

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

DOE, ET AL., :
 :
 PLAINTIFFS, : CASE No. 2:91-cv-0464
 :
 V. :
 :
 STATE OF OHIO, ET.AL., : JUDGE JOHN D. HOLSCHUH
 :
 DEFENDANTS. :

PLAINTIFFS' AND THE PLAINTIFF CLASS' MEMORANDUM *CONTRA* DEFENDANTS MOTION
TO DISMISS OR FOR SUMMARY JUDGMENT

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[Local Rule 7.2 (a)(3)]

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The purpose of a motion to dismiss under F.R.C.P. 12 (b)(6) is to test the sufficiency of the plaintiffs' complaint. A 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. *Scheuer v. Rhodes*, 416 U.S. 232 (1974). A complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41 (1957).

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Defendants erroneously argue, in the absence of any statutory language or case precedent, that the U.S. Secretary of Education has exclusive jurisdiction over IDEA claims against the State. The "primary jurisdiction" doctrine does not apply to IDEA cases. Instead, it is a prudential doctrine allocating the lawmaking power over certain aspects of commercial

relations and transfers from the courts to an administrative body the power to determine some of the incidents of such relations.

United States v. Western P.R. Co., 352 U.S. 59 (1956). Moreover, the authority of an executive funding agency to administer a federal program or even to withhold federal dollars for non-compliance does not preclude a federal cause of action. *Rosado v. Wyman*, 397 U.S. 397 (1970). Finally, a number of IDEA cases previously cited by this Court in this case, have rejected a "leave-it-to OSEP" argument. *Corey H.*, *supra*.

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The defendants confuse the issue of "de novo" review of an administrative record under IDEA appeals with the issue of federal court jurisdiction to hear a claim. The type of questions presented by plaintiffs' claims in this case do not involve educational methodology that might otherwise be outside of the Court's expertise. Instead, plaintiffs argue that local decisions about educational services are driven by funding, other resource availability and district property wealth, i.e., an overreliance on property taxes.

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In order for amendments to relate back to the date of the original pleading, they must arise from the same conduct, transaction or occurrence set forth in the original pleading. Moore's Federal Practice Civil Section 15.19[2]. In determining whether an amendment adding a party relates back, courts focus on whether the new party had actual, constructive, or imputed notice. *Wine v. EMSA Ltd. Partnership*, 167 F.R.D. 34 (E.D. Pa. 1996). Courts freely grant leave to amend to effectuate the purpose of the Rules. *Younger v. Chemovetz*, 792 F. Supp. 173 (D. Conn. 1992). Defendant Taft had notice of this action and will not be prejudiced in defending the merits of the case.

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2. The Statute of Limitations Also Does Not Bar Plaintiffs' Claims Because They Suffer Continuing Violations of Law 28

The plaintiffs in this case have been subjected to continuing failures to ensure their right to a free appropriate public education. Because the alleged violations are a part of a continuous pattern of discrimination, they are not barred by the statute of limitations. *Martin v. Voinovich*, 840 F. Supp. 1175 (S.D. Ohio 1993).

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The Court should not extend the concept of legislative immunity to an executive official (Defendant Taft). The court must look to the nature of the governmental function being performed. *Butz v. Economou*, 438 U.S. 478 (1978). Section 1983 would be drained of meaning if the Governor is permitted to make decisions affecting federal statutory and Constitutional rights that are unreviewable through the judicial power of the federal government. *Scheuer, supra*. Plaintiffs claims relate to defendant Taft's executive functions and therefore they are

subject to judicial resolution.

2. The *Pennhurst* Doctrine is Inapplicable to Plaintiffs’ Claims 33

Plaintiffs' third cause of action asserts state-created liberty and property interests that have been denied in violation of federal due process rights and therefore, the *Pennhurst* doctrine does not apply to the plaintiffs' claims. *Martin v. Voinovich, supra*.

3. Third Cause of Action : Plaintiffs raise significant constitutional issues that transcend the *San Antonio Independent Schools* case 33

The holding in *San Antonio* concerned, solely, whether classification based on wealth (or a lack of it) constituted a suspect classification for equal protection purposes. Plaintiffs do not advance this theory in this case, but rather point out disparities in educational opportunities that require this Court to scrutinize of whether the state’s purported basis for its actions is, in fact, rationally related to the means used.

