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United States District Court, S.D. Ohio, Eastern Division.

THOMPSON, et al., Plaintiffs,
v.
STATE of Ohio, et al., Defendants.

No. C2–91–464.
|
Sept. 13, 2000.

MEMORANDUM AND ORDER

HOLSCHUH, J.

***1** This matter is before the Court on *Plaintiffs' Motion for Partial Summary Judgment,* filed June 3, 1997 (Record at 65), *Defendants' Memorandum in Opposition,* filed September 25, 1997 (Record at 68), and *Plaintiffs' Reply Memorandum,* filed January 9, 1998 (Record at 70). Plaintiffs assert that they are entitled to partial summary judgment in this case based on facts previously adjudicated in *DeRolph v. State of Ohio*, Perry County Court of Common Pleas, Case No. 22043. Plaintiffs claim that the Court's Findings of Fact in *DeRolph* have preclusive effect here, and that this Court should apply those findings to Plaintiffs' federal claims and grant partial summary judgment accordingly. For the reasons stated herein, Plaintiffs' motion is DENIED.

PROCEDURAL HISTORY

This case began as *Thompson, et al. v. State of Ohio,* Perry County Court of Common Pleas, Case No. 21752, on May 9, 1991. Defendants were the State of Ohio, the State Board of Education, the Superintendent of Public Instruction, and the Ohio Department of Education. Plaintiffs included the Southern Local School District of Perry County, Cardington–Lincoln Local School District, Dawson–Bryant Local District of Lawrence County, the Lima City School District, the Youngstown City School District, and the Union–Scioto Local School District, along with certain named students, parents, teachers, and superintendents of those districts.

The Complaint alleged, in short, that Ohio's statutory scheme for financing public elementary and secondary education was unconstitutional under both the Ohio and federal constitutions. On June 10, 1991, Defendants filed a notice of removal to this Court. Plaintiffs moved to remand, but this Court denied the motion on September 19, 1991 (Record at 9).

On December 19, 1991, the Northern Local School District filed a parallel state court suit, *DeRolph v. State of Ohio,* Perry County Court of Common Pleas, Case No. 22043. Plaintiffs included the Northern Local School District, its Superintendent, a member of its Board of Education, a teacher, a parent, and a student, all from the district. The suit alleged, similarly, that Ohio's system of funding public education violated the Ohio Constitution, but did not allege any federal claims.

On January 15, 1992, the Youngstown City School District, the Dawson–Bryant Local District of Lawrence County, the Lima City School District, the Southern Local School District, and the individual plaintiffs associated with those districts, all stipulated to dismissal of their claims in this Court (Record at 11), thereafter joining the state court suit. Thus, the remaining plaintiffs in this federal suit were the Cardington–Lincoln Local School District, the Union–Scioto Local School District, various named students, parents and next friends from the two school districts, members of each district's Board of Education and the districts' Superintendents. These plaintiffs filed a *Second Amended Complaint* on August 25, 1992 (Record at 15) to mirror the parallel state court complaint, but with the addition of federal constitutional claims. Defendants remained the same, the State of Ohio, the State Board of Education, the Superintendent of Public Instruction, and the Ohio Department of Education.

***2** On February 9, 1994, John Doe, his parents, and the Ohio Legal Rights Service were granted leave to intervene as plaintiffs. They filed an *Intervenor's Class Action Complaint* on February 9, 1994 (Record at 46), alleging violations of the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1401, *et seq.* (IDEA); Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794; the Americans with Disabilities Act, 42 U.S.C. §§ 12131, *et seq.* (ADA); and the equal protection and due process clauses of the U.S. Constitution, through 42 U.S.C. § 1983. Plaintiffs sought declaratory and

injunctive relief.

On February 27, 1995, the two remaining plaintiff school districts, Union–Scioto Local School District and Cardington–Lincoln Local School District, along with their associated individual plaintiffs, each stipulated to dismissal of their claims in this Court (Record at 51). On September 5, 1995, intervenor the Ohio Legal Rights Service also stipulated to dismissal (Record at 56). This left John Doe and his parents as plaintiffs, whose motion to certify a class of disabled students was granted on February 20, 1996 (Record at 59). Defendants remain the same, the State of Ohio, the State Board of Education, the Superintendent of Public Instruction, and the Ohio Department of Education.

