2012 WL 12985973
Only the Westlaw citation is currently available.
United States District Court, S.D. Ohio, Eastern Division.

John DOE, et al., Plaintiffs,
v.
State of OHIO, et al., Defendants.

Case No. 2:91–cv–464
|
Signed 02/16/2012

Attorneys and Law Firms

Kerstin Sjoberg–Witt, Jason Charles Boylan, Michael Kirkman, Vanessa K. Miller–Coterel, Laura A. Osseck, Ohio Legal Rights Service, Columbus, OH, Douglas Gustave Green, Pro Hac Vice, Steptoe & Johnson LLP, Ira A. Burnim, Pro Hac Vice, Lewis L. Bossing, Pro Hac Vice, Judge Bazelon Center for Mental Health Law, Washington, DC, for Plaintiffs.

Mark David Landes, Aaron Michael Glasgow, Brandon Lee Abshier, Maribeth Meluch, Robert Curtis Perryman, Isaac Wiles Burkholder & Teetor, LLC, Todd Robert Marti, Education Section, Mark Alan VanderLaan, William M. Mattes, Dinsmore & Shohl, Columbus, OH, for Defendants.

MEMORANDUM OPINION & ORDER

Michael H. Watson, Judge United States District Court

***1** Plaintiffs' Amended Class Action Complaint for Declaratory and Injunctive Relief, ECF No. 189, alleges violations of the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*, and § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. Plaintiffs also seek declaratory and injunctive relief under 42 U.S.C. § 1983 for alleged violations of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

Defendants include the State of Ohio, John Kasich in his official capacity as Governor of the State of Ohio,[1] Stan W. Heffner in his official capacity as the State Superintendent of Public Instruction, the Ohio State Board of Education, and the Ohio Department of Education. This matter is currently before the Court on Defendants' Motion for Partial Dismissal. ECF No. 194.

I. Procedural History

For twenty years, this case has been intricately intertwined with the landmark case of *DeRolph v. State of Ohio*, 78 Ohio St. 3d, 193 (1997). In *DeRolph*, the Supreme Court of Ohio held that Ohio's system of funding public education violated Section 2, Article VI of the Ohio Constitution, which mandates a "thorough and efficient system of common schools throughout the State." *See DeRolph v. State*, 78 Ohio St. 3d 193, (1997).

A brief history of this litigation is as follows. In 1991, Keely Thompson and others filed suit in the Perry County Court of Common Pleas against the State of Ohio, the Ohio State Board of Education, the Superintendent of Public Instruction, and the Ohio Department of Education, alleging that Ohio's statutory scheme for financing public education violated federal and state law. Defendants removed that case, captioned *Thompson v. State of Ohio*, to federal court. After this Court denied a motion to remand, some of the plaintiffs stipulated to a dismissal of their claims in federal court and joined with Dale DeRolph in filing a parallel suit in the Perry County Court of Common Pleas.

In 1992, the remaining *Thompson* plaintiffs filed a Second Amended Complaint. In February of 1994, disabled student John Doe, his parents, and the Ohio Legal Rights Service were granted leave to intervene as plaintiffs. They filed a class action complaint, alleging violations of the Individuals with Disabilities Education Act ("IDEA"), § 504 of the Rehabilitation Act, and Title II of the Americans with Disabilities Act ("ADA"). They also sought relief under 42 U.S.C. § 1983 for alleged violations of the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution. They asked the Court to declare illegal Ohio's system of funding and providing services to students with disabilities and to order Defendants to provide a new system for funding special education services.

***2** In 1995, all of the remaining original plaintiffs in *Thompson* stipulated to a dismissal of their claims. Later

that year, the parties stipulated to the dismissal of the Ohio Legal Rights Service as a party plaintiff, leaving only John Doe and the putative class members as plaintiffs. The case caption was subsequently changed from *Thompson v. State of Ohio* to *Doe v. State of Ohio.*

In February of 1996, the Court certified the case as a class action. The certified class includes:

> All children, ages three through 21, currently enrolled or seeking enrollment, now or in the future, in Ohio's public school system, who have a disability under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq.*, the Rehabilitation Act of 1973, 29 U.S.C. §§ 790 *et seq.*, or the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, and who require special education and related services as a result of their disability, and the parents or guardians of such children. Children who are disabled include those who are mentally retarded, who are hearing impaired or deaf, who have a speech or language impairment, who are blind or otherwise visually impaired, who have a serious emotional disturbance, who have an orthopedic impairment, who are autistic, who have a traumatic brain injury, or who have some other health impairment or specific disability. Children who are disabled also include those who are multihandicapped, who are developmentally handicapped, who are severe behavior handicapped, who have a specific learning disability, who have attention deficit disorder or hyperactivity disorder, or who have a physical or mental impairment that substantially affects their ability to perform a major life activity.

Because so many of the issues concerning special education funding in the State of Ohio overlapped with the broader school funding issues still being litigated in state court in *DeRolph*, the parties agreed that *Doe* should be stayed until the Supreme Court of Ohio issued a decision in *DeRolph.* In 1997, the Supreme Court of Ohio issued its initial opinion, holding that Ohio's system of funding public schools violated the Ohio Constitution. The court ordered the General Assembly to craft a new system of school funding and remanded the case to the Perry County Court of Common Pleas to enter judgment. It ordered the trial court to retain jurisdiction until the new legislation was enacted and in effect. *See DeRolph v. State*, 78 Ohio St. 3d 193, 213 (1997).

The General Assembly enacted remedial legislation but, in 2000, the Supreme Court of Ohio held that the revised school funding system was still unconstitutional. *See DeRolph v. State*, 89 Ohio St. 3d 1, 35–36 (2000). The General Assembly made additional modifications, but the Supreme Court of Ohio was not yet satisfied. It ordered specific changes to be made so that the new legislation would pass constitutional muster. *See DeRolph v. State*, 93 Ohio St. 3d 309, 323–25 (2001). That decision was later vacated. The court instead simply directed the General Assembly to enact a constitutional school-funding scheme as explained in the court's earlier opinions. *See DeRolph v. State*, 97 Ohio St. 3d 434, 435 (2002).