4. Due Process: Liberty and Property Interests That Are Worthy Of Constitutional Protections 35

Plaintiffs have stated both a liberty and property interest in education that are deserving of protection under the 14th Amendment

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Concepts of ordered liberty used to define substantive due process protections include education of discrete groups such as the children with disabilities in this class. *Bell v. Ohio State University*, 351 F.3d 240 (6th Cir. 2003); *Mills v. Board of Ed. of District of Columbia*, 348 F.Supp. 866 (D.D.C.1972); *Association for Disabled Americans, Inc. v. Florida International University*, 405 F.3d 954, 957-958 (11th Cir. 2005). Heightened scrutiny is required when education is involved, *Plyler v. Doe*, 457 U.S. 202 (1982), as the Constitution give heightened protection to interests, such as education, that promote full participation in the democratic process.

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The *DeRolph / Lewis* line of cases in the Ohio Supreme Court establish a state created property interest that is protected by the 14th Amendment. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982); *Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 11-12 (1978); *Goss v. Lopez*, 419 U.S. 565, 573-574 (1975) In that the Court has abandoned a judicial remedy, the plaintiff

class has been denied the process due to protect this interest. *State ex Rel State v. Lewis*, 99 Ohio St.3d 97; 789 N.E.2d 195 (2003); *Morrissey v. Brewer*, 408 U.S. 471 (1972).

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When a state creates a judicial process, it may not grant the benefits of that process to some litigants and deny it to others without implicating the closely related issues of equal protection and due process of law. *M.L.B. v. S.L.J.*, 519 U.S. 102 at 120 (1996). *Raney v. Board of Educ.*, 391 U.S. 443, 449(1968); *Brown v. Board of Educ.*, 349 U.S. 294, 301 (1954)

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It is not state rights that the plaintiff class is seeking to vindicate, but important federal rights. Additionally, such a suit could not redress the ongoing deprivation of the remedy to which the school children are presently entitled, under *DeRolph IV* and *Lewis*. Unless the Ohio Supreme Court would reverse its holding in *Lewis*, a new suit could not yield anything more than Ohio’s school children already have obtained – a comprehensive declaration of rights, all of which are completely unenforceable in state court.

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Plaintiffs have alleged disparity based on arbitrary classifications related to a district’s ability to levy property taxes on its citizens, as well as the native wealth of those citizens and the value of the tax base in that district. Classifications cannot, however, be based on stereotypes. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) Even under rational basis scrutiny, the plaintiffs have alleged that the current funding system is not minimally “rational.”

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I. INTRODUCTION

Defendants have moved this Court to dismiss or to grant summary judgment in this case (Doc. # 109). In support of this motion, defendants have crafted arguments that, while sometimes creative, ignore the prior decisions of the Court in this case and, at other times, either misstate or misunderstand the basis of the plaintiffs' claims in this matter.

The best example of this is the argument regarding "primary jurisdiction," an outgrowth of modern administrative law involving quasi-judicial federal commissions that cannot credibly be extended to a federal executive department's administrative oversight of Spending Clause and civil rights legislation. Indeed, as will be shown below, this argument is merely an attempt to re-craft the exhaustion argument already rejected by the Court, and to ignore the Supreme Court's holding in *Rosado v. Wyman*, 397 U.S. 397 (1970) that executive funding authority does not conflict with or preclude a federal cause of action.

Moreover, while the plaintiffs agree that the Court can take notice of certain matters, bringing extraneous and unauthenticated documents before the Court does not change the nature of this motion, which is essentially a 12(b)(6) motion for failure to state a claim. Only after full discovery and additional briefing would this case be ripe for summary judgment. As shown, however, by the facts presented in plaintiffs' complaint and the material presented with this memorandum, there remains no question that the defendants have failed in their duty to provide Ohio schoolchildren with disabilities with a free, appropriate public education.¹

¹ Class counsel is aware of several groups that will file briefs *amicus curiae* in support of the plaintiff class. Defendant has no objection to the filing of *amici* briefs by all interested groups, with plaintiffs'

Plaintiffs and the plaintiff class will demonstrate that they have stated viable causes of action. This case should now move to full discovery and trial.

A. History of the Case

In 1991, Keely Thompson and numerous other parents, students, teachers, and superintendents 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. Plaintiffs alleged that Ohio's statutory scheme for financing public education violated both federal and state law. That case, captioned *Thompson v. State of Ohio*, was removed to this Court. After this Court denied plaintiffs' motion to remand, some of those plaintiffs filed a parallel suit in state court, the case of *DeRolph v. State of Ohio* – and stipulated to a dismissal of their claims here. In 1992, the remaining *Thompson* plaintiffs filed a Second Amended Complaint.

