IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF OHIO EASTERN DIVISION

JOHN DOE, et al.,	:	**Case No. 2:91-cv-464**
	:	
Plaintiffs,	:	
	:	**Judge Holschuh**
v.	:	
	:	**Magistrate Judge Kemp**
STATE OF OHIO, et al.,	:	
	:	
Defendants.	:	

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR PARTIAL DISMISSAL

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"In order to properly dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), the complaint must be successfully challenged on its face or on the factual truthfulness of its averments." *Titus v. Sullivan,* 4 F.3d 590, 593 (8th Cir. 1993). "A case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1978).

Pursuant to Federal Rule of Civil Procedure 12(b)(6) when determining the sufficiency of a complaint a court will apply the principle that "...once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 563 (2007).

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A. Plaintiffs' claims are not moot 4

Plaintiffs' claims are actionable under a "continuing violation" theory. The alleged discrimination is an ongoing and continuous violation manifested in a number of incidents, and at least one of the alleged discriminatory acts occurred within the two year statute of limitations. *Martin v. Voinovich,* 840 F. Supp. 1175, 1189 (S.D. Ohio 1993).

The cases cited by defendants have no relevance to this case. *Board of. Educ. v. Steven L*, 89 F.3d 464 (7th Cir. 1996) is clearly distinguishable from this case which alleges ongoing, systemic failures to create a system of funding to ensure FAPE and other federal rights. *See Penn-Harris-Madison, School Corp. v. Joy,* 768 N.E.2d 940, 945 (4th Dist. Ind. App. 2002).

Sanchez v. Reagan, 770 F.2d 202, 210 (D.C. Cir. 1985) has no relevance to this case because the operative effect of the legislation in question ended at the end of the fiscal year. In contrast, the *Doe* plaintiffs allege that the operative effect of the current legislation remains constant. Until the State enacts legislation that provides for full and adequate funding, plaintiffs will continue to suffer harm and their claims can not be moot.

B. Plaintiffs' claims under the IDEA against the State and Governor Strickland are proper 7

Throughout IDEA, provisions allocate responsibilities to "the State" as distinguished from those

specifically allocated to the "State educational agency (SEA)." 20 U.S.C. § 1411; 20 U.S.C. § 1407; 20 U.S.C. § 1412 (a); 20 U.S.C. § 1414 (a)(15); 20 U.S.C. §§ 1414(a)(17),(18); 20 U.S.C. § 1412 (a)(5)(B)(i); 20 U.S.C. § 1403.

The governor and the State are proper parties subject to an IDEA cause of action. *M.T.V. v. Purdue,* No. Civ. A. 1:03CV0468-A, 2004 U.S. Dist. LEXIS 29670 (N.D. Ga. Feb. 3, 2004).

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Monahan v. Nebraska, 687 F.2d 1164 (8th Cir. 1982) *cert. denied,* 460 U.S. 1012 (1983) warned against judges substituting their own judgment regarding the educational placement of the child for the judgment of educational professionals when evaluating educational decisions. *Monahan*, 687 F.2d at 1171. This heightened standard should not be applied where, as here, systemic discrimination is at issue.

It is clear that disparate impact discrimination constitutes a valid cause of action under Section 504. *Alexander v. Choate*, 469 U.S. 287, 296 (1985). Section 504 and ADA claims can be based on the discriminatory effect on children with disabilities of seemingly neutral practices and do not require a finding of intentional discrimination. *Susavage v. Bucks County Schs. Intermediate Unit No.*, 2002 U.S. Dist. LEXIS 1274 (E.D. Pa. 2002).

A disparate impact theory is actionable where plaintiffs do not challenge the professional judgment of educators; their discrimination claims do not require bad faith/gross misjudgment. *Robinson v. State of Kansa,* 117 F. Supp. 2d 1124 (2000), *aff'd, Robinson v. Kansas*, 295 F.3d 1183 (10th Cir. 2002), *cert. den.* 539 U.S. 926 (2003).

2. Even when plaintiffs seek damages, which the *Doe* plaintiffs do not seek here, deliberate indifference is sufficient to establish liability under Section 504 . 14

Even when plaintiffs bring a damages action, a showing of only deliberate indifference is required. *Mark H. v. Lemahieu*, 513 F.3d 922, 936 (9th Cir. 2008).

3. The bad faith/gross misjudgment standard lacks any statutory basis and defeats the remedial purposes of the act 14

The standard in *Monahan* insulates educational professionals from liability by requiring "extreme fault." Thomas Simmons, *The ADA Prima Facie Plaintiff: A Critical Overview of Eighth Circuit Case Law*, 47 Drake L. Rev. 761 (1999) at 823. "Much of the conduct that Congress sought to alter in passing the Rehabilitation Act would be difficult if not impossible to reach were the Act construed to proscribe only conduct fueled by a discriminatory intent." *Alexander v. Choate*, 469 U.S. 287, 296.

4. Plaintiffs have pled facts sufficient to survive a Rule 12(b)(6) motion........... 15

Plaintiffs allege with specificity how the defendants have deliberately discriminated against students them. These factual allegations are sufficient to withstand defendants' charge that plaintiffs have only offered conclusions or a formulaic recitation of the elements of a Section 504 cause of action per *Iqbal*. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009).

D. Plaintiffs' valid claims under 42 U.S.C. § 1983 are not procedurally barred ... 17

1. Defendant Strickland is not immune from plaintiffs' § 1983 claims.............. 17

Immunity from liability is an exception to the general rule, particularly as it relates to state officials and federal law under the doctrine of *Ex Parte Young*, that individuals must conform their conduct to the law. *See generally Ex Parte Young*, 209 U.S. 123 (1908).

Section 1983 would be drained of meaning were the courts to hold that the acts of a governor or other high executive officers have "the quality of a supreme and unchangeable edict, overriding all conflicting rights of property and unreviewable through the judicial power of the Federal Government." *Scheuer v. Rhodes,* 416 U.S. 232, 248 (1974).

2. The State and its agencies are amenable to suit under § 1983........................ 19

Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989) does not prohibit § 1983 claims against the State in suits like this one where plaintiffs seek only prospective injunctive relief.

E. Plaintiffs due process and equal protection claims raise significant Constitutional interests.. 20

Children with disabilities have been excluded from public education over the history of this country. *Association for Disabled Americans, Inc.* 405 F.3d 954, 959; *Tennessee v. Lane,* 541 U.S. 509, 525 n. 12 (2004). The U.S. Supreme Court has recognized education, particularly education that allows individuals to be fully included in society, as a value that is substantially protected by the Constitution. *See Brown v. Board of Education,* 347 U.S. 483, 493 (1954).

Defendants' arguments based on decisions involving general public benefits, licensing laws, or mere rational basis review fail to take into account the significance of public education.

1. Plaintiffs allege a valid due process claim (Third Cause of Action)............... 23

A procedural due process analysis addresses two questions. The first asks whether there exists a liberty or property interest which has been interfered with by the state. The second examines whether the procedures attendant upon that deprivation were constitutionally sufficient. *Bazzetta v. McGinnis,* 430 F.3d 795, 801 (6th Cir. 2005).

a. Denial of plaintiffs' state-created property interest in education............... 23

Property interests are "created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law…." *Daniels v. Woodside,* 396 F.3d 730, 736 (6th Cir. 2005)

The class members have a state-created right to education pursuant to the Ohio Constitution. The Supreme Court of Ohio has ruled conclusively on four separate occasions that school children in Ohio, including the children with disabilities who make up the plaintiff class in this case, have an interest, defined in the state constitution, in a properly funded educational system. *See DeRolph IV,* 97 Ohio St. 3d 434, 780 N.E. 2d 529 (2002).

This Court has already held that plaintiffs have a property right in a free, appropriate public education, secured by the IDEA and state statutes implementing that federal law. *Fetto v. Sergi*, 181 F. Supp. 2d 53, 80 (D. Conn. 2001). The Court should therefore conclude again that plaintiffs have sufficiently alleged the deprivation of a protected liberty or property interest.

b. Plaintiffs are entitled to due process through this Court 25

In due process cases, once the plaintiff establishes a deprivation of life, liberty or property, "the question remains what process is due." *Morrissey v. Brewer,* 408 U.S. 471,481 (1972).

c. The legislative process is not sufficient due process 26

It is beyond question that courts possess the power to declare legislation unconstitutional. Furthermore, courts have the power to act when the legislating body fails to remedy the unconstitutional act. *Brown v. Board of Education,* 347 U.S. 483, 493 (1954). Even if the legislative process would be sufficient due process, the legislature has failed to remedy the deficiencies repeatedly identified by the Ohio Supreme Court thus providing no legislative process.

d. The Pennhurst Doctrine is inapplicable to plaintiffs' due process claim .. 27

Defendants mistakenly characterize plaintiffs' third cause of action as an attempt to enforce state law claims in federal court. Instead, plaintiffs' third cause of action asserts state-created liberty and property rights that have been denied in violation of federal due process rights. *Martin v. Voinovich,* 840 F. Supp. 1175 (S.D. Ohio 1993).

2. Plaintiffs' fourth cause of action alleges a denial of access to courts, which is enforceable here 28

A cause of action is a type of property protected by the Fourteenth Amendment's Due Process Clause. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

The right of access to the courts is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights. *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974).