When the General Assembly failed to promptly comply with the court's latest order, the *DeRolph* plaintiffs asked Judge Linton Lewis of the Perry County Common Pleas Court to schedule a compliance conference. This prompted the defendants to file an action for a writ of prohibition, seeking to prevent the common pleas court from exercising further jurisdiction over the *DeRolph* litigation. The Supreme Court of Ohio granted the writ, finding that the task of remedying the constitutional violations now lay solely with the General Assembly. *See State ex rel. State v. Lewis*, 99 Ohio St. 3d 97, 104 (2003).

***3** After the decision was issued in *Lewis*, the parties in *Doe* agreed the stay in federal court should be lifted. Because Ohio's system of school funding had changed in the years since the original class action complaint was filed, it was agreed that before any additional discovery took place, Defendants would file a motion for summary judgment limited to purely legal issues. On July 9, 2004, the Court granted in part and denied in part Defendants' motion for summary judgment. The Court dismissed Plaintiffs' § 504 claim, ADA claim, and § 1983 due process claim. However, it permitted Plaintiffs to proceed with their IDEA claim and § 1983 equal protection claim.

On July 29, 2005, Plaintiffs filed an Amended Class Action Complaint, seeking declaratory and injunctive relief. Named defendants included the State of Ohio,

Governor Robert Taft, the Ohio Schools Facilities Commission, State Superintendent of Public Instruction Susan Zelman, the Ohio State Board of Education, the Ohio Department of Education, the Office for Exceptional Children, and the Office for Early Learning and School Readiness. The Amended Class Action Complaint again alleged violations of the IDEA and § 504 of the Rehabilitation Act. It also sought declaratory and injunctive relief under 42 U.S.C. § 1983 for alleged violations of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

On January 6, 2006, Defendants filed a motion for dismissal and partial summary judgment. With the Court's permission, three groups filed amicus briefs in support of Plaintiffs. While Defendants' motion was still pending, the parties agreed to engage in settlement negotiations and, with the help of a mediator, they eventually were able to reach a partial settlement. The Court preliminarily approved the partial settlement and ordered that notice be distributed to the class members.

A hearing was held on October 20, 2009, and a Consent Order was filed the next day. The Consent Order resolved Plaintiffs' claims concerning: (1) ODE's monitoring of school districts' compliance with the IDEA; (2) requests for waivers of state standards controlling the delivery of special education services; (3) complaint proceedings; and (4) corrective action to be taken when a school district fails to meet applicable standards. The Consent Order, however, did not resolve any of Plaintiffs' claims related to the funding of special education in the State of Ohio.

On December 9, 2009, the Court entered an Agreed Order which provided, in part, that Plaintiffs would file another Amended Class Action Complaint. Because that Amended Class Action Complaint would render moot certain issues raised in Defendants' motion for dismissal and partial summary judgment, which had remained pending during settlement negotiations, that motion was denied without prejudice.

Plaintiffs filed their Amended Class Action Complaint on June 1, 2010, naming as Defendants the State of Ohio, Governor Ted Strickland, State Superintendent of Public Instruction Deborah Delisle, the Ohio State Board of Education, and the Ohio Department of Education.[2] As before, Plaintiffs allege that as a result of the current school funding scheme in Ohio, they have been denied a free appropriate public education ("FAPE") in the least restrictive environment ("LRE") individually tailored to meet each student's unique needs as required by the IDEA. Plaintiffs further allege that Defendants' failure to provide adequate funding for special education violates Plaintiffs' rights under Section 504 of the Rehabilitation Act of 1973. In addition, Plaintiffs seek relief under 42 U.S.C. § 1983 for alleged violations of their due process and equal protection rights. Plaintiffs ask the Court to declare illegal Ohio's system of funding and providing services to students with disabilities and to enjoin Defendants from failing to provide for and fund a system of special education services that complies with the requirements of federal law.

***4** On September 1, 2010, Defendants filed a Motion for Partial Dismissal pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6), arguing that: (1) all claims based on acts or omissions occurring on or before June 30, 2009 are moot; (2) portions of Plaintiffs' IDEA claim fail as a matter of law; (3) the Rehabilitation Act claim fails as a matter of law; (4) some of Plaintiffs' § 1983 claims are procedurally barred; and (5) all of Plaintiffs' § 1983 claims fail on the merits. That motion is now fully briefed and ripe for decision.

II. Scope of Claims

Defendants first argue that the scope of Plaintiffs' claims must be limited to acts or omissions occurring after July 1, 2009, when Ohio adopted a new evidence-based model ("EBM") for school funding. Defendants maintain that any claims for declaratory or injunctive relief based on acts or omissions that occurred before that date are moot and are, therefore, beyond this Court's Article III jurisdiction.[3] The Court agrees.

Federal courts may adjudicate only "actual, ongoing controversies." *Honig v. Doe*, 484 U.S. 305, 317 (1988). "The test for mootness is whether the relief sought would, if granted, make a difference to the legal interests of the parties." *McPherson v. Michigan High Sch. Athletic Ass'n, Inc.*, 119 F.3d 453, 458 (6th Cir. 1997) (internal quotation omitted). In this case, Plaintiffs seek only declaratory and prospective, injunctive relief. Declaring previous versions of Ohio's school funding statute illegal would obviously make no difference to the legal interests of the parties. Likewise, the Court cannot order prospective injunctive relief with respect to school funding laws that are no longer in effect. The most the Court can do is declare Ohio's *current* system of school funding illegal and craft appropriate injunctive relief on that basis.

It appears Plaintiffs misunderstand Defendants' argument concerning mootness. Plaintiffs argue their claims are not moot because, despite legislative revisions to the school

funding scheme, the same systemic deficiencies remain, causing Plaintiffs to suffer ongoing violations of their federal rights.[4] As Defendants point out, however, the relevant question is not whether the new system of school funding continues to violate Plaintiffs' rights, but rather whether the Court has any authority to grant declaratory or injunctive relief with respect to any portion of Plaintiffs' claims that arise out of previous versions of Ohio's school funding laws. It is clear the Court lacks any such authority.

***5** For these reasons, pursuant to Federal Rule of Civil Procedure 12(b)(1), the Court grants Defendants' Motion to Dismiss for lack of subject matter jurisdiction any portion of Plaintiffs' claims based on acts or omissions occurring prior to July 1, 2009.