In February of 1994, John Doe, a student with disabilities, and his parents were granted leave to intervene as plaintiffs in *Thompson*.² They filed a class action complaint, alleging violations of the IDEA, § 504, and Title II of the ADA. They also sought relief under 42 U.S.C. § 1983 for violations of the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution.

In 1995, the remaining original plaintiffs stipulated to a dismissal of their claims in this Court.

amici filings due by April 17, 2006. Plaintiffs anticipate that the *amici* will provide the court with contextual materials that demonstrate the present status of Ohio's school funding system.

² An additional new plaintiff, the Ohio Legal Rights Service, eventually was dismissed from the action by stipulation.

Because this case and *DeRolph* contained overlapping issues, the parties and the Court agreed that this case should be stayed until the Ohio Supreme Court issued a final decision in *DeRolph*. In February of 2003, when it appeared that a final decision had been rendered in *DeRolph*, and after the Supreme Court of Ohio ruled that a state court could not impose a judicial remedy in a constitutional challenge to Ohio's school funding system,³ this Court held a status conference and the parties agreed that the stay should be lifted. It was agreed that defendants would file a motion for summary judgment limited to purely legal issues, and that discovery would be stayed until this Court issued a ruling on that motion.

On July 9, 2004, this Court issued its ruling which granted in part and denied in part defendants' motion. (Docket # 89). This Court dismissed plaintiffs' claims brought under § 504 of the Rehabilitation Act, Title II of the ADA and plaintiffs' § 1983 claim alleging a violation of the Due Process Clause of the Fourteenth Amendment. However, this Court denied defendants' motion with respect to plaintiffs' IDEA claim and plaintiffs' § 1983 claim alleging a violation of the Equal Protection Clause of the Fourteenth Amendment.

Plaintiffs were permitted to conduct limited discovery, and filed their supplemental complaint on July 29, 2004. (Docket # 100). It is this complaint that is the subject of defendants' current motion.

B. Standards of Review

At the outset, plaintiffs note that defendants variously argue that plaintiffs' claims should be dismissed under:

Rule 12 (b)(1) (plaintiffs' first cause of action alleging violations of the IDEA);

³ *State ex rel. Ohio v. Lewis*, 99 Ohio St.3d 97, 789 N.E.2d 195 *cert. denied sub nom. DeRolph v. Ohio*, 540 U.S. 966 (2003).

Rule 12(b)(6) (plaintiffs' second cause of action alleging violations of Section 504; plaintiff's third cause of action alleging violations of federal due process under Section 1983 for the denial of state-created liberty and property interests; plaintiffs' fourth cause of action alleging violations of federal equal protection and due process under Section 1983 for the denial of access to the courts; and plaintiffs' fifth cause of action alleging violations of federal equal protection under Section 1983 because of the disparities resulting from the defendants' education funding policies); and

Rule 12(c) (plaintiffs' first cause of action regarding any defendant except ODE and OSFC;⁴ plaintiffs' second, third, fourth and fifth causes of action).

Alternatively, defendants request that summary judgment be granted under Rule 56 (plaintiffs' first cause of action because defendants claim that this Court should defer to the U.S. Secretary of Education, and plaintiffs' fourth cause of action).

Defendants also raise a statute of limitations defense in response to plaintiffs' first cause of action. Finally defendants argue that defendant Taft should be granted legislative immunity.

1. Motion to Dismiss Standard

The purpose of a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) is to test the sufficiency of the complaint. This rule permits courts to dismiss meritless cases which would otherwise waste judicial resources and result in unnecessary discovery. See *Neitzke v. Williams*, 490 U.S. 319, 326-27 (1989). When considering a motion to dismiss pursuant to Rule 12(b)(6), a 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

⁴ The plaintiffs have named only divisions and officials of ODE as defendants in the first cause of action; therefore, the Court should deny defendants' request.

Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); *Murphy v. Sofamor Danek Group, Inc.*, 123 F.3d 394, 400 (6th Cir.1997).

Although the court must liberally construe the complaint in favor of the party opposing the motion to dismiss, it will not accept conclusions of law or unwarranted inferences cast in the form of factual allegations. *See Lewis v. ACB Business Serv., Inc.*, 135 F.3d 389, 405-06 (6th Cir. 1998). The court, however, will indulge all reasonable inferences that might be drawn from the pleading. *See Fitzke v. Shappell*, 468 F.2d 1072, 1077, n.6 (6th Cir. 1972).

