in *DeRolph*.

The federal courts historically have recognized, as an essential and fundamental underpinning of our legal system, the rights of successful litigants to rely upon, obtain the benefits of, and compel compliance with, the judgments awarded them. *DeRolph* determined that the educational rights of Ohio's public school children, including disabled school children, were being violated, but enforcement of the ordered remedy continues to be denied. That denial violates the federal substantive and procedural due process rights of Ohio's public school children, including Plaintiffs.

Although the individual Justices of the United States Supreme Court have at times urged varying approaches to substantive due process, the Supreme Court generally requires, as an initial matter, that the interests asserted to merit such protection be described with care and specificity; the Supreme Court has then examined the interests to determine whether they are both "'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed,'" and "objectively, 'deeply rooted in this Nation's history and tradition.'" *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997).

Applying the foregoing standards, the interest of Ohio's public school children in securing enforcement of the rights declared in and the remedy granted them by *DeRolph IV* unquestionably qualifies for the protections of substantive due process. Beginning, as *Glucksberg* counsels, with a careful description of the interest asserted, it is critical to note that at

stake in this suit is not merely an abstract "right to a remedy" but a right to the particular remedy for unconstitutional educational deprivation *ordered* by the state's highest court.

The specific characteristics of the interests denied are compelling. In substantive terms, the interests concern the educational rights of Plaintiffs, together with millions of other current and future public school children. The entitlement is created by the Ohio Constitution, the supreme law of Ohio. The inadequacies in the funding laws are so pervasive that the Supreme Court of Ohio declared them "inherently incapable of achieving their constitutional purpose." *DeRolph I* at 212. The continued operation of these laws exposes children to physical danger as well as to the lifelong consequences of educational neglect, impoverishing them physically, intellectually, and economically. The deprivation not only condemns them to lives of diminished potential, but it also negatively affects the welfare of the entire state and nation. It is difficult to conceive of a set of circumstances of greater significance or more worthy of substantive due process protection.

In procedural terms, the Supreme Court of Ohio recognized and declared the violation of these vital rights. It acknowledged its duty to provide a remedy and its authority to enforce its orders. It repeatedly issued remedial orders requiring comprehensive reform and providing specific direction regarding the nature of the reform.⁶⁷ Yet, to date, there has been neither compliance with those orders nor any evidence that Defendants intend *ever* to comply with them, and the harm to Ohio's children is consequently ongoing.

It is in this specific context that Amicus asserts that Plaintiffs' entitlements to the fruits of *DeRolph* are protected by federal procedural and substantive due process. The idea that public school children may litigate rights of this magnitude for a decade, repeatedly emerge victorious, be the beneficiaries of remedial orders issued by the highest court of the state, and yet be denied

⁶⁷ See *DeRolph I* at 212, *DeRolph II* at 37, and *DeRolph IV* at ¶5.

the right to enforce the judgment in their favor, is wholly inconsistent with notions of ordered liberty and the rule of law.

The entitlement to a remedy for a legal wrong in circumstances such as these is "deeply rooted in this Nation's history and tradition." See *Glucksberg*, 521 U.S. at 702. As early as *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 163 (1803), the United States Supreme Court recognized that "it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded," unless, as in *Marbury*, the courts lack jurisdiction over the dispute – which clearly is not the case here. *Id.* (quoting 3 William Blackstone, Commentaries *23).⁶⁸

In the context of the *DeRolph* litigation, *Lewis'* sudden and extraordinary prohibition of the enforcement of remedies earlier and repeatedly ordered is reminiscent of the "bait-and-switch" scheme condemned by the United States Supreme Court as violative of due process in *Reich v. Collins*, 513 U.S. 106 (1994).⁶⁹ Ohio's public school children litigated *DeRolph* for an additional six years after the Supreme Court of Ohio first declared, in *DeRolph I*, that constitutional rights to education were justiciable and enforceable and issued the first in a series of remedial orders. Subsequent proceedings were in reliance upon the consequent expectation of

⁶⁸ In cases involving interests far less vital than those asserted here, and affecting far fewer people, the Supreme Court has evaluated remedies according to the Due Process Clause. In *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990), for example, the Court found prospective relief alone inadequate to vindicate rights violated by a state tax law. Even a legal claim not yet reduced to judgment has been accorded protection as a property interest. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428-29 (a cause of action is a protected property interest); *Richards v. Jefferson County, Ala.*, 517 U.S. 793, 804 (1996) (describing a chose in action, as "a protected property interest in its own right.") See, also, *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 682 (1930) ("Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.").