III. Federal Rule of Civil Procedure 12(b)(6)

The remainder of Defendants' Motion for Partial Dismissal is based on Federal Rule of Civil Procedure 12(b)(6). That rule provides that a complaint may be dismissed if it fails to state a claim upon which relief can be granted. Because a motion under Rule 12(b)(6) is directed solely to the complaint itself, *Roth Steel Prods. v. Sharon Steel Corp.*, 705 F.2d 134, 155 (6th Cir. 1983), the focus is on whether the plaintiff is entitled to offer evidence to support the claims, rather than on whether the plaintiff will ultimately prevail. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 184 (2005) (citing *Scheuer v. Rhodes*, 4I6 U.S. 232, 236 (1974)). The purpose of a motion to dismiss under Rule 12(b)(6) "is to allow a defendant to test whether, as a matter of law, the plaintiff is entitled to legal relief even if everything alleged in the complaint is true." *Mayer v. Mylod*, 988 F.2d 635, 638 (6th Cir. 1993).

Dismissal of the action is proper if there is an absence of law to support the type of claim made, if the facts alleged are insufficient to state a valid claim, or if, on the face of the complaint, there is an insurmountable bar to relief. *Little v. UNUM Provident Corp.*, 196 F. Supp. 2d 659, 662 (S.D. Ohio 2002) (citing *Rauch v. Day & Night Mfg. Corp.*, 576 F.2d 697 (6th Cir. 1978)).

The function of the complaint is to afford the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. *See Conley v. Gibson*, 355 U.S. 41, 47 (1957); *Lewis v. ACB Business Serv., Inc.*, 135 F.3d 389, 405 (6th Cir. 1998). A complaint need not set down in detail all the particularities of a plaintiff's claim. Rule 8(a)(2) of the Federal Rules of Civil Procedure requires only a "short and plain statement of the claim showing that the pleader is entitled to relief." However, "Rule 8 ... does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* at 1949. *See also Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) ("A formulaic recitation of the elements of a cause of action" is not enough). The complaint "must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under *some* viable legal theory." *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436 (6th Cir. 1988) (emphasis in original).

Legal conclusions "must be supported by factual allegations" that give rise to an inference that the defendant is, in fact, liable for the misconduct alleged. *Iqbal*, 129 S. Ct. at 1949–50. The factual allegations must show more than a possibility the defendant acted unlawfully. "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.' ' " *Id.* at 1949 (quoting *Twombly*, 550 U.S. at 557).

***6** When considering a motion to dismiss pursuant to Rule 12(b)(6), the court must construe the complaint in the light most favorable to the plaintiff and accept all well-pleaded material allegations in the complaint as true. *See Scheuer*, 4I6 U.S. at 236; *Arrow v. Fed. Reserve Bank of St. Louis*, 358 F.3d 392, 393 (6th Cir. 2004); *Mayer*, 988 F.2d at 638. The court will indulge all reasonable inferences that might be drawn from the pleading. *See Saglioccolo v. Eagle Ins. Co.*, 112 F.3d 226, 228 (6th Cir. 1997). However, it will not accept conclusions of law or unwarranted inferences cast in the form of factual allegations. See *Gregory v. Shelby County*, 220 F.3d 433, 446 (6th Cir. 2000); *Lewis*, 135 F.3d at 405.

IV. IDEA: Proper Parties

Count I of Plaintiffs' Amended Class Action Complaint alleges Ohio's current system of funding special education, the evidence-based model ("EBM"), violates the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq*. The IDEA requires States to provide a "free appropriate public education" for all eligible children in the "least restrictive environment," individually tailored to meet the needs of each child with a disability. 20 U.S.C. §§ 1412(a)(1), (a)(4) and (a)(5). Plaintiffs allege both the EBM conflicts with federal and state standards in several respects, and Defendants have

violated the IDEA by failing to provide sufficient funding for special education.

The IDEA creates a private right of action, *see* 20 U.S.C. § 1415(i)(2)(A), but does not expressly state who can be sued.[5] Citing *Pace v. Bogulusa City School Board*, 403 F.3d 272, 283 (5th Cir. 2005), Defendants argue only those state educational agencies that have accepted federal funding are bound by the substantive requirements of the IDEA. In their Amended Class Action Complaint, Plaintiffs do not distinguish among those defendants that receive federal funds and those that do not. Defendants argue no IDEA claim lies against the State of Ohio or any state agency that does not receive federal funds.

Citing *Weyrick v. New–Albany–Floyd County Consolidated School Corp.*, No. 4:03–cv–0095, 2004 WL 3059793, at *7 n.3 (S.D. Ind. Dec. 23, 2004), Defendants also argue Governor Kasich is not a proper party because the IDEA does not contemplate suits against individuals. In *Weyrick*, the court noted money damages are not available for IDEA claims brought against school employees in their individual capacities. Defendants acknowledge Governor Kasich is sued in his official capacity, and Plaintiffs seek only declaratory and injunctive relief. They nevertheless argue that, because the Governor's office does not receive federal funding under the IDEA and is not bound by its substantive provisions, he is not a proper party.

Plaintiffs maintain the State of Ohio and Governor Kasich are both proper parties.[6] The IDEA imposes many duties on state educational agencies and local educational agencies that receive federal funding. Nevertheless, the IDEA also allocates numerous responsibilities to the State itself. For example, each State that receives federal funds must: (1) ensure compliance with the IDEA, *see* 20 U.S.C. § 1407(a)(1); (2) submit a plan providing assurances of such compliance, *see 20* U.S.C. § 1412(a); and (3) establish performance goals for children with disabilities, *see* 20 U.S.C. § 1412(a)(15). *See also* 34 C.F.R. § 300.2(a) (noting the IDEA regulations apply "to each State that receives payments under Part B of the Act"). Plaintiffs have specifically alleged the State of Ohio has failed to comply with its obligations under the IDEA.

***7** Moreover, in enacting the IDEA, Congress abrogated the States' sovereign immunity. *See* 20 U.S.C. § 1403(a) ("A State shall not be immune under the 11th amendment..."). Congress also provided for remedies "[i]n a suit against a State for a violation of [the IDEA]." 20 U.S.C. § 1403(b). In the Court's view, this language suggests Congress contemplated that suit could be brought not only against educational agencies but also against the States themselves. The Court therefore finds that the State of Ohio is a proper party to this claim.

The Court also finds Governor Kasich is a proper party to this claim. Plaintiffs have sued Governor Kasich for prospective, injunctive relief "in his official capacity under the doctrine of *Ex Parte Young*." (Amd. Class Action Compl. ¶ 157). In *Ex Parte Young*, the Supreme Court held the Eleventh Amendment did not bar suits seeking declaratory and injunctive relief against state officers to end continuing violations of federal law. 209 U.S. 123, 159–60 (1908). A state official is a proper party to a suit if the officer has "some connection with the enforcement of the act." Whether that connection arises out of the general law, or is specially created by the act itself, does not matter. *Id.* at 157.

