

HB 305: A Step in the Right Direction for Ohio's Students

Jacob Davis

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HB 305: A STEP IN THE RIGHT DIRECTION FOR OHIO'S STUDENTS

*Jacob Davis**

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I. INTRODUCTION

“Unconstitutional” remains one of the most powerful words in American democracy. American society is rooted in the idea of liberty, certain unalienable rights that have been deemed to be self-evident. When these rights are violated, there is hell to pay, and the people’s government must swiftly respond to correct the injustice. But this swift response to an identified injustice has not been felt by millions of Ohioans—instead, it has persisted for almost twenty-four years.

The right to a thorough and efficient system of common schools is not as flashy or oft-cited as the rights to life, liberty, or property, but it is shared by the American public just the same. Ohio’s Constitution establishes the fundamental right to education: “The general assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the State.”¹

Over four years, the Ohio Supreme Court provided four different rulings finding that Ohio’s approach to achieving this constitutional mandate was flawed, and therefore unconstitutional.² These rulings, known as the *DeRolph* decisions, found that a funding formula rooted in a district’s property value leads to rampant inequality. According to the Court, this inequality violated the Ohio Constitution’s Thorough and Efficient Clause.

Ohio’s schools, though, have continued to be funded under this unconstitutional formula because the state legislature had failed to implement the changes required under *DeRolph*. The Ohio House of Representatives passed the latest attempt to remedy this injustice on December 3, 2020.³ HB 305, also known as the Cupp-Patterson proposal, overhauled Ohio school funding. The formula combines wealth-focused factors with factors focused on a district’s property value.⁴ The proposal would also create the Funding Oversight Commission, which would oversee, monitor, and propose real-time tweaks and changes to school funding as problems or new considerations arise.⁵

1. OHIO CONST. art. VI, §2.

2. *DeRolph* decisions; discussed in detail *infra*.

3. Anna Staver, *Ohio Senate Won’t Consider New School-Funding Plan This Year That Was Ok’d 84-8 by House*, COLUMBUS DISPATCH (Dec. 4, 2020, 1:47 PM) <https://www.dispatch.com/story/news/education/2020/12/03/ohio-house-passes-new-k-12-funding-formula-but-senate-may-kill-measure-to-make-system-constitutional/3810589001/> [perma.cc/MJK9-XECA].

4. See Microsoft Excel Spreadsheet, *Fair School Funding Plan: State/Local Distribution Calculator*, <https://sites.google.com/view/ohiofairschoolfunding/report> [perma.cc/NFD2-W6TS] (accessible under “State/Local Distribution Calculator”) (last visited Mar. 10, 2021).

5. H.R. 305, 133 Gen. Assemb., Reg. Sess. (Ohio 2020) (citing to §3317.64(A)).

Unfortunately, the Ohio Senate did not even take a vote on Cupp-Patterson before the ending of the General Assembly's session on December 31, 2020.⁶ This failure will require the bill to be reconsidered by the one-hundred thirty-fourth General Assembly, which will reconvene in 2021; HB 305 will need to again pass through both the Ohio House and Senate.⁷

Cupp-Patterson is the most viable option lawmakers have proposed to correct Ohio's persistently unconstitutional school funding. While the proposal has some room for improvement, its passage would be the first step in the right direction for Ohio's students in nearly twenty-four years. No matter a child's zip code, they should be provided the same opportunity to learn and grow throughout Ohio. The passage of HB 305 would ensure this inherent right becomes a reality.

Part Two of this article will explore the checkered past of school finance litigation in the state of Ohio, with a central focus on the *DeRolph* litigation. Part Three will highlight the main components of the Cupp-Patterson proposal while also touching on the political struggle that remains if the proposal is to become Ohio law.

II. THE STORY OF SCHOOL FINANCE LITIGATION IN OHIO

School finance litigation has a checkered past in the state of Ohio. The right to a thorough and efficient education, while not provided by the United States Constitution, is an enumerated right in the Ohio Constitution. This provision, though, came with no instructions or recommendations on how to achieve its mandate. The battle that has ensued over the interpretation of this language has been ongoing, evolving into a remarkable story about the pursuit of adequacy and equity for Ohio's children.

A. *Education as a Fundamental Right*

Challenges to educational funding have been numerous, and like any lawsuit, have involved plenty of strategic decisions. A major lesson for Ohio's proponents of funding reform came from the United States Supreme Court in 1973 concerning the choice of venue.

A group of San Antonio parents filed a class-action suit in the Western District Court of Texas alleging that Texas's educational funding

6. Staver, *supra* note 3.

7. *Id.*

was unconstitutional.⁸ The District Court agreed with the parents, finding that the state's approach to school funding violated the Equal Protection Clause of the Fourteenth Amendment.⁹ In *San Antonio Independent School District v. Rodriguez*, the Supreme Court disagreed. The Court found that education is not a fundamental right included implicitly or explicitly in the Constitution.¹⁰ "[T]he key to discovering whether education is 'fundamental' is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing....[T]he answer lies in assessing whether there is a right to education explicitly or implicitly granted by the Constitution."¹¹ Without firm constitutional footing, the Supreme Court declined to recognize a new fundamental right.¹²

The Court's decision in *Rodriguez* was viewed as vesting the responsibility for education with state governments.¹³ Ohio's founders included an enumerated right in the state constitution mandating the creation of a public education system.¹⁴ The Ohio Constitution provides that "[t]he general assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the State."¹⁵ Ohio's Constitution explicitly includes a funding requirement,¹⁶ but does leave much to be desired concerning the meaning of "thorough and efficient."

8. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 5–6 (1973).

9. *Id.* at 6.

10. *Id.* at 35.

11. *Id.* at 33.

12. The Court also included two additional arguments as to why the class's equal protection argument must fail. The first was rooted in the fact that there was no clear discrimination of an entire distinguishable class. "[T]here is no basis on the record in this case for assuming that the poorest people—defined by reference to any level of absolute impecuniosity—are concentrated in the poorest districts." *Id.* at 23. The second was that the entire case could have also been decided on Tenth Amendment or non-justiciability grounds because the Justices lack the knowledge to make decisions concerning the use of public revenues as well as educational policy decisions. *Id.* at 42.

13. EMILY PARKER, EDUCATION COMMISSION OF THE STATES, 50-STATE REVIEW: CONSTITUTIONAL OBLIGATIONS FOR PUBLIC EDUCATION 2 (2016).

14. *Id.*

15. OHIO CONST. art. VI, § 2.

16. PARKER, *supra* note 13, at 17. Interestingly, eleven of the fifty states do not have explicit funding requirements for public education in their state constitution, leaving the procedure and decision-making to the state legislature. *Id.* at 5–22.

B. Pre-DeRolph: Walter and the Foundation Program

The Ohio Supreme Court’s first contemporary opportunity to interpret the meaning of “thorough and efficient” came in *Board of Education v. Walter* in 1979. The underlying funding formula provides significant insight into how the Ohio legislature can fund education constitutionally.

Board of Education v. Walter was a class action suit instituted by the City School District of Cincinnati on behalf of itself and all families in its district.¹⁷ The District sought a declaratory judgment providing that the way the state financed public and secondary schools were unconstitutional under Ohio’s constitutional mandate.¹⁸ The trial court agreed with the District that the funding mechanism provided by the Ohio legislature fell short of providing a thorough and efficient education to all of Ohio’s students.¹⁹

The state appealed, and the First District Court of Appeals reversed the trial court’s ruling in part.²⁰ The Court of Appeals held that the funding formula violated the Equal Protection Clause of Ohio’s Constitution, but it did not violate Ohio’s Thorough and Efficient Clause.²¹ This reliance on equal protection grounds harkened back to the *Rodriguez* challenge that the U.S. Supreme Court found to be unpersuasive.

The funding formula challenged by *Walter* was referred to as the Equal Yield Formula.²² Under the formula, a flat amount of funding per pupil was provided to each district in the state.²³ This flat rate of funding was rooted in the Goettle Report prepared by Ohio’s Education Review Committee. The report found that “the 1973–74 cost for a school district to operate at the state minimum standards which define a general education of high quality was \$715 per pupil.”²⁴ The basic aid level was uniform throughout the state, with a district receiving \$48 per pupil per

17. Bd. of Educ. v. Walter, 390 N.E.2d 813, 815 (Ohio 1979).

18. *Id.*

19. *Id.*

20. *Id.* at 815.

21. *Id.* at 815–16.

22. DeRolph v. State, 677 N.E.2d 733, 745 (Ohio 1997) [hereinafter *DeRolph I*]. The formula contained two pieces: basic aid and “reward for effort.” Basic aid encompassed the equitable floor that all districts would receive. The “reward for effort” provided additional funding to districts that levied between twenty and thirty mills of property tax. *Walter*, 390 N.E.2d at 816.