A mere formal right of access to the courts does not pass constitutional muster. Courts have required that the access be "adequate, effective, and meaningful." *Bounds v. Smith,* 430 U.S. 817, 822-825 (1977)

State ex Rel State v. Lewis, 99 Ohio St.3d 97; 789 N.E.2d 195 (2003) left the plaintiffs in *DeRolph,* and every other schoolchild in Ohio, including those in the plaintiff class, without a meaningful judicial remedy for violation of an interest created by the Ohio Constitution in a thorough and efficient funding system for the education of the state's schoolchildren. The Due Process Clause is implicated not simply because the State has refused to comply with *DeRolph IV,* but because *Lewis* flatly held that litigants may be barred from applying to the courts to secure the enforcement of binding judicial decrees.

3. Plaintiffs' Fifth Cause of Action alleges disparities in funding lacking any rational basis in violation of equal protection 32

The Equal Protection Clause prohibits a state from denying to any person within its jurisdiction the equal protection of the laws. In essence, a State must "treat similarly situated individuals in a similar manner." *Buchanan v. City of Boliva,* 99 F.3d 1352, 1360 (6th Cir. 1996).

To survive a motion to dismiss for failure to state a claim, a plaintiff must allege facts sufficient to overcome the presumption of rationality that applies to government classifications. *Bower v. Village of Mt. Sterling,* 44 Fed. Appx. 670 (6th Cir. July 26, 2002).

Plaintiffs asserting an Equal Protection claim need not allege that they were a member of a suspect class or that defendants intentionally discriminated against them. It is enough for plaintiffs to allege that they were "intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Village of Willowbrook v. Olech,* 528 U.S. 562, 564 (2000).

When it comes to funding decisions, States are generally given wide latitude. This discretion is not limitless, however, and the disparity cannot be based on stereotypical or other irrational bases. *City of Cleburne v. Cleburne Living Ctr*, 473 U.S. 432, 447 (1985).

Defendants argue that the disparities of funds and opportunities foster local control and therefore are rationally based. Defendants' analysis is based on an overly broad reading of *San Antonio Independent Schools v. Rodriguez,* 411 U.S. 1 (1973).

Cases have distinguished *San Antonio* where disparities in funding based on wealth result in educational inadequacy claims. *Conn. Coalition for Justice in Educ. Funding, Inc. v. Rell,* 990 A.2d 206 (Conn. 2010). *San Antonio* did not purport to validate all funding variations that might result from a State's public school funding decision. *Robinson v. Kansas,* 117 F. Supp. 2d 1124, 1149 (D. Kan. 2000).

In this case, plaintiffs have claimed that disparities in funding result in educational inadequacy. The plaintiffs have alleged facts which demonstrate that school districts and their residents have little local control.

There is no rational basis for Ohio's system where funding disparities result in denying students with disabilities their federally mandated right to receive a free appropriate public education.

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INTRODUCTION

Named plaintiffs and plaintiff class members are parents and their children who are students with disabilities. These students are eligible for and entitled to a free appropriate public education (FAPE) with children who do not have disabilities to the maximum extent appropriate (least restrictive environment or 'LRE') under the Individuals with Disabilities Education Act (IDEA); 20 U.S.C. §§ 1401, *et seq.* As a result of the current school funding scheme in Ohio, these plaintiffs have been denied the individualized special education and related services that constitute a FAPE. In addition to violating the IDEA, defendants' failures or refusals to provide adequate funding for plaintiff students' education violate their rights under the U.S. Constitution and Section 504 of the Rehabilitation Act of 1973.

The Amended Complaint provides the historical background of this case and describes the various versions of formulas devised by the defendants to fund educational services in Ohio. While the State has devised several different mechanisms over the years to fund those educational services, there has been a continuous failure to provide adequate, equitable and cost-based funding, which has resulted in the deprivation of the federal rights of the named plaintiff students and plaintiff class members.

Defendants' motion should be denied because plaintiffs': 1) claims are not moot as the injuries they have suffered continue, despite the enactment of the "Evidence Based Model" (EBM) for funding education; 2) IDEA claims against the State and Governor are proper; 3) claim under Section 504 of the Rehabilitation Act is based on sufficient factual allegations that meet even the most stringent culpability standard; 4) Section 1983 claims are valid because defendant Strickland is not immune from suit and also, the state and its agencies are amenable to suit; and 5) claims raise significant Constitutional issues involving liberty and property interests that are entitled to procedural and substantive due process protections.

As explained more fully below, these and defendants' other arguments for dismissal are without merit and should be denied.

ARGUMENT

I. MOTION TO DISMISS STANDARD

Defendants move this Court to dismiss plaintiffs' claims based on acts or omissions occurring on or before June 30, 2009 based on Fed. R. Civ. P. 12(b)(1) and portions of plaintiffs' other claims under Fed. R. Civ. P. 12(b)(6).

First, defendants argue that this court lacks subject matter jurisdiction because the State's revised funding formula renders plaintiffs' claims moot. "In order to properly dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), the complaint must be successfully challenged on its face or on the factual truthfulness of its averments." *Titus v. Sullivan,* 4 F.3d 590, 593 (8th Cir. 1993) (citing *Osborn v. United States,* 918 F.2d 724, 729 n.6 (8th Cir. 1990)). For a facial attack arguing the absence of subject matter jurisdiction, the court examines plaintiff's factual allegations to determine if Congress has specifically provided subject matter jurisdiction. *See United States v. Ritchie,* 15 F.3d 592, 598 (6th Cir. 1994). Second, even if Congress has provided subject matter jurisdiction by statute, if plaintiff's claims are moot, the court also lacks subject matter jurisdiction to decide the case. *WJW-TV, Inc. v. City of Cleveland,* 878 F.2d 906, 909 (6th Cir. 1989). "A case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *County of Los Angeles v. Davis,* 440 U.S. 625, 631 (1978) (citation omitted). When determining subject matter jurisdiction, the court must assume that plaintiff's allegations are true and draw all inferences in a light most favorable to him. *See Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974). Dismissal is only appropriate if it is apparent there is an absence of subject matter jurisdiction or the case is

moot. *See Ritchie,* 15 F.3d at 598. As explained more fully below, the issues in this case are "live" as plaintiffs continue to suffer deprivation of their rights.

Second, defendants argue that this Court should, pursuant to Federal Rule of Civil Procedure 12(b)(6), dismiss: 1) portions of plaintiffs' claims under the "IDEA" that are pressed against any State entity that does not receive IDEA funds and against Governor Strickland, 2) plaintiffs' claims under § 504 of the Rehabilitation Act and 3) plaintiffs' claims under 42 U.S.C. § 1983 in their entirety or, failing that, dismiss those claims asserted against the Governor.

The purpose of a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) is to test the sufficiency of the complaint. When determining the sufficiency of a complaint in the context of a motion to dismiss, a court will apply the principle that "...once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 563 (2007). Under Rule 12(b)(6) the court must accept all factual allegations contained in the pleading as true, and resolve all factual ambiguities in favor of the party who sought the amendment. *Roth Steel Prods. v. Sharon Steel Corp.*, 705 F.2d 134, 155 (6th Cir. 1983). The focus of the inquiry is on whether the plaintiff is entitled to offer evidence to support the claims, rather than on whether the plaintiff will ultimately prevail. *See McDaniel v. Rhodes*, 512 F. Supp. 117, 120 (S.D. Ohio 1981). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal,* 129 S. Ct. 1937, 1949 (2009). "[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss." *Id.*

As discussed later in this memorandum, plaintiffs in this case have alleged sufficient facts and stated plausible claims for relief. Therefore, defendants' motion should be denied in its entirety.

II. DEFENDANTS' ARGUMENTS LACK MERIT AND THEIR MOTION SHOULD BE DENIED

A. Plaintiffs' claims are not moot

Defendants argue that all claims based on acts or omissions occurring on or before June 30, 2009, are moot and therefore beyond this Court's Article III jurisdiction. Defendants' argument is as meritless now as it was in 2004 when this Court issued its Order rejecting a virtually identical argument. Docket #89. In rejecting the defendants' prior argument that the plaintiffs' claims are moot because of changes to the funding formula, this Court stated: "As both parties acknowledge, the structure of Ohio's system for funding special education has changed considerably since Plaintiffs filed their class action complaint in 1994.... Plaintiffs have represented to the Court that, despite the changes in the structure of school funding, the system still suffers from many of the same deficiencies as the previous system, and these deficiencies, presumably, give rise to the same causes of action." Docket #89, pp. 5-6. Despite continuing changes to the funding system, the deficiencies still remain.

It should be noted that plaintiffs are not adding new claims; instead, there are merely factual changes regarding the mechanism for funding education in Ohio. Their original complaint included claims under IDEA, Section 504 of the Rehabilitation Act of 1973, and Section 1983 claims pursuant to the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the U.S. Constitution. These are the same causes of action contained in the prior complaint. In this case, the facts relate only to changes in the formula for funding education with those changes continuing to result in the same injury, denial of the plaintiffs' federal rights, which continues today. Thus all of the incidents are actionable under a "continuing violation" theory.