The State Court Proceeding

The trial of *DeRolph v. State of Ohio,* Common Pleas Court of Perry County, Ohio, Case No. 22043, began on October 25, 1993 in New Lexington, Ohio, and concluded over a month later on December 8, 1993. *See Findings of Fact, Conclusions of Law, Order and Memorandum,* Judge Linton D. Lewis, Jr., July 1, 1994 (attached as Appendix to *Intervenor Plaintiffs' Reply Memorandum in Support of Class Certification,* filed July 12, 1994 (Record at 50)). Plaintiffs sought a declaration that the right to a public elementary and secondary education in Ohio was a fundamental right under the Ohio Constitution, and that Ohio's current system of funding public education, including special education programs, violated the Ohio Constitution and laws of the State of Ohio. In particular, Plaintiffs sought a declaration that:

- the system of funding public education in Ohio had deprived plaintiffs of a fundamental right in violation of the Ohio Constitution;

- the system of funding public education in Ohio had deprived plaintiffs of equal protection, due process of law and uniform operation of laws as guaranteed by the Ohio Constitution;

- the system of funding public education in Ohio had failed to provide handicapped and disabled students the education and related services required by O.R.C. § 3323;

- the system of funding public education in Ohio had failed to provide sufficient revenue to provide the educational programs and related services for non-handicapped students as required by law in violation of the equal protection clause of the Ohio Constitution; and

- Defendants had failed to provide a "thorough and efficient system of common schools throughout the state" as required by the Ohio Constitution.

***3** Plaintiffs sought a mandatory injunction requiring Defendants to establish and fund an education system that complied with the Ohio Constitution and laws of Ohio.

Plaintiffs won on all counts. The trial lasted for 30 days, resulting in a trial transcript totaling 5,642 pages. Another 5,185 pages of deposition testimony were read by the Court, which included 215 objections, bringing the total record of testimony in the case to 10,827 pages. Over 500 exhibits were admitted. Thirty-eight witnesses were heard at trial, and 33 more testified by deposition. The Court's Findings of Fact totaled 448 pages, with an additional 30 pages for its Conclusions of Law. (*Id.* at 463).

The Court found education to be a fundamental right guaranteed by the Ohio Constitution, subject to strict judicial scrutiny, requiring the State to show that the system it had in place for funding public education justified a compelling state interest. (*Id.* at 469). Defendants claimed that "local control" of education provided a compelling or legitimate state interest that justified the large disparities in funding and educational opportunities afforded students in Ohio. (*Id.*). The Court agreed that "[i]f in fact such 'local control' existed to any significant degree," it could qualify as a compelling or legitimate state interest, but due to the reality of unfunded state mandates, the Court concluded that such control was actually a "cruel illusion." (*Id.*).

Under O.R.C. § 3323.02, Ohio's handicapped children are entitled to an "appropriate public education." The Court concluded that this appropriate education was protected as "an inalienable right" by the equal protection clause and the uniform operation of laws provisions of the Ohio Constitution. (*Id.* at 471) (*citing* Art. I, §§ 1 and 2; Art. II., § 26 of the Ohio Constitution). The Court found that state mandates required schools to provide a certain number of special education units in each district, but did not provide any funding for the facilities or space needed to provide such units. (*Id.* at 471–472). In addition, the lack of necessary special education funding resulted in a significant delay in identifying children with special needs, because no programs were available to help those students, should they be identified. (*Id.* at 472). As a result, the Court found, "our special education students are not receiving an appropriate public education," required under O.R.C. § 3323. (*Id.* 473). Thus, the current system of funding the needs of Ohio's special education students violated O.R.C. § 3323 and the Ohio

Constitution. (*Id.* at 472).

The Court then noted that due to the state's unfunded mandates regarding special education, school districts were forced to rely on their general fund monies to meet the state requirements. As a result, monies were taken away from educating non-handicapped students. Moreover, "[w]hen the general fund is used to assist in providing the special education requirements the poorer school districts are hurt worse than the wealthier ones." (*Id.* at 472). Though the special education students certainly were entitled to special education, there still remained no "rational basis for funding the education of non-handicapped students at a funding level based on what remains after funding special education rather than being based on the actual needs of those non-handicapped students." (*Id.*). Accordingly, the Court concluded that the equal protection and due process rights of non-handicapped students, secured by the Ohio Constitution, were also violated by the current system of funding. (*Id*. at 473).

***4** The Court then relied on scores of findings, detailing deplorable conditions, dilapidated buildings, the lack of handicap access, the lack of equipment, supplies, textbooks, and technology, the distressing failure rate on the ninth grade proficiency test, and the rate at which districts were borrowing money to meet funding needs, to conclude that "[t]he present system of school funding established by statute is neither thorough nor efficient" as required by the Ohio Constitution. (*Id.* at 473–475).

The Court then directed the Superintendent of Public Instruction for the State of Ohio and the State Board of Education to prepare a report setting forth proposals for the elimination of the wealth-based disparities and present the same to the Ohio Legislature upon completion. In addition, the State Superintendent and Board of Education were directed to prepare a report following the end of the 1994 and 1995 Ohio legislative sessions, setting forth the steps that had been taken to resolve the issues brought out in the case. (*Id.* at 478).

Judge Lewis' decision was appealed to the Fifth District Court of Appeals for Perry County by Ohio's Attorney General. *See DeRolph v. State of Ohio*, 1995 WL 557316 (Ohio App. 5 Dist., Aug. 30, 1995) (No. CA–477). Relying on *Cincinnati School Dist. Brd. of Educ. v. Walter*, 58 Ohio St.2d 368, 390 N.E.2d 813 (1979), which the trial court found non-binding, the appeals court reversed the trial court's decision. It concluded, among other things, that the manner in which education is funded in Ohio did not involve a fundamental right. (*Id.* at 3). It also found that the facts relied on by the trial court did not support a conclusion that Defendants had failed to provide a "thorough and efficient" system of common schools in violation of the Ohio Constitution. (*Id.* at 4).