⁶⁹ "[D]ue process requires a 'clear and certain' remedy for taxes collected in violation of federal law. A State has the flexibility to provide that remedy before the disputed taxes are paid (predeprivation), after they are paid (postdeprivation), or both. But what it may not do, and what Georgia did here, is hold out what plainly appears to be a 'clear and certain' postdeprivation remedy and then declare, only after the disputed taxes have been paid, that no such remedy exists." *Reich* at 108 (citations omitted); see also *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

an enforceable remedy at the conclusion of the liability phase of the *DeRolph* litigation – remedies the Plaintiffs properly ask this Court to enforce pursuant to the Fourteenth Amendment.

2. This Court Has Both the Right and Responsibility to Protect Plaintiffs – And All Of Ohio's School Children – From The Unlawful Educational Deprivation Inflicted By Defendants.

The United States Supreme Court has unequivocally rejected the notion that a state or local government may refuse to comply with judicially ordered remedies.⁷⁰ In the school desegregation cases, faced with the same kind of institutional intransigence (and with similar interests at stake), the Supreme Court approved the exercise of judicial authority to compel compliance with remedial decrees. *See, e.g., Swann v. Charlotte-Mecklenburg Board of Educ.*, 402 U.S. 1, 15 (1971) ("If school authorities fail in their affirmative obligations under these holdings, judicial authority may be invoked. Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.").⁷¹ Moreover, remedial authority of the judiciary takes on heightened importance where, as here, the remedy is needed to redress *ongoing* wrongs. *See Hutto v. Finney*, 437 U.S. 678, 690 (1978).

In the desegregation cases, the Supreme Court clearly established the principle that, once issued, remedial orders may not be modified and judicial supervision may not be withdrawn until such time as "[t]he purposes of the desegregation have been fully achieved." *Board of Ed. of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237, 247 (1991). *Accord Freeman v. Pitts*, 503 U.S. 467 (1992). By comparison, in the instant case the issue is not whether a remedy so far provided is constitutionally sufficient. *No* remedy of any kind has ever been provided to the

⁷⁰ While the cases referenced in support of this proposition concern federal court enforcement of federal court orders, the principles underlying the cases apply with equal force in the context of state courts, likewise requiring those courts to act to enforce their own remedial decrees.

⁷¹ The Supreme Court has even acknowledged the power of the judiciary to order that taxes be levied when necessary to remedy adjudicated wrongs. *Missouri v. Jenkins*, 495 U.S. 33, 55 (1990).

Plaintiffs, or to the larger student population, in response to *DeRolph*. The violations of the educational rights of Ohio's public school children, as declared in *DeRolph IV* and the earlier decisions, are entirely unabated.

The question thus presented to this Court is not one of degree. Rather, the question is whether Plaintiffs and other public school children may, consistent with procedural and substantive due process, be cut off from *any remedy whatsoever* for wrongs that have already been judicially declared and accompanied by remedial orders.

Ohio stands "ordered liberty" on its head, enabling the legislative and executive branches of state government to continue to knowingly violate the law with impunity, while Ohio's courts refrain from requiring them to do otherwise. The defiant lawlessness of Defendants, the unconstitutional harm they knowingly inflict on powerless and dependent victims, and the utter unavailability of relief by way of state officials and institutions – including the courts – is beyond understanding or excuse. And it is a violation of federal constitutional rights. As another federal court has stated,

In the final analysis, the concept of law and order, the very essence of a republican form of government, embraces the notion that when the judicial process of a state or federal court, acting within the sphere of its competence, has been exhausted and has resulted in a final judgment, all persons affected thereby are obliged to obey it.

United States v. Wallace, 218 F. Supp. 290, 292 (N.D. Ala. 1963).

3. Due Process Protects *Meaningful Access to The Courts*

The Due Process Clause is implicated not simply by Defendants' refusal to comply with *DeRolph*, but also by Ohio's denial of access to its courts for the purpose of securing enforcement of *DeRolph's* binding judicial decrees. The United States Supreme Court historically has recognized that the federal constitution protects access to the judicial processes established by the states. In *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), the Court

noted that it "traditionally has held that the Due Process Clauses [of the Fifth and Fourteenth Amendments] protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances." *Id.* at 429. The protection emanates from the understanding that the Due Process Clause creates a constitutionally protected interest in access to a forum created by the State for such purposes. *See id.*⁷²

