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

JOHN DOE, et al.,	:	
	:	
Plaintiffs,	:	**Case No. C2-91-464**
	:	
v.	:	**JUDGE HOLSCHUH**
	:	
STATE OF OHIO, et al.,	:	**MAGISTRATE JUDGE KEMP**
	:	
	:	
Defendants.	:	

MEMORANDUM IN SUPPORT OF MOTION FOR DISMISSAL AND PARTIAL SUMMARY JUDGMENT

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I. Summary of Argument.

Plaintiffs' amended complaint claims that Ohio's special education system is structurally flawed in ways that violate the Individuals with Disabilities Education Improvement Act ("IDEIA"), the Rehabilitation Act, and 42 U.S.C. § 1983. Those claims should be dismissed.

A. IDEIA claims.

Plaintiffs' IDEIA claims are flawed on several levels.

Most fundamentally, this Court does not have subject matter jurisdiction over those claims. The statutes emerging for the IDEIA route disputes over states' compliance with the Act to the United States Secretary of Education, not the courts, and Plaintiffs' claims address state level compliance with the Act. Those claims are therefore beyond the Court's subject matter jurisdiction.

If this Court has jurisdiction, it should dismiss these claims until the Secretary of Education has exercised her primary jurisdiction, and utilized her greater expertise and much fuller data set, in analyzing the specialized matters underlying those claims. The Secretary will make two determinations as to Ohio's systemic compliance with the IDEIA in coming months; the Court should dismiss Plaintiffs' parallel claims and let the Secretary complete her analysis.

If the Court does decide to hear those claims it should conclude that they cannot be pressed against Governor Taft. The IDEIA does not authorize suit against persons or agencies that don't receive IDEIA funds, Defendant Taft is not an agency, and his office does not receive IDEIA funds. That places him outside the scope of the Act.

Similarly, Plaintiffs' claims against the State as a whole go beyond the scope of the IDEIA. That Act only controls individual agencies receiving IDEIA funds and only the Ohio Department of Education ("ODE") and the Ohio School Facilities Commission ("OSFC")

receive any IDEIA funds relevant to this case. The balance of Ohio's State government should therefore be dismissed, both on the merits and on immunity grounds.

Further, aspects of Plaintiffs' IDEIA claims are time barred. They are covered by a two year statute of limitation, yet several matters of the alleged occurred more than two years before those claims were first asserted.

B. Rehabilitation Act claim.

Plaintiffs' Rehabilitation Act claim is barred by the law of the case. It is indistinguishable from the claim found fatally flawed in Doc. No. 89, and Plaintiffs acknowledge the preclusive effect of that prior order. That claim should be dismissed.

C. 42 U.S.C. § 1983 claims.

Plaintiffs press three constitutional claims, but each are fatally flawed on several levels.

Procedurally, those claims cannot be pressed against Defendant Taft. He is protected by legislative immunity. Further, those claims are time barred to the extent that they are based matters occurring before July 30, 2003.

Those claims also fail on the merits. Plaintiffs' claim that they have been deprived of a liberty/property interest by Ohio's supposed failure to provide a thorough and efficient system of education fails because the legislative process provides all the process required. Their access to court claim fails because it is based on a misreading of Ohio law and Plaintiffs can't show the prejudice required for this federal claim. Finally, Plaintiffs' claim that Ohio's reliance on local property taxes deprives residents of property poor districts of equal protection is indistinguishable from the claim rejected in *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 93 S. Ct. 1278 (1973).

II. Law and Argument.

A. Plaintiffs' claims under the IDEIA fail as a matter of law.

There are multiple flaws in Plaintiffs' IDEIA claims. Recent legislation places Plaintiffs' claims of state level non-compliance beyond this Court's subject matter jurisdiction. Moreover, those claims should be dismissed to let the Secretary utilize her technical expertise and much boarder data set to determine whether Ohio is complying with the IDEIA. Finally, if the Court exercises jurisdiction now, it should dismiss Defendant Taft, all aspects of Ohio's State government other than ODE and OSFC, and any aspects of Plaintiffs' claims based on acts or omissions occurring before July 30, 2003.

1. The Court lacks subject matter jurisdiction over Plaintiffs' IDEIA claims.

"As courts of limited jurisdiction, federal courts may exercise only those powers authorized by the Constitution and statute." *Fisher v. Peters*, 249 F.3d 433, 444 (6th Cir. 2001). It is "presumed that a cause lies outside this limited jurisdiction and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S. Ct. 1673 (1994). Moreover, federal courts must "scrupulously confine their own jurisdiction to the precise limits which the statute has defined." *Finley v. United States*, 490 U.S. 545, 552-553, 109 S. Ct. 2003 (1989).

Those principles require dismissal of Plaintiffs' IDEIA claims because the statutory framework that emerged from the Act provides that the courts do not have jurisdiction over claims that states are out of compliance with the IDEIA. Instead, Congress has limited the courts' jurisdiction to disputes between parents and local educational agencies and routed questions of states' compliance with the IDEIA to the United States Secretary of Education.

a. The IDEIA shifts jurisdiction over disputes about state level compliance from the Courts to the Secretary of Education.

i. 20 U.S.C. § 1415(i)(1)(A) textually limits the courts' jurisdiction to disputes between parents and local educational agencies.

The courts' jurisdiction over IDEIA cases is set by 20 U.S.C. § 1415(i)(1)(A). That statute authorizes suits over claims that could be brought under the processes established by 20 U.S.C. §§ 1415(f) and (k). Review of §§ 1415(f) and (k) reveals that both are limited to disputes between parents and *local* educational agencies ("LEA"), mandating the conclusion that suits under § 1415(i)(1)(A) are limited to those between parents and local agencies.

Section 1415(f) is focused on disputes between parents and LEAs. Section 1415(f)(1)(A) provides for hearings wherein the parents and LEAs can be heard, after those parties have completed or waived attempts to resolve their disputes pursuant to § 1415(f)(1)(B). Those proceedings' focus on localized disputes is further evidenced by the § 1415(f)(3)(D)'s exclusive consideration of LEAs' actions in fixing the limitations period, § 1415(f)(3)(F)'s instruction that hearing officers can compel LEAs to take action under the statute, and the absence of any mention of state educational agencies ("SEA"), except as either initial arbiters or appellate decision makers in disputes between parents and LEAs. S*ee* §§ 1415(f)(1)(A) (SEAs conduct the hearing), § 1415(f)(3)(F) (allowing complaints to be filed with a SEA), 1415(g)(1) and (2) (allowing for appeals to SEAs).

Section 1415(k) also focuses exclusively on controversies between parents and LEAs. It covers disputes about a child's placement after he has violated school rules. It is triggered by an LEA's knowledge of the child's special needs, § 1415(k)(5), and requires very localized interactions between parents, school officials, and members of the child's IEP team to determine the appropriate placement. §§ 1415(k)(1) and (2). It allows either a parent or a LEA to appeal, §

1415(k)(3), and the only meaningful mention of SEA's is as the appellate decision maker. §§ 1415(g)(1) and (2).

In sum, § 1415(i)(1)(A) only authorizes suits over the type of claims initially cognizeable under §§ 1415(f) and (k) and those provisions are limited to disputes between parents and LEA's. Section § 1415(i)(1)(A) therefore provides no jurisdiction for suits pressing claims against states.

ii. 20 U.S.C. § 1416 routes questions of state compliance with the IDEIA to the Secretary of Education.