Regarding the trial court's conclusion that the current system violated O.R.C. § 3323 and the Ohio Constitution by failing to provide sufficient funds for handicapped students, the Court held that:

> In Ohio, handicapped students receive the same state funding as non-handicapped students. They also receive, through state enabling legislation, federal funds in addition to the state funds. This court has already found the state school funding system constitutional, despite the numerous findings by the trial court otherwise. Therefore, *the handicapped students who receive the same state funding as non-handicapped students cannot logically be deprived of a constitutional right based on that finding.* Since the additional or special funding they receive is provided by the federal government, through state enabling legislation, any violation cannot be constitutional but would have to be statutory. We find no such statutory violation.

(*Id.* at 5).

The Court also reversed the trial court's order that the Superintendent of Public Instruction for the State of Ohio and the State Board of Education prepare a report setting forth proposals for the elimination of wealth-based disparities and to present the same to the Ohio Legislature upon completion, declaring that a common pleas court judge did not have authority to legislate school funding by telling the school board to recommend legislation and then retain jurisdiction to review the legislation. (*Id.* at 7).

***5** A discretionary appeal of the Fifth District Court of Appeals decision was allowed to the Ohio Supreme Court. *See DeRolph v. State of Ohio*, 78 Ohio St.3d 193, 677 N.E.2d 733 (1997). In a 4–3 decision, the Court reversed the appellate court, finding that the "current legislation fails to provide for a thorough and efficient system of common schools in violation of Section 2,

Article VI of the Ohio Constitution." *DeRolph,* 78 Ohio St.3d at 198, 677 N.E.2d at 737.

However, having decided that Ohio's school financing system did indeed violate the "thorough and efficient" clause of the Ohio Constitution, the Court declined to address plaintiffs' contentions that education was a fundamental right; that the current funding system violated equal protection; or that the school financing system violated § 3, Article VIII or § 4, Article XII of the Ohio Constitution. (*Id.* at 202, n. 5). Thus, the Court did not address the trial court's specific finding that the current system of funding denied handicapped students or those in need of special education their right to an "appropriate public education" as required by O.R.C. § 3323 and the equal protection clause of the Ohio Constitution.

The Court stayed the effect of the decision for twelve months, giving the Ohio legislature time "for adequate study, drafting of the appropriate legislation, and transition from the present scheme of financing to one in conformity with this decision." (*Id.* at 213). It further ordered the trial court to retain jurisdiction until the legislation was enacted and in effect. (*Id.*).

Back to Federal Court

It was after the Ohio Supreme Court's decision in March 1997 that Plaintiffs, here, filed their motion for summary judgment requesting this Court to apply the Findings of Fact from the Perry County *trial* court to Plaintiffs' federal claims here, and grant partial summary judgment. Plaintiffs' claims in this federal action, and the subject of their motion for summary judgment, allege that Ohio's system for funding public education violates the following federal rights of disabled students:

> • the right to a free appropriate public education under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1401, *et seq.*, and § 504 of the Rehabilitation Act of 1973;
>
> • the constitutional right to due process and equal protection under the U.S. Constitution and 42 U.S.C. § 1983 (by providing students with disabilities in poorer districts inadequate educations, while similar students with disabilities in wealthier school districts are much more likely to be provided with an appropriate education);
> • the right to be free from discrimination based upon their handicaps in accordance with § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 and the Americans with Disabilities Act, 42 U.S.C. §§ 12131, *et seq.* (by failing to ensure school building accessibility).[1]

(Pls.' Mtn. S.J. at 2).

ISSUE PRECLUSION

***6** As is at once evident, Plaintiffs' claims regarding disabled students in this federal action are not the same as in the state suit. Though they are similar, the issues related to disabled students in the state suit alleged violations of *Ohio* Rev.Code § 3323 and the *Ohio* Constitution, while the claims here allege violations of *federal* laws and the *U.S.* Constitution. For this reason, Plaintiffs do not assert *claim* preclusion (res judicata) to bar relitigation in this Court, but rather *issue* preclusion (collateral estoppel). Plaintiffs assert that Defendants should be barred from relitigating specific facts decided by the trial court judge in *DeRolph v. State of Ohio*, Common Pleas Court of Perry County, Case No. 22043, and that application of those facts to certain federal claims, here, should result in summary judgment on those issues.

This Court must apply Ohio law to determine the preclusive effect to be given the state court judgment in this Court. *Migra v. Warren City School Distr. Brd. of Educ.*, 465 U.S. 75, 81, 104 S.Ct. 892, 896 (1984) ("It is now settled that a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered."). The federal cases not applying Ohio law cited by the parties do not apply to this determination.

