

IN THE COURT OF APPEALS
TENTH APPELLATE DISTRICT
FRANKLIN COUNTY, OHIO

COLUMBUS CITY SCHOOL DISTRICT, et al.,) Case No. Consolidated Case Nos.
Plaintiffs-Appellees and Cross Appellants,) 25AP-603
v.) 25AP-604
STATE OF OHIO, et al.,) 25AP-605
Defendants-Appellants.))
) Regular Calendar
)
) On appeal from the Franklin
) County Court of Common Pleas
) Case No. 22-cv-000067
)

REPLY BRIEF OF PLAINTIFFS-APPELLEES/ CROSS-APPELLANTS IN SUPPORT OF CROSS-APPEAL

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I. Introduction

In sixty-five pages of combined briefing, neither the State nor the Intervenors (“Defendants”) answered this fundamental question: What is the legitimate government interest requiring Ohio to not only fund private education, but to fund it **at as much as 3-4 times** what it sends for Plaintiff Students’ schooling?

There is no rational reason for this inequity, so Defendants resort to challenging standing, offering misleading comparisons, and distorting data. This Reply Brief addresses each of the above. First, however, Plaintiffs address Defendants’ impermissible novel arguments on appeal.

II. Novel Arguments Are Impermissible on Appeal.

Evidence and arguments not presented to the trial court cannot be considered on appeal. *East v. McGhee*, 2017-Ohio-7619, ¶6 (10th Dist.) (new evidence not permitted on appeal); *Nunn v. Ohio Dept. of Ins.*, 2018-Ohio-4030, ¶11 (10th Dist.) (new arguments not permitted on appeal).

However, Defendants’ briefs are riddled with novel arguments and new factual allegations never presented to the trial court. For example:

- The State cites a 2025 post-MSJ newspaper article alleging Richmond Heights is trying to fix its boilers. (State Brief, p.14.)
- The State offers new factual allegations that Cleveland Heights-University Heights (“CH-UH”) received state funding ten years ago for its high school. (*Id.*, p. 21)
- The State offers new arguments claiming that the EdChoice payments to private schools remain fixed because any other option is “laborious and involves policy judgments” and that this facilitates local self-governance. (*Id.* pp.26-27.)
- The Boggs Intervenors present an entirely novel argument, claiming that Plaintiff Students are not similarly situated to their private school counterparts specifically because the former opted for public education. (Boggs Intervenors’ Brief pp. 3-14.)
- The Boggs Intervenors posit a novel justification for the exorbitant EdChoice payments: Public school is already free but private school costs money, which the state tries to pay “in amounts roughly proportional to the tuition.” (*Id.* pp. 14, 19-26.)

Defendants do not cite any source in the record for any of the above, because these are all new arguments and novel factual allegations. This Court must disregard them entirely because the trial court has not been given the opportunity to consider these contentions. For the most part, this disposes of the Intervenors' brief. Plaintiff Students, however, address all Defendants' arguments below.

III. Standing

The State Defendants misrepresent case law regarding traditional standing and omit standing under the Declaratory Judgment Act entirely. Traditional standing requires an injury fairly traceable to defendants' conduct and likely to be redressed by the requested relief. *Ohioans for Concealed Carry, Inc v. City of Columbus*, 164 Ohio St.3d 291, 2020-Ohio-6724, ¶12.

Declaratory relief, however, requires less: a real controversy, justiciability, and the need for speedy relief to preserve the parties' rights. *Id.* at 299. Moreover, the Ohio Supreme Court has warned that standing is not a technical rule intended to keep aggrieved parties out of court. *Moore v. City of Middletown*, 133 Ohio St.3d 55, 2012-Ohio-3897, ¶47.

Instead, standing requirements ensure that judicial decisions are “forged in hot controversy, with each view fairly and vigorously represented.” *Id.* Courts, accordingly, are expected to be “generous in considering whether a party has standing.” *Id.*

When the government erects a barrier that prevents a particular group from obtaining a benefit, that barrier itself – the denial of equal treatment – *is* the injury in fact. *Northeastern Florida Chapter of Associated Gen. Contrs. of Am. v. City of Jacksonville*, 508 U.S. 656, 666, 113 S.Ct. 2297, 124 L.Ed.2d 586 (1993). Moreover, where plaintiff students show a lack of teachers, buildings, or materials, courts find these to be concrete, particular and actual injuries satisfying standing. *See e.g.* *Gary B. v. Snyder*, 329 F. Supp. 3d 344, 355 (E.D. Mich. 2018).