When determining the sufficiency of a complaint in the face of a motion to dismiss, a court will apply the principle that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). *See also, Lewis*, 135 F.3d at 405. Under Rule 12(b)(6) the court must accept all factual allegations contained in the pleading as true, and resolve all factual ambiguities in favor of the party who sought the amendment. *Roth Steel Prods. v. Sharon Steel Corp.*, 705 F.2d 134, 155 (6th Cir. 1983). The focus of the inquiry is on whether the plaintiff is entitled to offer evidence to support the claims, rather than on whether the plaintiff will ultimately prevail. *See Scheuer*, 416 U.S. at 236, *McDaniel v. Rhodes*, 512 F. Supp. 117, 120 (S.D. Ohio 1981). For a Rule 12(b)(6) motion to be granted, there must be no set of facts which would entitle the plaintiff to recover. *Hammond v. Baldwin*, 866 F.2d 172, 175 (6th Cir. 1989).

A Rule 12(b)(6) motion is directed solely to the complaint itself. *Roth Steel Products, supra*. Matters outside of the pleadings are not to be considered by a court in ruling on a

12(b)(6) motion to dismiss. *See Hammond, supra*. However, the Sixth Circuit considers documents attached to a motion to dismiss as part of the pleadings, if they are referred to in the complaint and are central to the claim. *Weiner, D.M.P. v. Klais & Co., Inc.*, 108 F.3d 86, 89 (6th Cir. 1997). As a general rule, matters outside the pleadings cannot be considered in determining a motion to dismiss unless the motion is converted to one for summary judgment. *Greenberg v. Life Ins. Co.*, 177 F.3d 507, 514 (6th Cir. 1999).

With respect to a motion for judgment on the pleadings under Rule 12(c), the Federal Rules of Civil Procedure Rules provide for a liberal system of notice pleading. Fed. R. Civ. P. 8(a). The Rules do not require a claimant to set out in detail the facts upon which the claim is based. To the contrary, all the Rules require is a short and plain statement of the claim that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. *EEOC v. J. H. Routh Packing Co.*, 246 F.3d 850, 851 (6th Cir. 2001).

2. Summary Judgment Standard

The district court should grant summary judgment only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). *Mays v. Buckeye Rural Elec. Coop., Inc.*, 277 F.3d 873, 877 (6th Cir. 2002) It is well settled that the function of a motion for summary judgment is not to afford a trial judge an opportunity to decide issues of fact, but merely to determine whether there was an absence of any genuine factual dispute material to the legal issues. *Aetna Ins. Co. v. Cooper Wells & Co.*, 234 F.2d 342, 345 (6th Cir. 1974). The effect of summary judgment - and the standard of review - is functionally the same as the rule 12(c)

motion for judgment on the pleadings or rule 12(b)(6) motion for dismissal for the failure to state a claim. *Boggsian v. Gulf Oil Corp.*, 561 F.2d 434, 444 (3d Cir. 1977) *cert. denied*, 434 U.S. 1086 (1978); 10 Wright, Miller & Krane, Federal Practice and Procedure, § 2713 at 594 (2d Ed. 1985). Therefore, the allegations of the complaint must be accepted as true. *Windsor v. The Tennessean*, 719 F.2d 155, 158 (6th Cir. 1983), *reh'g denied*, 726 F.2d 277, *cert. denied* 469 U.S. 826 (1984).

A party must support its motion for summary judgment by directing a court to pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which demonstrate the absence of a genuine issue as to a material fact. Fed. R. Civ. P. 56(c). However, the moving party does not need to support its motion by negating the opponent's claim. Although the moving party has the burden of showing conclusively that no genuine issue of material fact exists, all facts and inferences must be viewed in a light most favorable to the nonmoving party. *Highlands Hosp. Corp. v. District 1199 WV/OH Nat'l Union of Hosp. & Health Care Employees*, 758 F. Supp. 414, (D. Ky. 1990). Only disputes over material facts, those that might affect the outcome of the suit under the governing law, will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted. Summary judgment will not lie if the dispute about a material fact is genuine, that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. A material issue of fact is defined as: where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial. *Davis v. Connecticut General Life Ins. Co.*, 743 F. Supp. 535 (D.

Tenn. 1990).