In Ohio, "[t]he doctrine of collateral estoppel, or, more correctly, issue preclusion, precludes further action on an *identical issue* that has been *actually litigated and determined* by a *valid and final judgment* as part of a prior action among the *same parties* or those in privity with those parties." *State v. Williams*, 76 Ohio St.3d 290, 294, 667 N.E.2d 932, 935 (1996) (emphasis added) (*citing Hicks v. De La Cruz*, 52 Ohio St.2d 71, 74, 369 N.E.2d 776, 777 (1977); *Goodson v. McDonough Power Equip., Inc.*, 2 Ohio St.3d 193, 443 N.E.2d 978, Syllabus ¶ 1 (1983)). Contrary to Plaintiffs' assertions, the burden of persuasion is not on Defendants to show they lacked a "full and fair opportunity to litigate" the issues presented here, but on Plaintiffs to prove to the Court that the prior judgment should be given preclusive effect. "The burden

of proving a former adjudication is upon the party attempting to use it as res judicata." 63 OH Jur 3d, *Judgments* § 515 (*citing Ohio Finance Co. v. McReynolds*, 27 Ohio App. 42, 160 N.E. 727 (1927)).

> [A]n absolute due process prerequisite to the application of collateral estoppel is that *the party* asserting *the preclusion* must prove that the identical issue was actually litigated, directly determined, and essential to the judgment in the prior action.

Goodson v. McDonough Power Equip., Inc., 2 Ohio St.3d 193, 201, 443 N.E.2d 978, 985 (1983) (emphasis added) (*citing Norwood v. McDonald*, 142 Ohio St. 299, 52 N.E.2d 67 (1943); *First Natl. Bank v. Berkshire Life Ins. Co.*, 176 Ohio St. 395, 199 N.E.2d 863 (1964); *Ohio Finance Co. v. McReynolds*, 27 Ohio App. 42, 160 N.E. 727 (1927)).

Same Parties

***7** This requirement was not heavily addressed by the parties, but seems the most obvious problem with permitting the state court findings of fact to be given preclusive effect here. Unlike the federal system and most other state jurisdictions, Ohio requires mutuality of parties before collateral estoppel may be applied to bar relitigation of issues.

> In Ohio, the general rule is that mutuality of parties is a requisite to collateral estoppel, or issue preclusion. As a general principle, collateral estoppel operates *only where all of the parties to the present proceeding were bound by the prior judgment.* A judgment, in order to preclude either party from relitigating an issue, must be preclusive on *both.*

Goodson, 2 Ohio St.3d at 193, 443 N.E.2d at 979, Syllabus ¶ 1 (emphasis added) (*approving and following Whitehead v. Genl. Tel. Co. of Ohio*, 20 Ohio St.2d 108, 254 N.E.2d 10, Syllabus ¶ 2 (1969); *Trautwein v. Sorgenfrei*, 58 Ohio St.2d 493, 391 N.E.2d 326, Syllabus (1979)). Thus, "collateral estoppel may generally be applied only when the party seeking to use the prior judgment and the party against whom the judgment is being asserted were parties to the original judgment or in privity with those parties." *Goodson*, 2 Ohio St.3d at 202, 443 N.E.2d at 987.

After the Ohio Supreme Court's decision in *Hicks v. De La Cruz*, 52 Ohio St.2d 71, 369 N.E.2d 776 (1977), some discussion arose that the Court was willing to abandon the requirement of strict mutuality. *See, e.g., Skliros v. City of Westlake*, 1982 WL 2517 (Ohio App. 8 Dist., Nov 04, 1982) (No. 44842). However, since *Hicks*, the Ohio Supreme Court has made clear that "this court has *not abandoned* the principal of mutuality." *Goodson*, 2 Ohio St.3d at 200, 443 N.E.2d at 985 (emphasis added). The Court cited several cases decided since *Hicks* "in which the issue was central to the decisions reached by th[e] court," that made clear the continuing "viability" of the rule. *Id.* (*citing Schomaeker v. First Natl. Bank*, 66 Ohio St.2d 304, 313, 421 N.E.2d 530 (1981); *Johnson v. Norman*, 66 Ohio St.2d 186, 190, 421 N.E.2d 124 (1981); *State ex rel. Westchester Estates, Inc. v. Bacon*, 61 Ohio St.2d 42, 399 N.E.2d 81 (1980); *Trautwein v. Sorgenfrei*, 58 Ohio St.2d 493, 391 N.E.2d 326 (1979); and *Werlin Corp. v. Pub. Util. Comm.*, 53 Ohio St.2d 76, 81, 372 N.E.2d 592 (1978)); *see also Everhardt v. Jackson Nat. Life Ins. Co.*, 1998 WL 831427,*2–3 (Ohio App. 9 Dist., Nov 25, 1998) (No. 18953) ("Ohio courts have consistently held that collateral estoppel may be invoked 'only when the party seeking to use the prior judgment and the party against whom the judgment is being asserted were parties to the original judgment or in privity with those parties." ') (citation omitted).