The Sixth Circuit has clarified the continuing violation theory, stating: "If subsequent identifiable acts of discrimination occurred within the critical time period and were related to the time-barred incident, the bar does not apply." *Hull v. Cuyahoga Valley Joint Vocational School District Bd. of Educ.,* 926 F.2d 505, 511 (6th Cir. 1991), *cert. denied,* 111 S. Ct. 2917 (1991) (citing *Held v. Gulf Oil Co.*, 684 F.2d 427, 430 (6th Cir. 1982)). In *Martin v. Voinovich,* Judge Smith applied the continuing violation theory to the plaintiffs' claims that they suffered continuing discrimination by being denied community based placements based on their disabilities: "the Court finds that the acts of discrimination alleged by plaintiffs are not based solely on isolated incidents. Instead, the alleged discrimination is an ongoing and continuous violation manifested in a number of incidents, and at least one of the alleged discriminatory acts occurred within the two year statute of limitations." *Martin v. Voinovich,* 840 F. Supp. 1175, 1189 (S.D. Ohio 1993).

Just as the plaintiffs in the *Martin* case suffered continuing violations of law, so too have the *Doe* plaintiffs been subjected to continuing failures by defendants to ensure their right to a free appropriate public education. For example, while the inception of a weighted per pupil formula for funding special education students occurred in 1997, the State continues to fail to provide full funding of that formula. Docket #189, para. 344. In fact, a comparison of plaintiffs' Complaint of July 29, 2005 (Docket #100) with the current Complaint (Docket #189) yields not only the same failures and resulting harm, but also, many of the same facts, such as those relating to preschool special education funding which is still funded by "units," underfunding for "catastrophic aid" for services to high cost students, continued over-reliance on property taxes and, continued denial of access to the courts to enforce the *DeRolph* decisions, to name a few.[1]

[1] Additional examples of continuing violations from the Amended Complaint include:

DeRolph v. State of Ohio, 78 Ohio St. 3d 193; 677 N.E.2d 733 (1997). Several of the named plaintiffs from the 2005 Complaint remain as representative plaintiffs in 2010, still suffering the same, ongoing violations of their federal rights. Therefore, plaintiffs' claims are not moot because they have suffered violations of law which continued to occur at the time the Amended Complaint was filed.

The cases cited by defendants have no relevance to this case. They cite *Board of. Educ. v. Steven L.* for the proposition that the end of the school year moots plaintiffs' claims; however, that case involved a dispute over a student's IEP and needs for the 5th grade even though the parties had agreed to a current IEP and the student was about to enter high school. *Board of. Educ. v. Steven L.*, 89 F.3d 464 (7th Cir. 1996). That case is clearly distinguishable from this case which alleges ongoing, systemic failures to create a system of funding to ensure FAPE and other federal rights. *See Penn-Harris-Madison, School Corp. v. Joy,* 768 N.E.2d 940, 945 (4th Dist. Ind. App. 2002) (*distinguishing Board of. Educ. v. Steven L.,* where the case involved a matter of constitutional proportions, affecting more than a single student.)

Also lacking merit is defendants' sweeping over-generalization that the end of the fiscal year moots claims based on legislation covering only that year. Docket #194, p. 7. They cite to *Sanchez v. Reagan* in support of that contention; however, *Sanchez* has no relevance to this case.

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190. The Ohio General Assembly failed to fully fund the special education formula weighted amounts in H.B. 94. In FY 2002 the weights were funded at 82.5% of the recommended level and in FY 2003 the weights were funded at 87.5% of the recommended level.
192. In Am. H.B. 94, the Ohio General Assembly provided no increase in weighted special education funding for FY 2002 and only a $20 million increase in FY 2003.
194. In response to the State Board of Education request, the Ohio General Assembly failed to fully fund the weighted formula, instead funding the weighted special education formula at 88% in FY 2004 and 90% in FY 2005.
196. For FY 2007 the State Board of Education recommended that the General Assembly fund the special education weights at 100% and recommended a 14.5% increase in funding.
197. Since that time, Ohio lawmakers failed to fully fund the weighted formula and the special education weights continue to be funded at 90%.

Sanchez v. Reagan, 770 F.2d 202, 210 (D.C. Cir. 1985).[2] In *Sanchez,* congressional appellants asserted that the federal appellees violated the Boland Amendment, Pub. L. No. 97-377, § 793, 96 Stat. 1865 (1982), a rider to appropriations for Fiscal Year 1983 which forbade the provision of assistance by the CIA or the Department of Defense "to any group or individual, not part of a country's armed forces, for the purpose of overthrowing the Government of Nicaragua…." The court noted that the appropriations, "and hence the operative effect of the limiting rider, expired on September 30, 1983, the end of the fiscal year. Since the congressional appellants seek relief of only prospective effect (declaratory judgment and injunction) we must dismiss this cause of action as moot." *Id.*

In contrast, the *Doe* plaintiffs allege that the operative effect of the current legislation remains constant: Inadequate funding that deprives them of their federal rights. Until the State enacts legislation that provides for full and adequate funding, plaintiffs will continue to suffer harm and their claims can not be moot.

B. Plaintiffs' claims under the IDEA against the State and Governor Strickland are proper

Defendants are in error when they assert that neither the State nor the Governor are proper parties with respect to plaintiffs' IDEA claims. Docket #194, p. 8. This Court needs only look to the provisions of the law which, throughout, allocates responsibilities to "the State" as distinguished from those specifically allocated to the "State educational agency (SEA)." For example:

- Grants under IDEA are made to the State. 20 U.S.C. § 1411.
- The State is responsible for administration of the grant and must ensure that any State rules, regulations, and policies relating to the Act conform to the purposes of the Act.

[2] Defendants incorrectly cited the year as 1982.

20 U.S.C. § 1407.

- The State must submit a plan that provides assurances of compliance with conditions to the U.S. Secretary of Education in order for the State to be eligible for federal financial assistance. 20 U.S.C. § 1412(a).
- The State is responsible for establishing performance goals for children with disabilities. 20 U.S.C. § 1414(a)(15).
- The State is required to maintain the amount of state financial support for special education and related services and is prohibited from supplanting state and local funds with funds provided under the IDEA. 20 U.S.C. §§ 1414(a)(17),(18).
- 20 U.S.C. § 1412(a)(5)(B)(i) prohibits States from using funding mechanisms that result in placements that violate the requirements for providing education in the least restrictive setting, and States are also prohibited from using a funding mechanism by which the State distributes funds on the basis of the type of setting in which a child is served that will result in the failure to provide a child with a disability a free appropriate public education according to the unique needs of the child as described in the child's IEP. Subsection(ii) provides that if the State does not have policies and procedures to ensure compliance with clause (i), the State shall provide the Secretary an assurance that the State will revise the funding mechanism as soon as feasible to ensure that such mechanism does not result in such placements.
- IDEA abrogates the State's sovereign immunity. 20 U.S.C. § 1403.

In contrast to the above provisions, other sections allocate responsibilities specifically to the SEA, for example, 20 U.S.C. § 1412(a)(11) which provides that the SEA is responsible for general supervision.

It is thus not surprising that courts have held the governor and the State to be proper parties subject to an IDEA cause of action. The court in *M.T.V. v. Purdue* stated that the State of Georgia could be a proper party under IDEA, where a state receives funding under the IDEA and plaintiffs make systemic claims about state policies. *M.T.V. v. Purdue,* No. Civ. A. 1:03CV0468-A, 2004 U.S. Dist. LEXIS 29670, 33-34 (N.D. Ga. Feb. 3, 2004). An example of a systemic claim is one which "implicates the integrity or reliability of the IDEA dispute resolution procedures themselves, or requires restructuring the education system itself in order to comply with the dictates of the [IDEA]." *Doe v. Ariz. Dept. of Educ.*, 111 F.3d 678, 681 (9th Cir. 1997). This is particularly appropriate where the systemic claims arise out of inadequate state funding, as the Governor and the State both bear responsibility for the provision of a system of public education in accordance with the law. Thus the Seventh Circuit found that the Governor of Illinois was a proper party in an action to enforce Part C (the Early Intervention section) of the IDEA. *Marie O. v. Edgar,* 157 F.R.D. 433, 437 (N.D. Ill. 1994), *summary judgment granted by Marie O. v. Edgar,* 1996 U.S. Dist. LEXIS 1070, (N.D. Ill. 1996), *affirmed by Marie O. v. Edgar*, 131 F.3d 610, 1997 U.S. App. LEXIS 33978, (7th Cir. Ill. 1997); *see also Robinson v. Kansas*, 117 F. Supp. 2d 1124, 1138 (D. Kan. 2000) (finding the Governor to be a proper party relating to plaintiffs' Section 504 claim in a school financing case.)

Defendant Strickland is charged with executing the laws of the State of Ohio and ensuring that those laws are not carried out in a way that violates federal statutes, such as the IDEA. Thus the IDEA claim against him is proper and defendants' argument is without merit.