23. *Walter* at 816–17.

24. *Id.* at 817.

mill²⁵ for the first twenty mills for a total of \$960 per pupil.²⁶ Importantly, a district's electorate must pass levies to control the number of mills assessed against properties by their school district; millage will therefore vary throughout the state depending on the willingness of the district's electorate to raise property taxes in the name of education. Under the Equal Yield Formula, though, if a district's electorate did not authorize at least twenty mills, the state supplemented funding to achieve the \$960 per pupil floor.²⁷ Thus, *every* district would receive at least \$960 per pupil no matter the millage level passed by their electorate.

Upon review, the Ohio Supreme Court found this funding scheme constitutional, rejecting the equal protection argument under Ohio's Constitution. The formula achieved the state constitution's thorough and efficient mandate because it created a *funding floor*, a minimum amount each district must receive, rooted in the cost of an education that met state standards.²⁸ By ensuring that every district received at least \$960 per pupil, which was above the cost outlined in the Goettle Report, the state legislature ensured a thorough and efficient education in every school district.

In addition to the constitutionality of the funding scheme at issue, the Court also made two other essential determinations in its opinion. First, the Court determined that even though Ohio recognized education as a fundamental right, strict scrutiny could not be applied to an issue that was so closely intertwined with local finances and educational policy.²⁹ Second, the Court dismissed the state's argument that challenging the funding framework involved a political question.³⁰ Because the state legislature enacted the measures in question under Article 6 of the Ohio Constitution, the matter was justiciable due to the Court's clear interest in judicial review for constitutionality.

25. School district venue is gathered according to the number of mills levied against each piece of property in the district. A mill is a unit of value that represents one-tenth of a cent. For example, if a piece of property is valued at \$150,000 and twenty mills are levied against that piece of property, the property owner would pay \$3,000 in property taxes: $(20 \times \$150,000) \div 1,000$. Julia Kagan, *Mill Rate*, INVESTOPEDIA, <https://www.investopedia.com/terms/m/millrate.asp> [perma.cc/3JAA-NJHL] (last visited Mar. 10, 2021).

26. *Walter*, 390 N.E.2d at 816–17.

27. *Id.* at 816.

28. *Id.* at 825–26.

29. *Id.* at 817. The Court's reasoning seems to echo the position of the U.S. Supreme Court in *San Antonio Indep. Sch. Dist. v. Rodriguez*, centering around deference to localities for these sorts of policy decisions. 411 U.S. 1; *see also*, *Walter*, 390 N.E.2d.

30. *Walter*, 390 N.E.2d at 824.

Three years after *Walter*, though, the Ohio General Assembly scrapped its constitutional funding scheme.³¹ The reason for this change is largely unknown, leaving partisan politics or budgetary constraints as the two most likely causes. The Education Review Committee and the Equal Yield Formula were replaced by the Foundation Program.³² The Foundation Program's main source of funding was a foundation amount, which in 1992–93 was \$2,817 per pupil.³³ This amount, unlike the Equal Yield Formula's floor amount, had no real relation to the actual cost of educating a student in Ohio³⁴:

Dr. Howard B. Fleeter, Assistant Professor at the School of Public Policy and Management at Ohio State University, stated that the foundation dollar amount “is a budgetary residual, which is determined as a result of working backwards through the state aid formula after the legislature determines the total dollars to be allocated to primary and secondary education in each biennial budget. Thus, the foundation level reflects political and budgetary considerations at least as much as it reflects a judgment as to how much money should be spent on K–12 education.”³⁵

Of particular importance is the role a district's property values play in determining how much the state must provide out of the allocated \$2,817 per pupil. The Foundation Program included a calculation called the “charge-off” amount. This section of the formula captures the local responsibility concerning funding; the adjusted total property value for a given district is multiplied by twenty-three mills to subtract a district's ability to levy property taxes.³⁶ The rationale is that a given district should strive to effectively use its property tax base to supplement the need for state funds; whatever tax revenue a district should be raising is thus charged off the state's funding responsibility.³⁷ Importantly, the charge-off amount is not determined by a district's *actual* millage level; the state would impose twenty-three mills for the calculation even if the district only raised twenty mills in property taxes. For example, if District A has a total property value of \$400 million, its charge-off amount would be \$9.2 million to represent its available local capacity.³⁸ This inequity is

31. Jessica Ice, *A Comment on DeRolph's Impacts on Ohio's School-Financing System, Twenty-Five Years Later*, 70 CASE W. RES. L. REV. 1261, 1266 (2020).

32. *Id.*

33. *DeRolph I*, 677 N.E.2d at 738.

34. *Id.*

35. *Id.*

36. *DeRolph v. State*, 728 N.E.2d 993, 1005 (Ohio 2000) [hereinafter *DeRolph II*].

37. *Id.*

38. Calculation *supra* note 18 ((23×\$400,000,000) ÷ 1,000).

clearly visible in reality too: of the 707 school districts in Ohio in 1992, sixty levied less than twenty-three mills of property tax, with the lowest being the Middle Bass Local School District at five mills.³⁹

C. *The DeRolph Decisions*

1. *DeRolph I*

With this change in the state's approach to school funding, challengers returned. School superintendents throughout the state organized to combine their voices and lobby for change. The first of these organizations was formed in 1987 in an effort called Promoting Appalachian and Rural Initiatives for Teaching Youth (PARITY).⁴⁰ This group of southeastern Ohio superintendents reorganized again and began spreading their message throughout the state, leading to the creation of the Ohio Coalition for Equity & Adequacy of School Funding (the "Coalition") in 1990 with 275 school districts as founding members.⁴¹ William Phillis, Executive Director of the Coalition, provided that the Coalition wanted to ensure that "if you go to school in Athens, Ohio you have the same opportunities as students in Upper Arlington. That's what equity is."⁴² The Coalition was formed with the explicit goal of challenging the constitutionality of Ohio's school funding system, and that battle began on December 19, 1991.⁴³

DeRolph v. Ohio was filed on December 19, 1991, in the Perry County Court of Common Pleas.⁴⁴ The plaintiffs were Nathan DeRolph and the Youngstown, Lima, Dawson-Bryant, Southern Local, and Northern Local School Districts.⁴⁵ Nathan DeRolph, the lead plaintiff, was a middle schooler in the Northern Local School District that did not have a chair to sit in while he was in class.⁴⁶ The districts, just like in *Walter*, sought a declaratory judgment providing that the current funding

39. OHIO DEPARTMENT OF TAXATION, 1992 PROPERTY TAX DATA BY SCHOOL DISTRICT, <https://tax.ohio.gov/wps/portal/gov/tax/researcher/tax-analysis/tax-data-series/school-district-data/sd1/sd1cy92> [perma.cc/KVU4-DZRF] (last visited Mar. 10, 2021).

40. Larry J. Obhof, *DeRolph v. State and Ohio's Long Road to an Adequate Education*, 2005 B.Y.U. EDUC. & L.J. 83, 95 (2005).

41. *Id.* at 96.

42. Interview with William Phillis, Executive Director, Coalition for Equity & Adequacy of School Funding (Oct. 9, 2020) (recorded conversation on file with the author). Phillis was one of the main architects behind the *DeRolph* litigation from inception to conclusion.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

scheme employed by the state of Ohio violated the Thorough and Efficient Clause of the Ohio Constitution.⁴⁷ During the trial, the Speaker of the House, President of the Senate, and Budget Director all took the stand.⁴⁸

On July 1, 1994, the trial court issued a 478-page opinion finding Ohio's school finance system unconstitutional.⁴⁹ The Fifth District Court of Appeals reversed, relying strongly on separation of powers and the *Walter* precedent.⁵⁰ When asked about this reversal, William Phillis, Executive Director of the Coalition for Equity & Adequacy of School Funding and organizer of the *DeRolph* litigation, shared that the Perry County Court of Common Pleas Clerk informed him that the Court of Appeals did not even pick up the trial record before making their decision—"they knew that this case was going to the [Ohio] Supreme Court regardless of their decision."⁵¹

The Fifth District's prediction was correct: the case progressed to the Ohio Supreme Court, and on March 24, 1997, Ohio's school finance system was deemed unconstitutional.⁵² Unfortunately, the Court's opinion provided no clear guidance to the state legislature on what changes were required to achieve constitutionality, but it specifically identified four aspects of the finance system to change:

- (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.⁵³

The majority, composed of two liberals and two conservatives, shocked Ohio's political leaders; "[t]he consensus leading up to the first decision was that we did not stand a chance considering the political forces at play behind the scenes."⁵⁴ With this precedent now in their back pocket, the Coalition pressed on.