The IDEA imposes no specific duties on Governor Kasich and, as Defendants note, the Governor's Office receives no federal funding under the IDEA. Nevertheless, Governor Kasich is vested with the "supreme executive power" of the State and has a constitutional duty to see "that the laws are faithfully executed." Ohio Const. Art. III, §§ 5 and 6.

Some courts have held a general duty to faithfully execute the law does not provide the necessary connection under *Ex Parte Young. See, e.g., 1st Westco Corp. v. Sch. Dist. of Philadelphia*, 6 F.3d 108, 113 (3d Cir. 1993) ("General authority to enforce the laws of the state is not sufficient to make government officials the proper parties to litigation challenging the law."); *Waste Mgmt. Holdings, Inc. v. Gilmore III*, 252 F.3d 316, 330 (4th Cir. 2001) (dismissing claims against governor because he had no specific duty to enforce the challenged statutes).

Nevertheless, the Sixth Circuit has found the governor's status as chief executive officer and his authority to enforce the law are sufficient to render the governor a proper party in actions seeking prospective, injunctive relief under *Ex Parte Young.* For example, in *Allied Artists Picture Corp. v. Rhodes*, 679 F.2d 656 (6th Cir. 1982), the court held:

> Even in the absence of specific enforcement provisions, the substantial public interest in enforcing the trade practices legislation involved here places a significant obligation upon the Governor to use his general authority to see that state laws are enforced .... We thus find that the

> Governor has sufficient connection with the enforcement of the Act that he falls outside the scope of eleventh amendment protection and may be sued for the declaratory and injunctive relief requested here."

Id. at 665 n.5. *See also League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 475 n.16 (6th Cir. 2008) (because Governor was chief executive officer and had the authority to control the local boards of elections, he was a proper party in suit alleging violations of right to vote) (citing *Lawson v. Shelby County*, 211 F.3d 331, 335 (6th Cir. 2000)).[7]

***8** In this case, as in *Allied Artists Picture Corp.*, there is clearly a "substantial public interest" at stake, i.e., providing an appropriate public education to disabled children. Moreover, this case involves more than just the Governor's duty to faithfully execute the law. Plaintiffs maintain the Governor's own conduct violated the IDEA. Pursuant to Ohio Revised Code § 107.03, the Governor must submit a state budget to the general assembly. Plaintiffs allege the current budget fails to provide adequate funding for the provision of a free appropriate public education as required by that statute. (Amd. Class Action Compl. ¶¶ 152–154). For these reasons, the Court concludes Governor Kasich is a proper party to the IDEA claim.

V. Rehabilitation Act

Count II of Plaintiffs' Amended Class Action Complaint alleges a violation of § 504 of the Rehabilitation Act of 1973. That statute states, in part, "[n]o otherwise qualified individual with a disability... shall, solely by reason of her or his disability... be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). Plaintiffs allege that, in failing to fully fund special education, Defendants have deliberately treated students with disabilities less favorably than students without disabilities. (Amd. Class Action Compl. ¶ 358).

Plaintiffs further allege that "Defendants have acted in bad faith or have exercised gross misjudgment." (Amd. Class Action Compl. ¶ 363). This particular allegation was obviously included in response to the Court's previous ruling dismissing Plaintiffs' § 504 claim. In its July 9, 2004 Memorandum and Order, ECF No. 89, the Court explained the Sixth Circuit requires plaintiffs seeking relief under § 504 to prove "something more than a simple failure to provide a free appropriate public education." *N.L. ex rel. Mrs. C. v. Knox County Schools*, 315 F.3d 688, 695 (6th Cir. 2003). The plaintiff must also prove the defendant's conduct was discriminatory. *See Campbell v. Bd. of Educ. of the Centerline Sch. Dist.*, No. 01–1186, 2003 WL 344217, at **5 (6th Cir. Feb. 13, 2003) (unpublished). According to the Sixth Circuit, "[s]urmounting that evidentiary hurdle requires that 'either bad faith or gross misjudgment must be shown before a § 504 violation can be made out, at least in the context of education of handicapped children.' " *Id.* (quoting *Monahan v. State of Nebraska*, 687 F.2d 1164, 1171 (8th Cir. 1982), *cert. denied*, 460 U.S. 1012 (1983)). Because the *Doe* plaintiffs did not allege Defendants had acted in bad faith or exercised gross misjudgment, the Court dismissed their § 504 claim. ECF No. 89, at 29.

Plaintiffs have now cured that particular defect. Defendants nevertheless ask the Court to dismiss this claim again, arguing this time that, under *Iqbal*, a conclusory statement of this kind is insufficient to survive a motion to dismiss. Defendants maintain that Plaintiffs' primary complaint—that the Ohio legislature has funded only 90% of the money needed for special education—amounts to nothing more than a "marginal disagreement" between policymakers and advocates for special needs children. According to Defendants, this simply does not rise to the level of bad faith or gross misjudgment, particularly in light of the State's current budget crisis.

In response, Plaintiffs first urge the Court to reconsider its previous ruling that a showing of bad faith or gross misjudgment is required. In the alternative, Plaintiffs argue they have set forth sufficient facts supporting their allegation that Defendants acted in bad faith or exercised gross misjudgment.

The Court finds no legal basis for reconsidering its previous ruling. Plaintiffs acknowledge that almost all courts, including the Sixth Circuit, have required a showing of bad faith or gross misjudgment in connection with § 504 claims, particularly when plaintiffs seek damages based on a challenge to an educator's professional judgment concerning a child's individual educational needs. Plaintiffs, however, ask the Court to find that this heightened standard has no place in cases where plaintiffs allege systemic deficiencies and seek prospective relief instead of damages.

***9** In its July 9, 2004 Memorandum and Order, the Court previously rejected this same argument, noting Plaintiffs had offered no supporting authority for making the sought-after distinction. The Court found it was bound by

the Sixth Circuit's decision in *Campbell*. ECF No. 89, at 28.

Plaintiffs now argue that:

> 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.