C. Plaintiffs have alleged facts sufficient to state a claim under Section 504 of the Rehabilitation Act of 1973.

Section 504 provides that "[n]o otherwise qualified individual with a disability…shall, solely by reason of her or his disability, be excluded from the participation in, be denied the

benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance…." 29 U.S.C. § 794(a). The Section 504 regulations include a requirement to provide a free appropriate public education to each qualified person with a disability, regardless of the nature or severity of the person's disability, that is designed to meet individual educational needs of students with disabilities as adequately as the needs of students who do not have disabilities are met. 34 C.F.R. § 104.33(b)(1). As explained more fully below, two types of cases can arise under Section 504: 1) those that challenge the professional judgment of educators and 2) those that concern systemic discrimination, including policies and practices that have a disparate impact on people with disabilities that constitutes discrimination. Courts have applied different standards of culpability, depending on the type of issue.

In the context of decision-making about educational services for students with disabilities, although not unanimous, the prevailing judicial opinion is that a showing of bad faith or gross misjudgment on the part of school officials is necessary to succeed on a Section 504 claim. *M.Y. by J.Y. and D.Y. v. Special Sch. Dist. No. 1*, 544 F.3d. 885, 888 (8th Cir. 2008).[3] This Court applied the bad faith/gross misjudgment standard of liability in its 2005 Order. Docket #89. Plaintiffs urge this Court to reconsider that ruling because the bad faith/gross misjudgment standard should not be used: 1) when plaintiffs are not questioning the professional judgment of local educators, but instead, challenge the State's system of funding which has a disparate and discriminatory impact on them; 2) in actions seeking prospective relief only and not damages; and 3) because that standard lacks any statutory basis and defeats the remedial

[3] The 3d U.S. Circuit Court of Appeals has taken the position that a simple deprivation of FAPE was sufficient to establish a Section 504 claim. *See J.F. v. School Dist.*, 2000 U.S. Dist. LEXIS 4434 (E.D. Pa. Apr. 7, 2000). The court found no reason to differentiate the FAPE requirement of the IDEA from that of Section 504. By extension, the court found no reason to impose additional requirements on parents bringing claims under Section 504 alleging a denial of FAPE. *See also, Essen v. Board of Educ. of the Ithaca City Sch. Dist.*, 1996 U.S. Dist. LEXIS 5231 (N.D.N.Y 1996).

purposes of the Act. However, if this Court opts to apply the bad faith/gross misjudgment standard here, plaintiffs have pled facts in their Complaint sufficient to survive a Rule 12(b)(6) motion under that standard.

1. The bad faith/gross misjudgment standard was designed to give deference to the professional judgment of educators, which is not at issue in this case.

This Court cited *Monahan v. Nebraska* in support of the bad faith/gross misjudgment standard for holding school officials liable under Section 504. *Monahan v. Nebraska*, 687 F.2d 1164 (8th Cir. 1982) *cert. denied,* 460 U.S. 1012 (1983); Docket #89, p. 24. While the Eighth Circuit was "merely giving instruction to the lower court if the case was brought again, the instruction has been used by many courts in a wide variety of circumstances and has led to the spreading of the suggested…standard." *NOTE: Judicially Reducing the Standard of Care: An Analysis of the Bad Faith/Gross Misjudgment Standard in Special Education Discrimination,* 96 Ky. L.J. 711, 718 (2008). The main issue in the district court concerned the parents' choice to forego the administrative proceedings because the state Commissioner of Education had the authority to decide appeals and this allegedly conflicted with the EACHA (IDEA's predecessor) requirements for final decision-making by hearing officers. The state legislature amended the law and the district court then held that the case was moot.

The Eighth Circuit dismissed the appeal without prejudice but offered *dicta* for the guidance of the district court and parties if the parties attempted to pursue claims under Section 504 and the EACHA in the future. In conferring guidance, the Eighth Circuit warned the lower court against substituting its own judgment regarding the educational placement of the child for the judgment of educational professionals when evaluating educational decisions. *Monahan*, 687 F.2d at 1171. This heightened standard should not be applied where, as here, systemic discrimination is at issue.

In contexts other than cases where educational judgment is challenged, it is clear that disparate impact discrimination constitutes a valid cause of action under Section 504. The Supreme Court has stated that the Rehabilitation Act addressed both intentional and disparate impact discrimination: "Much of the conduct that Congress sought to alter in passing the Rehabilitation Act would be difficult if not impossible to reach were the Act construed to proscribe only conduct fueled by a discriminatory intent." *Alexander v. Choate*, 469 U.S. 287, 296 (1985). Section 504 and ADA claims can be based on the discriminatory effect on children with disabilities of seemingly neutral practices and do not require a finding of intentional discrimination. *Susavage v. Bucks County Schs. Intermediate Unit No.*, 2002 U.S. Dist. LEXIS 1274 (E.D. Pa. 2002), (quoting *Helen L. v. DiDario,* 46 F.3d 325, 335 (3rd Cir. 1995)) ("'affirmative animus'…was not the focus of the ADA or section 504"); s*ee also, New Mexico Ass'n for Retarded Citizens v. New Mexico,* 678 F.2d 847, 853 (10th Cir. 1982): ("[A] federally-funded education system may be found in violation of Section 504 where the entity's practices preclude the handicapped from obtaining system benefits realized by the non-handicapped.").

Plaintiffs previously argued that *Campbell v. Bd. of Educ. of Centerline School District* should not be followed and the disparate impact standard could support a claim under Section 504 where, as here, plaintiffs do not challenge educators' professional judgment. *Campbell v. Bd. of Educ. of Centerline School District*, 58 Fed. Appx. 162, 167 (6th Cir. 2003). This Court rejected that argument because plaintiffs did not offer any authority to support their claim that no showing of bad faith or gross misjudgment is required under the circumstances of this case. Docket #89, p. 28. Since the Court issued its ruling, other courts have adopted plaintiffs' argument. Courts now recognize that a disparate impact theory is actionable such that, where plaintiffs are not challenging the professional judgment of educators, their claims of

discrimination do not require the heightened level of intentionality of bad faith/gross misjudgment. In *Robinson v. State of Kansas* , *aff'd, Robinson v. Kansas*, 295 F.3d 1183 (10th Cir. 2002), *cert. den.* 539 U.S. 926 (2003), plaintiffs sued the state and the governor claiming that provisions of the state's School District Finance and Quality Performance Act created a discriminatory disparate impact against the state's minority students and students with disabilities. *Robinson v. State of Kansas,* 117 F. Supp. 2d 1124 (2000). The court denied the defendants' motion to dismiss for plaintiffs' failure to allege bad faith or gross misjudgment. *Id.* at 1145. In support of its holding, the court looked to two education cases: *New Mexico Ass'n for Retarded Citizens v. New Mexico,* 678 F.2d 847, 854 (10th Cir. 1982) and *Pushkin v. Regents of Univ. of Colorado,* 658 F.2d 1372, 1384-85 (10th Cir. 1981). Concurring with the reasoning of these cases, the court found "no language in the statute or regulations suggesting that proof of disparate treatment is essential to establishing a Section 504 infraction in connection with the educational rights of handicapped children" (*New Mexico* at 854) and, that "it would be a rare case indeed in which a hostile discriminatory purpose or subjective intent to discriminate solely on the basis of handicap could be shown" (*Pushkin* at 1385). *Robinson* at 1144-1145. As a result, the court found plaintiffs' disparate impact claim cognizable under Section 504 of the Rehabilitation Act. *Id.*

Similar to the *Robinson* case, the *Doe* plaintiffs' claims are not based on a challenge to the judgment of educational professionals or educational decision-making; instead, they challenge the discriminatory impact of the state's funding system. Therefore, the bad faith/gross misjudgment standard should not be applied in this case.

2. Even when plaintiffs seek damages, which the *Doe* plaintiffs do not seek here, deliberate indifference is sufficient to establish liability under Section 504.

Even when plaintiffs bring an action for damages under IDEA and Section 504, a showing of only deliberate indifference, and not bad faith or gross misjudgment is required. The Ninth Circuit found that the Section 504 regulations require a comparison between the treatment of disabled and nondisabled children. *Mark H. v. Lemahieu*, 513 F.3d 922, 936 (9th Cir. 2008). In concluding that the applicable standard for intentionality for a damages action under Section 504 can be deliberate indifference, the court analyzed the state of mind with regard to a denial of "meaningful access" or "reasonable accommodation" necessary to justify monetary damages "…that standard may be met by showing "deliberate indifference," and not only by showing "discriminatory animus." *Mark H.* at 43 (*citing Duval v. County of Kitsap*, 260 F.3d 1124, 1139 (9th Cir. 2001) ("Deliberate indifference requires both knowledge that a harm to a federally protected right is substantially likely, and a failure to act upon that…likelihood."); *Lovell v. Chandler*, 303 F.3d 1039, 1056 (9th Cir. 2002)); *Barber v. Colorado*, 562 F.3d 1222, 1228-9 (10th Cir., April 15, 2009): ("Intentional discrimination does not require a showing of personal ill will or animosity toward the disabled person; rather, "intentional discrimination can be inferred from a defendant's deliberate indifference to the strong likelihood that pursuit of its questioned policies will likely result in a violation of federally protected rights.").

Since damages actions require only deliberate indifference to likely violations of federally protected rights and since the *Doe* plaintiffs do not seek damages, the higher standard of bad faith/gross misjudgment should not be applied to their Section 504 claim.