47. *DeRolph I*, 677 N.E.2d at 734.

48. Interview with William Phillis, *supra* note 42. During our interview, Mr. Phillis provided, "I wish they'd have gotten [then-Governor] Voinovich." Before the case progressed to the Court of Appeals, Governor Voinovich had pressed through numerous pieces of legislation in the hopes that the decision would be overturned."; Obhof, *supra* note 40, at 100.

49. Obhof, *supra* note 40, at 100; *see generally* *DeRolph v. State*, 712 N.E.2d 125, 297 (Ohio C.P. Perry 1994).

50. *DeRolph v. State*, 1995 WL 557316, 2-3 (Ohio Ct. App. 1995).

51. Interview with William Phillis, *supra* note 41.

52. *DeRolph I*, 677 N.E.2d at 747.

53. *Id.*

54. Interview with William Phillis, *supra* note 42.

2. *DeRolph II*

The Ohio Supreme Court's ruling in *DeRolph I* provided the Ohio legislature twelve months to remedy the identified problems, with the Perry County Court of Common Pleas retaining jurisdiction.⁵⁵ The state legislature responded with twelve pieces of remedial legislation between May 20, 1997, and November 2, 1999.⁵⁶ Upon careful review of these changes, the Perry County Court of Common Pleas found that the legislature still had not done enough to comply with the terms of the *DeRolph I* ruling.⁵⁷ Further, the court declined to retain ongoing jurisdiction over the matter and instead signaled to the parties that they should take up their appeals directly with the Ohio Supreme Court.⁵⁸ When the case returned before the Ohio Supreme Court on November 16, 1999, the Court of Common Pleas' decision was affirmed: the changes were not enough to achieve a "thorough and efficient" system.

The Court centered its analysis on the four points set forth in *DeRolph I*. Of central importance to the Court was the continued reliance on property tax revenues to fund districts, which would now be exacerbated through some of the "remedial" measures that the Ohio General Assembly passed.⁵⁹ The Court determined that the new proposed funding formula was nearly identical to its predecessor⁶⁰—per-pupil funding was actually *lowered* from \$4,269 in 1999 to \$4,063 in 2000.⁶¹ The General Assembly also passed a series of unfunded mandates to increase district accountability for achieving student-performance benchmarks.⁶² The proposed bills were expected to cost districts an estimated \$343,758,940; to comply, districts would need to *increase* their property tax revenues considerably.⁶³

The Court again declined to provide any direct guidance to the Ohio legislature, stating "[t]hat degree of involvement in fashioning a remedy... is not, nor should ever be, how we perceive our role."⁶⁴ Instead, the Court highlighted seven "major areas [that] warrant further attention, study, and development by the General Assembly, but are not by any

55. *DeRolph I*, 677 N.E.2d at 747.

56. *DeRolph II*, 728 N.E.2d at 1003–04.

57. *DeRolph v. State*, 712 N.E.2d 125, 297 (Ohio C.P. 1999).

58. *Id.*

59. *DeRolph II*, 728 N.E.2d at 1014–15.

60. *Id.* at 1006.

61. *Id.* at 1007.

62. *Id.* at 1004. S.B. 55 standards included increased high school graduation requirements on districts and also the creation of the district report card system to measure performance. *Id.*

63. *Id.* at 1014.

64. *DeRolph II*, 728 N.E.2d at 1003.

means the only areas requiring scrutiny”⁶⁵—the most glaring area being the failure to address the overreliance on local property taxes.⁶⁶ The Supreme Court of Ohio maintained jurisdiction until June 15, 2001, when the state’s progress would be reevaluated by the Court.⁶⁷

3. *DeRolph III* and Its Fallout

On September 6, 2001, the Court’s third decision marked an about-face concerning the amount of guidance it was willing to provide the Ohio legislature.⁶⁸ The Court’s opinion included an order specifying the key changes that needed to be made to the funding formula to bring it into compliance with the Thorough and Efficient Clause; the terms of the order focused primarily on correcting the overreliance on property tax revenues.⁶⁹ “With full implementation of these modifications to the funding plan adopted by the General Assembly the plan will meet the test for constitutionality created in *DeRolph I* and *DeRolph II*.”⁷⁰

Unfortunately, the Court would not be able to resolve the *DeRolph* progeny so easily. After receiving the order underlying *DeRolph III*, the state submitted a motion for reconsideration; after the legislature saw the consequences of the Court’s order, it became clear that the *DeRolph III* order was “based in part upon erroneous calculations and data.”⁷¹ The Court believed that the required changes set forth in its order would cost \$325 million: but in reality, the changes would have cost billions of dollars.⁷² Because of this new development, the Court required the parties to attend mediation concerning the state’s motion for reconsideration.⁷³

A mediator was brought in from Wisconsin and became quickly discouraged.⁷⁴ The state maintained the offer that encompassed *DeRolph III*, which boiled down to an additional \$325 million in funding.⁷⁵ The

65. *Id.* at 1021.

66. *Id.* at 1020.

67. *Id.* at 1022.

68. *DeRolph v. State*, 754 N.E.2d 1184, 1189–90 (Ohio 2001) [hereinafter *DeRolph III*] (“None of us is completely comfortable with the decision we announce in this opinion. But we have responded to a duty that is intrinsic to our position as justices on the highest court of the state. Drawing upon our own instincts and the wisdom of Thomas Jefferson, we have reached the point where, while continuing to hold our previously expressed opinions, the greater good requires us to recognize ‘the necessity of sacrificing our opinions sometimes to the opinions of others for the sake of harmony.’”).

69. *Id.* at 1199.

70. *Id.* at 1201.

71. *DeRolph v. State*, 758 N.E.2d 1113, 1113 (Ohio 2001) [hereinafter *DeRolph III+*].

72. *Id.*

73. *DeRolph III+*, 758 N.E.2d at 1116.

74. Interview with William Phillis, *supra* note 42.

75. *Id.*

Coalition repeatedly declined this offer because, according to Phillis, the Coalition wanted a process whereby the components and cost of a high-quality education were determined, then funded accordingly.⁷⁶ On his way to the airport, the mediator called Chief Justice Moyer and withdrew from the matter because the parties were too far apart.⁷⁷

Following the failed mediation, Phillis and the Coalition received a call from the new Speaker of the House, Larry Householder.⁷⁸ Householder told Phillis that *DeRolph* started with a Perry County judge, and he wanted to be the Perry County legislator that saw it ended.⁷⁹ The Speaker first promised to get districts a foundational amount of \$5,400,⁸⁰ which the Coalition shot down. More negotiation, though, finally produced what the Coalition had hoped for—a formula rooted in the actual cost of an equitable and adequate education. But Householder could not convince his Republican counterparts in the Ohio Senate or Governor’s Office to back the agreement.⁸¹

4. *DeRolph IV*

After the failed mediation between the parties and the failed negotiation with state lawmakers, the state now asked the Ohio Supreme Court to reconsider *DeRolph III*. If their decision was not vacated, the state would have to implement the changes rooted in the flawed previous calculations. In an eleven-paragraph opinion, the Supreme Court of Ohio provided the final page in the *DeRolph* story on December 11, 2002:

The consensus arrived at in *DeRolph III* was in many ways the result of impatience. We do not regret that decision, because it reflected a genuine effort by the majority to reach a solution to a troubling constitutional issue. However, upon being asked to reconsider that decision, we have changed our collective mind. Despite the many good aspects of *DeRolph III*, we now vacate it. Accordingly, *DeRolph I* and *II* are the law of the case, and the current school-funding system is unconstitutional.⁸²

76. *Id.*

77. *Id.*

78. *Id.*

79. Interview with William Phillis, *supra* note 42.

80. Compare to the foundation amount in 2000 (\$4,063) and the foundation amount in 2020 (\$6,020) *supra* note 33.

81. *Id.*

82. *DeRolph v. State*, 780 N.E.2d 529, 530 (Ohio 2002) [hereinafter *DeRolph IV*].

The majority acknowledged the fact that the state legislature could not spend money that it did not have,⁸³ but the changes required under *DeRolph I* and *II* needed to be implemented to achieve a thorough and efficient school funding system, per constitutional mandate.⁸⁴

The Coalition ended the *DeRolph* fight after the 2002 ruling due in large part to the election of Justice Maureen O'Connor.⁸⁵ O'Connor replaced fellow conservative Justice Andrew Douglas on the Ohio Supreme Court; Douglas had been one of the two conservatives in each of the *DeRolph* decisions that found the state's funding scheme unconstitutional. In the interest of maintaining their binding precedent, the Coalition decided it was time to stop their fight.