Here, Plaintiff Students meet the requirements for both traditional and declaratory judgment standing. The undisputed evidence shows that the state of Ohio funds Chase and Savannah’s education at \$1,530 per year, while sending \$6,166 to EdChoice schools for their fellow Richmond Heights residents’ private school educations. (R.004268, Ex. O to Ps’ MSJ, *Second Admissions* No.93.) Likewise, in FY 2024 the state

allocated only \$2,600 for Malcom and Fergus while funding Cleveland Heights private high school students at \$8,408 annually. (R.004269, Ex. O No. 99). This unequal treatment is the injury itself, an unconstitutional harm that would be entirely eliminated by enjoining EdChoice.

Although the above satisfies standing, Plaintiff Students also explained how their education is affected by disparate treatment. (*Brief in Support of Cross Appeal*, pp.11-12.) Malcolm and Fergus are forced to learn in overcrowded classrooms because EdChoice led to District-wide layoffs and reductions to curricular and extracurricular activities. (*Id.*) Their buildings need masonry and roofing repairs that this district cannot afford. (R.004908, Ex. AA, *Gainer Affidavit ¶¶* 12-13.) Chase and Savannah attend school in a building with a leaking roof and deficient boilers.¹ (*Brief in Support of Cross Appeal*, pp.11-12.) They have virtually no afterschool programming now and will not be able to take in-person

¹ In its novel claims, the State highlights the District's efforts to repair boilers. Should the Court wish to take any notice, it may first consider that this district faces fiscal emergency after its third levy request failed. <https://www.yahoo.com/news/articles/richmond-heights-schools-faces-future-045900938.html>

foreign language classes in middle school. (*Id.*) Because state funding is inadequate, these children’s materials and curricula depend on what outside grants administrators may secure in any particular year. (*Id.*)

The State cites *Walgate* and *Toledo* to support its standing arguments, but they are irrelevant. Unlike the instant case, the *Walgate* Plaintiffs included parents and teachers, but **not** directly affected students. *State ex rel. Walgate v. Kasich*, 147 Ohio St.3d 1, 2016-Ohio-1176, ¶32. Similarly, in *Toledo*, this Court held that plaintiff parents lacked standing “based solely on their status as taxpayers” and should have alleged denial of specific educational opportunities instead. *Toledo City School Dist. Bd. of Edn. v. State Bd. of Edn.*, 2014-Ohio-3741, ¶57 (10th Dist.).

In contrast, Plaintiffs here are students, not parents or taxpayers. Not only have Plaintiffs presented uncontested evidence of disparate treatment by the state, they have also demonstrated how this affects their educational experiences, including impacts on teachers, buildings, and materials. *See Snyder*, 329 F. Supp. 3d at 355.

School districts cannot assert equal protection claims against the state. *Avon Lake City School Dist. v. Limbach*, 35 Ohio St.3d 118, 122

(1988). Thus, if Plaintiff Students lack standing, **no one could ever have standing** to assert this discrimination claim. This Court cannot endorse such an unjust result and must reject the State's meritless assertions.

IV. Plaintiff Students' Requested Remedy

Defendants repeatedly challenge Plaintiffs' requested remedy, both in the standing context and generally. (State Brief, pp. 2,6, 8.) However, they cannot dispute that ending EdChoice would end the discriminatory treatment challenged in Count V. Plaintiff Students do not seek a transfer of foundation funding or monetary damages; instead, they ask only that the Court enjoin the funding of the EdChoice program as unconstitutional.

To that end, Appellate Rule 12(B) allows this Court to grant summary judgment to Plaintiff Students, an appropriate outcome given that Defendants failed to demonstrate genuine disputes of material fact for trial. *Houk v. Ross*, 34 Ohio St.2d 77, 80 (1973). Stated differently, this Court is authorized not only to deny Defendants' summary judgement motion, but also to grant summary judgment to Plaintiff Students instead. This outcome would fully redress Plaintiff Students' equal protection claim because it would end the disparate treatment at issue.

Summary judgment for Plaintiff Students is especially appropriate if this Court applies strict scrutiny. As Defendants note, the *Walter* Court did not apply this standard, because that litigation was about taxation and fiscal planning, not “a challenge to the way in which Ohio educates its children.” *Bd. of Edn. v. Walter*, 58 Ohio St.2d 368, 376 (1979). But this case is just that: a challenge to the way Ohio educates its children. Thus, the Court should find that education is a fundamental right under the Ohio Constitution and apply strict scrutiny.