3. The bad faith/gross misjudgment standard lacks any statutory basis and defeats the remedial purposes of the act.

The standard in *Monahan* insulates educational professionals from liability by requiring "extreme fault." Thomas Simmons, *The ADA Prima Facie Plaintiff: A Critical Overview of*

Eighth Circuit Case Law, 47 Drake L. Rev. 761 (1999) at 823. "Although hypothetically possible, proving that state officials acted in such a way as to satisfy this standard has proved to be an impossible task for those who have run up against it." *Judicially Reducing the Standard of Care: An Analysis of the Bad Faith/Gross Misjudgment Standard in Special Education Discrimination,* 96 Ky. L.J. (2008) at 8.[4] Nothing in the Section 504 statute or regulations articulates this standard, nor has it not been applied by the U.S. Department of Education, Office for Civil Rights, the Section 504, ADA investigative and enforcement agency for educational entities. Indeed, "[m]uch of the conduct that Congress sought to alter in passing the Rehabilitation Act would be difficult if not impossible to reach were the Act construed to proscribe only conduct fueled by a discriminatory intent." *Alexander v. Choate*, 469 U.S. 287, 296 (1985). To effectuate the remedial purposes of the Act, this Court should look to the disparate and discriminatory impact of the State's education funding system.

4. Plaintiffs have pled facts sufficient to survive a Rule 12(b)(6) motion.

Plaintiffs allege with specificity how the defendants have deliberately discriminated against students with disabilities in violation of Section 504. Docket #189, para 354-363. These allegations include:

- In devising a school funding scheme, defendants have deliberately treated students with disabilities differently than students who do not have disabilities.
- While the EBM has some evidence behind the method for funding the education of students without disabilities, defendants deliberately ignored the funding requirements for educating students with disabilities by *inter alia* failing to: fully fund the special education weights, fund the required student to teacher and student to aide

[4] The author of the Note writes: "After extensive research the Author can find no case in which a court ruled that the "bad faith or gross misjudgment" standard had been satisfied. ***Id***. at n. 123.

ratios, factor in the costs of related services, factor in for inflation, account for additional services added under the IDEA amendments and concomitant changes to Ohio's standards, and provide sufficient funds for preschool special education units.

- While defendants have a plan to eventually fully fund the EBM for regular education, defendants have no plan to fully fund the special education weights.
- Defendants have deliberately diverted special education funding to other purposes. In part, they accomplished this by lowering the requirements for adequate yearly progress and for reporting whether students with disabilities are being educated in the least restrictive setting. As a result, students with disabilities are being educated in overly restrictive settings and are being excluded from participation in programs or activities for which they are otherwise qualified.
- Defendants have also failed to provide sufficient funding to ensure physical accessibility of school buildings and access to technologies, resulting in students with disabilities being excluded from and denied the benefits of participation in programs or activities for which they are otherwise qualified.

Docket #189. These factual allegations are sufficient to withstand defendants' charge that plaintiffs have only offered conclusions or a formulaic recitation of the elements of a Section 504 cause of action per *Iqbal*. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). Contrary to defendants' assertion, plaintiffs allege detailed facts and meet the plausibility standard of *Iqbal*.

Additionally, it should be noted that *Iqbal* has not dramatically changed plaintiffs' burden of pleading. In reversing the lower court's dismissal of plaintiff's housing discrimination claims, the Seventh Circuit recently discussed the plausibility requirement of pleading articulated in *Iqbal* and said, "As we understand it, the Court is saying…that the plaintiff must give enough

details about the subject-matter of the case to present a story that holds together. In other words, the court will ask itself *could* these things have happened, not *did* they happen." *Swanson v. Citibank*, N.A., 2010 U.S. App. LEXIS 15761, *8 (7th Cir. 2010). In reviewing the U.S. Supreme Court's decisions, the Seventh Circuit observed that in many cases, it will not be any more difficult today for a plaintiff to meet that burden than it was before the Court's recent decisions. *Id.*

Plaintiffs have provided details about how the State's funding system discriminates, excludes and denies them benefits of Ohio's education system. They have presented a "story that holds together" and their claim should survive defendants' Rule 12(b)(6) motion. *Id.*

D. Plaintiffs valid claims under 42 U.S.C. § 1983 are not procedurally barred

1. Defendant Strickland is not immune from plaintiffs' § 1983 claims

Immunity from liability is an exception to the general rule, particularly as it relates to state officials and federal law under the doctrine of *Ex Parte Young*, that individuals must conform their conduct to the law. *See generally Ex Parte Young*, 209 U.S. 123 (1908). Thus, the Court should be reluctant to extend, as suggested by the defendants, the concept of legislative immunity to an executive official who is performing executive functions. The cases cited by defendants in support of their argument that defendant Strickland is legislatively immune from suit do not justify such an extension. For example, defendants cite to *Alia v. Michigan Supreme Court,* 906 F.2d 1100 (6th Cir. 1990). The *Alia* case was a 42 U.S.C. § 1983 action in federal district court against the Michigan Supreme Court and its seven justices. The *Alia* plaintiffs alleged that defendants "violated the plaintiffs' civil rights and rights to equal protection of the laws" by promulgating a rule of court that required mediation in the plaintiffs' case. *Id.* at 1101. Plaintiffs sought money damages, attorney fees, and declaratory and injunctive relief. The court found in favor of the Michigan justices because the promulgation of court rules of practice and

procedure were a protected legislative activity entitling the justices to legislative immunity. The facts alleged in the case *sub judice* are distinguishable.

A prerequisite for granting legislative immunity is the presence of legislative rather than administrative, executive, or managerial conduct. To determine whether legislative immunity should apply in a given situation the court must look to the nature of the governmental function being performed. *Butz v. Economou,* 438 U.S. 478, 511-517 (1978). Some governmental functions will not shield government officials from liability. Indeed, courts have recognized the supremacy of federal law and the primary public interest in protecting citizens whose Constitutional rights have been overridden by the exercise of state authority. Under the criteria developed by precedents of the U.S. Supreme Court, § 1983 would be drained of meaning were the courts to hold that the acts of a governor or other high executive officers have "the quality of a supreme and unchangeable edict, overriding all conflicting rights of property and unreviewable through the judicial power of the Federal Government." *Scheuer v. Rhodes,* 416 U.S. 232, 248 (1974).

The U.S. Supreme Court rejected this notion, stating: "If this extreme position could be deemed to be well taken, it is manifest that the fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of the land; that the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases, the futility of which the State may at any time disclose by the simple process of transferring powers of legislation to the Governor to be exercised by him, beyond control, upon his assertion of necessity." *Scheuer* at 248-249 (*quoting Sterling v. Constantin,* 287 U.S. 378, 397-398 (1932)). The court concluded that: "Under our system of government, such a conclusion is obviously untenable. There is no such avenue of escape from the paramount authority of the Federal

Constitution. When there is a substantial showing that the exertion of state power has overridden private rights secured by that Constitution, the subject is necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression." *Id.*

Plaintiffs in the case at bar have alleged sufficient facts that their private rights secured by the Constitution have been overridden by the exertion of state power. Plaintiffs have alleged that under Article III, § 6 of the Ohio Constitution, defendant Strickland is charged with seeing that the laws are faithfully executed. Docket #189, para. 152. Moreover, "[d]efendant Strickland is required to exercise and maintain effective supervision and control over the expenditures of the state" (Docket #189, para. 155) and, "[i]n spite of his awareness of the orders of the Ohio Supreme Court in *DeRolph v. State of Ohio,* 78 Ohio St. 3d 193, 202; 677 N.E.2d 733, 740 (1997), and budget recommendations from Defendant Ohio State Board of Education, Defendant Strickland submitted an Executive Budget in 2009 which failed to provide for a thorough and efficient system of common schools and to provide adequate funding for the provision of a free appropriate public education to plaintiffs and the plaintiff class." Docket #189, para. 154. These are executive, not legislative functions, and the plaintiff class is entitled to have its claims judicially resolved. Defendant Strickland is alleged to have failed in his duty to ensure that the laws are faithfully executed and the factual allegations contained in plaintiffs' complaint are sufficient to withstand a Rule 12(b) motion. Docket #189, para 370, 375, 382.

2. The State and its agencies are amenable to suit under § 1983

Defendants repeat their previously failed argument that the State and its "subparts" are not a "person" amenable to suit under 42 U.S.C. § 1983. *Will v. Michigan Dep't of State Police,* 491 U.S. 58 (1989). This Court has already held that *Will* does not prohibit § 1983 claims against the State in suits like this one where plaintiffs seek only prospective injunctive relief. *Id.*

at 71 n.10. Docket #89, p. 30. There is no basis to revisit this issue. Indeed, the principles of law of the case argue against revisiting a prior court ruling.

However, defendants attempt to revisit the issue and argue that footnote 10 is irrelevant because that note uses the term "state officials" instead of the "state." This argument fails. As explained concisely by one legal treatise: "The question whether the defendant is a § 1983 person and the question whether the defendant enjoys Eleventh Amendment immunity are answered in precisely the same way. Although the ensuing discussion is framed in traditional Eleventh Amendment terms, it is equally applicable to the holding in *Will.* Matthew Bender 1-2 Civil Rights Actions 2.01(c)(2)(g) (2010) . The only significant differences between *Will* and the Eleventh Amendment are cases dealing with state court § 1983 litigation and the ability of a state to consent to suit which are not applicable in this case. Since the defendants in this case are not immune from suit, they are persons for purposes of § 1983 and, their argument for Rule 12(b)(6) dismissal must be denied.