Mem. in Opp'n at 12–13. In support of this argument, Plaintiffs point to *Robinson v. State of Kansas*, 117 F. Supp. 2d 1124 (D. Kan. 2000). The plaintiffs in that case alleged that Kansas's school funding scheme had a disparate impact on disabled students. The district court rejected defendants' argument that proof of disparate treatment was required, noting that the Tenth Circuit had recognized claims of disparate impact under the Rehabilitation Act.[8] *Id*. at 1145–46.

The district court also rejected defendants' argument that the § 504 claim should be dismissed because plaintiffs had failed to allege that defendants acted with bad faith or gross misjudgment. The court noted that the Tenth Circuit, in *Powers v. MJB Acquisition Corp.*, 184 F.3d 1147, 1153 (10th Cir. 1999), had held that a plaintiff must plead and prove intentional discrimination in order to receive compensatory damages. The *Robinson* court stated, "[b]y negative implication, then, it can be assumed that the court was also stating that intent need not be pleaded nor proved if the plaintiff does not seek such a monetary award." 117 F. Supp. 2d at 1146.

Aside from the fact that *Robinson* is not binding on this Court, there are other problems with Plaintiffs' reliance on that case. First, despite Plaintiffs' attempt to characterize this as a change in the law, *Robinson* and the cases cited therein were decided several years before this Court's July 9, 2004 ruling dismissing Plaintiffs' § 504 claim, and Plaintiffs do not explain why they have waited until now to call those cases to the Court's attention. Second, *Robinson* is inapposite because it involves a claim of disparate impact, which traditionally requires no showing of intentional discrimination or bad faith.[9] Moreover, in contrast to the Tenth Circuit, the Sixth Circuit has found that "[t]here is good reason to believe that a disparate impact theory is not available under the Rehabilitation Act." *Crocker v. Runyon*, 207 F.3d 314, 321 (6th Cir. 2000). Third, with all due respect to the *Robinson* court, this Court disagrees that just because a plaintiff seeking compensatory damages must prove intentional discrimination, it necessarily follows that a plaintiff seeking only equitable relief need not prove intentional discrimination. The elements of a claim do not typically change depending on the type of relief sought.

***10** Plaintiffs also note that some courts have held that deliberate indifference, rather than intentional discrimination, is sufficient to warrant compensatory damages under § 504. *See, e.g., Mark H. v. Lamahieu*, 513 F.3d 922, 938 (9th Cir. 2008); *Barber v. Colorado*, 562 F.3d 1222, 1228–29 (10th Cir. 2009). Plaintiffs then argue that because they seek only injunctive relief rather than damages, it is unfair to hold them to the higher standard of bad faith or gross misjudgment.[10]

Again, the cases cited are not consistent with the law of the Sixth Circuit. As this Court interprets *Campbell*, a § 504 plaintiff must show bad faith or gross misjudgment in order to establish the requisite discriminatory intent. Admittedly, *Campbell* is factually distinguishable in that the plaintiffs in that case were seeking damages from school officials with respect to challenges to the individualized educational plan of one particular student. The Sixth Circuit has not spoken on the issue of whether the bad faith or gross misjudgment standard also applies to § 504 claims seeking only injunctive relief. Nevertheless, in the absence of Sixth Circuit law to the contrary, the Court must presume that the same standard would apply regardless of the type of relief sought.[11] For these reasons, the Court again finds that Plaintiffs must plead and prove bad faith or gross misjudgment.

The Court now turns to the question of whether the factual allegations in the Amended Class Action Complaint are sufficient under *Iqbal* to support a finding of bad faith or gross misjudgment. Plaintiffs allege Defendants "deliberately treated students with disabilities differently than students who do not have disabilities." (Amd. Class Action Compl. ¶ 358). They also allege Defendants deliberately ignored the funding requirements for educating students with disabilities. More specifically, Defendants allegedly failed to: (1) fully fund the special education weights (despite recommendations from the State Board of Education); (2) fund the required student-to-teacher and student-to-aide ratios; (3) factor in the costs of related services and inflation; (4) account for additional services added under the IDEA amendments; and (5) provide sufficient funds for preschool education units. (Amd. Class Action Compl. ¶ 359). Plaintiffs argue

the Ohio General Assembly arbitrarily changed the special education weights recommended by the Ohio Coalition for the Education of Children with Disabilities (OCECD) "without any articulated justification." (Amd. Class Action Compl. ¶ 189).

Plaintiffs further allege Defendants" "have deliberately diverted special education funding to other purposes," in part by lowering the requirements for adequate yearly progress, and Defendants have a plan to fully fund the EBM for regular education but have "no plan to fully fund the special education weights." (Amd. Class Action Compl. ¶360). Additionally, Plaintiffs contend Governor Strickland submitted an Executive Budget in 2009 that failed to provide adequate funding for FAPE or for a thorough and efficient system of public schools despite his awareness of the Ohio Supreme Court's decision in *DeRolph.* (Amd. Class Action Compl. ¶ 154). Reviewing these allegations in the light most favorable to Plaintiffs, the Court finds Plaintiffs have alleged facts from which the requisite state of mind may be inferred.

***11** Defendants' reply brief is directed solely to the question of whether a showing of bad faith or gross misjudgment is required under § 504. It is completely silent concerning the sufficiency of Plaintiffs' allegations under *Iqbal.* The Court expresses no opinion on whether Plaintiffs ultimately will be able to prove Defendants acted with bad faith or gross misjudgment. Nevertheless, in the Court's view, Plaintiffs' allegations of bad faith and gross misjudgment are supported by sufficient factual allegations to withstand the motion to dismiss. The Court therefore denies Defendants' motion to dismiss Plaintiffs' § 504 claim.

VI. 42 U.S.C. § 1983 Claims

In Counts III, IV, and V of the Amended Class Action Complaint, Plaintiffs seek declaratory and injunctive relief under 42 U.S.C. § 1983. That statute states, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...

42 U.S.C. § 1983. Plaintiffs allege Defendants Kasich and Heffner, acting under color of state law, violated Plaintiffs' rights as guaranteed by the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

Defendants argue that some of Plaintiffs' § 1983 claims are procedurally barred[12] and that all of Plaintiffs' § 1983 claims fail on the merits. Even if the Court were to find that the § 1983 claims against certain defendants are not procedurally barred, this would not fully resolve any of those claims. The Court would still have to reach the merits of those claims. For the reasons stated below, the Court finds that all three § 1983 claims fail on the merits. Accordingly, there is no need for the Court to address the procedural issues.