D. Current Funding Formula

Ohio's current funding formula was instituted by Governor John Kasich in 2013 and is referred to as the Achievement Everywhere Model; Governor Mike DeWine has not made any substantial changes to this funding framework since entering office in 2019.⁸⁶ The Achievement Everywhere Model derives funding from multiple different sources, the most important being the Opportunity Grant.⁸⁷ The Opportunity Grant amount is calculated according to the formula amount and the state share index.⁸⁸ The formula amount, similar to the base cost amount in *DeRolph*, provides a per-pupil funding level that changes with the annual budget.⁸⁹ The state share index, similar to the "charge-off" amount in *DeRolph*, is a complex formula designed to assess a district's capacity to raise local revenue.⁹⁰ The Opportunity Grant is then supplemented through other funding factors to provide for districts with low local revenue capacities, low local property values, and drastic enrollment changes.⁹¹

83. *Id.* at 532.

84. *Id.* at 530.

85. Interview with William Phillis, *supra* note 42.

86. Ice, *supra* note 31, at 1276; Jessie Balmert & Jackie Borchardt, *Education, Cigarettes and Taxes: What Does Ohio Gov. DeWine's Budget Mean for You?*, CINCINNATI ENQUIRER (Mar. 15, 2019) <https://www.cincinnati.com/story/news/politics/2019/03/14/ohio-gov-mike-dewine-rolls-out-first-budget/3143612002/> [perma.cc/4FMH-DJCR]; *Investing in Ohio's Schools, Colleges, and Universities*, OFF. OF BUDGET & MGMT., https://archives.obm.ohio.gov/Files/Budget_and_Planning/Operating_Budget/Fiscal_Years_2020-2021/Enacted/Investing_in_Education.pdf [perma.cc/2FMY-KDBW] (last visited Mar. 10, 2021).

87. *Id.*

88. *Id.*

89. *Id.* The formula amount in 2019 was \$6,020 per pupil.

90. *Id.*

91. Ice, *supra* note 31, at 1276. Targeted Assistance is given to districts that have a lower capacity to raise local revenues due to lower property values throughout the district. Transitional aid

III. NECESSARY CHANGE TO AN UNCONSTITUTIONAL SYSTEM

Ohio's lengthy story of school finance litigation always centered around the same problem no matter the party: the funding formula's overreliance on a district's property tax revenue. But Ohio's Constitution does not outlaw the use of property tax revenue to fund schools; it provides that "[t]he general assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund."⁹² This language communicates a partnership for funding between communities and the state. The question that remains, though, is what is the proper balance of responsibility in this partnership?

A. *The Ills of Property Tax Reliance*

Dr. Lee R. McMurren, the Beachwood City Schools' Superintendent from 1987 to 1994, took a tour of the Dawson-Bryant School District before testifying during *DeRolph I*.⁹³ He stated that "the types of classrooms used to educate the students [in the district] were a disgrace to the state of Ohio and to all Americans."⁹⁴ In 1991, the Dawson-Bryant School District had a total assessed property valuation of \$28,882,580 compared to Beachwood School District's valuation of \$376,229,512.⁹⁵ At the time, these districts had about the same number of pupils, but Beachwood had thirteen times more taxable property than Dawson-Bryant.⁹⁶ In 2019, Dawson-Bryant had closed the taxable property gap, though not by much: Beachwood still had ten times the total taxable property.⁹⁷

This gross inequality the Court and Dr. McMurren identified in 1997 still persists throughout Ohio. The Danbury Local Schools in Ottawa

is provided to districts in an effort to remedy any drastic funding changes resulting from a lowering of their enrollment from year to year. The goal of transitional aid is to ensure that a district does not see a sharp decrease in state funds from year to year.

92. OHIO CONST. art. VI, §2.

93. *DeRolph I*, 677 N.E.2d at 763 (Douglas, J., concurring).

94. *Id.*

95. *DeRolph I*, 677 N.E.2d at 746.

96. *Id.* Checking total enrollment data, Dawson-Bryant had about 1,400 students in the district in 1991 compared to Beachwood's 1,296. OHIO DEPARTMENT OF EDUCATION, 1990-91 ENROLLMENT DATA, <http://education.ohio.gov/Topics/Data/Frequently-Requested-Data/Enrollment-Data> [perma.cc/6N82-BYVK] (last visited Mar. 10, 2021) [hereinafter ENROLLMENT DATA 2019].

97. OHIO DEPT OF TAX'N, 2019 PROPERTY TAX DATA BY SCHOOL DISTRICT, <https://tax.ohio.gov/wps/portal/gov/tax/researcher/tax-analysis/tax-data-series/school-district-data/sd1/sd1cy92> [perma.cc/9MQB-Z47U] (last visited Mar. 10, 2021) [hereinafter PROPERTY VALUE DATA 2019].

County had a total enrollment of 528 and a total taxable property value of \$484,558,100 in 2019.⁹⁸ Pettisville Local Schools in Fulton County had a total enrollment of 531 and a total taxable property value of \$53,604,850⁹⁹—nine times less than Danbury despite having only three fewer students. The Orange Local Schools in Cuyahoga County had a total enrollment of 2,045 and a total taxable property value five times greater than the Van Wert City Schools, which had a total enrollment of 2,064.¹⁰⁰ The Lakewood City Schools in Cuyahoga County had a total enrollment of 4,818 and a total taxable property value four times greater than the Warren City Schools in Trumbull County, with a total enrollment of 4,749.¹⁰¹ This inequality in property value is not clustered in one county, in urban environments, or even between small districts—clear examples exist throughout the state, no matter the region or enrollment.

The relevance of this disparity is evident by understanding how property taxes fund education under Ohio’s formula. As mentioned above, the current formula imposes expectations on districts for levying a certain number of mills against their property tax base, known as the community capacity. The formula uses a mill as a unit of measure, but a mill’s value varies depending on the total taxable property in a given district.¹⁰² For example, “a one-mill property tax on Class I real property [in 1995] produced \$272.90 per student in the district with the highest property tax base and \$13.34 per student in the district with the lowest.”¹⁰³ This disparity translates to district revenues widely varying depending on their total taxable property base. The primary complaint with this continuing disparity is that the cost of an adequate and equitable education doesn’t change depending on the student’s location.

It is also worth noting the implicit penalty a property-rich district faces compared to a property-poor district. The State employs a “charge-off” amount, subtracting a district’s community capacity from the amount of aid the state must provide.¹⁰⁴ For example, if the state calculates the community capacity at twenty-three mills in every district, Danbury Local would have a charge-off amount of \$11,144,836.30 compared to Pettisville Local at \$1,232,911.55.¹⁰⁵ This result places serious pressure

98. Compare ENROLLMENT DATA 2019 with PROPERTY VALUE DATA 2019.

99. *Id.*

100. *Id.* \$1,123,764,910 and \$248,898,430, respectively.

101. *Id.* \$1,067,281,710 and \$259,423,290, respectively.

102. *Id.* Take the previous Beachwood and Dawson-Bryant example from *DeRolph I* based upon the 1991 date. One mill in Beachwood would equal \$376,229.51 compared to \$28,882.58.

103. *DeRolph II*, 728 N.E.2d at 1013.

104. *See, supra* note 31, at 1276.

105. Calculation, *supra* note 25, based upon data values *supra* notes 97 and 98.

on Danbury: if the district is unable to fully meet its community share capacity, it will likely face major budgetary problems. Put differently, the state is not basing its calculations on how much revenue the district is *actually* generating through property taxation but rather on what level of revenue they *should be able* to generate. On the other hand, Pettisville's charge-off amount allows the district to rely more on funding from the state instead of the district's constituents.

Whether one looks at the consequences on poor or rich districts, the results firmly show that property tax reliance is detrimental. The quality of a student's education will vary from district to district based upon the arbitrarily drawn boundary lines on a map. This outcome, which necessitated *DeRolph*, persists decades after the Ohio Supreme Court struck it down. Through Cupp-Patterson, though, Ohio's students may be one step closer to fair and equitable education funding.

B. *Cupp-Patterson HB 305*

HB 305, known as the Cupp-Patterson plan, is the latest and most admirable attempt by Columbus lawmakers to address Ohio's unconstitutional education funding system. The Ohio Supreme Court succinctly summarized its central concern with funding reforms in *DeRolph II*:

The most glaring weakness in the state's attempts to put in place a thorough and efficient system of education is the failure to specifically address the overreliance on local property taxes. If this problem is not rectified, it will be virtually impossible for the revised school-funding system to be characterized as thorough and efficient.¹⁰⁶

The Cupp-Patterson plan has taken this prescription for future reforms to heart, and the result seems to be the first sign of true progress in an attempt to adapt a unique solution to a unique problem. While the proposed legislation is by no means the final solution, its provisions take important steps in introducing new aspects to the way Ohio funds its schools.