The conclusion that §1415(i)(1)(A)'s jurisdictional grant does not cover questions of state level compliance is supported by the fact that another portion of the IDEIA does address such matters and routes them to a distinct decision maker—the Secretary of Education. The IDEIA amended 20 U.S.C. § 1416 in several ways that specifically charge the Secretary with determining whether states are in compliance with the IDEIA and those newly added provisions, not § 1415, control here.

Initially, § 1416 requires the Secretary to engage in ongoing, focused, monitoring of each state's implementation of the IDEIA. Section 1416(a) requires the Secretary to monitor each state's "implementation of" the IDEIA, as well as the state's "general supervision" of local special education programs, and to take action to enforce compliance with the IDEIA's requirements. That requires examination of whether "States meet the program requirements of the" IDEIA, § 1416(a)(2)(B), and involves quantitative analysis of key areas, such as whether services are provided in the least restrictive environment, whether the states are diligently trying to find children that need services, whether the states provide adequate means to vindicate the educational objectives set out in each child's education plan, and whether there are smooth

transitions between pre-school and regular school and from high school to the adult world. § 1416(a)(3).

In addition, § 1416(b)(1)(A) requires each state to submit periodic "performance plans" that "evaluate[] [their] efforts to implement the requirements and purposes" of the IDEIA. Those plans must set forth "measurable and rigorous targets" for determining compliance. § 1416(b)(2)(A). The Secretary is statutorily required to review each plan and determine whether the State is in compliance with the IDEIA. § 1416(c).

Those plans are supplemented annually with performance reports detailing each state's implementation of the IDEIA. Section 1416(b)(2)(C) requires states to "use the targets established in the plan . . . to analyze the performance of each local educational agency . . . in implementing the" Act and § 1416(b)(2)(C)(ii)(II) requires the data be reported to the Secretary. She then reviews the report, as well as all data obtained through monitoring and other public sources, and in order to "determine if the State meets the requirements and purposes" of the IDEIA or whether it falls short. § 1416(d)(2)(A). If a shortfall is found, the Secretary may take various enforcement actions, including suit by the Department of Justice. § 1416(e).

In sum, the IDEIA's extensive modifications make it clear that Congress intended the Secretary, not the courts, to evaluate states' compliance with the IDEIA. That's why the Secretary monitors them, why the Secretary passes on their performance plans, and the Secretary annually "determine[s] if [a] State meets the requirements and purposes" of the Act. § 1416(d)(2)(A).

b. Plaintiffs' likely responses do not undermine that conclusion.

That conclusion is not undermined by any of Plaintiffs' likely arguments to the contrary.

The Defendants' jurisdictional analysis is not undercut by 20 U.S.C. § 1403's reference to suits against states. That statute deals with Eleventh Amendment immunity and remedies in a suit against "a State," but that is not inconsistent with the Defendants' reading of § 1415(i) because there are a number of cases that would be against "a State" while also being against an LEA, as required by § 1415(i). For example, the State of Ohio operates schools for deaf and blind students and suits against those schools would be both against the "State," for purposes of § 1403 and against LEAs within the meaning of the IDEIA as a whole. *See* Ohio Rev. Code § 3325.01 and 20 U.S.C. § 1401(19). The same would be true of suits against the Ohio Central School System, a discrete school system run by the Ohio Department of Rehabilitation and Correction. *See* Ohio Rev. Code § 5145.06. Those types of institutions are not unique to Ohio and provide ample explanation for § 1403.

Nor is Defendants' analysis precluded by the Court's prior decision finding a private cause of action over systemic claims. Doc. No. 89 at pp. 9-18. There are two reasons why that is true.

Initially, the analysis offered here is different in kind from that rejected in Doc. No. 89 so that decision does not have preclusive effect. Defendants' prior analysis dealt with the nature of the *substantive* rights conferred by the IDEA as a whole, while the analysis offered here deals with the scope of the *jurisdictional* grant set out in § 1415(i). The prior analysis dealt with the nature of the underlying question, this motion focuses on which decision maker answers it. Moreover, because this argument goes to subject matter jurisdiction, it can be raised at anytime. Fed. R. Civ. P. 12(h)(3).

Further, the issue must be revisited because the law has significantly changed since Doc. No. 89 came down. Sections 1415(f) and (k), the statutes which define the types of disputes made judicially cognizable under § 1415(i), have been modified in ways that tighten their focus to disputes between parents and LEAs. Just as importantly, the IDEIA added the provisions now codified in §§ 1416(a) through (e) that expressly require the Secretary to determine whether a state is in compliance with the IDEIA. Those changes must be considered in spite of Doc. No. 89 because "subsequent acts can shape or focus [] meanings" previously given a statute. *Food and Drug Admin. v. Brown & Williamson Tobacco* Corp., 529 U.S. 120, 143, 120 S. Ct. 1291 (2000). Indeed, the "classic judicial task of reconciling [] laws enacted over time, and getting them to 'make sense' in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute." *Id*. (emphasis omitted). "This is particularly so where," as here, "subsequent statutes more specifically address the topic at hand." *Id.*

* * *

The plain language of § 1415(i)(1)(A) limits its jurisdictional grant to disputes between parents and LEAs and makes no mention of states, except as arbiters of those disputes. In contrast, § 1416 expressly, and in multiple ways, directs questions of state level compliance with the IDEIA to another decision maker. "It is [] fundamental . . . that the words of a statute must be read . . . with a view to their place in the overall statutory scheme" and that a court "must [] interpret the statute as a . . . coherent regulatory scheme, and fit . . . all parts into an harmonious whole." *Brown & Williamson*, 529 U.S. at 133, (citations and internal punctuation omitted). The plain language of § 1415(i) and its role in the overall structure of the IDEIA combine with those fundamental principles of statutory construction to compel the conclusion that the courts

have no jurisdiction over claims about state level compliance with the IDEIA. That requires dismissal of Plaintiffs' IDEIA claims for lack of jurisdiction.

2. This Court should defer to the primary jurisdiction of the Secretary of Education.

If the Court finds that it has subject matter jurisdiction over Plaintiffs' IDEIA claim, it should defer exercising it pursuant to the doctrine of primary jurisdiction. More specifically, the Defendants submit that the Court should dismiss Plaintiffs' IDEIA claims subject to refilling after the Secretary of Education passes on Ohio's state performance plan and application for IDEIA funds, both of which will assess Ohio's systemic compliance with the IDEIA.

"Primary jurisdiction is the deferral by a court of its power to hear a case, pending administrative determination of issues particularly within agency competence." *United States v. Haun*, 124 F.3d 745, 749 (6th Cir. 1997). That "principle, now firmly established," provides "that in cases raising issues of fact not within the conventional experience of judges . . . agencies created by Congress for regulating the subject matter should not be passed over." *Far East Conference v. United States*, 342 U.S. 570, 574, 72 S. Ct. 492 (1952). The Sixth Circuit likewise "adhere[s] to the belief . . . that in most instances where . . . the facts call for the deciding tribunal to exercise a degree of expertise or discretion, courts should stay their hand to allow the appropriate administrative agency an opportunity for initial determination." *Haun*, 124 F.3d at 752.