In addition, since *Hicks*, this Court and the Sixth Circuit have both recognized that Ohio still requires mutuality of parties before collateral estoppel may be applied. *See Bell v. City of Miamisburg*, 1992 WL 1258527,*5 (S.D.Ohio, Jan 17, 1992) (J.Rice) ("Ohio law requires *strict* mutuality of parties before collateral estoppel will foreclose the litigation of an issue decided in a prior decision.") (emphasis added) (*citing Goodson*, 2 Ohio St.3d at 193, 443 N.E.2d at 979); *First Federal Savings and Loan v. Fidelity and Deposit Co.*, 895 F.2d 254, 262 (6th Cir.1990) ("Under Ohio law, collateral estoppel and estoppel by judgment operate *only* where there exists mutuality of parties.") (emphasis added).

***8** Here, mutuality of parties does not exist. Though Defendants in both cases are the same, and the Plaintiffs in *DeRolph v. State of Ohio* did *begin* their pursuit in this

Court, the remaining intervening Plaintiffs now asserting collateral estoppel are not the same as those in the state court suit. Plaintiffs in the state suit were the Northern Local School Board of Education, the Southern Local School District Board of Education, the Dawson–Bryant Local School District Board of Education, the Lima City School District Board of Education, and the Youngstown City School District Board of Education, along with certain named members of each district's Board of Education, the Superintendent of each district, a parent and next friend of a student from each district, and a teacher from each district. On the other hand, intervening Plaintiffs in this case are now John Doe and his parents, representing a defined class of disabled students.

Because of the parties involved, Defendants in the state proceeding were defending the very broad issue of the overall constitutionality (under Ohio law) of the state's system of funding public education as it impacted a contingency of *local school districts.* Defendants were not specifically concerned with the narrower issue of the impact that system might have on a defined class of *disabled students,* as it related to requirements imposed by various federal laws. Thus, it would be unfair to preclude Defendants from litigating those issues here. *See Parklane Hosiery Co., Inc. v. Shore,* 439 U.S. 322, 330, 99 S.Ct. 645, 651 (1979) (such "offensive use of collateral estoppel is ... unfair to a defendant"); *Goodson,* 2 Ohio St.3d at 198, 443 N.E.2d at 983 (*citing Parklane, supra*).

Full and Fair Opportunity to Litigate Identical Issues

> The main legal thread which runs throughout the determination of the applicability of res judicata, inclusive of the adjunct principle of collateral estoppel, is the necessity of a *fair opportunity to fully litigate and to be "heard" in the due process sense.* Accordingly, an absolute due process prerequisite to the application of collateral estoppel is that the party asserting the preclusion must prove that the identical issue was actually litigated, directly determined, and essential to the judgment in the prior action.
> *Goodson,* 2 Ohio St.3d 193, 200–201, 443 N.E.2d 978, 985–986 (*citing Norwood v. McDonald,* 142 Ohio St. 299, 52 N.E.2d 67 (1943); *First Natl. Bank v. Berkshire Life Ins. Co.,* 176 Ohio St. 395, 199 N.E.2d 863 (1964); *Ohio Finance Co. v. McReynolds,* 27 Ohio App. 42, 160 N.E. 727 (1927)).

One of the luxuries that mutuality of parties affords a subsequent court is the confidence that issues addressed in the earlier litigation were actually decided as between those parties, or at least that the party against whom estoppel is now being asserted had a full and fair *opportunity* to litigate those issues. Depending on the motivation for litigating the earlier suit, the possible liability involved in the earlier suit, the actual parties involved, and the relative significance of various issues presented in that suit, a party might not have defended the particular issue as vigorously as it might have had it known it would later be used against them. It is for these reasons that:

> ***9** Collaterally estopping a party from relitigating an issue previously decided against it *violates due process* where it could not be *foreseen* that the issue would subsequently be utilized collaterally, and where the party had little knowledge or *incentive* to litigate fully and vigorously in the first action due to the procedural and/or factual circumstances presented therein.

Goodson, 2 Ohio St.3d at 201, 443 N.E.2d at 986 (emphasis added).

Again, Defendants were defending an enormous lawsuit in the state court proceeding, against a large contingency of school district plaintiffs, on a broad range of constitutional and statutory issues under Ohio law. Though the rights of disabled students were included among those issues, disabled students were not specific plaintiffs in that case; thus, Defendants had less incentive to address their specific concerns. Moreover, *Intervenor's Class Action Complaint* (Record at 46) was not filed in this case until February 9, 1994, several months *after* the trial in state court had ended. In addition, the class in this matter was not certified until two *years* after that judgment was entered. Thus, Defendants could not have foreseen that their failure to aggressively litigate the particular disabled student issues in the state proceeding would later be used against them in this matter. Accordingly, the Court finds that Defendants have not yet had a full and fair opportunity to litigate the particular issues addressed in this suit.

Moreover, it is evident that, since the trial court's decision on July 1, 1994, the facts established in that case have changed.