After two years of brainstorming, debating, and drafting, HB 305 was provided to the public on June 26, 2019.¹⁰⁷ The Bill's main sponsors, Robert Cupp (R) and John Patterson (D), were joined by sixty-six cosponsors in the Ohio House of Representatives; in total, more than two-

106. *DeRolph II*, 728 N.E.2d at 1020.

107. Laura Hancock, *New Ohio Ed Funding Bill Introduced with at Least \$600 Million More for Schools*, CLEVELAND.COM (Jun. 26, 2019), <https://www.cleveland.com/open/2019/06/new-ohio-ed-funding-bill-introduced-with-at-least-600-million-more-for-schools.html> [perma.cc/LQ2U-FFVM].

thirds of the Ohio House supported the bill at its presentation.¹⁰⁸ Cupp, a former Ohio Supreme Court Justice, believed that the legislation was strong and would withstand the legal challenges made in *DeRolph*.¹⁰⁹ Cupp and Patterson hoped to see the Bill passed by the end of the General Assembly's 2019 session;¹¹⁰ however, the Ohio Senate failed to hold a vote before the end of the session on December 31, 2020. Its components, while promising, do not entirely end the Coalition's pursuit for adequacy and equity, says Phillis: "I will support Cupp-Patterson with the caveat that it needs a lot of work. As advocates, though, we cannot throw [the bill] out just because there's some problems with it."¹¹¹ Problems do abound, but Cupp-Patterson may be the first step in the right direction in the past two decades for funding Ohio's schools.

1. Cupp-Patterson introduces wealth factors to a district's funding formula.

As mentioned extensively above, the Ohio Supreme Court has taken considerable issue with the extensive inequity that results from a funding formula rooted primarily in a district's property values. The Court has repeatedly and plainly provided that it cannot find a funding formula rooted in property values constitutional:

The valuation of local property has no connection whatsoever to the actual education needs of the locality, with the result that a system over reliant on local property taxes is by its very nature an arbitrary system that can never be totally thorough or efficient. In a very real sense, this problem underlies most of the other deficiencies in Ohio's school system and is either the direct or indirect cause of them.¹¹²

With these powerful words in mind, Cupp-Patterson's drafters seek, for the first time in Ohio, to introduce funding factors rooted in a district's relative wealth to determine the level of funding a given district must receive.

Cupp-Patterson proposes a complete rethinking of how to calculate a district's local share. Whereas currently, property values throughout the

108. Catherine Candisky & Darrel Rowland, *Bottom Line of New 'Constitutional' School Funding Plan: \$1.5 Billion*, COLUMBUS DISPATCH (Jul. 10, 2019) <https://www.dispatch.com/news/20190710/bottom-line-of-new-constitutional-school-funding-plan-15-billion> [perma.cc/67TZ-A82W].

109. Hancock, *supra* note 108.

110. *Id.*

111. Interview with William Phillis, *supra* note 42.

112. *DeRolph II*, 728 N.E.2d at 1000.

district are the sole consideration,¹¹³ Cupp-Patterson introduces both gross and median income factors.¹¹⁴ These income factors carry a 40% weight in the formula, with a district's property values carrying the additional 60%.¹¹⁵ Ryan Pendleton, Chief Financial Officer and Treasurer of the Akron Public Schools, has served on the Cupp-Patterson drafting committee since the proposal's infant stages. He provided that while this breakdown seems to result in a reliance on property values, there is more income wealth than property wealth in Ohio. Therefore, both factors are weighed to create an even split. As a purely mathematical example that seemingly unequal inputs can result in similar funding, 40% of \$200,000 is \$80,000 and 60% of \$133,333 is also \$80,000. Pendleton provided that the drafting committee calculated numerous other wealth ratios to property values and that the 40:60 split was thought to achieve the *DeRolph* mandate.¹¹⁶

The Cupp-Patterson Plan drafters provide the following illustrations on how to compute a district's local share under the proposed plan. They placed local capacity at 2.25% to represent 22.5 mills of property tax, which is believed to be the average mills levied by districts throughout the state.¹¹⁷ Figure 1 provides an example of the calculation for the 60% weight placed on a district's property wealth, while Figure 2 provides an example of the calculation for the 40% income weight; both are calculated using a total student population of 959.

113. *Ice*, *supra* note 31, at 1276.

114. Microsoft Excel Spreadsheet, *supra* note 4.

115. *Id.*

116. *Id.*

117. Microsoft Excel Spreadsheet, *supra* note 115.

Figure 1¹¹⁸

| Local Share Calculation: Property Wealth | | |
|---|---|----------------|
| Item | Formula/Description | Example |
| Number of Pupils in District | Final count of pupils from the previous year | 959 |
| Taxable Property Valuation | This number is obtained through the County Auditor's property evaluations | \$165,000,000 |
| Property Valuation Per Pupil | $\frac{\text{Taxable Property Valuation}}{\text{Number of Pupils}}$ | \$172,054 |
| (PROPERTY WEALTH SHARE) | Property valuation per pupil x 0.0135 | \$2,323 |

The resulting \$2,323 encapsulates 60% of the 22.5 mills the district would be expected to generate. This calculation is virtually unchanged from the current approach: divide total property wealth by total enrollment to inform the local capacity per pupil.¹¹⁹ Importantly, the Ohio Supreme Court has not held that property wealth cannot be *one* factor in the funding formula, just that it cannot be the central factor in a funding formula.

Figure 2, while a bit more complicated, provides for the inclusion of gross income and median income per pupil to determine the district's local capacity. The addition of income variables, while revolutionary for Ohio, has become a common practice throughout the country to correct the inequality created by overreliance on property taxes.¹²⁰

118. *Id.*

119. *Ice, supra* note 31, at 1276.

120. EDUC. L. CTR., FUNDING, FORMULAS, AND FAIRNESS: WHAT PENNSYLVANIA CAN LEARN FROM OTHER STATES' EDUCATION FUNDING FORMULAS 11 (Feb. 2013).

Figure 2¹²¹

| Local Share Calculation: Personal Wealth or District Federal Adjusted Gross Income (40% of the 2.25% local capacity) | | |
|---|--|----------------|
| Item | Formula/Description | Example |
| Total Federal Adjusted Gross Income (FAGI) | This number is obtained by adding up all of the adjusted gross incomes from resident's federal tax returns | \$187,000,000 |
| Federal Adjusted Gross Income (FAGI) per Pupil | $\frac{\text{Total Federal Adjusted Gross Income}}{\text{Number of Pupils}}$ | \$194,995 |
| Per Pupil FAGI Share | FAGI Per Pupil x (20% of .0225) OR FAGI Per Pupil x .0045 | \$877 |
| Median FAGI of District | This number is obtained by finding the median of all resident's FAGI | \$32,876 |
| Number of Income Tax Returns | This is the total number of federal returns filed within the district | 4,091 |
| Median FAGI Per Pupil | $\frac{\text{Median FAGI} \times \text{No. of Tax Returns}}{\text{Number of Pupils}}$ | \$140,246 |
| Median FAGI Per Pupil Share | Median FAGI Per Pupil x (20% of .0225) | \$631 |
| TOTAL PERSONAL WEALTH CONTRIBUTION | FAGI per pupil share + Median FAGI per pupil share | \$1,509 |

Both the gross and the median income values for the district are given equal weights, or 20%, of the overall 40% weight on the district's given income. By taking both gross and a median income into account, the resulting values are more representative of the district's true economic circumstances, while also considering outlier values that nonetheless play

121. Microsoft Excel Spreadsheet, *supra* note 4.

an important role in categorizing the district's wealth. Combining the property value share from Figure 1 (\$2,323) and the total personal wealth contribution in Figure 2 (\$1,509), this hypothetical district's local capacity would be \$3,832 per pupil.