E. Plaintiffs due process and equal protection claims raise significant constitutional interests

Plaintiffs have alleged violations of both the due process clause and the equal protection clause of the Fourteenth Amendment to the United States Constitution. The analysis of both of these claims is largely dependent on the interest at stake. In the context of due process, the interest at stake informs the analysis of what process is due, and for equal protection, the interest advanced determines whether it is deserving of heightened scrutiny even where no suspect claims is involved. Here, the named plaintiffs and the plaintiff class, made up entirely of children with disabilities, seek a right to access education as guaranteed to them by federal law and by Article VI, § 2 of the Ohio Constitution.

There can be no doubt that children with disabilities have been excluded from public education over the history of this country. *See Association for Disabled Americans, Inc. v. Fla. Int'l Univ.* 405 F.3d 954, 959 (11th Cir. 2005); *Tennessee v. Lane,* 541 U.S. 509, 525 n. 12 (2004). There similarly can be no doubt that the U.S. Supreme Court has recognized education, particularly education that allows individuals to be fully included in society, as a value that is substantially protected by the Constitution. *See Brown v. Board of Education,* 347 U.S. 483, 493 (1954) ("education is perhaps the most important function of state and local governments" because "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education"); *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (applying heightened scrutiny to an otherwise rational basis review because of the pivotal role of public education in our society).

"The Supreme Court has long recognized that even when discrimination in education does not abridge a fundamental right, the gravity of the harm is vast and far reaching." *Association for Disabled Americans, Inc. v. Fla. Int'l Univ.,* 405 F.3d 954, 957-958 (11th Cir. 2005). While facing a different question than presented here—whether Congress had authority under § 5 of the 14th Amendment to abrogate a state's 11th Amendment immunity when passing the Americans with Disabilities Act—the Eleventh Circuit's analysis in *Association for Disabled Americans, Inc.* is relevant because it relied on both the importance of education within our society and the history of discrimination against children with disabilities in their access to education. The court found that "the constitutional right to equality in education, though not fundamental, is vital to the future success of our society." *Id.* at 958. After reviewing the history of discrimination in education against children with disabilities that Congress had before it in passing the ADA, the court concluded that "[d]iscrimination against disabled students in

education affects disabled persons' future ability to exercise and participate in the most basic rights and responsibilities of citizenship, such as voting and participation in public programs and services" such that Title II was a "congruent and proportional"[5] remedial statute that abrogated state immunity. *Id.* at 959.

By recognizing that education, particularly education that was designed to include individuals who had historically been excluded from the democratic process, constituted a constitutionally significant interest that deserved a heightened level of protection, the Eleventh Circuit followed the Supreme Court's explicit recognition of the fundamental role that education has in the ordered liberty of this nation. *Plyler v. Doe*, 457 U.S. 202, 221 (1982). *Plyler* found that while "[p]ublic education is not a 'right' granted to individuals by the Constitution…neither is it merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation." *Id.* The "importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction." *Id.* It was upon this basis that the Court applied heightened scrutiny to a provision that excluded undocumented children from the public schools, concluding that "if the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest." *Id.* at 230.

Here, plaintiffs' claims under 42 U.S.C. § 1983 for violations of their due process and equal protection rights must be analyzed under this lens. When viewed accordingly, defendants' arguments are based on decisions involving general public benefits, licensing laws, or mere

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[5] Congress can abrogate 11th Amendment immunity where (1) it unequivocally expresses an intent to abrogate immunity, and (2) it acted pursuant to a valid grant of constitutional authority. *Association for Disabled Americans, Inc.*, 405 F.3d at 956-57. Legislation enacted pursuant to § 5 of the Fourteenth Amendment "is valid if it exhibits 'a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" *Id.* at 957.

rational basis review that fails to take into account the significance of public education to our society must be rejected.

1. Plaintiffs allege a valid due process claim (Third Cause of Action)

Plaintiffs have been denied the due process entitlement to a state-created property interest in a properly-funded education system. The Fourteenth Amendment to the U.S. Constitution protects an individual from deprivation of life, liberty or property, without due process of law. Those who seek to invoke its protections must establish that one of these interests is at stake. Accordingly, a procedural due process analysis addresses two questions. The first asks whether there exists a liberty or property interest which has been interfered with by the state. The second examines whether the procedures attendant upon that deprivation were constitutionally sufficient. *Bazzetta v. McGinnis,* 430 F.3d 795, 801 (6th Cir. 2005).

a. Denial of plaintiffs' state-created property interest in education

Property interests are not created by the Constitution. Rather, "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law…." *Daniels v. Woodside,* 396 F.3d 730, 736 (6th Cir. 2005), *citing Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 538 (1985) (quoting *Board of Regents v. Roth,* 408 U.S. 564 (1972)). State statutes or rules create protected property interests by entitling a citizen to certain benefits. *Goss v. Lopez,* 419 U.S. 565, 573 (1975) ("Here, on the basis of state law, appellees plainly had legitimate claims of entitlement to a public education."). The U.S. Supreme Court has long held that the hallmark of property "…is an individual entitlement grounded in state law, which cannot be removed except 'for cause.'" *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 430 (1982); *Light, Gas & Water Div. v. Craft,* 436 U.S. 1, 11-12 (1978); *Goss v. Lopez,* 419 U.S. 565, 573-574 (1975).

Section 2 of Article VI of the Ohio Constitution provides in relevant part as follows:

> The general assembly shall make such provisions, by taxation, or otherwise, as…will secure a thorough and efficient system of common schools throughout the state….

There can be no questioning that the class members have a state-created right to education pursuant to the Ohio Constitution. This is a matter of state law and has already been decided by the Supreme Court of Ohio in *DeRolph.*[6] As this Court is well aware, the Supreme Court of Ohio has ruled conclusively on four separate occasions that school children in Ohio, including the children with disabilities who make up the plaintiff class in this case, have an interest, defined in the state constitution, in a properly funded educational system. *See DeRolph IV,* 97 Ohio St. 3d 434, 780 N.E. 2d 529 (2002). Stated differently, the Supreme Court of Ohio has ruled that the State had failed in its state constitutional duty to provide a thorough and efficient system of public education. The final ruling of the Ohio Supreme Court on December 11, 2002, found that "the current school-funding system is unconstitutional," and re-iterated its rationale as set forth in the first two opinions. *Id.* at 435. As a result, it is now settled law that the education clauses of the Ohio Constitution are not merely aspirational; rather, they create entitlements on the part of Ohio's students and corresponding enforceable obligations on the part of the State.

Indeed, this Court has already held that plaintiffs have a property right in a free, appropriate public education, secured by the IDEA and state statutes implementing that federal law. Docket #89, pp.36-37, *citing Fetto v. Sergi*, 181 F. Supp. 2d 53, 80 (D. Conn. 2001) (student had "a protected property right to an appropriate IEP under the IDEA"); *Quackenbush v. Johnson City Sch. Dist.,* 716 F.2d 141, 148 (2d Cir. 1983) (denial of FAPE constitutes denial of right secured by federal law); *B.D. v. DeBuono,* 130 F. Supp. 2d 401, 431 (S.D.N.Y. 2000)

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[6] *See also Goss v. Lopez,* 419 U.S. at 573, "Here, on the basis of state law, appellees plainly had legitimate claims of entitlement to a public education. Ohio Rev. Code Ann. §§ 3313.48 and 3313.64 (1972 and Supp. 1973) direct local authorities to provide a free education to all residents between five and 21 years of age, and a compulsory-attendance law requires attendance for a school year of not less than 32 weeks…."

(students had a "protected property right to an individualized treatment plan that would meet their needs"). Plaintiffs' Complaint clearly alleges that they have been denied a free appropriate public education. The Court should therefore conclude again that plaintiffs have sufficiently alleged the deprivation of a protected liberty or property interest.

b. Plaintiffs are entitled to due process through this Court

In due process cases, once the plaintiff establishes a deprivation of life, liberty or property, "the question remains what process is due." *Morrissey v. Brewer,* 408 U.S. 471, 481 (1972). "In procedural due process claims, the deprivation by state action of a constitutionally protected interest in 'life, liberty, or property' is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest **without due process of law**." *Zinermon v. Burch,* 494 U.S. 113, 125 (1990) (emphasis in original). A court must weigh several factors to determine what process is due: First, the private interest that will be affected by defendants' official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Mathews v. Eldridge,* 424 U.S. 319, 335 (1976). Given the significant interest that education has, the amount of process due should be substantial.

This Court has already concluded that the impartial due process hearing procedures provided for in Chapter 3323 of the Ohio Revised Code were not sufficient to address the plaintiffs' alleged violations of their rights. Docket #89. Similarly, the legislative process is insufficient to protect plaintiffs' right to education under federal law and the Ohio Constitution.

c. The legislative process is not sufficient due process

Defendants wrongly argue that the legislative process is all the process that is due to plaintiffs. Defendants point to several cases for the proposition that generalized governmental decision making that affects the public at large does not give rise to a right to due process outside of the legislative process. *Bi-Metallic Investment Company v. State Board of Equalization*, 239 U.S. 441 (1915); *Adkins v. Parker*, 472 U.S. 115 (1985); *37112, Inc. v. Ohio Dep't of Liquor Control*, 113 F.3d 614 (6th Cir. 1997). These cases involve a tax increase, a legislatively-imposed reduction in welfare benefits, and liquor licenses, which are not at all in line with the fundamental value of public education. Nor do they involve an independently protected interest, as in this case, where plaintiffs have a right to a free and appropriate public education under the IDEA.