> Where there has been a *change in the facts* since a decision was rendered in an action, which either raises a new material issue or which would have been relevant to the resolution of a material issue involved in the earlier action, neither the doctrine of res judicata nor the doctrine of collateral estoppel will bar litigation of that issue in a later action.

State ex rel. Westchester Estates, Inc. v. Bacon, 61 Ohio St.2d 42, 399 N.E.2d 81, Syllabus ¶ 2 (1980); *see also Gerstenberger v. Macedonia,* 97 Ohio App.3d 167, 173, 646 N.E.2d 489, 493 (Ohio App. 9 Dist., 1994); *Jacobs v. Teledyne, Inc.*, 39 Ohio St.3d 168, 171, 529 N.E.2d 1255, 1259 (1988); *Couch v. Middletown,* 86 Ohio App.3d 128, 132, 620 N.E.2d 177, 180 (Ohio App. 12 Dist., 1993); *Olentangy Associates v. Franklin County Brd. of Revision,* 1988 WL 73528,*2 (Ohio App. 10 Dist., Jul. 12, 1988) (No. 88AP–07, 88AP–08, 88AP–09, 88AP–10).[2]

Defendants provide affidavits (attached to *Defs.' Mem. Opp. S.J* . (Record at 68)) from Susan Tavakolian, Director of School Finance with the Ohio Department of Education, and John Herner, Director of the Division of Special Education with the Ohio Department of Education, which detail several changes made to Ohio's system of funding since the state trial court's decision in 1994. They include, among other changes: the establishment of an equity funding program to alleviate disparities between poor and wealthy districts (contributing $484 million to low wealth districts); the appropriation of nearly $50 million to low wealth districts through equity technology grants; establishment of a SchoolNet and SchoolNet Plus program to provide technical assistance to poorer districts ($95 million in 1995–96 and $125 million in 1996–97); a 12% increase in federal funding through the IDEA ($94 million for 1996–97); an 11% increase in funding for transportation of special education students (an additional $23 million); a $5 million appropriation to improve handicap accessibility; development of a policy manual entitled *Model Policies and Procedures for the Education of Children with Disabilities.* In addition, the Court notes that since the July 1, 1994 findings of the state trial court, the Ohio General Assembly has enacted several pieces of legislation in an attempt to revamp its funding system.[3]

***10** Indeed, Plaintiffs admit that changes have been made since the state trial court's decision, but they argue that such changes are not enough. (*Pls.' Reply Mem.* (Record at 70)). This may very well be true, but it does not belie the fact that changes have indeed occurred. And, "[w]here there has been a *change in the facts* since a decision was rendered in an action ... neither the doctrine of res judicata nor the doctrine of collateral estoppel will bar litigation of that issue in a later action." *State ex rel. Westchester Estates, Inc. v. Bacon,* 61 Ohio St.2d 42, 399 N.E .2d 81, Syllabus ¶ 2 (1980).

Valid and Final Judgment

In addition, Plaintiffs have failed to present a "valid and final judgment" from the state court upon which to base this request for collateral estoppel. "A 'valid and final judgment' is necessary before collateral estoppel can be invoked." *City of Cleveland v. Cleveland Elec. Illuminating Co.,* 734 F.2d 1157, 1166 (6th Cir.1984) (*citing Ashe v. Swenson,* 397 U.S. 436, 443, 90 S.Ct. 1189, 1194 (1970)). Here, Plaintiffs move the Court to apply Findings of Fact adjudicated in the July 1, 1994 decision of Judge Lewis, Jr., in *DeRolph v. State of Ohio,* Common Pleas Court of Perry County, Ohio, Case No. 22043. However, that judgment was reversed by the Fifth District Court of Appeals in *DeRolph v. State of Ohio,* 1995 WL 557316 (Ohio App. 5 Dist., Aug. 30, 1995) (No. CA–477), at which point the trial court's judgment, including its Findings of Fact, lost all preclusive effect.

> It is well established that "[w]hen a judgment has been subjected to appellate review, the *appellate court's disposition* of the judgment generally provides the key to its continued force as res judicata and collateral estoppel. A judgment that has been vacated, reversed, or set aside on appeal is thereby deprived of *all* conclusive effect, *both as res judicata and as collateral estoppel."*

Erebia v. Chrysler Plastic Products Corp., 891 F.2d 1212, 1215 (6th Cir.1989) (citations omitted).[4]

This is true even if Defendants had a full and fair opportunity to litigate the issues in the earlier proceeding, and even if the trial court's findings of fact were never specifically challenged on appeal.

> The issues that [defendant] now wants to litigate *were* fully litigated and firmly decided at the [earlier] trial. [Defendant] did not challenge the fact-findings on appeal. The [decision] was reversed on grounds

> having no bearing on the validity of the fact-findings. *The reversal, however, vacates the judgment entirely, technically leaving nothing to which we may accord preclusive effect.* ... [T]he general rule is that a judgment which is vacated, *for whatever reason,* is deprived of its conclusive effect as collateral estoppel [citations omitted].

Dodrill v. Ludt, 764 F.2d 442, 444–445 (6th Cir.1985) (emphasis added).