A. Procedural Due Process Claims: State–Created Interest and Denial of Access to Courts

Count III of the Amended Class Action Complaint alleges that Defendants Kasich and Heffner, acting under color of state law, violated Plaintiffs' rights as guaranteed by the Due Process Clause of the Fourteenth Amendment. Plaintiffs seeking to establish a procedural due process violation must show: (1) they have been deprived of a protected liberty or property interest; and (2) the available state procedures were inadequate to compensate for the alleged deprivation. *See Albrecht v. Treon*, 617 F.3d 890, 894 (6th Cir. 2010).

Plaintiffs contend that Section 2, Article VI of the Ohio Constitution, which mandates a thorough and efficient system of common schools throughout the state, creates a protected property interest and liberty interest. The parties appear to agree that, pursuant to the Ohio Supreme Court's holding in *DeRolph*, Plaintiffs have a protected property interest in a thorough and efficient system of education. Plaintiffs allege they have been deprived of this state-created interest because Ohio's current system of school funding, the evidence-based model or "EBM," continues to feature the following characteristics: (1) an over-reliance on local property tax as a school funding source; (2) phantom revenue; (3) the need for school districts to borrow funds to maintain current operations;

(4) the need for school districts to cut staff and educational programs in order to balance their local budgets; and (5) school buildings that are not physically accessible to students with disabilities.

***12** At issue is whether Plaintiffs were deprived of their state-created property interest without due process of law.[13] As the Supreme Court explained in *Zinermon v. Burch*, 494 U.S. 113, 126 (1990), "to determine whether a constitutional violation has occurred, it is necessary to ask what process the State provided, and whether it was constitutionally adequate." The Due Process Clause "grants the aggrieved party the opportunity to present his case and have its merits fairly judged." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982). That opportunity must take place at a "meaningful time and in a meaningful manner." *Id.* at 437 (*quoting Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

In their Motion for Partial Dismissal, Defendants argue that Plaintiffs' claim fails because legislative actions that affect the general public, as opposed to actions that affect only certain individuals, are not subject to the requirements of notice and an individual opportunity to be heard. Rather, the "legislative determination provides all the process that is due." *Atkins v. Parker*, 472 U.S. 115, 130 (1985) (quoting *Logan*, 455 U.S. at 432–33). *See also Bi–Metallic Investment Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915) (noting it is impractical in such situations for everyone to be heard, and the appropriate recourse for the adversely affected parties is to vote the legislators out of office).

In support of their argument, Defendants also cite to the case of *Blount–Hill v. Zelman*, No. 3:04–cv–197 (S.D. Ohio March 30, 2009), in which parents whose children attended public schools challenged the Community Schools Law. Plaintiffs alleged they were deprived of their due process rights because funds were diverted from the public schools to charter schools without notice and an opportunity to be heard. The court found that Plaintiffs had failed to state a claim upon which relief can be granted. Relying on *BiMetallic Investment Co.* and *Tennessee Scrap Dealers Association v. Bredesen*, 556 F.3d 442 (6th Cir. 2009), the court, in *Blount–Hill*, concluded that "the Plaintiffs received all the process that was due, because community school statutes are legislative in character." Decision and Entry at 22.

In response, Plaintiffs essentially argue that because the interests at stake here are so substantial and are guaranteed by the Ohio Constitution and the IDEA, they should be entitled to a greater degree of due process than is typically warranted in cases involving the legislative process. They also maintain that, in this case, the legislative process has proved to be insufficient because despite revisions to the school funding model, the Ohio legislature has failed to remedy the deficiencies identified in *DeRolph.*

In the Court's view, both parties have drifted significantly off course by arguing about whether the legislative process adequately protects Plaintiffs' due process rights. As the Court reads the Amended Class Action Complaint, the thrust of Plaintiffs' claim is not that they were deprived of a meaningful opportunity to be heard by the *legislature* in connection with its enactment of the new EBM. Rather, in Count III of the Amended Class Action Complaint, Plaintiffs allege only that available state procedures are inadequate because they have been denied access to the *courts* of Ohio to challenge the new system of school funding enacted by the legislature in response to *DeRolph.* (Amd. Class Action Compl. ¶ 372.) Because this allegation dovetails directly into Count IV of Amended Class Action Complaint, the Court will consider Counts III and IV together, as one and the same due process claim.

***13** In Count IV, undoubtedly referring to the Ohio Supreme Court's decision in *State ex rel. State v. Lewis*, 99 Ohio St. 3d 97, Plaintiffs allege:

> The Supreme Court of Ohio has determined that it is without jurisdiction to enforce the duty established by Article VI, § 2 of the Ohio Constitution, and has prohibited the state's lower courts from enforcing the mandatory duty created by this section. This denial of access to the courts of Ohio to seek redress for this failure, deprives plaintiffs and the plaintiff class of a protected liberty and property interest without due process of law, and violates the Due Process Clause of the Fourteenth Amendment.

(Amd. Class Action Compl. ¶ 374.) Plaintiffs maintain the *Lewis* decision left them without a meaningful judicial remedy to enforce their right to a thorough and efficient system of common schools, thereby violating their right to due process of law.[14]

Defendants argue, however, the Ohio Supreme Court's decision in *Lewis* does not bar Ohio courts from

considering challenges to the EBM, Ohio's new system of school funding. The Court agrees.

The circumstances giving rise to the *Lewis* decision were as follows. In 2003, the *DeRolph* plaintiffs asked Judge Linton Lewis, of the Perry County Common Pleas Court to schedule a "compliance conference" to ensure that the State initiated, without further delay, the process of enacting a new system of school funding that complied with the mandates of the Ohio Supreme Court. The State filed an action for a writ of prohibition, seeking to prohibit Judge Lewis from exercising further jurisdiction over the *DeRolph* litigation. Judge Lewis sought guidance from the Ohio Supreme Court.

The Ohio Supreme Court concluded that "the exercise of further jurisdiction in this litigation would violate our *DeRolph IV* mandate." *Lewis*, 2003–Ohio–2476, at ¶ 20. The court noted that in *DeRolph IV*, it had ordered Judge Lewis only to "carry this judgment into execution." It had not remanded the case for further proceedings. *Id.* at ¶ 28. The court found that it would be improper to provide "continuing judicial oversight of the *preparation* of the final legislative remedy." *Id.* at ¶ 29 (emphasis added). Likewise, the court refused to retain jurisdiction over the *DeRolph* case for the purpose of one day ruling on the constitutionality of the new legislation that was to be enacted in response to its mandate. *Id.* at ¶ 30. The court ended "any further litigation in *DeRolph v. State*." *Id.* at ¶ 34. Nevertheless, the court clearly contemplated "new challenges to the new legislation," *id*., and anticipated that those new challenges, requiring new and different proof, would be presented in a separate action. *Id.* n.2.