Defendants' reliance on *Blount-Hill v. Zelman* also misses the mark. *Blount-Hill v. Zelman*, Case No. 3:04-cv-197 (S.D. Ohio, March 30, 2009). The plaintiffs in *Blount-Hill* alleged that their due process rights were violated as the result of the diversion of funds to community schools from public schools. As an initial matter, the plaintiffs failed to assert the existence of a property interest. *Id.* at 21. The court went on to find that the legislative process was sufficient in that case because "community school statutes are legislative in character." *Id.* at 22. This case is different because the plaintiffs have been deprived of a right guaranteed by the Ohio Constitution and by the IDEA. The simple passage of legislation regarding education does not negate the preexisting constitutional right to a public education or the rights protected by the IDEA.

It is beyond question that courts possess the power to declare legislation unconstitutional. Furthermore, courts have the power to act when the legislating body fails to remedy the unconstitutional act. *Brown v. Board of Education,* 347 U.S. 483, 493 (1954). Here, plaintiffs

allege that the State has neglected its obligation and that the laws that presently compose the State's school funding system remain unconstitutional. Though a new school funding model was implemented in 2010, the new model continues to exhibit the same flaws from years past because it:

- continues an overreliance on local property taxes as a funding source (para. 300);
- fails to eliminate phantom revenue, which bars local schools from benefitting in property tax valuation increases (para. 326-336);
- causes local school districts to have to reduce staffing and programs or borrow funds to maintain operations (para. 301-322); and
- will not be fully funded, if at all, for at least ten years (para. 325).

Docket # 189. Even if the legislative process would be sufficient due process, the legislature has failed to remedy the deficiencies repeatedly identified by the Ohio Supreme Court thus providing no legislative process.

d. The Pennhurst Doctrine is inapplicable to plaintiffs' due process claim

Defendants mistakenly characterize plaintiffs' third cause of action as an attempt to enforce state law claims in federal court. Plaintiffs are not asking this Court to compel Governor Strickland to comply with state law. If that were the case, plaintiffs agree that the doctrine of sovereign immunity and the *Pennhurst* doctrine would be relevant here. *See Pennhurst State School & Hospital v. Halderman,* 465 U.S. 89 (1984). Instead, plaintiffs' third cause of action asserts state-created liberty and property rights that have been denied in violation of federal due process rights. Docket #189, para. 364-372; *see also Martin v. Voinovich,* 840 F. Supp. 1175 (S.D. Ohio 1993). For the same reasons, *Pennhurst* does not apply to plaintiffs' fourth and fifth causes of action either.

2. Plaintiffs' fourth cause of action alleges a denial of access to courts, which is enforceable here

The U.S. Supreme Court held in *Mullane* that a cause of action is a type of property protected by the Fourteenth Amendment's Due Process Clause. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).[7] In *Wolff v. McDonnell*, the Supreme Court defined the right of access in a civil rights action under section 1983 in the following terms: "The right of access to the courts, upon which *Avery* [*Johnson v. Avery,* 393 U.S. 483 (1969)] was premised, is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights." *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974). A mere formal right of access to the courts does not pass constitutional muster. Courts have required that the access be "adequate, effective, and meaningful." *Bounds v. Smith,* 430 U.S. 817, 822-825 (1977).[8]

Courts typically exercise continuing jurisdiction to achieve structural reform. To this end, a court cannot terminate its jurisdiction until it has eliminated the constitutional violation "root and branch." *Battle v. Anderson,* 708 F.2d 1523, 1538 (10th Cir. 1983) *citing Green v. County School Board,* 391 U.S. 430, 438 (1968). The court must exercise supervisory power over the matter until it can say with assurance that the unconstitutional practices have been

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[7] The federal constitutional right of access to public tribunals has been found under the privileges and immunities clause of the Fourteenth Amendment, the First Amendment Right to petition for redress of grievances, and the due process clause of the Fourteenth Amendment. *Ryland v. Shapiro,* 708 F 2d 967(5th Cir. 1983).

[8] Moreover, when a state creates a judicial process, it may not grant the benefits of that process to some litigants and deny it to others without implicating the closely related issues of equal protection and due process of law. *See generally M.L.B. v. S.L.J.*, 519 U.S. 102, 120 (1996) ("[T]he Court's decisions concerning access to judicial processes, commencing with *Griffin* and running through *Mayer,* reflect both equal protection and due process concerns."); *Griffin v. Illinois*, 351 U.S. 12 (1956), construed in *Lindsey v. Normet*, 405 U.S. 56, 77 (1972) ("When an appeal is afforded, however, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause."); *See also Boddie v. Connecticut,* 401 U.S. 371, 377 (1971).

discontinued and that there is no reasonable expectation that unconstitutional practices will recur.[9]

This Court has already found that state court litigation and ensuing legislative action has been futile: "The *DeRolph* case was reviewed by the Supreme Court of Ohio on four separate occasions. Although the Supreme Court of Ohio found Ohio's system of funding public education was unconstitutional, efforts to remedy the situation have proved to be futile, even after court-directed mediation." Docket #89, n. 1.

The Ohio Supreme Court's order in 2002 directed "the General Assembly to enact a school-funding scheme that is thorough and efficient, as explained in *DeRolph I, DeRolph II,* and the accompanying concurrences." *DeRolph IV*, 97 Ohio St. 3d 434, 780 N.E. 2d 529 (2002). The Supreme Court of Ohio neither stayed the effective date of its *DeRolph IV* decision nor retained ongoing jurisdiction over the case. On the same day as the decision, the court issued its judgment entry that Ohio's public school funding system was unconstitutional and issued a mandate to the trial court to carry the judgment into execution.

After December 11, 2002, the State continued the operation of Ohio's public schools under the same system of laws declared unconstitutional by the Supreme Court of Ohio in *DeRolph IV*. On March 4, 2003, the *DeRolph* plaintiffs filed a motion for compliance conference in the trial court. The State responded by filing an original action in the Supreme Court of Ohio requesting a writ to prohibit the trial court from considering the plaintiffs' motion.

On May 16, 2003, the Supreme Court of Ohio rendered its decision and entered a judgment granting the State's request for a writ of prohibition against the trial court. *State ex Rel*

[9] In *Green,* a classic example of structural reform of segregated schools, the Court stated that "the court should retain jurisdiction until it is clear that state-imposed segregation has been completely removed." *Id.* at 439; *accord, Raney v. Board of Educ.*, 391 U.S. 443, 449(1968); *see also Brown v. Board of Educ.*, 349 U.S. 294, 301 (1954) (district court to retain jurisdiction during "period of transition" to desegregated schools).

State v. Lewis, 99 Ohio St.3d 97; 789 N.E.2d 195 (2003). The Court stated that "we now grant a peremptory writ and end any further *DeRolph* litigation in *DeRolph v. State*." *Id.* at 104.[10] The decision in *Lewis* left the plaintiffs in *DeRolph,* and every other schoolchild in Ohio, including those in the plaintiff class, without a meaningful judicial remedy for violation of an interest created by the Ohio Constitution in a thorough and efficient funding system for the education of the state's schoolchildren.

It is this state-created interest that the plaintiff class seeks redress for in this cause of action. Whether characterized as a property or liberty interest, it is apparent that the absence of a judicial remedy has deprived the Ohio schoolchildren in this class of their ability to enforce a state created interest in education, and therefore violated their right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution.

Plaintiffs have alleged that the legislative process has failed to ensure an educational system that meets Ohio Constitutional standards as well as federal special education standards. The only process available to the plaintiff class to seek redress for violations of their property right to an adequate and appropriate public education is in this Court. Unless the Ohio Supreme Court would reverse its holding in *Lewis,* a new suit could not yield anything more than Ohio's school children already have obtained – a comprehensive declaration of rights, all of which are completely unenforceable in state court. In this case, as in those before it, the prophylactic effect of a mandatory injunction is the only remedy that can effectively protect the rights of this class under federal law.

Concerns regarding the costs of ensuring a free appropriate public education to all Ohio students with disabilities are clearly a barrier to the enforcement of that right in the Ohio Courts

[10] The Court, in a triumph of the former dissenters and two newly elected justices, focused on the legislative nature of the remedy, insisting that any further remedial actions must be left to the Ohio General Assembly.

and legislature. The Sixth Circuit has repeatedly held that cost considerations are only relevant when choosing between appropriate educational options. *See e.g., Clevenger v. Oak Ridge School Bd.,* 744 F.2d 514, 517 (6th Cir. 1984); *Roncker ex rel. Roncker v. Walter,* 700 F.2d 1058, 1063 (6th Cir. 1983). It is also clear that "ordinary considerations of cost and convenience alone cannot justify a State's failure to provide individuals with a meaningful right of access to the courts." *Tennessee v. Lane,* 541 U.S. 509, 533 (2004). It is ultimately up to the federal courts to enforce these important, indeed fundamental, federal constitutional interests.