Although there is no fixed formula for determining when to apply the doctrine, the courts have focused on the practical reasons for its development in deciding whether it should be applied in a given case. *United States v. Western P. R. Co.*, 352 U.S. 59, 64, 77 S. Ct. 161

(1956). Several of those reasons—the wisdom of harnessing agency expertise, the voluminous nature of the data to be analyzed here, and the need for a uniform answer to the question of the extent Ohio's in compliance with the IDEIA—strongly support this Court deferring to the Secretary of Education's primary jurisdiction.

a. The administrative alternatives: two upcoming evaluations of Ohio's systemic compliance with the IDEIA.

Plaintiffs claim that Ohio is systemically out of compliance with the IDEIA, and the Secretary of Education will evaluate Ohio's systemic compliance with that Act twice in the next several months. The first is in connection with her review of Ohio' state performance plan. The IDEIA required Ohio to submit a plan "evaluate[ing] [its] efforts to implement the requirements and purposes" of the IDEIA that sets forth "measurable and rigorous targets" for determining compliance. §§ 1416(b)(1)(A) and (b)(2)(A). Ohio finalized its plan on November 30, 2005. That 138 page plan provided past performance data and projections on, among other things::

- Disciplinary issues.
- Participation in statewide assessment tests.
- Issues concerning least restrictive environment, for both school-age and preschool children.
- Other preschool issues.
- Transition between IDEIA Parts C and B.
- General state level supervision.
- Focused monitoring.
- Sanctions.
- The complaint process.

Ex. A at ¶ 9. The Secretary will review the plan, and after considering any interested parties' submissions and the wealth of other information in her possession about Ohio's administration of the IDEIA, will issue a decision as to whether Ohio's plan meets the Act's requirements. *Id.* at ¶¶ 3, 10. Although no one yet knows the nature of the decision that will come from this newly enacted procedure, the Secretary's prior evaluations of Ohio's annual performance reports have provided specific feedback on the extent of Ohio's compliance with the IDEA. *Id*. at ¶¶ 8, 11, and 14.

The second evaluation will be made in connection with Ohio's annual application for IDEIA funds. Ohio must apply for those funds pursuant to 20 U.S.C. § 1412 through an application explaining how Ohio will meet the Act's requirements. The application must address, among other things, the following matters:

- Ohio's plans to provide free appropriate public education in the least restrictive environment.
- Ohio's plans for providing full educational opportunity for all students with disabilities.
- Ohio's "child find" plans for locating children with disabilities in need of services.
- Ohio's plans for developing and enforcing individual education programs.
- Ohio's plan for evaluating individual children referred for special education.
- Ohio's performance goals.
- Ohio's plans for encouraging public participation in its administration of the IDEIA.
- Ohio's plans for dealing with disciplinary issues involving students with disabilities.

20 U.S.C. § 1412(a). That application must be formulated after the solicitation of public input pursuant to 34 C.F.R. §§ 300, 280-384. Once Ohio's application is submitted to the Secretary,

there is a separate public comment period whereby members of the public can comment on any aspect of Ohio's application. Ex. A at ¶ 12.

The Secretary will review Ohio's application, any public comments, and the large body of other information in her possession on Ohio's administration of the IDEIA (Ohio's performance plan and annual performance reports, data submitted pursuant to 20 U.S.C. § 1418, information obtained through monitoring and inspection visits) and make a decision as to Ohio's compliance with the Act. Ex. A at ¶¶ 3, 13. The Secretary has, in the past, identified areas of non-compliance through special conditions describing them and what must be done to remedy those problems. Ex. A at ¶ 14.

b This case raises issues within the special expertise of the Secretary of Education.

"Specialized knowledge of the agencies involved has been particularly stressed" by the Supreme Court in determining whether a court should defer to an agency's primary jurisdiction. *Western P. R. Co.*, 352 U.S. at 64. The Sixth Circuit has likewise observed that one of the "principal reasons for the doctrine . . . [is] to obtain the benefit of the expertise and experience of the administrative agencies," and has held that "questions within the special competency of an administrative agency should be resolved by that agency." *Alltel Tenn. v. Tennessee Pub. Serv. Comm'n*, 913 F.2d 305, 309 (6th Cir. 1990). This Court has held that courts should defer resolution of technical questions "until they have been considered and passed upon by the trained body established for that very purpose and especially equipped to examine the intricate facts commonly involved." *Kocolene Oil Corp. v. Ashland Oil, Inc.*, 509 F. Supp. 741, 743 (S.D. Ohio 1981).

There is no doubt, on a general level, of the relative expertise of the courts and educational agencies on the matters at issue here. The Supreme Court has recognized that educational policy as a whole in is an "area in which [the courts'] lack of specialized knowledge and experience counsels against premature interference with [] informed judgments." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42, 93 S. Ct. 1278 (1973). That dynamic is more pronounced in the more specialized area of *special* education; "federal courts are generalists with no expertise in the educational needs of handicapped children, and [] benefit from the factfinding of a [body] with expertise in the field." *Renner v. Board of Educ.*, 185 F.3d 635, 641 (6th Cir. 1999). Indeed, the Supreme Court has recognized that the "primary responsibility for formulating" policy in this area "was left by the Act to . . . educational agencies in cooperation with the parents or guardian of the child." *Bd. of Educ. v. Rowley*, 458 U.S. 176, 207, 102 S. Ct. 3034 (1982).

Those general considerations are illustrated by the specific claims pressed here. They involve such technical questions as the propriety of Ohio's special education weights (Doc. No. 100 at ¶¶ 185-203), the propriety of waiving special education standards (Doc. No. 100 at ¶¶ 234-240), the propriety of Ohio's unit system of funding services for 3 to 5 year old children (Doc. No. 100 at ¶¶ 250-277), whether services can be properly delivered through educational service centers and county boards of mental retardation and developmental disabilities (Doc. No. 100 at ¶¶ 280-281), and the adequacy of Ohio's focused monitoring (Doc. No. 100 at ¶¶ 351-370) and complaint systems (Doc. No. 100 at ¶¶ 371-380). All of those matters are indisputably arcane to those outside of special education, and hence "not within the conventional experience of judges." *Far East Conference*, 342 U.S. at 374.

But, they are bread and butter issues for the Department of Education, with its decades of experience evaluating states' compliance with the IDEIA and its predecessors. It is hard to dispute the proposition that those, and the other technical issues raised in the amended complaint, "are matters that should be dealt with in the first instance by those especially familiar with the customs and practices of the [area] and of the unique [environment] involved in this case." *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289, 305, 93 S. Ct. 573 (1973).

c This case will require analysis of voluminous data that can be more effectively digested by the Secretary of Education.

Another reason for deferring to the primary jurisdiction of an agency is to take advantage of its superior ability to manage the data necessary to resolve technical issues. Such "determination[s] [are] reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts [are] . . . indispensable; and such acquaintance is commonly to be found only in a body of experts." *Crain v. Blue Grass Stockyards Co.,* 399 F.2d 868, 872 (6th Cir. 1968) (quoting *Great N. R. Co. v. Merchants Elevator Co.*, 259 U.S. 285 (1922)). The Supreme Court has therefore observed that "courts . . . should avail themselves of the aid implicit in the agency's superiority in gathering the relevant facts and in marshaling them into a meaningful pattern." *Ricci*, 409 U.S. at 305-6.