Furthermore, the Ohio Supreme Court's subsequent reversal of the Fifth District Court of Appeals' decision does not alter this result. The Ohio Supreme Court specifically did not address the special education issues. As discussed earlier, the Ohio Supreme Court reviewed the Fifth District Court of Appeals' decision and found that Ohio's school financing system did indeed violate the "thorough and efficient" clause of the Ohio Constitution. However, the Court *specifically* declined to address plaintiffs' other claims, including the contention that the funding system violated the Ohio Constitution's guarantee of equal protection. *See DeRolph,* 78 Ohio St.3d at 202, n. 5. Therefore, the Court did not address the trial court's specific finding that the current system of funding denied handicapped students or those in need of special education their right to an "appropriate public education" as required by O.R.C. § 3323 and the Ohio Constitution.

***11** Moreover, this Court declines to give merit to Plaintiffs' claim that the trial court's findings which related to special education were "essential" to the Ohio Supreme Court's decision. Plaintiffs argue that, in finding that Ohio's system of funding violated the "thorough and efficient" clause, the Ohio Supreme Court "necessarily" relied on particular findings of fact related to special education. However, though the Ohio Supreme Court did refer to a few findings (out of the 448 pages of findings) that specifically related to special education, those findings and the Court's references to them were *not* "essential" to its holding regarding the "thorough and efficient" clause. They were collateral facts, used to illustrate the Court's decision on the "thorough and efficient" issue only.[5] "Where a determination in a prior ... action was not *essential* to the judgment obtained therein, collateral estoppel will not foreclose consideration of the issue in a subsequent ... proceeding involving a different claim for relief." *Kelly v. Georgia–Pacific Corporation,* 46 Ohio St.3d 134, 545 N.E.2d 1244, syllabus ¶ 1 (1989) (emphasis added); *see also Buckeye Union Ins. Co. v. New England Ins. Co.,* 87 Ohio St.3d 280, 287, 720 N.E.2d 495, 501 (1999); *Goodson,* 2 Ohio St.3d at 201, 443 N.E.2d at 985; *Porter v. Wagner,* 36 Ohio St. 471, 1881 WL 22, Syllabus ¶ 3 (Ohio, Jan. Term 1881) ("A judgment is conclusive by way of estoppel only as to *facts, without the proof or the admission of which it could not have been rendered."*) (emphasis added).

Moreover, the Ohio Supreme Court's failure to address the special education issues does not revive the trial court's findings. "A judgment that has been vacated, reversed, or set aside on appeal is thereby deprived of *all* conclusive effect...." *Erebia v. Chrysler Plastic Products Corp.,* 891 F.2d 1212, 1215 (6th Cir.1989). When the Fifth District Court of Appeals reversed the trial court's judgment, the special education issues were again open to litigation. *Dodrill v. Ludt,* 764 F.2d 442, 444 (6th Cir.1985) (" 'By reversal a judgment is made void, and the matters, litigated in the case reversed, *again become open for litigation between the same parties." '*) (*quoting Hinton v. McNeil,* 5 Ohio 509, 511 (1832)). As the issues were not decided, then, on appeal to the Ohio Supreme Court, there is no new judgment on which to base collateral estoppel.

> Any other rule would needlessly and astronomically proliferate the number of issues raised on appeal. If a judgment could be entirely vacated yet preclusive effect still given to issues determined at trial but not specifically appealed, appellants generally would feel compelled to appeal *every contrary factual determination.* Such inefficiency neither lawyers nor judges ought to court. Litigants ought to be encouraged to expend their energies on their most compelling issues and arguments, without *paranoia about the preclusive effect of other issues or determinations.*

***12** *Id.* at 444–445 (emphasis added).

CONCLUSION

This Court does not underestimate the importance of the special education issues raised by Plaintiffs' claims. The Court is also aware of the fact that an enormous amount of time, money and judicial resources have been expended in litigating through the state court system issues that not only concern Ohio's funding of its schools in general but also the state's funding of education for handicapped students. It is certainly possible, and, hopefully probable, that the ultimate result of that litigation will serve to substantially resolve, or at least greatly narrow, the issues involved in this case. In that event, a protracted trial with the attendant burdens and costs on the litigants may not be necessary.

However, should a trial be necessary, it is inappropriate for this Court to rely on the same set of facts in this proceeding that were relied upon by the state court in making its 1994 determination. That initial judgment was reversed on appeal and the special education issues left unaddressed by the Ohio Supreme Court. In addition, the facts relied upon by the state trial court have grown stale by the passing of time and new legislation enacted in the Ohio General Assembly. Thus, those specific findings of fact cannot be given preclusive effect here.

Even were this Court to give the trial court's findings preclusive effect, the Court still could not find, based on those facts, that the *current* system of funding in Ohio violates the various federal laws at issue here. To decide such issues, the Court will need updated facts and a current view of the funding system to judge the validity of the current system against those federal issues.