In short, *Lewis* cannot be interpreted to bar challenges to Ohio's *new* system of school funding. If Plaintiffs believe that Ohio's new model of school funding continues to be deficient, nothing prevents them from filing another suit in state court, and there is no reason to believe the judicial process would be inadequate to protect their property interest in a thorough and efficient system of public schools.

***14** The Court finds that, with respect to the due process claims set forth in Counts III and IV of the Amended Class Action Complaint, Plaintiffs have failed to state a claim upon which relief can be granted. These § 1983 claims are therefore dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6).

B. Equal Protection Claim

Count V of the Amended Class Action Complaint alleges that the current system of school funding violates Plaintiffs' rights as guaranteed by the Equal Protection Clause of the Fourteenth Amendment. Plaintiffs allege that the adequacy of special education services offered often depends on the ability of the local school district to levy property taxes and that there are gross disparities in funding among the local school districts. Plaintiffs maintain that "particularly in less well funded school districts, children with disabilities with identified needs for special education services are denied such services" and that "children with disabilities in less well funded districts are less likely to be identified as in need of special education services." (Amd. Class Action Compl. ¶ 380–81.) Plaintiffs also allege that Defendants Kasich and Heffner, acting under color of state law, have failed to provide funding in a manner that is rational and not based on arbitrary factors.

Defendants maintain that this claim is governed by the Supreme Court's decision in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973). *Rodriguez* was a class action challenging Texas's reliance on local property taxes to fund its public schools. Like Ohio, Texas relies on a combination of state and local money to fund its public schools, and this funding scheme results in significant disparities in spending among local school districts. *Rodriguez* was brought on behalf of children who lived in school districts with a low property tax base. The three-judge district court found that the school funding system violated the Equal Protection Clause of the Fourteenth Amendment.

The Supreme Court reversed. It held that because the challenged state action did not involve a suspect class or implicate a fundamental right, it was subject only to the rational basis test, whereby the challenged action must be upheld if it bears "some rational relationship to legitimate state purposes." *Id.* at 40. The court noted that, in matters of fiscal policy and educational policy, it is best if the courts do not interfere "with the informed judgments made at the state and local levels." *Id.* at 42. It found that Texas's school funding scheme assured a basic education for all children while permitting and encouraging local participation and control, deemed to be vital to continued public support of the schools. Even though the funding scheme resulted in spending disparities between children who resided in different districts, it was rationally related to the legitimate state purpose of fostering local control over the public schools. *Id.* at 49. Therefore, it did not violate the Equal Protection Clause.

Plaintiffs agree that the constitutionality of Ohio's school funding scheme is governed by the rational basis test, but they deny that *Rodriguez* requires dismissal of the equal

protection claim. In *Rodriguez*, the Supreme Court noted that plaintiffs had not alleged that the systemic deficiencies resulted in an "absolute denial" of an opportunity to acquire "basic minimal skills." Instead, the case involved only "relative differences in spending levels." *Id.* at 37. Plaintiffs maintain that their case is distinguishable. According to Plaintiffs, because they have raised claims of educational inadequacy, their case is more akin to *Connecticut Coalition for Justice in Educ. Funding, Inc. v. Rell*, 990 A.2d 206 (Conn. 2010).

***15** The plaintiffs in that case alleged that the state failed to provide "substantially suitable equal educational opportunit[ies]" as required by the Connecticut Constitution. Citing "inadequate and unequal inputs," the plaintiffs complained about class sizes and curriculum, the quality of teachers and administrators, outdated libraries, textbooks, and technology, and the inadequacy of services provided to special needs children. *Id.* at 212. The deficiencies cited were allegedly the result of a "flawed educational funding system." *Id.* at 214. The trial court granted a motion to strike several counts of the complaint, but the Supreme Court of Connecticut reversed. In analyzing the state constitutional claims at issue, the court found that federal precedent, and *Rodriguez* in particular, was "largely inapposite." *Id.* at 242. Plaintiffs correctly point out that the appellate court stated that "unlike the present case, [*Rodriguez*] did not present any educational adequacy claims." *Id.* at 243 n.47. Rather, it dealt only with disparities in funding among the school districts.

What Plaintiffs fail to point out is that the predominant reason the Supreme Court of Connecticut declined to apply *Rodriguez* was because, in contrast to the United States Constitution, the Connecticut Constitution has been interpreted to provide a fundamental right to a free public education. *Id.* at 242–44. Therefore, while the plaintiffs' claims in *Rodriguez* were subject to rational basis review, the plaintiffs' claims in *Rell* were subject to strict scrutiny.

Because the standard of review is significantly different, *Rell* has very little application to this case. Moreover, the Court rejects Plaintiffs' attempt to characterize their allegations as claims of "educational inadequacy." Admittedly, Plaintiffs do allege that some students in poorer districts are denied the services they need. However, Plaintiffs do not allege any absolute "across-the-board" deprivation of educational opportunities. Viewed as a whole, the allegations in the Amended Class Action Complaint are focused on the disparities in funding among the local school districts, resulting in differing levels of services provided. This is precisely what was at issue in *Rodriguez.*

In accordance with *Rodriguez*, the Court finds that Ohio's current school funding scheme is rationally related to the legitimate state interest in fostering local participation and control in public education. Although this funding scheme results in differing levels of educational opportunities among the local school districts, it does not violate Plaintiffs' equal protection rights. Because Plaintiffs have failed to state a claim upon which relief can be granted, the Court dismisses Count V of the Amended Class Action Complaint.

VII. Conclusion

For the reasons cited above, the Court **GRANTS IN PART and DENIES IN PART** Defendants' Motion for Partial Dismissal, ECF No. 194. The Court finds that the scope of Plaintiffs' claims for declaratory and injunctive relief must be limited to acts or omissions occurring on or after July 1, 2009, when Ohio's new school funding scheme became effective. The Court further finds that Governor Kasich and the State of Ohio are proper parties with respect to Plaintiffs' IDEA claim as set forth in Count I of the Amended Class Action Complaint.