This Supreme Court has indicated that whether or not access to the civil courts of the states is constitutionally protected depends upon the significance of the underlying interest sought to be adjudicated. *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996). Here, the educational interests at stake are vital – both to the children who have been deprived of them and to the society those children ultimately must sustain. As the Supreme Court has observed, "[w]e have repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to 'sustaining our political and cultural heritage' with a fundamental role in maintaining the fabric of society." *Grutter v Bollinger*, 539 U.S. 306, 331 (2003) (quoting *Plyler v. Doe*, 457 U.S. 202, 221 [1982]). *Accord Brown v. Board of Education*, 347 U.S. 483, 493 (1954) ("Today, education is perhaps the most important function of state and local governments."). Similarly, in 1974 the United States Congress declared education to be a matter of national interest:

Recognizing that the Nation's economic, political, and social security require a well-educated citizenry, the Congress (1) reaffirms, as a matter of high priority, the Nation's goal of equal educational opportunity, and (2) declares it to be the policy of the United States of America that every citizen is entitled to an education to meet his or her full potential without financial barriers.

⁷² In addition to the Due Process Clause of the Fourteenth Amendment, the Supreme Court has derived the right of access to the courts from a variety of other constitutional provisions, including the Article IV Privileges and Immunities Clause, and the First, Fifth and Fourteenth Amendments. *See Christopher v. Harbury*, 536 U.S. 403, n.12 (2002).

20 U.S.C. § 1221-1. More recently, a similar declaration of congressional intent accompanied the enactment of the No Child Left Behind Act:

The purpose of this title is to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and state academic assessments.

20 U.S.C. § 6301.

The constitutional significance of the right to public education was underscored in *Goss v. Lopez*, 419 U.S. 565 (1975), in which the Supreme Court found that depriving a single student of ten days of education was sufficiently consequential to require the protections of due process. Surely, then, such protections are warranted when Ohio denies its public school children access to the judicial processes of the state invoked for the purpose of vindicating educational rights of countless students who otherwise must continue, *into a second decade*, to suffer educational deprivation of declared constitutional proportions.

Defendants' cynically seek to trivialize the import of *Lewis*, arguing that Ohio's public school children are not really denied access to the state courts since they can, after all, commence a new lawsuit. Defendants' assertion is nonsensical and contemptuous. If rights vested through litigation can be denied arbitrarily, as the *DeRolph* rights now are by Defendants, what purpose would be served by litigating all over again? A new suit in the state courts could not yield anything more than the public school children already have – a comprehensive declaration of rights, with corresponding remedial orders, all of which Defendants ignore.

Litigation is not a game. The rule of law demands that the outcome of litigation be honored and implemented by the parties, with the aid of the courts if necessary. Defendants' argument that the children are free to commence a new suit makes a mockery of our judicial

system. "Access to the courts" is not constitutionally protected as an end in itself; it requires implementation of ordered remedies for declared constitutional violations. By denying Ohio's public school children those remedies, Defendants, inflict an ongoing and escalating deprivation of paramount interests, in violation of the federal constitution.⁷³

B. Defendants' Refusal to Comply with the Decrees of the Ohio Supreme Court Shocks the Conscience.

In addition to analyzing substantive due process claims in terms of historical notions of ordered liberty, the United States Supreme Court at times has evaluated challenged state action in terms of a "shocks the conscience" standard. *See generally Chavez v. Martinez*, 538 U.S. 760 (2003). In this regard, if Defendants' continued operation of a school funding system long-since declared to be unconstitutional is not "conscience shocking," it is difficult to conceive of any governmental conduct that would merit such description. While the Supreme Court has variously employed – and sometimes questioned, as lacking clear parameters – both the shocks-the-conscience and implicit-in-ordered-liberty approaches to substantive due process (*see id.*; *County of Sacramento v. Lewis*, 523 U.S. 833 [1998]), this is not a case that tests the outer limits of either approach. However analyzed, the manner and impact of the deprivation wrought by Defendants violates the Due Process Clause.

Post-*DeRolph*, it is absolutely settled law that the education clauses of the Ohio Constitution are not merely aspirational. They create substantive entitlements on the part of Ohio's children, including the Plaintiff class, and corresponding enforceable obligations on the part of the Defendants. Yet today, more than three years after *DeRolph IV*, it is business as usual in Ohio – as if *DeRolph* had never occurred. Defendants' comprehensive repudiation of the

⁷³ *Cf. Barry v. Barchi*, 443 U.S. 55 (1979) (protected interest in horse trainer's license); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 11-12 (1978) (protected interest in utility service); *Bell v. Burson*, 402 U.S. 535 (1971) (protected interest in driver's license).

orders of the Ohio Supreme Court is wholly without precedent in Ohio, and it is a shocking affront to the Due Process Clause of the United States Constitution.