However, the outcome is identical if this Court opts for rational basis review. Simply put, Defendants offer only half-baked justifications that never answer the central question: Why doesn’t the state pay the same per-pupil amount for private education as it does for public education? For example, why don’t EdChoice schools serving Richmond Heights residents receive \$1,530 per student from the State, like Chase and Savanna do, instead of \$6,166? And why do EdChoice high schools receive an extra two thousand dollars, for a total of \$8,408 in taxpayer funds, when Malcolm and Fergus receive no bonus in any amount for high

school? As outlined below, Defendants fail to answer these questions meaningfully, much less offer genuine issues of material fact for trial.

V. Defendants' Justifications Do Not Create Genuine Issues of Material Fact for Trial.

A. Defendants' justifications fail to carry their burden under rational basis review, much less strict scrutiny.

To support an equal protection claim, a party must show that the government is treating similarly situated persons differently. *Northville Downs v. Granholm*, 622 F.3d 579, 586 (6th Cir.2010). Distinguishing comparators as not similarly-situated requires a showing of differences that justify the disparate treatment. *See e.g. Mitchell v. Toledo Hosp.*, 964 F.2d 577, 583 (6th Cir.1992); *Brehm v. Macintosh Co.*, 2019-Ohio-5322, ¶39 (10th Dist.).

In analyzing equal protection claims under rational basis review, courts: (1) identify a valid state interest; and (2) determine whether the method chosen by the state to advance this interest is rational. *State v. Mole*, 149 Ohio St.3d 215, 2016-Ohio-5124, ¶27. Importantly, to survive a challenge, the government's classification must bear a rational relationship to the identified legitimate interest, or other reasonable

grounds must exist for the distinction. *Id.* Even in applying a deferential standard, defendants must demonstrate a relationship “between the classification adopted and the object to be attained.” *Id.*

Applying the above compels rejection of Defendants’ justifications. To be clear, the classification adopted here is:

- **Group A** – EdChoice students for whose education the state allocates \$6,166- \$8,408 annually, including a significant high school bonus;
- **Group B** - Plaintiff Students for whose education the state distributes only \$1,530-\$2,600 annually, with no high school bonus.

There is no valid state interest in maintaining the above classification, so Defendants’ explanations fail at the first step. The Boggs Intervenors cite Article I, Section 7, for the imaginative proposition that this provision creates an “imperative” to support private education. (Boggs’ Brief pp. 21-22.)

The Ohio Supreme Court, however, disagrees. Although the Boggs Intervenors skip over this section, Article I, Section 7, explicitly notes “that no preference shall be given, by law, to any religious society....” Ohio Const. art I, §7. The *Findley* Court relied on this very phrasing to

bar public support of private education. *Findley v. Conneaut*, 145 Ohio St. 480, 489 (1945) (“Under the above-quoted section ... a municipality is without authority to issue bonds or expend funds raised by taxation for the support or maintenance of a sectarian school.”); *Bd. of Edn. v. Minor*, 23 Ohio St. 211, 250 (1872) (“[I]f we have no right to tax him to support “worship,” we have no right to tax him to support religious instructions”).

In a similar vein, the Intervenors posit that EdChoice schools receive a bonus for high schoolers because private schools charge more for high school. (Boggs Brief, pp. 23-24.) Again, this argument was not raised below, and is impermissible on appeal. But the proposal itself illustrates the absurdity of claiming that Ohio has a valid interest in supporting private education. If private schools are entitled to a high school bonus simply by charging more for high school students, even if high school students cost no more to educate, perhaps they could also receive more taxpayer dollars by charging a premium for third graders. There is no valid governmental interest in paying *any* private school tuition; any other outcome results in the total looting of school funds by private entities. This is, in essence, a delegation of the legislature’s right to allocate State

funds to private school operators. In short, supporting private schools with public dollars violates the very constitutional provision the Intervenors cite. Because there is no legitimate reason to subsidize private education, there is no rational basis for this classification.

As for the second prong – whether the method chosen to advance this interest is rational – Defendants fare no better. The Boggs Intervenors argue that Groups A and B are not similarly situated, precisely because EdChoice students chose private education and, therefore, must pay tuition. (Boggs’ Brief, pp. 3-14.) As noted earlier, this argument is novel and impermissible on appeal. *See Nunn.*, 2018-Ohio-4030 at ¶11.