This case will likely be an exemplar of that dynamic. Because of the systemic nature of Plaintiffs' claims, the Court will be asked to examine how special education is delivered in the more than 900 school districts and community schools across the State, requiring it to digest a truly mountainous body of evidence. Indeed, the limited discovery undertaken in connection with the amended complaint alone has already generated more that 17,000 documents and many hours of depositions, and that is likely to be only the tip of the iceberg. *See Board of Education*

v. Walter, 58 Ohio St.2d 368-369, 390 N.E.2d 813 (Ohio 1979) (detailing the scope of proceedings in a prior systemic challenge to Ohio's educational system); *DeRolph v. State of Ohio,* 78 Ohio St.3d 193, 194, 677 N.E.2d 733 (Ohio 1997) (same).

A similar evaluation will be undertaken by the Secretary, regardless of the outcome of this motion, and it makes sense to take advantage of that. Her agency conducts annual evaluations of Ohio's proposals of how to implement the IDEIA, evaluations that involve many of the issues presented here. It engages in ongoing monitoring of the actual delivery of special education, including on site inspections and the solicitation of input from stakeholders in the system. Ex. A at ¶ 4. It annually analyzes reams of statistical data detailing the facts of Ohio's special education programs. *Id.* at ¶ 5. It reviews annual reports of Ohio's performance under the IDEIA. *Id.* at ¶¶ 6-8. And it will consider all the information generated in those processes in passing on Ohio's submitted plan for implementing the IDEIA and application for IDEIA funds. *Id.* at ¶¶ 3, 10, 13. That specialized, experienced, agency is far better suited to those essential tasks than this Court of general jurisdiction.

d. Deferral to the Secretary of Education would increase the likelihood of uniform results.

"[T]he desirable uniformity which occurs when a specialized agency decides certain administrative questions" is another reason for the primary jurisdiction doctrine. *Alltel Tenn*, 913 F.2d at 309. Courts take the opportunity to consider how an agency resolves common questions because "otherwise the parties who are subject to the agency's continuous regulation may become the victims of uncoordinated and conflicting requirements." *Kocolene Oil Corp.*, 509 F. Supp. at 742.

Absent deferral of these proceedings, Ohio could receive differing decisions on the extent of its compliance with the IDEIA. The likelihood of disagreement, and hence conflicting conclusions, would be reduced by the Court having the benefit of the Secretary's analysis before it tackles this case.

e. Plaintiffs' likely counter arguments should not persuade.

The Defendants recognize that Plaintiffs will likely oppose deferral, but their likely arguments should not carry the day.

At the outset, Defendants' invocation of primary jurisdiction is not foreclosed by the Court's prior decision that Plaintiffs need not exhaust the administrative remedies provided in 20 U.S.C. § 1415(f). Doc. No. 89 at pp. 17-9. The primary jurisdiction doctrine is distinct from the exhaustion doctrine, *Western P. R. Co.*, 352 U.S. at 63-64, so rejection of our exhaustion argument does not foreclose consideration of primary jurisdiction. More importantly, the cornerstone of the Court's exhaustion analysis, Plaintiffs' inability to raise systemic claims through § 1415(f), is absent because the different processes Defendants suggest, the Secretary's evaluation of Ohio's performance plan and application for IDEIA funds, both indisputably address systemic matters. Finally, the law has changed significantly since the Court's prior decision, adding the administrative review procedures set out in § 1416, and those changes alone justify a reevaluation of the role of the administrative process.

Nor should the Court be persuaded by any argument that this case is controlled by the holding in *Rosado v. Wyman*, 397 U.S. 397, 406, 90 S. Ct. 1207 (1970), that courts shouldn't defer to agencies' primary jurisdiction if there is no way for plaintiffs to trigger or participate in agency review. Those problems aren't present here.

Agency review is triggered here in other ways: by Ohio's submission of its performance plan and application for IDEIA funds. Other courts have held that similar triggering mechanisms are sufficient to satisfy that aspect of *Rosado*. *Corum v. Beth Israel Medical Center*, 373 F. Supp. 558, 561-2 (S.D.N.Y 1974); *Gordon v. Forsyth County Hospital*, 409 F. Supp. 708, 724 (M.D.N.C.1975).

Further, unlike the plaintiffs in *Rosado*, the these Plaintiffs may participate in the administrative process in multiple ways. Those ways include providing input into Ohio's submissions to the Secretary, Ex. A at ¶¶ 9-12, submissions to the Secretary critiquing Ohio's state performance plan, Ex. A at ¶ 10, and through the public comment period on Ohio's application for IDEIA funds, Ex. A at ¶ 12. Other courts have held that those devices are sufficient to satisfy Rosado. *Feliciano v. Romney*, 363 F. Supp. 656, 675 (S.D.N.Y 1973) (input into initial plan formulation); *Crawford v. University of North Carolina*, 440 F. Supp. 1047, 1058 (M.D.N.C. 1977) (submissions); *Corum*, 373 F. Supp at 562 (comment period).

f. Plaintiffs' IDEIA claims should be dismissed rather than stayed.

A court that decides to defer to an agency's primary jurisdiction may either dismiss or stay the case, but the precedents indicate that dismissal is appropriate here for two reasons.

The first is close relationship between the claims alleged here and the matters the agency will pass on. The Sixth Circuit has distinguished between, on the one hand, cases where the issues before the agency are peripheral to those before the court and those, on the other, that go to the core of the case, and holds that dismissal is generally appropriate in the later category of cases. *Detroit, T. & I. R. Co. v. Consolidated Rail Corp.*, 767 F.2d 274, 279 (6th Cir. 1985). This

central issue here is whether Ohio's special education system meets IDEIA standards and that will be at the core of what the Secretary will be deciding. This factor supports dismissal.

The second is the lack of prejudice. Both the Supreme Court and the Sixth Circuit have held that "[d]ismissal rather than a stay has been approved where there is assurance that no party is prejudiced thereby." *United States v. Michigan National Bank Corp.*, 419 U.S. 1, 5, 95 S. Ct. 10 (1974); *Consolidated Rail*, 767 F.2d at 280. The courts, including the Sixth Circuit, have held that the fact that a "similar suit is easily initiated later" precludes any finding of prejudice, *Consolidated Rail*, 767 F.2d at 279; *Engelhardt v. Consolidated Rail Corporation*, 756 F.2d 1368, 1369 (2d Cir. 1985); *South Austin Coalition Community Council v. SBC Communications*, 191 F.3d 842, 845 (7th Cir. 1999); *Montgomery Environmental Coalition v. Washington Suburban Sanitary Commission*, 607 F.2d 378, 383 (1979). There is no barrier to these Plaintiffs' refiling their IDEIA claims if they are dissatisfied with the Secretary's decisions. This factor supports dismissal.

* * *

The Secretary of Education will soon be utilizing her agency's established expertise and sizeable resources to address the technical questions involved in evaluating Ohio's systemic compliance with the IDEIA. If past practice is an accurate predictor of what will result, those processes will result in specific findings of any ways Ohio is out of compliance and instructions on how to cure those problems. It would be wasteful in the extreme for this Court to take up the same issues before availing itself of the Secretary's parallel analysis. Plaintiffs' IDEIA claims should be dismissed.