It should be noted that Fed. R. Civ. P. 56(c) mandates the entry of summary judgment, after adequate time for discovery⁵ and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, (1986). *Highlands Hosp. Corp. v. District 1199 WV/OH Nat'l Union of Hosp. & Health Care Employees*, 758 F. Supp. 414 (E.D. Ky. 1990).

Civil rights actions are subject to special scrutiny on motions for summary judgment. *Davis v. Connecticut General Life Ins.*, *supra*, at 537. The “principle [that summary judgment should not ordinarily be granted before discovery has been completed] is particularly strong when constitutional and civil rights claims are at issue.” *Tarleton v. Meharry Medical College*, 717 F.2d 1523, 1535 (6th Cir. 1984). *See also, Azar v. Conley*, 456 F.2d 1382, 1384, n. 1 (6th Cir. 1972).

The essence of the defendants' motion is, however, a motion under Rule 12, and this Court should use the highly deferential standard set out above to review the motion. Significantly, the portions labeled “summary judgment” are, in fact, based solely on legal arguments and do not implicate the many factual materials that the defendants have filed as exhibits. Accordingly, the Court should apply the necessary deference to plaintiffs on those claims.⁶

⁵ It should be noted that plaintiffs have been provided with only a limited opportunity for discovery.

⁶ Should the Court be inclined to decide this matter on factual issues, plaintiffs and the plaintiff class request that an additional time period for discovery be permitted to allow them to respond in kind to the factual matters now before the Court.

II. ARGUMENT

As discussed below, this Court has subject matter jurisdiction over plaintiffs' claims. Moreover defendants have failed to show beyond doubt that the plaintiffs can prove no set of facts in support of their claims which would entitle them to relief. Finally, they have failed to show that there exists no genuine issue of material fact which would entitle them to a grant of summary judgment.

A. The Court has subject matter jurisdiction over plaintiffs' IDEA claims

The concept of subject matter jurisdiction involves a court's power to adjudicate a particular type of controversy. This Court has already determined that the IDEA grants subject matter jurisdiction to the district courts of the United States. (Docket # 89, p. 10, n. 4). The arguments defendants now raise do not support a different result. However, even if this Court were to take the unprecedented approach of applying the doctrine of primary jurisdiction to plaintiffs' IDEA claims as advocated by the defendants, this would not divest the Court of jurisdiction as explained below.

1. Disputes under the IDEA are not limited to those between parents and local school districts

Although defendants' counsel has changed, many of defendants' arguments from their May 7, 2003 Motion for Summary Judgment are recycled in their latest Motion. Specifically, defendants argue again at pages 12 through 14 of their motion that plaintiffs have no right to pursue systemic relief against the state. This Court has rejected defendants' prior arguments that the IDEA does not create a private right of action against the state and also, that plaintiffs' claim should be dismissed for failure to exhaust administrative remedies.

See Opinion and Order, pp. 15 and 9, respectively (Document #89). While the current motion frames the argument as a lack of subject matter jurisdiction instead of failure to state a claim upon which relief can be granted, the underlying argument is similar to the one that defendants unsuccessfully made in 2003. (See Defendants' May 7, 2003 Motion, beginning at page 35, Section C.)

Specifically, defendants argue once again that parents and students can only pursue relief against local school districts through an impartial due process hearing and appeals. However, defendants' argument must fail. Nothing in IDEA 2004 supports defendants' argument that this Court has no jurisdiction over plaintiffs' claims against them.

It is indisputable that IDEA 2004, 20 U.S.C. Section 1412 continues to provide that the state is responsible for ensuring that:

each eligible student with a disability has available to him or her a free appropriate public education;

all children with disabilities residing in the State, and who are in need of special education and related services, are identified, located, and evaluated;

an individualized education program is developed, reviewed, and revised for each child with a disability in accordance with the provisions of the Act;

to the maximum extent appropriate, children with disabilities are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily; and

children with disabilities and their parents are afforded the procedural safeguards required by the Act

Moreover, Section 1412(11) continues to provide that that **the state educational**

agency is responsible for “general supervision,” which includes ensuring that:

the requirements of the Act are met; and

all educational programs for children with disabilities in the State, including all such programs administered by any other State agency **or local agency** are:

a) under the general supervision of individuals in the State who are responsible for educational programs for children with disabilities; and

b) meet the educational standards of the State educational agency.