But this justification also fails because it simply doesn’t answer the question: How does this difference between these groups justify the state’s discriminatory treatment? Intervenors are correct that private schools often charge tuition while public schools generally do not. This does not explain discriminatory treatment or how this classification advances a legitimate governmental interest. *Brehm* 2019-Ohio-5322, ¶39; *Mole*, 149 Ohio St.3d 215.

At no point do Defendants explain how, even if subsidizing private tuition were a valid interest, this goal is furthered by allocating 3-4 times as much for EdChoice tuition as to Plaintiff Students. Merely claiming that vouchers are “roughly proportional” to private tuition, without any evidentiary support does not provide an evidentiary basis justifying the differential payments. Nor do they explain why EdChoice students receive a high school bonus of over \$2,000, but no such bonus is allocated for Malcom and Fergus’s schooling. Either it costs more to educate high school students, or it doesn’t. Defendants can’t have it both ways.

In contrast to EdChoice entities, community (charter) schools can never receive more per pupil funding than children attending traditional school districts. *State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Edn.*, 111 Ohio St.3d 568, 2006-Ohio-5512, ¶53. The state, in other words, knows how to support other educational entities without running afoul of Ohio’s Equal Protection clause.

The legislature ignored this in funding EdChoice, resulting in disparate treatment not justified by citing different educational choices made by private and public-school families. (Boggs’ Brief, pp. 9-10.)

Should recipients get more for choosing high-quality private schools than if they pick an awful one? Isn't that an educational choice as well? Educational choices don't change the similarity of students who live in the same districts. If Plaintiff Students' parents enrolled them in EdChoice schools tomorrow, they would be similarly situated to themselves in all relevant aspects, but for the state's disparate treatment of their educations.

To that end, the State suggests that Plaintiff Students should have submitted affidavits declaring their interest in remaining in public schools. (State Brief pp. 19-20.) This might make sense if plaintiffs alleging religious or sex discrimination were required to testify that they do not wish to convert or transition. But there are no such conditions, because requiring citizens to forfeit a fundamental right to obtain a governmental benefit impermissibly burdens that right. *Sullivan v. Benningfield*, 920 F.3d 401, 409 (6th Cir.2019).

Regardless of whether education is deemed to be a fundamental right, selecting schooling is certainly a fundamental parental choice, as the Boggs Intervenors argue in their merit brief. (Boggs' Merit Brief, pp. 73-74.) And the right to choose public education *cannot* be conditioned

on accepting 3-4 times less in per pupil funding for that education. In praising school choice, the legislature cannot punish the choice of public education, the only option it is constitutionally mandated to secure.

B. Defendants attempt to mislead this court with irrelevant comparisons and inaccurate data.

Defendants cannot dispute Plaintiff Students' unassailable evidence of disparate treatment. Instead, they attempt to distract with inappropriate comparisons, inaccurate data, and fear mongering.

Inappropriate Comparisons. Defendants repeatedly rely on non-state funding districts receive, including local, federal, and even private grants. (State Brief, pp.20-24; Boggs' Brief, pp.28-32.) The State even proposes that local funding, generated by local property taxes, be credited to its ledger! (State, pp. 23-24.)

The Court must reject these misguided attempts for three reasons: **First**, Plaintiffs would be happy to compare total public school funding (also known as “per pupil *spending*”) with total private school funding. But private schools keep their finances secret and do not share their revenues or how much they spend per pupil. (R.004720, Ex. GGG to Ps'

MSJ, *Third Admissions*, No. 26.) Because the only data both sides have about EdChoice schools is the per pupil voucher amount, the only possible comparison is between that and Plaintiff Students' per-pupil state funding.

Second, Defendants' comparisons should be rejected because they themselves cannot agree on the correct numbers. For example, the Boggs Intervenors claim that Richmond Heights and CH-UH's total funding is about \$7-\$10K more per student than the State Defendants assert. (*See* Boggs' Brief p. 29 and State Brief p. 24; *See also* R. 006747). Similarly, the Intervenors acknowledge that private schools receive an additional \$1,400 per student in state dollars (Boggs' Brief, pp.31-32), while the State ignores these funds. In other words, Defendants disagree among themselves about their own key facts; this by itself precludes summary judgment in their favor.