3. Defendant Taft is not a proper defendant under the IDEIA.

The IDEIA does not authorize suits against individual officials. Substantively, the IDEIA regulates state and local educational *agencies*, which are elsewhere defined as being entities, rather than individuals. *See* 20 U.S.C. §§ 1401(19) and (32)[1] (defining local and state educational agencies); 20 U.S.C. §§ 1412(11) and 1413 (substantive provisions). Jurisdictionally, 20 U.S.C. § 1415(i)(2)(A) only provides for suit over the type of claims that can be brought in proceedings under §§ 1415(f), and (k), and, those subsections only contemplate administrative proceedings between parents on one hand and local educational *agencies* on the other. The IDEIA simply does not contemplate suit against individual officials. Governor Taft is an official, not an educational agency. He therefore cannot be sued under the IDEIA.

That is not changed by the fact that Governor Taft is sued in his official capacity and that such suits are considered to be suits against the office, rather than the official. Initially, "the requirements of the IDEA [do not] apply to a state agency that has not received . . . federal IDEA dollars," *Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 283 (5th Cir. en banc) *cert. den.* 126 S. Ct. 416 (2005), and the Governor's office receives no such funding. Plaintiffs' IDEIA claims against Governor Taft should therefore be dismissed.

4. No state agencies other than ODE and OSFC can be sued under the IDEIA.

Consistent with the limitations inherent in the fact that the IDEIA is Spending Clause legislation, *Board of Education of the Hendrick Central School District v. Rowley*, 458 U.S. 176, 204 n. 26, 102 S. Ct. 3034 (1982), the courts have held that the IDEIA's conditions only go as far

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[1] Section 1401(32) does allow officials to be considered to be state educational agencies when a state has not designated an agency to act in that capacity, but it is not applicable here because Ohio has designated the ODE to act as its state educational agency. See Ohio Rev. Code §§ 3323.06 and 3323.07.

as the federal funds making it applicable. More specifically, only those state agencies that actually receive IDEIA funds are substantively bound by the Act; other parts of state government are not so bound. *Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 283 (5th Cir. en banc) *cert. den.* 126 S. Ct. 416 (2005). Further, other state agencies are not considered to have waived their sovereign immunity. *S.C. v. Deptford Township Board of Education*, 248 F. Supp.2d 368, 387 (D.N.J. 2003).

The only state agencies of concern here that receive IDEIA funds are OSFC and ODE.[2] That means that Plaintiffs' claims against all other unspecified agencies made by their suing "the State of Ohio" fail on two levels. First, those agencies have no substantive obligations under the IDEIA. Second, those agencies still enjoy Eleventh Amendment immunity from this suit.

5. Portions of Plaintiffs' claims are time barred.

Doc. No. 89 holds that the scope of litigation brought under § 1415(i) is set by subsection § 1415(b)(6) and § 1415(b)(6)(B) sets a two year statute of limitation on claims brought under § 1415. Doc. 89 at p. 11. The claims pressed in the amended complaint were first asserted in July 29, 2005 (Doc. No. 100). Therefore, only matters occurring after on or after July 30, 2003 are actionable §§ 1415(b)(6)(B) and 1415(i). The amended complaint alleges a number of matters that supposedly occurred before that date. Doc. No. 100 at ¶¶ 82-85, 161-162, 185-194, 382-385. Those matters, and any others based on facts occurring on or before July 29, 2003, are time barred.

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[2]The Ohio Department of Health ("ODH") and Ohio Department of Rehabilitation and Correction ("ODRC") do receive IDEIA funding to operate programming for, respectively, children from birth through their second year of life and incarcerated students. However, none of the allegations in the amended complaint deal with those children or incarcerated students, so neither ODH nor ODRC are proper defendants, in spite of their receipt of IDEIA funds.

B. The Court has already rejected Plaintiffs' Rehabilitation Act claim.

Plaintiffs' Second Cause of Action is barred by the law of the case doctrine. That doctrine "dictates that issues, once decided, should be reopened only in very limited, exceptional circumstances." *Doyle v. City of Columbus*, 41 F. Supp. 2d 765, 767 (S.D. Ohio 1998). Although courts have some ability to revisit prior holdings, they should "as a rule . . . be loathe to do so in the absence of extraordinary circumstances." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817, 108 S. Ct. 2166 (1998). As the Sixth Circuit has held, "[t]o differ," a court "must find some cogent reason to show the prior ruling is no longer applicable, such as if [the] opinion was a clearly erroneous decision which would work a manifest injustice. *Brady-Morris v. Schilling* (*In re Knight Trust*), 303 F.3d 671, 677-678 (6th Cir. 2002).

Plaintiffs' Second Cause of Action claims that Ohio's special education programs violate § 504 of the Rehabilitation Act. Doc. No. 100 at ¶¶ 396-401. A similar claim was made in Plaintiffs' prior complaint, Doc. No. 46 at ¶¶ 174-175, but the Court found that the claim failed as a matter of law because there was no allegation of bad faith or gross misjudgment. Doc. No. 89 at pp. 23-29. A comparison of the crucial portion of Plaintiffs' current Rehabilitation Act claim, Doc. No. 100 at ¶ 401, reveals that there is no material difference between the current allegations and those rejected by the Court; neither allege bad faith or gross mismanagement. There is no indication that the legal foundation for the decision—the clear weight of circuit level precedent requiring a showing of bad faith or gross mismanagement—has been undermined. Plaintiffs' indistinguishable Rehabilitation Act claim therefore fails as a matter of law.[3]

[3]To the contrary, the cases decided after this Court's decision on this question have consistently reached the same conclusion. *Alex G. v. Bd. of Trs.,* 387 F. Supp. 2d 1119, 1124 E.D. Cal. 2005); *Zayas v. Puerto Rico*, 378 F. Supp. 2d 13, 21 (D.P.R. 2005); *See also E.W. v. School Bd. of Miami-Dade County Fla.,* 307 F. Supp. 2d 1363, 1370-1371 (S.D. Fla. 2004) (under the ADA).

C. Plaintiffs' claims under 42 U.S.C. § 1983 fail as a matter of law.

Plaintiffs' Third, Fourth and Fifth Causes of Action allege constitutional violations via 42 U.S.C. § 1983. Those claims fail on two levels. Procedurally, Defendant Taft can't be held liable under that statute and other portions of those claims are time barred. Substantively, those claims fall well short of stating constitutional violations.

1. Plaintiffs' claims are procedurally barred.

a. Defendant Taft is immune from Plaintiffs' § 1983 claim.

Plaintiffs assert their § 1983 claims against Defendant Taft, but he is protected by legislative immunity. The Supreme Court and the Sixth Circuit have held that officials exercising legislative authority are absolutely immune from monetary, declaratory and injunctive relief. *Supreme Court of Virginia v. Consumers Union, Inc.*, 446 U.S. 719, 732-733, 100 S. Ct. 1967 (1980); *Alia v. Michigan Supreme Court*, 906 F.2d 1100, 1102 (6th Cir. 1990). The Supreme Court has held that the nominally executive actions of proposing and signing legislation, including the type of budgetary legislation at issue here, are integral parts of the legislative process and hence that legislative immunity precludes suit for those actions. *Bogan v. Scott-Harris*, 523 U.S. 44, 55-56, 118 S. Ct. 966 (1998). With the one exception discussed in the next paragraph, the allegations against Governor Taft are based on his actions in proposing and signing legislation and hence those claims are barred.