The vigor with which the *DeRolph* parties and the Ohio Supreme Court (including dissenting justices) addressed the case throughout the decade that it was litigated evidenced the common understanding of all concerned that *DeRolph* was not a mere academic exercise. All expected that the case would, at the end, have legal and practical consequences of unparalleled magnitude.

But just as the momentous sequence of rulings in *DeRolph* was unique in Ohio, so, too, is the contempt Defendants have since exhibited by their ongoing disregard of those rulings. The breadth of the deprivation identified in *DeRolph* and unremedied in the years since, together with the manner of the ongoing deprivation that is perpetuated by the very officials having the moral authority and legal duty to enforce the law plainly "shock the conscience," calling into question the continued vitality of the rule of law in Ohio.

C. The Lack Of Enforcement Of The *DeRolph* Decrees Violates Equal Protection

The United States Supreme Court has recognized that when a state creates a judicial process, it may not grant the benefits of that process to some litigants and deny it to others without implicating the often-intertwined issues of equal protection and due process. *See generally M.L.B. v. S.L.J.*, 519 U.S. at 120 (1996) ("the Court's decisions concerning access to judicial processes, commencing with *Griffin* and running through *Mayer*, reflect both equal protection and due process concerns."); *Griffin v. Illinois*, 351 U.S. 12 (1956), *construed in Lindsey v. Normet*, 405 U.S. 56, 77 (1972) ("When an appeal is afforded, however, it cannot be

granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause."); *see also Boddie v. Connecticut*, 401 U.S. 371, 377 (1971).⁷⁴

Ohio law (and practice, save *Lewis*) historically and routinely affords *all* litigants the right to seek the aid of the courts in the enforcement of judgments. From among all other litigants, Ohio has singled out one group – those who, like the Plaintiff class, seek enforcement of the educational clauses of the Ohio Constitution, as declared and ordered in *DeRolph* – denying them and them alone access to state judicial processes. This lone nullification of rights not only lacks a compelling state interest, it lacks any proper purpose whatever. As the United States Supreme Court has stated in another context, "Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance." *Romer v. Evans*, 517 U.S. 620, 633 (1996).⁷⁵

By deliberately and selectively excluding Ohio's vulnerable public school children from the judicial processes available under state law to all others, Ohio deprives its children of the education the United States Supreme Court has described as "pivotal to 'sustaining our political and cultural heritage'." *Grutter*, 539 U.S. at 331. The conduct of Ohio's state officials is morally unconscionable, and it violates the fundamental promises of due process and equal protection contained in the United States Constitution.

⁷⁴ Concerning the relationship between due process and equal protection generally, *see also Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) ("[T]he concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.").

⁷⁵ *Cf., Primes v. Tyler*, 43 Ohio St.2d 195, 205 (1975) (striking down Ohio's "guest statute" on the grounds that it was "violative of the Fourteenth Amendment to the United States Constitution, in that it denies due process of law and equal protection of the laws to the people of this state.").

V. Federal Judicial Intervention Is Warranted To Compel Defendants' Compliance With Law.

Remedies for systemic violations of constitutional rights by governmental agencies may be complex, time consuming, and at times unpopular, but the notion of denying any remedy whatsoever has never been tolerated. Had the Supreme Court in *Brown v. Board of Education* declared the rights of public school children to attend integrated schools but deprived them of the ability to enforce that decree, there can be little doubt that segregation would have continued for decades – and perhaps forever. No less than the children in *Brown*, Ohio's children, including the Plaintiff class, are entitled to a remedy.

There is yet a broader issue presented by this case. At the present time, numerous other states are engaged in school funding litigation.⁷⁶ Currently, the state of New York, like Ohio, has failed to fully comply with major funding mandates approved by the highest court of the state.⁷⁷ In some of those states, the legislatures have demonstrated the same unwillingness to institute court-ordered reforms as has been demonstrated in Ohio. If Defendants' response to *DeRolph* is permitted to stand, the formula for back-door evisceration of legal rights will be clear: recognize constitutional rights but deny enforcement of a remedy for violations of those rights. Legal protections will effectively be eliminated, not by any change in state laws or constitutions but by the absence of any enforceable remedy for their violation.

While the consequences of such lawlessness are enormous when measured in the context of school funding suits, even this does not represent the full extent of the threat to our democracy. The gaping hole Defendants have created in the fabric of due process potentially

⁷⁶ See Campaign for Fiscal Equity, Inc. (visited April 17, 2006) <<http://www.cfequity.org>> and Advocacy Center for Children's Educational Success with Standards (visited April 17, 2006) <http://www.schoolfunding.info/states/state_by_state.php3> for the status of school funding litigation in the 50 states.