Finally, the Ohio Supreme Court categorically distinguishes between state and local funding: "Our state Constitution makes the state responsible for educating our youth. Thus, the state should not shirk its obligation by espousing cliches about 'local control.'" *DeRolph v. State*, 78 Ohio St.3d 193, 211 (1997). Not only does this holding preclude the

state from taking credit for local funding, it also emphasizes that the relevant analyses always focus on the *state's* obligation, the state's per pupil funding. Plaintiffs do not dispute that school districts are increasingly forced to seek help from other sources, including local taxpayers and private or public grants. (See R. 004319, Ex. V, *Brown Affidavit*, ¶14.) But these desperate measures underscore the state's failure to support public education; they do not excuse or redeem it.

Inaccurate Data: Defendants attempt to mislead this Court with inaccurate interpretations and chronologically impossible explanations. The Boggs Intervenors, for example, assert that the average EdChoice student receives \$5,630 in state funding. (Boggs' Brief, pp. 27-28.) This, the Intervenors assert, is less than the maximum voucher amount because some students receive a voucher that scales back value based on family income. But they base this conclusion on data from 2021-2022, **before** H.B.33 expanded voucher eligibility to all Ohio students, correlated voucher amount with income, *and increased voucher value.*

In 2022, a K-8 voucher was \$5,500 and a high school voucher was \$7,500; there were no maximums or minimums. (R.004307, Ex. S to Ps'

MSJ, H.B.110 Selections p.14.) The average amount that year (\$5,630) simply reflected the mix of high school and K-8 EdChoice students. Incredibly, in 2022, the state's per pupil payments to CH-UH and Richmond Heights were so low that private school residents of those districts received more in EdChoice funds than **these entire districts** received in foundation funding. (R.004249-50, Ex. O, No.2, 5.)

None of this relates to the current voucher maximums – \$6,166 and \$8,408 – that the vast majority of EdChoice students received in 2024. (R.004663, Ex. AAA to Ps' MSJ, showing that 94K students out of 127K total received the maximum amount.) In contrast, the average FY2024 per pupil state funding for public education was under \$5,000. (R.004267, Ex.O, No.87.) The Boggs Intervenors, in other words, cited 2022 data and old voucher amounts to mislead this Court about EdChoice today.

Fear mongering. Defendants resort to alarmism. The State claims, for example, that a ruling in Plaintiff Students' favor would open the door to challenge unequal per pupil funding across districts. (State Brief, pp. 22-23.) But that's precisely the equal protection claim *Walter* already decided. *Bd. of Edn. v. Walter*, 58 Ohio St.2d 368, 381 (1979).

The Intervenors go even further: Adopting Plaintiff Students' argument, they claim, would automatically entitle private school students and even homeschoolers to state funding. (Boggs' Brief, pp. 33-35.) This is silly. The government must pay only for the education it provides and supervises and should not finance any system other than the one it is constitutionally mandated to secure. (*See Plaintiff-Appellees' Merit Brief*, pp. 29-44.) But if the legislature nonetheless opts to fund other educational entities, it must follow the community school model and ensure no recipient receives per-pupil funding greater than public school students. *See Ohio Congress*, 111 Ohio St.3d 568, ¶53 (formula amount for community schools can never exceed traditional schools' funding.)

Ultimately, Defendants justify exorbitant EdChoice payments by arguing that public schools have other resources, while disregarding the "other" resources available to private schools. But there is no valid governmental interest in funding private education, much less in seeking parity between public and private resources. And without knowing what those private resources amount to, because private schools do not disclose

their revenue, Defendants simply cannot explain how the state's exorbitant EdChoice payments rationally advance any legitimate goals.

The cycle never ends: The state insufficiently funds public schools, which are then forced to seek local tax levies or apply for private grants. The state then diverts more taxpayer dollars to private entities, justifying this by citing those very same levies and grants. Thus, even less state funding is allocated for Plaintiff Students' education and the cycle continues. This is nothing more than punishing the constitutionally protected choice of public education by inequitably funding the schooling of those who choose that option. If school choice is anything more than tired rhetoric and catchy messaging, the state must value Plaintiff Students' choice equally and fund it equitably.

VI. Conclusion

The state allocates 3-4 times less for the public education of Plaintiff Students than it does for their private school counterparts via vouchers. The EdChoice program violates Article I, Section 2, of Ohio's Constitution; Plaintiff Students ask this Court to reverse the trial court and grant them summary judgment on Count V.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of January, 2026, *Reply Brief of Plaintiffs-Appellees/Cross-Appellants in Support of Cross-Appeal*, was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. I further certify that a copy of the foregoing was served by email upon the following:

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