Defendants recognize that Governor Taft is also sued because of his issuance of an executive order in March of 2003. Doc. No. 100 at ¶¶ 161-162. However, as discussed below, this § 1983 claim is controlled by a two year statute of limitations and that claim was not brought until July of 2005, two years and four months after that action was taken, and hence is time

barred. Further, that claim, in this case seeking only prospective relief, is now moot because that order only controlled fiscal year 2003 that ended June 30, 2003.

b. Some of Plaintiffs' § 1983 claims are time barred.

It is well settled that § 1983 claims are governed by a two year statute of limitations. *Banks v. City of Whitehall,* 344 F.3d 550, 553 (6th Cir. 2003). The claims pressed in the amended complaint were first asserted on July 29, 2005. Therefore, only matters occurring on or after July 30, 2003 are actionable under §§ 1983 and 1415(b)(6)(B). The amended complaint alleges a number of matters that supposedly occurred before that date. Doc. No. 100 at ¶¶ 82-85, 161-162, 185-194, 382-385. Those matters, and any others based on facts occurring on or before July 29, 2003, are time barred.

2. Plaintiffs' claims fail on the merits.

a. Plaintiffs' Third Cause of Action fails because the legislative process provided all the process due.

Plaintiffs' Third Cause of Action claim, their claim that they have been denied liberty and property interests in an education without sufficient process, fails because the legislative process provided all the process due.

Both the Supreme Court and the Sixth Circuit have held that legislative actions, those that affect the public at large rather than specific individuals, are not subject to heightened due process requirements. In *Bi-Metallic Investment Company v. State Board of Equalization*, 239 U.S. 441, 36 S. Ct. 141 (1915), a state decision making body imposed a significant, across the board, increase in tax rates that was challenged on procedural due process grounds. The Court rejected the proposition that normal notice and hearing requirements applied, holding that "where a rule of conduct applies to more than a few people it is impracticable that every one

should have a direct voice in its adoption." *Id.* at 445. Instead, affected parties' "rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule." *Id.*.

The same constitutional dynamic, and outcome, is seen in *Adkins v. Parker*, 472 U.S. 115, 105 S. Ct. 2520 (1985), where welfare recipients claimed they had been deprived of procedural due process when Congress reduced benefits. The Court recognized that although the recipients had a constitutionally protected interest in benefits, *id.* at 128, "the procedural component of the Due Process Clause [did] not 'impose a constitutional limitation on the power of Congress to make substantive changes in the law of entitlement to public benefits.'" *Id.* at 129 (quoting *Richardson* v. *Belcher*, 404 U.S. 78, 81 (1971)). Instead, the Court held that the "legislative determination provides all the process that is due." *Id.* at 130 (quoting *Logan v. Zimmerman Brush Co*., 455 U.S. 422, 432-433 (1982)).

The Sixth Circuit has likewise recognized that "[g]overnmental determinations of a general nature that affect all equally do not give rise to a due process right to be heard." *Nasierowski Bros. Inv. Co. v. Sterling Heights*, 949 F.2d 890, 896 (6th Cir. 1991). Hence that Court rejected the argument that a liquor licensee was deprived of due process when the area it served was made dry, holding that no notice or opportunity to be heard need proceed legislative action of general applicability. *37712, Inc. v. Ohio Dep't of Liquor Control*, 113 F.3d 614 (6th Cir. 1997). *See also*, *Pro-Eco v. Board of Comm'rs of Jay County,* 57 F.3d 505, 513 (7th Cir. 1995) ("Governing bodies may enact generally applicable laws, that is, they may legislate, without affording affected parties so much as notice and an opportunity to be heard.").

That dooms Plaintiffs' Third Cause of Action. These Plaintiffs, like those in *Bi-Metallic*, *Adkins*, and *37712*, sue over laws that affect the public at large, not specific individuals. They,

like the claimants in *Bi-Metallic*, *Adkins*, and *37712*, contend that those laws deprive them of a constitutionally protected interest.[4] And, as in *Bi-Metallic*, *Adkins*, and *37712*, Plaintiffs claim that they were not given sufficient process in connection with those deprivations. *Bi-Metallic*, *Adkins*, and *37712* establish that the legislative process is all the Constitution requires and there is no claim that process was not provided. This claim therefore fails as a matter of law.

That is not changed by any of Plaintiffs' likely arguments to the contrary. The fact that they allege a violation of Ohio's Constitution is immaterial. Procedurally, that is a legal conclusion and hence is not assumed to be true. *Papasan v. Allain*, 478 U.S. 265, 286, 106 S. Ct. 2932 (1986). Substantively, the Eleventh Amendment precludes federal plaintiffs from obtaining injunctive or declaratory relief against state officials on state law theories. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 106, 104 S. Ct. 900 (1984). Moreover, any attempt to enforce state law rights via 42 U.S.C. § 1983, the exclusive basis for this claim, fails

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[4] Although not necessary for resolution of this motion (because it only addresses the process due), the Defendants *do not* concede that Ohio has failed to provide a thorough and efficient educational system. To the contrary, the latest objective indicators show that academic performance has improved under the system Plaintiffs describe as inadequate and in fact exceeds national averages. For example, Ohio students' proficiency scores in mathematics have improved significantly since Ohio set out to revamp its educational systems after *DeRolph*, exceed national averages, and are lower than only a handful of other states. National Center for Educational Statistics, *The Nation's Report Card, Mathematics 2005, Ohio Grade 4* (2005); National Center for Educational Statistics, *The Nation's Report Card, Mathematics 2005, Ohio Grade 8* (2005), attached respectively as Ex.s B and C. The same is true with regard to reading scores; they too have improved, exceed national averages, and lag behind only a few states. National Center for Educational Statistics, *The Nation's Report Card, Reading 2005, Ohio Grade 4* (2005); National Center for Educational Statistics, *The Nation's Report Card, Reading 2005, Ohio Grade 8* (2005), attached respectively as Ex.s D and E. Although the data on writing and science is not as extensive or current, they show that Ohio exceeds national averages in those areas as well. National Center for Educational Statistics, *State Profiles*, *Scale Scores for Writing, Ohio vs. National Public* (2005); National Center for Educational Statistics, *State Profiles*, *Scale Scores for Science, Ohio vs. National Public* (2005) attached collectively as Ex. F.

because that statute only allows for claims based on federal law. *Huron Valley Hospital, Inc. v. Pontiac*, 887 F.2d 710, 714 (6th Cir. 1989).

Nor is it changed by Plaintiffs' claim that the laws in question impose distinctive burdens on some school districts because, regardless of those allegedly disparate impacts, the laws at issue have general applicability. The Supreme Court has held that "the fact that [a law] may in its effects have been thought more disadvantageous by some [] than by others does not change its generalized nature," so as to trigger heightened due process requirements. *United States v. Florida E. C. R. Co*., 410 U.S. 224, 246, 93 S. Ct. 810 (1973). No one disputes that the laws attacked here apply to the entire state and that precludes any claim that heightened due process requirements apply, even if one accepts Plaintiffs' claim that those laws are less advantageous to some districts than to others.

b. Plaintiffs' Fourth Cause of Action fails because Ohio's courts do entertain cases under § 2, Art. VI of Ohio's Constitution.