For these reasons, Plaintiffs' motion for partial summary judgment (Record at 65) is hereby DENIED.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2000 WL 1456995

Footnotes

[1] Plaintiffs also allege that the funding scheme for special education in Ohio illegally fosters exclusion of students with disabilities from regular classrooms in neighborhood schools and that the Ohio Department of Education has failed in its duty to monitor and enforce the IDEA at the local school district level in violation of the IDEA, § 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act (ADA), and the Equal Protection and Due Process Clauses of the U.S. Constitution. But these claims are not the subject of Plaintiffs' current motion for summary judgment. (*See* Pls.'s Mtn. S.J. at 3) (*citing Complaint* at ¶¶ 101–128; 148–169).

[2] *See also* the following unreported cases: *Perry v. Guttman,* 1988 WL 101216,*3 (Ohio App. 1 Dist., Sep 28, 1988) (No. C–870530, C–870568); *Crape v. City of Toledo,* 1984 WL 7891,*5 (Ohio App. 6 Dist., Jun 01, 1984) (No. 84–026); *Kramer v. Myers,* 1983 WL 3766,*3 (Ohio App. 10 Dist., Nov 10, 1983) (No. 83AP–311); *Fry v. Adams,* 1983 WL 3271,*3 (Ohio App. 4 Dist ., Sep 22, 1983) (No. 82CA3); *Abrams v. Bureau of Motor Vehicles,* 1983 WL 3018,*2 (Ohio App. 8 Dist., May 26, 1983) (No. 45798).

[3] Such legislation includes: Am. Sub. H.B. 650 and Am. Sub. H.B. 770 (setting forth the funding plan for operation of Ohio's schools), Sub H.B. 412 (containing provisions for mandatory set-asides, borrowing and accountability measures), Am. Sub. S.B. 55 (setting forth requirements for report cards labeling school districts according to achievement of performance standards, increased graduation requirements, mandatory remediation programs and mandatory retention of certain fourth grade pupils who fail to pass the reading portion of the proficiency tests), Am. Sub. S.B. 102 (creating the Ohio Facilities Commission and transferring operation of the Classroom Facilities Act to that agency), and H.B. 215.

[4] *See also Fannin v. Norfolk and Western Ry. Co.,* 1996 WL 683762,*1 (6th Cir., Nov 25, 1996) (No. 95–4140) ("The

reversal of the common pleas court judgment deprived that judgment of *all* preclusive effect.") (emphasis added) (citation omitted); *Metropolis Night Club, Inc. v. Ertel,* 104 Ohio App.3d 417, 662 N.E.2d 94 (Ohio App. 8 Dist., 1995) (res judicata may not be used to bar action where trial court's judgment in prior, related case had been reversed and remanded on appeal, so there was no "existing final judgment" on which to base doctrine of collateral estoppel); *State v. Thrower,* 85 Ohio App.3d 729, 736, 621 N.E.2d 456, 461 (Ohio App. 9 Dist., 1993) ("A decision which is overturned on appeal cannot be the basis for collateral estoppel."); *Newton v. Pennsylvania Iron & Coal, Inc.,* 85 Ohio App.3d 353, 356–357, 619 N.E.2d 1081, 1084 (Ohio App. 2 Dist., 1993) (" 'If the judgment of the trial court is reversed, then obviously the trial court judgment has no preclusive effect." ') (*quoting* Vestal, *Res Judicata/Preclusion* 235 (1969)).

[5] For example, in explaining its finding that the overall financing scheme was unconstitutional, the Ohio Supreme Court noted that the "financing scheme is further complicated when special factors are taken into account." *DeRolph,* 78 Ohio St.3d at 200. The Court then referred to several "special" factors that complicated the overall scheme: "vocational education, special education, and transportation." *Id.* As related to special education, the Court noted that:

> [C]hildren in funded handicapped 'units' are not included in the state basic aid formula. R.C. 3317.02(A). Thus, funds for handicapped students, for instance, whose education costs are substantially higher (due to state mandates of small class size and because of related extra services) are disbursed in a flat amount per unit (see R.C. 3317.05). If the actual cost exceeds the funds received, wealthier districts are in a better position to make up the difference.

Id. But this collateral notation by the Court did not produce a finding on any special education issues, it was used only to support the Court's overall constitutionality holding.

Later the Court referred to the *1990 Ohio Public School Facility Survey,* which identified a need for $10.2 billion in facility repair and construction. *Id.* at 206. Of the many findings in the report used as illustrations by the Court, it mentioned that "[o]nly twenty percent of the buildings had satisfactory handicapped access." *Id.* The Court then addressed a litany of deplorable building conditions in the districts, which included a notation concerning the lack of handicap accessibility and the lack of appropriate space for special education classes. *Id.* at 206–207. But these notations related only generally to the problem of needed facility repairs, not to the more specific issue of special education, which the Court had already made clear it would not be addressing. "[S]ince we decide that Ohio's school financing system violates the Thorough and Efficient Clause of our state Constitution, we decline to address appellants' other constitutional claims." *Id.* at 202, n. 5.