The Court rejects Plaintiffs' request to reconsider its previous ruling that "bad faith or gross misjudgment" must be shown in connection with Plaintiffs' claim under § 504 of the Rehabilitation Act (Count II). Nevertheless, the Court finds that Plaintiffs' allegations are sufficient to survive Defendants' motion. Defendants' motion to dismiss Count II of the Amended Class Action Complaint is therefore denied.

With respect to Plaintiffs' claims under 42 U.S.C. § 1983 (Counts III–V), the Court finds that Plaintiffs have failed to state a claim upon which relief can be granted. The Court therefore **DISMISSES** those claims pursuant to Federal Rule of Civil Procedure 12(b)(6).

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2012 WL 12985973

Footnotes

[1] Pursuant to Federal Rule of Civil Procedure 25(d), Governor Kasich is automatically substituted for former Governor Ted Strickland, and Stan W. Heffner is automatically substituted for former Superintendent of Public Instruction Deborah Delisle.

[2] Because Plaintiffs already filed an "Amended Class Action Complaint" in 2005, this is actually a "Second Amended Class Action Complaint." Nevertheless, all future references to the "Amended Class Action Complaint" will refer to the latest Complaint filed on June 1, 2010.

[3] Defendants note that some of the allegations in Plaintiffs' Amended Class Action Complaint concern events that took place before this new system of school funding was in place. Defendants specifically point to paragraphs 12, 52, 54–56, 61–76, 173–197, 295–298, 337–339 of the Amended Class Action Complaint. Many of the paragraphs cited simply set forth the history of the *DeRolph* case and the Ohio legislature's attempts to remedy the constitutional violation. *See* ¶¶ 173–197, 295–298. These paragraphs appear to be background information only and do not appear to form a basis for Plaintiffs' current claims. Other paragraphs, however, contain allegations dating back several years, concerning Defendants' alleged failure to provide the named Plaintiffs with a free appropriate public education. *See* ¶¶12, 52, 54–56, 61–76. The remaining paragraphs cited concern a 2009 Verification Letter from the U.S. Department of Education, Office for Special Education Programs, concluding that Ohio did not have policies and procedures in place to ensure compliance with the IDEA. *See* ¶¶ 337–339.

[4] Plaintiffs' citation to the "continuing violation" theory is misplaced. The "continuing violation" theory operates to extend a *statute of limitations* in cases involving ongoing violations of civil rights. It cannot save claims that are *moot.*

[5] The Court rejects Defendants' argument that § 1415(i)(2)(A) contains a "jurisdictional grant" expressly limiting the Court's authority to consider only those claims brought against "educational agencies." As explained in the July 9, 2004 Memorandum and Order, the private right of action created by § 1415(i)(2)(A) is broad enough to encompass claims of state-wide systemic deficiencies. It is not limited to claims by parties aggrieved by an individualized decision of an educational agency. *See* July 9, 2004 Mem. and Order at 9–18.

[6] It is somewhat unclear which of the state agencies named in Plaintiffs' Amended Class Action Complaint receive federal funding under the IDEA. The Court presumes Defendants concede that if those agencies receive federal funding, they are also proper parties to this claim.

[7] *But see Children's Healthcare is a Legal Duty, Inc. v. Deters*, 92 F.3d 1412, 1416 (6th Cir. 1996), in which the court quoted *1st Westco* with approval and stated, "[h]olding that a state official's obligation to execute the laws is a sufficient connection to the enforcement of a challenged statute would extend *Young* beyond what the Supreme Court has intended and held." *Children's Healthcare* is distinguishable. It involved a claim brought against the State's Attorney General, rather than the Governor. Because the Attorney General had not yet enforced or threatened to

enforce the allegedly unconstitutional statute, the court found that *Ex Parte Young* was inapplicable. *Id.* at 1418.

[8] *See New Mexico Ass'n for Retarded Citizens v. New Mexico*, 678 F.2d 847, 854 (10th Cir. 1982); *Pushkin v. Regents of Univ. of Colorado*, 658 F.2d 1372, 1384–85 (10th Cir. 1981).

[9] Plaintiffs' Amended Class Action Complaint does not allege disparate impact, but intentional discrimination. It states that "[i]n devising a school funding scheme, defendants have deliberately treated students with disabilities differently than students who do not have disabilities." (Amd. Class Action Compl. ¶ 358). It also alleges that "defendants deliberately ignored the funding requirements for educating students with disabilities," and "deliberately diverted special education funding to other purposes." (Amd. Class Action Compl. ¶¶ 359, 361).

[10] Plaintiffs also note that this heightened standard has proved almost impossible to meet. Drew Millar, *Judicially Reducing the Standard of Care: An Analysis of the Bad Faith/Gross Misjudgment Standard in Special Education Discrimination*, 96 Ky. L.J. 711, 724 (2008).

[11] Defendants point out that other district courts have applied this heightened standard in cases alleging systemic deficiencies and seeking only injunctive relief. *See*, *e.g., St. Louis Dev. Disabilities Treatment Center Parents Assoc. v. Mallory*, 591 F. Supp. 1416, 1465–66 (W.D. Mo. 1984); *Grieco v. New Jersey Dep't of Educ.*, No. 06–cv–4077, 2007 U.S. Dist. LEXIS 46463 at *8–9, 14 (D.N.J. June 27, 2007).

[12] More specifically, Defendants maintain that: (1) Governor Kasich is entitled to legislative immunity; and (2) the State of Ohio, the Ohio State Board of Education, and the Ohio Department of Education are not "persons" for purposes of § 1983.

[13] The Court agrees with Plaintiffs that the *Pennhurst* doctrine, which precludes § 1983 plaintiffs from obtaining injunctive relief against state officials based on alleged violations of state law, is inapplicable. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984). Although Plaintiffs argue they have a state-created property interest in a thorough and efficient school system, they do not allege violations of state law. Instead, they allege they have been deprived of their rights under the IDEA, the Rehabilitation Act, and the United States Constitution.

[14] Plaintiffs insist that "[u]nless the Ohio Supreme Court would reverse its holding in *Lewis,* a new suit could not yield anything more than Ohio's school children have already obtained—a comprehensive declaration of rights, all of which are completely unenforceable in state court." (Mem. in Opp'n to Mot. for Partial Dismissal, at 30.)