Plaintiffs' Fourth Cause of Action asserts, mistakenly, that they have been denied their federal right to access the courts because Ohio's courts are supposedly prohibited from considering claims arising under § 2, Art. VI of Ohio's Constitution. That claim fails on both Ohio and federal grounds.

i There is no Ohio law barrier to the prosecution of claims under § 2, Art. VI.

Plaintiffs claim that they are barred from bringing § 2, Art. VI claims in Ohio's courts appears to be based on the Ohio Supreme Court's decision in *State ex rel. State of Ohio v. Lewis*, 99 Ohio St.3d 97, 789 N.E.2d 195 (Ohio 2003). However, a close reading of *Lewis* reveals that it does not bar prosecution of such claims.

Lewis arose from the *DeRolph* litigation. After the Ohio Supreme Court's final decision that the prior system was unconstitutional, the *DeRolph* plaintiffs filed a motion in the original trial court case seeking to compel the adoption of a constitutional funding system. *Lewis* was a prohibition action, based on the claim that jurisdiction over the entire *DeRolph* controversy had ceased. The Supreme Court agreed and prohibited further action in that case.

However, the Supreme Court did not, as Plaintiffs claim, prohibit further litigation to enforce § 2, Art. VI of Ohio's Constitution. Instead, *Lewis* made clear in two ways that although the *DeRolph* matter was indeed closed, the adequacy of Ohio's school funding system could be raised in another case.

The first was by quoting comments to that effect in a prior *DeRolph* decision. The full Court's opinion in *Lewis* approvingly quoted Justice Resnik's concurrence in *DeRolph v. State of Ohio*, 97 Ohio St.3d 434, 780 N.E.2d 529 (2002), anticipating that "further litigation will be forthcoming in the area of school funding, even though it apparently will be under a name other than *DeRolph*." *Id.* at 104, ¶ 32. That is hardly consistent with the judicial firewall Plaintiffs' claim.

The second is the Supreme Court's approving citation of cases from other states involving the same question: how to enforce prior decisions that funding systems violated state constitutions. *Lewis* cited two cases holding that although jurisdiction over the cases resulting in findings of unconstitutionality had ended, the constitutionality of the systems could be raised in subsequent cases. The first was the Arkansas Supreme Court's explicit statement that the matter could be raised "once again in an appropriate case." *Lake View School Dist. No. 25 v Huckabee*, 91 S.W.3d 472, 511 (Ark 2002), quoted at 99 Ohio St.3d at 105, ¶ 34 n. 2. The second was *Helena Elementary School Dist No. I v. State*, 784 P.2d 412 (Mont. 1990), wherein Montana's

Supreme Court concluded that "should such action be necessary, it can be presented in a new and separate court action." quoted at 99 Ohio St.3d at 105, ¶ 34 n. 2. Plaintiffs' assertion that Ohio's courts are forever barred from considering claims challenging Ohio's school funding system is simply wrong.

ii. Plaintiffs cannot show the prejudice required to support a federal access to court claim.

It is well established that no federal access claim lies unless a claimant can show the matters complained of actually hindered his ability to prosecute a claim. The Defendants are entitled to summary judgment because Plaintiffs cannot prove that their ability to prosecute a claim under § 2, Art. VI of Ohio's Constitution has been prejudiced.

Supreme Court precedent establishes that a plaintiff claiming denial of his federal right to access the courts must show that the challenged actions impaired his ability to press a claim. *Walter v. National Assoc. of Radiation Survivors*, 473 U.S. 305, 327, 331, 105 S. Ct. 3180 (1985), held that the access claim pressed there failed because, *inter alia*, the plaintiffs could not show that the disputed government action, limits on how much they could pay their attorney, impaired their ability to prosecute their claims. *United States v. Triplett*, 494 U.S. 715, 110 S. Ct. 1428 (1990), reversed a finding of an access violation because there was insufficient proof that the disputed policy actually had any effect on the litigation process. *Lewis v. Casey*, 518 U.S. 343, 351, 116 S. Ct. 2174 (1996), held that an access claimant must "demonstrate that the [challenged government action] hindered his ability to pursue a legal claim." Most recently, *Christopher v. Harbury*, 536 U.S. 403, 415, 122 S. Ct. 2179 (2002), cataloged two types of access claims, both of which involved the "injury of being shut out of court."

These Plaintiffs cannot show such injury. The public record establishes that Ohio's courts are indeed entertaining claims under § 2, Art. VI of Ohio's Constitution. *State ex rel Ohio Congress of Parents and Teachers v. State of Ohio*, 2004-Ohio-4421 (Franklin Co. App. 2004) (copy attached as Ex. G), rejected the argument that such claims are barred. *Id*. at ¶¶ 21, 25, 27, 35. Claims based on that constitutional provision are also pending in *Pate v. Ohio State Board of Education*, Case No. 01 CVH 05 4414 (Franklin Co. C.P.), Doc. No. 108 at ¶¶ 68-78. Ohio's Supreme Court recently (Nov. 29, 2005) heard argument on such claims without any indication that they were non-justiciable. Those cases show that there is no barrier to prosecuting claims under § 2, Art. VI of Ohio's Constitution. That requires judgment on Plaintiffs' access claim.

c. Plaintiffs' Fifth Cause of Action fails because Plaintiffs cannot negate the existence of any rational basis for Ohio's partial reliance upon local property taxes.

Plaintiffs' Fifth Cause of Action, their claim that Ohio's partial reliance on differing local tax bases to fund education violates Equal Protection requirements, fails because it is indistinguishable from the claim rejected in *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 93 S. Ct. 1278 (1973). Like the system sustained in *San Antonio*, Ohio's reliance on local taxes is rationally related to the legitimate interest of preserving local control over education. The Plaintiffs therefore cannot meet their heavy burden of disproving any rational bases for Ohio's partial reliance upon local tax revenue.

i. The controlling Equal Protection standard: deferential rational basis review.

San Antonio established that the rational basis standard controls the type of Equal Protection claim advanced here, one challenging different levels of funding resulting from reliance on local taxes, 411 U.S. at 55. The Sixth Circuit has consistently applied that standard to education related

Equal Protection claims. *Gwinn Area Community Schools v. Michigan,* 741 F.3d 840, 844 (6th Cir. 1984); *Mixon v. Ohio,* 193 F.3d 389, 403 (6th Cir. 999); *Seal v. Morgan,* 229 F.3d 567, 574-575 (6th Cir. 2000). Plaintiffs' amended complaint acknowledges that legal reality. Doc. No. 100 at ¶ 420. That is a very deferential standard.

"In the ordinary case" controlled by rational basis review, "a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous." *Romer v. Evans*, 517 U.S. 620, 632, 116 S. Ct. 1620 (1996). That requires a challenged law be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis" for the matter at issue. *Heller v. Doe*, 509 U.S. 312, 320, 113 S. Ct. 2367 (1993).

Those challenging a law subject to such review have the burden of negating all rational bases for the law. In order to give "substance to the presumption of validity" such laws enjoy, *San Antonio*, 411 U.S. at 56, "[o]ne who assails…such a law must carry the burden of showing that it does not rest upon *any* reasonable basis . . . ." *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79, 31 S. Ct. 337 (1911) (emphasis added). *Accord, Heller*, 509 U.S. at 320 ("A statute is presumed constitutional . . . and the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.").

ii. Reliance on local taxes is rationally related to fostering local control.