Contrary to defendants' contention, Ohio's Courts have not continued to hear plaintiffs' claims. Defendants point to *State ex rel. Ohio Cong. of Parents & Teachers* in support of its contention that Ohio's courts can continue to hear claims under Art. VI, § 2 of the Ohio Constitution. *State ex rel. Ohio Cong. of Parents & Teachers v. State Bd. of Educ.* 111 Ohio St. 3d 568 (Ohio 2006). Contrary to defendants' assertion, however, plaintiffs do not make the broad contention that, in light of *Lewis,* Ohio's courts cannot hear any claims under Art. VI, § 2 of the Ohio Constitution. Rather, plaintiffs allege that the Ohio Supreme Court has ended its jurisdiction to enforce the plaintiff class' right to a thorough and efficient system of common schools. The Court of Appeals in *State ex rel. Ohio Cong. of Parents & Teachers* explained these arguments quite clearly that "… the Supreme Court's judgment in the *DeRolph* litigation did not address the issues appellants raise and thus does not bar appellants' attempts to litigate the constitutionality of the provisions establishing community schools." *Id.* at 577. This result is understandable since the appellants made claims regarding the constitutionality of community schools, which was at issue neither in *DeRolph* nor in the case *sub judice.* Thus defendants' citation to the case is inapposite.

The Due Process Clause is implicated not simply because the State has refused to comply with *DeRolph IV,* but because *Lewis* flatly held that litigants may be barred from applying to the courts to secure the enforcement of binding judicial decrees. Thus, plaintiffs have stated a claim and defendants' motion should be denied.

3. Plaintiffs' Fifth Cause of Action alleges disparities in funding lacking any rational basis in violation of equal protection

The Equal Protection Clause of the Fourteenth Amendment prohibits a state from denying to any person within its jurisdiction the equal protection of the laws. In essence, a State must "treat similarly situated individuals in a similar manner." *Buchanan v. City of Bolivar,* 99 F.3d 1352, 1360 (6th Cir. 1996) (*quoting Gutzwiller v. Fenik*, 860 F.2d 1317, 1328 (6th Cir.1988)). As this Court has held, there is no Equal Protection violation "if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose. Docket #89, p. 33. "To survive a motion to dismiss for failure to state a claim, a plaintiff must allege facts sufficient to overcome the presumption of rationality that applies to government classifications." *See Bower v. Village of Mt. Sterling,* 44 Fed. Appx. 670 (6th Cir. July 26, 2002) (*quoting Wroblewski v. City of Washburn,* 965 F.2d 452, 459-60 (7th Cir. 1992)).

The Supreme Court held in *Village of Willowbrook v. Olech,* 528 U.S. 562 (2000) that plaintiffs asserting an Equal Protection claim need not allege that they were a member of a suspect class or that defendants intentionally discriminated against them. It is enough for plaintiffs to allege that they were "intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Id.* at 564.

The parties agree that because children with disabilities are not a suspect class, classifications based on disability are subject to a rational basis review. *See Board of Trustees of the Univ. of Alabama v. Garrett,* 531 U.S. 356, 366-67 (2001). As defendants note, when it

comes to funding decisions, States are generally given "wide latitude." *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985); *see also Mathews v. de Castro,* 429 U.S. 181, 185 (1976) (holding that legislation enacted pursuant to the spending power is "entitled to a strong presumption of constitutionality" and decisions to spend money in one way and not another do not give rise to Equal Protection claims "unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment"). This discretion is not limitless, however, and the disparity cannot be based on stereotypical or other irrational bases. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 447 (1985).

Moreover, if a state elects to furnish free compulsory public education to any of its citizens (as does Ohio), it must do so in a manner, respecting all of its residents, which comports with basic Fourteenth Amendment equal protection and due process requirements. *See Brown* at 493 ("Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."); *Goss,* 419 U.S. at 572-75 (explaining that, when state law has guaranteed access to a free public education, a beneficiary of that statutory entitlement may be denied that right only if the state effected that deprivation in conformity with due process requisites). Public education, while not a fundamental right, is a significant interest and cases involving a denial of equal access to education may require more scrutiny. *See Plyer,* 457 U.S. at 230, "if the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest."

Defendants argue that the disparities of funds and opportunities foster local control and therefore are rationally based. Defendants' analysis is based on an overly broad reading of *San Antonio Independent Schools v. Rodriguez,* 411 U.S. 1 (1973). A number of cases have

distinguished *San Antonio* where, as in this case, disparities in funding based on wealth result in educational inadequacy claims. For example, the Supreme Court of Connecticut recently declined to apply the holding of *San Antonio* where, due to the State's arbitrary and inadequate funding system and inadequate and unequal inputs, it failed to provide students suitable and substantially equal educational opportunities. *Conn. Coalition for Justice in Educ. Funding, Inc. v. Rell,* 990 A.2d 206 (Conn. 2010). In distinguishing *San Antonio*, the court noted the U.S. Supreme Court's emphasis that,"[e]ven if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either right, we have no indication that the present levels of educational expenditures in Texas provide an education that falls short;" (quoting *San Antonio* at. 36-37; and that "no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.") *Id.* at 299.

Similarly, the U.S. District Court of Kansas correctly explained that "*Rodriguez* did not, however, purport to validate all funding variations that might result from a State's public school funding decision. It held merely that the variations that resulted from allowing local control over local property tax funding of the public schools were constitutionally permissible in that case." *Robinson v. Kansas,* 117 F. Supp. 2d 1124, 1149 (D. Kan. 2000).

In this case, plaintiffs have claimed that disparities in funding result in educational inadequacy. For example, they allege: "This disparity has harmed plaintiffs and the plaintiff class in that, particularly in less well funded school districts, children with disabilities with identified needs for special education services are denied such services." Docket # 189, para. 380. "Further, children with disabilities in less well funded districts are less likely to be

identified as in need of special education services." Docket # 189, para. 381. When children are not identified for special education services, they are impermissibly denied equal educational opportunities.

Contrary to defendants' assertion that disparities of funds and opportunities foster local control and therefore are rationally based, the plaintiffs have alleged facts which demonstrate that school districts and their residents have little local control, and as a result, the list of Ohio's financially troubled school districts is growing. Docket #189, para. 302.

Specifically, plaintiffs have alleged disparity based on arbitrary classifications related to a district's ability to levy property taxes on its citizens, as well as the native wealth of those citizens and the value of the tax base in that district. Docket #189, para. 378. As a result of these resource disparities, students receive differing, and often inadequate levels of educational opportunity from district to district as reflected by school and building report cards and disparities in graduation rates and proficiency test passage rates. Docket #189, para. 379. Also, plaintiffs allege that because of defendants' failure to fully fund the school-age special education formula: "Poor districts are less able to raise revenue to fund the 10% formula shortfall." Docket # 189, para. 217. With respect to special education preschool, plaintiffs have alleged that the scheme by which Ohio distributes the state funds appropriated each biennium results in under-funding and inequitable funding for special education. Docket #189, para. 270. The inequities arise from the method of calculation for state approved preschool special education unit funding which is not equalized based on the wealth of the district. Docket #189, para. 271. Thus unit funding adversely impacts children with disabilities in smaller and poorer school districts to a greater degree than students in larger and wealthier school districts.

Instead of exercising reasoned judgment about how the needs of students with disabilities can be adequately funded, Ohio's system continues to be based on what the Ohio General Assembly is willing to spend.[11] Some examples of arbitrary limits placed on funding for special education services include:

- the state limits reimbursement for home instruction costs for only three disability categories (para. 232), reimbursement is limited to 50% of the cost of home instruction for a maximum of one hour per day (para. 234) and there is a budgetary cap on the amount of funds available to reimburse school districts for the costs of home instruction (para. 235);
- there is no allocation of state funds to assist districts with the amount above the amount provided by the special education weighted formula but before the catastrophic aid threshold amount is reached (para. 240) and there is a budgetary cap on catastrophic aid (para. 243);
- Ohio lawmakers have again failed to fully fund the special education weighted formula, with funding provided at 90% and no plan to fund the weights at 100% (para. 197).

Docket #189. Because of these arbitrary and irrational funding shortfalls, children with disabilities in poorer school districts are more likely to be denied an adequate education as mandated by the IDEA and equal educational opportunity as mandated under Section 504.

Therefore, plaintiffs have alleged sufficient facts entitling them to proceed with their argument that there is no rational basis for Ohio's system where funding disparities result in

[11] Plaintiffs allege as follows: "The Ohio State Board of Education continues to make budget recommendations based on political viability and not based on the actual costs of providing students, including students with disabilities, an adequate education. The Ohio General Assembly continues to enact education budgets that do not fully fund the costs of providing a thorough and efficient system of common schools." Docket #189, para. 324.

denying students with disabilities their federally mandated right to receive a free appropriate public education.

CONCLUSION

Plaintiffs and the plaintiff class have demonstrated that defendants' arguments must fail, and that this case is ready to move to trial on plaintiffs' claims. Accordingly, the defendants' motion should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 8, 2010, the Plaintiffs' Response to Defendants' Motion for Partial Dismissal was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

Respectfully submitted,

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