This shift to income-centric factors in the funding formula is a necessary update to Ohio's educational funding approach. Considering additional demographic data creates a more complicated formula, but also controls for more externalities. In a 2013 report on the state of Pennsylvania, the Education Law Center conducted a detailed analysis of all fifty states' various education formula factors.¹²² Their study identified ten main factors that recur throughout the country, ranging from an accurate student count in a given district to a weight factor for English-language learner students.¹²³ The study provided that three states (Alabama, California, and Michigan) controlled for two factors; two states (Ohio and Delaware) controlled for just one factor; and two states (Pennsylvania and North Carolina) controlled for zero factors.¹²⁴ The Center's conclusion was that Pennsylvania's funding formula "was now obsolete" after comparing it to the approaches of the rest of the country—a conclusion that would likely be echoed for Ohio, whose only funding factor (accurate student count) was shared by forty-seven other states.¹²⁵ Accurate student count was also the only factor in Ohio's formula at the time of the *DeRolph* litigation.¹²⁶

Cupp-Patterson utilizing additional factors for Ohio's funding formula serves as a central response to the Ohio Supreme Court's charge to break from a reliance on property taxes. The plan seeks to capture a district's local capacity more accurately by controlling for income levels

122. EDUC L. CTR., *supra* note 123.

123. *Id.* at 11.

124. *Id.*

125. *Id.* Importantly, though, inclusion of these factors has not proven to appease a state's parents. New York and Texas, whose state legislatures represent two distinct political persuasions, include all ten factors in their funding formulas. *Id.* However, both states have faced current and pending legal challenges concerning the constitutionality of their funding formulas. See Aliyya Swaby, *Texas' School Finance System is Unpopular and Complex: Here's How it Works*, TEX. TRIB. (Feb. 15, 2019), <https://www.texastribune.org/2019/02/15/texas-school-funding-how-it-works/> [perma.cc/F5Y6-RK9G]; Cynthia Nixon, *In Two Phone Calls, I Learned Just Who Counts in New York*, N.Y. TIMES (Sept. 15, 2020), <https://www.nytimes.com/2020/09/15/opinion/cynthia-nixon-new-york-schools.html> [perma.cc/ZR7D-65NN]. While the factors highlighted by the Education Law Center alone seem to not be enough to ensure constitutionality, it is worth further noting that both a Republican and a Democrat-dominated state legislature have enacted all ten factors. Thus, such a prioritization (or lack of prioritization) cannot necessarily be explained away through a partisan lens.

126. *DeRolph I*, 677 N.E.2d at 738.

in any given district. But as the Education Law Center pointed out in 2013, there are many more factors at a state's disposal.

Two specific factors that would substantially benefit Ohio schools are weighted factors for students with disabilities and English-language learner (ELL) students. During the Center's 2013 study, twenty-five states included a weighted factor for disabled students, and twenty-four included a weighted factor for ELL students.¹²⁷ Including a weighting function for a district's disabled and ELL students is yet another step that will be required to provide a thorough and efficient education for all of Ohio's students. It is important to understand that not every student operates at the same level and therefore cannot be funded at the same level. Lawmakers should keep in mind the added costs associated with the education of these two subsets of a district's enrollment and, more broadly, that every district in the state is unique. The more factors included capturing these unique characteristics, the better.

While including these more nuanced factors would be a greater step toward equity, including *any* factor is a step in the right direction for Ohio's students. Cupp-Patterson's introduction of income-based factors will hopefully catalyze future factor inclusion. One of the plan's other strong suits, though, is the creation of a commission tasked with making these sorts of updates to the funding overlay.

2. Cupp-Patterson provides for the creation of a new review commission, which will make on-the-fly revisions to the state funding formula.

Partisan politics can prove especially problematic during funding discussions; lobbying efforts and differing political goals precipitate gridlock when money is being allocated. The Ohio General Assembly approves the state's budget every two years.¹²⁸ As such, the funding formula adopted by the state controls for the following two years. This rigid structure does not allow for adaptable funding or amendments to school funding.

For some budgetary items, two years is not an unusually long time before reconsidering funding, but education poses some unique considerations that need to be addressed quickly. The best contemporary example is the added technology expenditures resulting from the ongoing

127. EDUC. L. CTR., *supra* note 123.

128. OHIO REV. CODE § 126.022 (2019).

COVID-19 pandemic.¹²⁹ Districts were forced to conduct the last third of the 2019–2020 academic year remotely in response to the COVID-19 pandemic, with restrictions continuing into the 2020–2021 school year as well.¹³⁰ Schools responded by providing students additional resources to continue the school year, but these provisions came with hefty price tags. For example, the Cincinnati Public School District estimated that the COVID-19 pandemic cost the District an additional \$35 million in 2020.¹³¹ Of this \$35 million, \$8 million has been spent to ensure that the district has enough substitute teachers, with the other \$27 million relating to the unanticipated costs of remote learning.¹³² All of Ohio’s schools have felt these same challenges. And as currently constituted, the funding formula cannot accommodate these changed circumstances.

Enter the Funding Oversight Commission created under § 3317.64 of the Cupp-Patterson funding plan. The Commission is tasked with numerous directives, each requiring it to serve as the analytical and advisory arm of the General Assembly to implement and adjust the funding formula.¹³³ This primary focus will afford the General Assembly a partner in pursuing adequate funding for Ohio’s schools. The Commission can evaluate progress and propose real-time adjustments as schools face different challenges.

The Commission is also tasked with conducting further studies, compiling further datasets, and assessing the overall impact of the funding directives passed by the General Assembly.¹³⁴ In delegating these responsibilities to the Commission, the General Assembly created a body that will delve deeper into school funding questions and return alternatives and factual findings to the General Assembly. The members of the General Assembly will thus be able to rely on the Commission, rather than their staff, to inform them about the current climate in the state concerning school funding.

129. Interview with Ryan Pendleton, *supra* note 117. Pendleton provided that this example has been one of the drafter’s main talking points concerning the inherent benefits of the Commission.

130. Jackie Borchardt & Jessie Balmert, *Coronavirus in Ohio: Schools to Close For 3 Weeks*, CINCINNATI ENQUIRER (Mar. 12, 2020), <https://www.cincinnati.com/story/news/2020/03/12/coronavirus-ohio-governor-mike-dewine/5031954002/> [perma.cc/J99J-GHWX]; Chris Anderson, *Nearly 300,000 Students Can’t Go to School in Person*, 19 NEWS (Oct. 20, 2020), <https://www.cleveland19.com/2020/10/20/nearly-ohio-students-cant-go-school-person-we-owe-it-these-kids-fight-back-against-this-virus/> [perma.cc/3YGN-UU92].

131. Chris Birkmeyer, *Coronavirus’s Cost to Cincinnati Public Schools Reaches \$35 Million, Official Says*, CINCINNATI ENQUIRER (Sept. 10, 2020), <https://www.bizjournals.com/cincinnati/news/2020/09/10/cps-treasurer-details-cost-of-pandemic.html> [perma.cc/2C2U-GA3U].

132. *Id.*

133. H.B. 305, 133 Gen. Assemb., Reg. Sess. (Ohio 2020) (citing § 3317.64(A)).

134. *Id.*

With these two directives aside, the Commission's greatest strength is its membership. The Commission comprises nineteen members: two members of the Ohio House of Representatives; two members of the Ohio Senate; three school superintendents; three school treasurers; three parents; three teachers; and three school board members.¹³⁵ The House and Senate must appoint one member from each party, and the school superintendents and treasurers must represent a combination of urban, suburban, and rural districts state-wide.¹³⁶ As currently drafted, no firm procedure is provided concerning the appointment of the parent, teacher, and school board members. The voices convened in this Commission will be supremely qualified to make the necessary recommendations to the General Assembly to afford better outcomes for Ohio's students. Cupp-Patterson's drafters undertook an apparent effort to provide a voice for the professionals that deal with the problems associated with school funding every day. This voice will resonate far louder than a lobbyist or a political staffer presenting problems that seem far-away and intangible to the politician that is left to make the policy decision.

Providing an opportunity to amend and adapt the funding formula on the fly and providing a voice to the professionals on the frontline of education issues, serves as one of the brightest directives proposed in the Cupp-Patterson plan. Phillis provided that this ability to "study and adapt should be viewed as one of the most beneficial aspects to Ohio's students" because an adequate education is evolving every year.¹³⁷

However, it remains to be seen how vital the observations and recommendations of the Commission will be viewed. The language of HB 305 does not provide the Commission with any legislative or regulatory powers, instead requiring that the Commission "make recommendations to the General Assembly to ensure" that the requirements of HB 305 are being implemented.¹³⁸ This language leaves open the possibility that the benefit of providing a voice to the fact-finding Commission might not be felt through the ability of the General Assembly to ignore the recommendations that they are provided. Without firmer language or true oversight powers, the Commission might turn into a figurehead rather than a body that can hold the General Assembly accountable. While the General Assembly must not wholly delegate its legislative authority to the Commission, a member of the Commission could be provided a seat on the House's Primary and Secondary Education Committee. Tying the

135. *Id.* (citing § 3317.64(B)(1)).