⁷⁷ See Campaign for Fiscal Equity, Inc. (visited April 17, 2006) <<http://www.schoolfunding.info/news/litigation/3-31-06nyfacilities.php3>> regarding New York state's failure to comply fully with the court's orders.

endangers *any* right, not just those concerned with education. When basic rights are so easily denied, the rule of law ceases to exist.

CONCLUSION

The Ohio Supreme Court's repeated declarations of unconstitutionality in the state's school funding system are not diminished by time. They are as valid today as when announced by that court, and Defendants' disregard of those declarations is not made lawful simply by the passage of time. Defendants' continued operation of an unconstitutional funding system is intolerable, constituting a radical negation of fundamental legal principles regarding the obligation of *every* person to comply with judicial decrees.

For Ohio's public school children, disabled and non-disabled alike, Defendants' refusal to conform to these decrees has perpetuated educational deprivation, of declared constitutional proportions, on a daily basis. The opportunities open to these children over the course of their lifetimes will be limited, as will be the heritage they are capable of passing on to future generations. The educational neglect Defendants unconstitutionally impose on the children also impoverishes Ohio as a whole. The decline manifested in so many aspects of Ohio's communities cannot be stemmed, let alone reversed, so long as state officials turn their backs on the educational responsibilities assigned to them by the Ohio Constitution. We pay a heavy and long-term price, collectively, for the short-sighted and unlawful conduct of Defendants.

The educational duties owed by Defendants are comprehensive, extending to Plaintiffs but not to them alone. The Ohio Supreme Court has determined that Ohio's is a single, statewide system of education, and this system presently remains unconstitutional with respect to *all* of Ohio's schoolchildren. While the focus of this suit is on the rights of disabled students, those rights cannot be considered or protected in isolation; they can *only* be fully preserved in the context of a funding system that is wholly compliant, in all of its manifestations and with respect

to all of its beneficiaries, with the Ohio Constitution. Amicus urges the Court to deny the instant motion and, ultimately, to require Defendants to bring the entire school funding system into compliance with the Ohio Constitution, as already ordered by the Ohio Supreme Court.

In previous generations, there were officials who, to the lingering shame of their respective states, refused to enforce the desegregation decrees of the federal courts.⁷⁸ The present conduct of Ohio's officials is a throwback to those times. Ultimately, defiance of law was not tolerated then and it must not be tolerated now. This suit calls upon the Court to protect the federal constitutional rights of *all* of Ohio's public school children, in the process restoring the rule of law to Ohio.

Respectfully submitted,

/s/ C. Allen Shaffer
C. Allen Shaffer (0077642)
ashaffer@bricker.com
Trial Attorney for *Amicus Curiae*,
the Ohio Coalition for Equity &
Adequacy of School Funding

Nicholas A. Pittner (0023159)
npittner@bricker.com
Susan B. Greenberger (0010154)
sgreenberger@bricker.com
Of counsel for *Amicus Curiae*, the
Ohio Coalition for Equity &
Adequacy of School Funding

BRICKER & ECKLER LLP
100 South Third Street
Columbus, Ohio 43215
Telephone: (614) 227-8815
Facsimile: (614) 227-2390

⁷⁸ Others understood that the rule of law must prevail, regardless of personal preferences or political pressures. *See, e.g., Missouri v. Jenkins*, 515 U.S. 70, 94 n.6 (1995) ("Immediately after the Court's decision in *Brown v. Board of Education*, the State's Attorney General issued an opinion declaring the provisions that mandated segregation unenforceable.") (citations omitted). *But see Glassroth v. Moore*, 335 F.3d 1282, 1303 (11th Cir. 2003) ("The rule of law does require that every person obey judicial orders when all available means of appealing them have been exhausted. ...If necessary, the court order will be enforced. The rule of law will prevail."), and *Glassroth v. Moore*, 275 F. Supp. 2d 1347, 1349 (M.D. Ala. 2003).

CERTIFICATE OF SERVICE

I hereby certify that on April 17, 2006, the Brief of *Amicus Curiae*, the Ohio Coalition for Equity & Adequacy of School Funding, in Support of Plaintiffs' and Plaintiff Class's Opposition to Defendants' Motion to Dismiss or for Summary Judgment was filed electronically (as Exhibit 1 to Motion of the Ohio Coalition for Equity & Adequacy of School Funding for leave to file, instant, an *Amicus* Brief). Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ C. Allen Shaffer