San Antonio challenged Texas' school funding system, a system that relied on roughly equal levels of state and local funding. 411 U.S. at 9 and n. 21, 45. In spite of Texas' efforts to increase state funding, *id*. at 11, 46, that system resulted in significant disparities between the resources available to the students in property poor and affluent districts. *Id*. at 15-16. The

plaintiffs claimed that "differences in expenditure levels occasioned by disparities in property tax income [made] children in less affluent districts . . . the subject of invidious discrimination." *Id.* at 47.

The Court rejected that claim because it found the system had a rational relationship to preserving local control over education, a legitimate state interest. It traced Texas' history of local control over education, *id.* at 7-8, 48-49, and recognized the well settled importance of fostering local decision making. *Id.* at 49 ("direct control over decisions vitally affecting the education of one's children is a need that is strongly felt in our society." "[L]ocal control is not only vital to continued public support of the schools, but it is of overriding importance from an educational standpoint as well."). *Id.* at 49. It also held that given that rationale, the resulting inequality, which in that case was substantial, *id.* at 12-13, did not invalidate the system, *id.* at 50-55, because "[t]he people of Texas may be justified in believing that other systems of school financing, which place more of the financial responsibility in the hands of the State, will result in a comparable lessening of desired local autonomy." *Id* at 51-53.

There is no material difference between these Plaintiffs' claim, the facts underlying it, and the claim and facts considered in *San Antonio.* Like Texas, Ohio relies on a roughly equal mix of state and local tax dollars to fund its schools, Ex. I hereto (on average, 44.2% of each students education is funded by state revenue and 47.4 % is funded by local revenue.).[5] Like

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[5]The Defendants are mindful that courts generally do not consider matters outside the pleadings in passing on motions to dismiss. However, both the Supreme Court and the Sixth Circuit have held that courts may properly consider public records and matters subject to judicial notice in deciding such motions. *Papasan v. Allain*, 478 U.S. 265, 269 n.1 (1986); *Jackson v. City of Columbus*, 194 F.3d 737, 745 (6th Cir. 1999). Further, courts may go beyond the pleadings when considering whether a legislative body had rational bases for a challenged law. *Spivey v. Ohio*, 999 F. Supp. 987, 991 (N.D. Ohio 1998) Aff'd sub nom. *Mixon v. Ohio*, 193 F.3d 389 (6th Cir. 1999). Exhibit I is a print out from a government website, the accuracy of which cannot be reasonably challenged, collected by the agency running that website and hence may be

Texas, although Ohio has significantly increased state funding in recent years,[6] there is still some difference in the resources available in affluent and property poor districts. Like their counterparts in Texas, Plaintiffs claim that results in a "disparity based on arbitrary classifications related to . . . the native wealth of those citizens and the value of the tax base in that district," Doc. No. 100 at ¶ 416, with the "result, [that] pupils receive differing, and often inadequate levels of educational opportunity from district-to-district as reflected by school and building report cards and disparities in graduation rates and proficiency test passage rates." *Id*. at ¶ 417.

These claims fail for the same reason as the claims rejected in *San Antonio*—Ohio's reliance on local funding is rationally related to fostering local control over education. Like Texas, Ohio's educational system has local origins, and also like Texas, Ohio has had to accommodate that historical interest with the need to respond to changing economic realities. *Bd. of Educ. v. Walter*, 58 Ohio St. 2d 368, 377, 390 N.E.2d 813 (1979); *San Antonio*, 411 U.S. at 8, 48. Ohio's partial reliance on local taxes is a response to those contradictory forces. "The history of educational funding in Ohio, [] has been an accommodation between . . . the interest in

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considered as either public documents or as a proper subject of judicial notice. The Courts, including the Sixth Circuit and this Court, have repeatedly taken judicial notice of data derived from government and other websites. Indeed, the Sixth Circuit and other courts have done so in precisely the procedural posture presented here, a motion testing the sufficiency of the pleadings. *City of Monroe Employees Retirement System v. Bridgestone Corp.,* 399 F.3d 651, 655 n. 1 (6th Cir. 2005); *Hall v. Commonwealth of Virginia*, 385 F.3d 421, 424 n. 3 (4th Cir. 2004); *In Re Vertex Pharmaceuticals, Inc. Securities Litigation*, 357 F. Supp. 2d 343, 352 n. 4 (D. Mass. 2005); *In re Wellbutrin SR/Zyban Antitrust Litig.*, 281 F. Supp. 2d 751, 754 n. 2 (E.D. Pa., 2003); *Presbyterian Church of the Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 296 n. 4, 297 n.5 (S.D.N.Y. 2003); *Martinez v. Dow Chemical Company*, 219 F. Supp. 2d 719, 735 n. 24 (E.D. La. 2002). The Defendants ask the Court to take judicial notice of the facts set out in Exhibit I.

[6] *Compare DeRolph v. State of Ohio*, 78 Ohio St.3d 193, 199, 677 N.E.2d 733 (1997) (per pupil basic aid was $2,817 during the 1992-1993 school year) with Ohio Rev. Code 3317.012(B)(4) (per pupil basic aid $5,283 for 2005-2006 school year).

local control of education programs . . . and the interest of the state in insuring that all children receive an adequate education." *Walter,* 58 Ohio St.2d at 378.

Retaining a significant local funding component preserves local control by "allowing people within a school district to determine how much money they are willing to devote to education" and by allowing "for local participation in the decision-making process that determines how these local tax dollars will be spent." *Walter,* 58 Ohio St.2d at 380. The rationality of the connection between reliance on local taxes and local control is obvious and is dispositive of Plaintiffs' Equal Protection claim.

That is not changed by any of Plaintiffs' likely counter arguments. The fact that the system allegedly results in some disparities is not controlling.[7] As noted in *San Antonio*, "[w]hile it is no doubt true that reliance on local property taxation for school revenues provides less… expenditures for some districts than for others, the existence of some inequality in the manner in which the State's rationale is achieved is not alone a sufficient basis for striking down the entire system." 411 U.S. at 50-51.

"Nor must the financing system fail because . . . other methods of satisfying the State's interest, which occasion 'less drastic' disparities in expenditures, might be conceived." *Id.* at 51. While Ohio's accommodation between local control and economic change is not perfect, "courts

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[7] Although the Defendants' do not dispute Plaintiffs' factual allegations of disparate funding levels for purposes of this motion, they do not agree that such disparities actually exist, at least not to the extent Plaintiffs allege. Ohio has made efforts to offset funding disparities between poor and affluent districts, and a very recent study concluded that Ohio actually spends *more*, on a per pupil basis, on students attending poorer districts than those attending wealthier districts. The Education Trust, *The Funding Gap 2005* (2005), p. 3, table 1.(attached as Ex. J). Indeed, while nationally states spend $907 less per student on children in poorer districts than in affluent districts, Ohio spends $54 more on students attending poorer districts. While that study admittedly does not address real property wealth disparities, it certainly raises serious doubts about Plaintiffs' assertions of funding disparities.

are compelled under rational-basis review to accept . . . an imperfect fit between means and ends." *Heller*, 509 U.S. at 321. "The problems of government are practical ones and may justify, if they do not require, rough accommodations -- illogical, it may be, and unscientific," *id.,* and Ohio's system passes that undemanding test.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing has been served upon all counsel of record via the Court's electronic filing system this 6th day of January, 2006.

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