136. *Id.*

137. Interview with William Phillis, *supra* note 42.

138. H.B. 305, *supra* note 136.

Commission's voice into the legislative hierarchy of the Ohio House would seek to ensure that one of HB 305's largest strengths is not subverted by the very politicians that have previously failed to prioritize school funding.

3. The Cupp-Patterson drafters have proven responsive to public criticism.

As is the case with any proposed change, the initial draft of the Cupp-Patterson plan garnered serious backlash from educators and politicians alike. One of the central critiques was that urban districts were not seeing the promised gains in funding under the Cupp-Patterson formula when real-world values were entered into the plan's framework.¹³⁹ One of the main reasons for this discrepancy was how the original Cupp-Patterson formula counted charter school and private-voucher students. Under the original model, these two subsets of a district's population were removed: only the students attending the district factored into a given district's income wealth per pupil.¹⁴⁰ What resulted was the removal of thousands of students from the equation, making a given district look far wealthier than it truly was.¹⁴¹ This disparity between the plan's goals and outcomes was seen as a potential reason for its exclusion in the 2020–2021 biennial budget.¹⁴²

The plan's drafters responded to this critique, though, and a revision to the plan introduced a metric called Tier Three Targeted Assistance to control the identified problem.¹⁴³ In the past, targeted assistance was used to assist districts with lower capacities to raise local revenue compared to other districts throughout the state.¹⁴⁴ The Cupp-Patterson drafters introduced this same idea into the funding scheme to correct for instances where students were removed from a district's per-pupil count.¹⁴⁵

139. *See, supra* note 31, at 1282–83; Jim Siegel, *Education Experts Weigh Pros and Cons of New Ohio School-Funding Plan*, COLUMBUS DISPATCH (Apr. 9, 2019), <https://www.dispatch.com/news/20190409/education-experts-weigh-pros-and-cons-of-new-ohio-school-funding-plan/1> [perma.cc/US8S-FUWN].

140. *Id.*

141. *Id.* For example, if a given district had \$25 million in income wealth, its wealth per pupil would look very different if only 3,300 students were counted in the formula (\$7,575.76 per pupil) compared to 2,800 students (\$8,928.57 per pupil).

142. *See, supra* note 31, at 1283.

143. Interview with Ryan Pendleton, *supra* note 117.

144. LEGISLATIVE BUDGET OFFICE: OHIO LEGISLATIVE SERVICE COMMISSION, SCHOOL FUNDING COMPLETE RESOURCE 18 (Feb. 2019).

145. Interview with Ryan Pendleton, *supra* note 117. Pendleton provided that the drafters identified the problem in the formula for the top twenty districts concerning enrollment, which are

The inclusion of the Oversight Commission provides a built-in mechanism to correct for future discrepancies or anomalies as well. While criticism will abound concerning any proposed legislation, the inclusion of the Commission provides for speedy adaptations and solutions that a normal piece of legislation lacks. The drafters' creation of the Commission will provide a mechanism for hearing these similar critiques and responding effectively instead of requiring entirely new proposals to be created.

C. *The Political Battle That Remains*

Legislative solutions require legislative action, and such action might not be seen for the Cupp-Patterson proposal, even though it could revolutionize school funding for Ohio's students. The Bill, which had sixty-six cosponsors in the Ohio House, passed the House with a vote of eighty-seven to nine on December 3, 2020.¹⁴⁶

The resounding support in the House, though, was not echoed within the Senate. In a message to his colleagues, Rep. Jamie Callender (R) provided the following:

My entire career has been overshadowed by a ruling that our school-funding system was unconstitutional. But in all of that time, twenty-seven years, this is the first time there has been a bill on this floor that universally is acknowledged as meeting the constitutional requirements. Twenty-seven years. That's a long time.... [But] [i]t may not pass the Senate.¹⁴⁷

The Senate failed to vote on HB 305 before the end of the General Assembly's term on December 31, 2020, which will require the Bill's reintroduction at the start of the next General Assembly in 2021.¹⁴⁸ Numerous senators commented on the unknowns, citing the possibility of a higher price tag than anticipated due to further studies that still need to

predominantly located in the urban centers of Ohio. This reality then necessitated the inclusion of the Tier Three Targeted Assistance factor.

146. THE OHIO LEGISLATURE, HOUSE BILL 305, <https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA133-HB-305> [perma.cc/PQK3-TFEE] (last visited Mar. 10, 2021).

147. Anna Staver, *Ohio Senate Won't Consider School-Funding Plan This Year That Was Ok'd 84-8 by House*, COLUMBUS DISPATCH (Dec. 3, 2020), <https://www.dispatch.com/story/news/education/2020/12/03/ohio-house-passes-new-k-12-funding-formula-but-senate-may-kill-measure-to-make-system-constitutional/3810589001/> [perma.cc/VYQ5-R8V4].

148. Carissa Woytach, *Ohio House Passes Revamp to School Funding*, CHRONICLE-TELEGRAM (Dec. 4, 2020), <https://chroniclet.com/news/243772/ohio-house-passes-revamp-to-school-funding/> [perma.cc/3R7G-GXRQ].

be completed concerning the proposal's costs.¹⁴⁹ Further, the uncertainty around state revenues amid the COVID-19 pandemic cautioned some senators to postpone a vote until considering the next biennial budget for 2022–2023.¹⁵⁰

On the surface, the disconnect between the Ohio House and Senate does not appear to be due to partisan reasons. While the Ohio General Assembly has been dominated by Republicans for over a decade, the bill received bipartisan support from the House's sixty-six cosponsors. The final vote saw support from fifty-one out of sixty Republicans and thirty-six out of thirty-six Democrats.¹⁵¹

However, there is a possibility that Ohio Republicans exhibited a bit of political gamesmanship while handling the Cupp-Patterson proposal. House Republicans, knowing the position of their party members in the Senate, might have voted for the proposal knowing it would not clear the upper chamber of the General Assembly. All ninety-nine seats in the Ohio House were up for reelection during the November 2020 election,¹⁵² with only sixteen of the thirty-three seats up for reelection in the Ohio Senate.¹⁵³ House Republicans might have supported the proposal in a bid to save face in their reelection campaigns, with the same concerns not present in the Ohio Senate where the party could not lose their majority control in 2020. Furthermore, Governor DeWine's treatment of school funding has effectually mirrored his predecessor, Governor Kasich.¹⁵⁴ Knowing the stance of Senate Republicans and Governor DeWine, House Republicans might have felt that there was no need to fall on the sword right before their reelection bid. While this is only speculation, such a decision would seem more strategic and logical than pure conjecture considering the magnitude and expectations surrounding the November 2020 election. The Ohio Republican Party may have wished simply to play it safe.

Regardless of the House Republicans' motivations, the outgoing Ohio Democratic Chair, David Pepper, felt the Senate's decision was political: "whenever gun lobbyists or anti-abortion groups have a priority bill, their lapdogs in the Ohio General Assembly figure out how to move

149. Staver, *supra* note 150.

150. *Id.*

151. OHIO LEGISLATURE, *supra* note 149.

152. BALLOTPEDIA, OHIO HOUSE OF REPRESENTATIVES ELECTIONS, 2020, https://ballotpedia.org/Ohio_House_of_Representatives_elections,_2020 [perma.cc/7EDJ-USL2] (last visited Mar. 10, 2021).

153. BALLOTPEDIA, OHIO SENATE ELECTIONS, 2020, https://ballotpedia.org/Ohio_State_Senate_elections,_2020 [perma.cc/QH72-MK5Y] (last visited Mar. 10, 2021).

154. *Id.*, *supra* note 31, at 1276.

legislative mountains. Now that it's Ohio kids who need help, GOP leaders in the state Senate can't even bring up the bill for a vote."¹⁵⁵ Representative Fred Strahorn (D) viewed the failure to take a vote in the Senate as not about money, but rather "about us not having the political will to do what's right for our children."¹⁵⁶ Incoming Senate President Matt Huffman (R) seemed to suggest that failing to conduct a vote was purely a result of poor timing; the prospect of passing a bill in two weeks up against the end of the General Assembly session was not great.¹⁵⁷ Regardless of the reason, if HB 305 is to become Ohio law, it will need to clear the Ohio House and Senate in 2021 and be signed into law by Governor DeWine.

There might be an even clearer explanation for the Senate's inaction following the passage of HB 305 in the Ohio House. Incoming Senate President Huffman has championed a different approach to education reform known as the EdChoice private-school voucher program.¹⁵⁸ The central idea of the program is to provide a voucher to any student attending a district that is deemed to be underperforming, therefore granting the student the opportunity to afford private school tuition.¹⁵⁹ A student's district must provide this voucher to any student that requests one if two criteria points are met: at least 20% of the district's students are eligible for Title 1,¹⁶⁰ and the district is in the bottom 20% of Ohio's school performance index.¹⁶¹ Both the Ohio House and Senate passed this voucher program in less than twenty-four hours on November 18–19, 2020.¹⁶² While the substantive policy points behind this program are widely criticized throughout the state,¹⁶³ they are not relevant to the

155. Staver, *supra* note 150.

156. *Id.*

157. *Id.*

158. Jeremy Pelzer, *Huffman's Revamped School-Voucher Program Passes State Senate*, LIMA OHIO.COM (Nov. 19, 2020), <https://www.limaohio.com/news/436973/huffmans-revamped-school-voucher-program-passes-state-senate> [perma.cc/AYS3-J8KA].

159. *Id.*

160. *Id.* Title 1 refers to a federal program that offers federal funding for students that come from low-income backgrounds.

161. *Id.* The school performance index is based a district's test scores from the past two school years.

162. William L. Phillis, *Column: Shame on the Ohio Senate for Failing Kids Again*, COLUMBUS DISPATCH (Dec. 24, 2020), <https://www.dispatch.com/story/opinion/columns/2020/12/24/column-shame-ohio-senate-failing-kids-again/3961902001/> [perma.cc/ZW34-BZJP].

163. Darrel Rowland, *Group That Won Ohio School-Funding Suit Now Challenging Vouchers for Private Schools*, COLUMBUS DISPATCH (May 14, 2020), <https://www.the-daily-record.com/news/20200514/group-that-won-ohio-school-funding-suit-now-challenging-vouchers-for-private-schools> [perma.cc/FZ8X-8MBT]. In May 2020, Phillis and the Ohio Coalition for Equity & Adequacy of School Funding announced a new lawsuit challenging Ohio's new school voucher

current discussion. What is relevant, though, is that Senator Huffman's education reforms might remain the priority as the new session of the General Assembly begins. Huffman has been singled out over the Senate's failure to cast a vote before the end of the session—he was gifted a lump of coal and a failing report card by Public Education Partners, a national public education advocacy association.¹⁶⁴ Interestingly, Senator Huffman is also replacing Senator Larry Obhof (R) as President of the Ohio Senate. Senator Obhof, an attorney with Squire Patton Boggs in Columbus, Ohio, published a review of the *DeRolph* decisions and Ohio's quest to provide an adequate education during a School Finance Litigation seminar he attended at Yale.¹⁶⁵ Unfortunately, it seems as though HB 305 might have arrived at the Ohio Senate just a year late.

With Senator Huffman's priorities clear, it will be vital to continue the pressure to ensure that the Cupp-Patterson proposal gets the attention it is due in the Ohio Senate. The COVID-19 pandemic did not stop the business of the General Assembly during 2020, but concerns over budgetary shortages and possible cuts will remain real concerns for government and businesses alike as society hopefully breaks out of the pandemic in 2021.

Whatever the reason, motivation, or agenda, it is unfortunate that HB 305 has been kicked back a peg by the Ohio Senate. While the inherent reasons can easily be viewed as political, hopefully the one-hundred thirty-fourth General Assembly will act quickly and pass the legislation in the coming months. Representative Patterson, one of HB 305's main authors and proponents, was term-limited in the Ohio House in 2020.¹⁶⁶ His powerful and veteran voice will no longer be heard within the General Assembly, and unfortunately, he saw his term end without a sound resolution to one of the largest pieces of legislation throughout his

program. What was passed in November was an updated version of the program; a version that the Coalition still views as unconstitutional, though.

164. PUBLIC EDUCATION PARTNERS, PUBLIC EDUCATIONS PARTNERS: YEAR IN REVIEW 2020, <https://publiceducationpartners.org/2020/12/29/public-education-partners-year-in-review-2020/> [perma.cc/PQV2-VJCQ]. Public Education Partners has served as a strong partner with the Ohio Coalition for Equity & Adequacy of School Funding, the organization headed by William Phillis. Public Education Partners and the Cincinnati Federation of Teachers hosted an event in front of the Ohio Statehouse where they delivered stockings full of coal while playing and singing holiday songs for the "Statehouse Grinches." The event also circulated a petition calling for the speedy passage of HB 305 in 2021.

165. See Larry J. Obhof, *DeRolph v. State and Ohio's Long Road to an Adequate Education*, 2005 B.Y.U. EDUC. & L.J. 83 (2005).

166. BALLOTEDIA, JOHN PATTERSON (OHIO), [https://ballotpedia.org/John_Patterson_\(Ohio\)](https://ballotpedia.org/John_Patterson_(Ohio)) (last visited Mar. 10, 2021) [perma.cc/2486-AXK9].

extensive political career. With his departure, and Senator Huffman's appointment as President of the Senate, the future of HB 305 is uneasy.

The onus now must fall on Ohioans throughout the state to recognize the clear problem that is school funding. Education issues seem to garner less press and stir less outcry from the masses, but they are problems that are faced by every citizen. The way Ohio funds its schools is unconstitutional, and Ohioans must hold their legislators accountable for their persistent inaction in crafting a workable solution. If the state does not require action from lawmakers in Columbus, Ohio's students might not see change for another decade to come. Democracy cannot tolerate persistent unconstitutionality, no matter the issue. Ohio deserves better.

IV. CONCLUSION

Young Nathan DeRolph, the middle schooler from the Northern Local School District that did not have a chair to sit in during class, provided his name for the pursuit of an adequate and equitable education for all of Ohio's students. William Phillis and the Ohio Coalition for Equity & Adequacy of School Funding fought for students like DeRolph throughout Ohio, and their efforts yielded positive results. The Ohio Supreme Court, in four separate decisions, reaffirmed that the way Ohio funded its schools was unconstitutional. This decree has been met with silence in Columbus, though, and remains a widely unknown issue throughout Ohio.

The first success for Mr. DeRolph might come through the passage of HB 305. The introduction of wealth-centric factors and the creation of the Education Oversight Committee are steps in the right direction under the Ohio Supreme Court's *DeRolph* decisions. What remains, though, is a massive hurdle. Partisan politics and possible budgetary concerns might push school funding reform off yet again. Legislators will remark that the delay is only temporary, and their attention will return as soon as normalcy can return. But such language communicates the reality that has been apparent for the past twenty-four years: education is not a flashy political priority on which a politician can couch reelection.

The battle has been fought, articles have been written, and Mr. DeRolph is now working in the mortgage industry.¹⁶⁷ The *DeRolph* rulings that were the source of so much work and devotion have begun to collect dust. Will Ohio ever provide a constitutional funding formula for its schools? Will state legislators ever decide to prioritize education

167. Nate DeRolph, LINKEDIN (Mar. 10, 2021), <https://www.linkedin.com/in/nate-derolph/perma.cc/TV2U-5CVM>].

reform? Hopefully, these questions will receive definitive answers in 2021. The bill has already been written; all that's left is to sign it.

V. EPILOGUE – A HALF-HEARTED SOLUTION

In June of 2021, a piecemeal version of the Cupp-Patterson proposal was included in the biennial budget by the one-hundred thirty-fourth Ohio General Assembly.¹⁶⁸ Representative Cupp, now Speaker of the Ohio House, provided that almost everything from the Cupp-Patterson proposal was included in the budget.¹⁶⁹ This phrasing was not echoed by former Representative Patterson, who was term-limited in 2020: “There are a few things that were not included.”¹⁷⁰ These “few things” are far from insignificant—the General Assembly struck the Funding Oversight Commission and the funding required for funding formula’s underlying input cost studies from the proposal.¹⁷¹

While the General Assembly took a step in the right direction in 2021, the root of the problem remains unresolved. Cupp-Patterson’s greatest strength was its flexibility; providing opportunities to amend and review funding decisions when necessary ensured a focus on positive outcomes rather than temporary compliance. The updated funding formula is a better alternative to its predecessor, but removing the formula’s foundation is troubling. The drafters included collaborative and adaptive measures for a reason—no formula with continuously changing inputs can be relied upon to afford positive outcomes. Until the General Assembly adopts measures that recognize educational funding as a moving target, true success will not be realized. Adequacy and equity were again pushed off for another day.

168. Brian Haytcher, *Version of Fair School Funding Plan Included in Final State Budget Bill*, STAR BEACON (Jun. 30, 2021), https://www.starbeacon.com/news/local_news/version-of-fair-school-funding-plan-included-in-final-state-budget-bill/article_23ec9470-9234-5a89-be5d-97e96ea71c6f.html [perma.cc/5QN2-8BY2].

169. *Id.*

170. *Id.*

171. *Id.*