(Emphasis added). Notwithstanding these ongoing and unaltered requirements, defendants argue that parents can only sue the state when the state directly provides educational services. Second, defendants argue that even if they have ultimate responsibility for the state’s compliance with IDEA, the sole remedy should be deference to the U.S. Department of Education, Office for Special Education Programs (OSEP). Defendants have previously failed to convince this Court that plaintiffs should be denied access to the courts on their IDEA claims against the state based on failure to exhaust administrative remedies and no private right of action theories. This Court should again foil defendants’ attempts by looking to its earlier ruling.

This Court relied in part on 20 U.S.C. Section 1415(b)(6) which is essentially unchanged from the Court’s ruling in favor of the plaintiffs in 2003. Under IDEA 2004, this section currently provides “an opportunity *for any party* to present *a complaint* -- with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.”⁷

⁷ Changes are italicized. At page 11 of the Court’s 2003 decision, the Court quoted the 1997 version: “In turn, subsection (b)(6), which describes “Types of procedures,” requires “an opportunity to present

This Court has cited to and discussed more than a half dozen federal court cases supporting a cause of action in federal court for systemic violations of the IDEA, including actions against state departments of education. The virtually same language of section 1415 was used in *Beth V. v. Carroll*, 87 F.3d 80 (3d Cir. 1996), cited by this Court on page 12 of its ruling, as the basis for finding the State of Pennsylvania in violation of IDEA.

Another instructive case found that IDEA “imposes on the state an overarching responsibility to ensure that the rights created by the statute are protected, regardless of the actions of local school districts. *Cordero v. Pennsylvania Dep't of Educ* 795 F. Supp. 1352 (E.D. PA 1992). The *Cordero* court concluded that:

with regard to the state's liability in this action, the fact that local agencies are not performing up to par or that parents are not fulfilling their duties becomes irrelevant. It is the state's obligation to ensure that the systems it put in place are running properly and that if they are not, to correct them. This is the crux of the state's liability in this matter.

795 F. Supp. at 1362.

Although the Pennsylvania court opined that “the violation of even one child's rights under the Act is sufficient to visit liability on the state” and that this proposition has been reiterated time and again, the *Cordero* case, like the case *sub judice* alleged numerous and continuing instances of children being denied their guaranteed right to a free appropriate public education. In light of these conditions, the *Cordero* court held that it was “well within its powers to declare that the Defendants' special education system as well as its supervision

complaints with respect to *any matter relating to* the identification, evaluation, or educational placement of the child, or *the provision of a free appropriate public education to such child.*” 20 U.S.C. § 1415(b)(6).”

and leadership under the act are inadequate and to order injunctive relief to fix the problems.” See also, *Beth V. v. Carroll, supra*.

2. The Secretary of Education has neither primary nor exclusive jurisdiction

Defendants argue, in the absence of any statutory language or case precedent, that the U.S. Secretary of Education has exclusive jurisdiction over IDEA claims against the State. They argue that this Court should import the administrative law doctrine of primary jurisdiction and apply it here, to a civil rights special education case. For the reasons explained below, their argument is meritless.

A review of cases applying the “primary jurisdiction” doctrine does not yield any cases that hold that the U.S. Secretary of Education has “primary jurisdiction” over issues of the education of students with disabilities or the constitutionality of education funding schemes. To the contrary, courts in almost every state in the country have addressed school funding without deferring to the U.S. Secretary of Education.⁸ Also, as discussed more fully below, several federal courts have rejected similar “leave it to OSEP” arguments and held states responsible for compliance with the IDEA.

The doctrine of “primary jurisdiction” is an outgrowth of modern administrative law. It is related to, but distinct from, the question of exhaustion of remedies. Like exhaustion, it is a prudential doctrine, and allows the Court to choose to defer its jurisdiction over a dispute when regulatory body also has jurisdiction to decide the dispute. *Texas & Pacific*

⁸ See e.g. National School funding Network chart, last updated February, 2004:

http://www.nsba.org/cosa2/nsfn/Litigation_Chart.doc

See also http://www.ohiocoalition.org/pdfs/Forum_2003_11.pdf november 11, 2003 newsletter of the Ohio Coalition for Equity and Adequacy which reports litigation in over 45 states.

Railway v Abilene Cotton Oil Co., 204 U.S. 426 (1907)(requiring the submission of a rate dispute to the Interstate Commerce Commission for adjudication).

As was explained by the U.S. Supreme Court in *United States v. Western P. R. Co.*, 352 U.S. 59 (1956):

The doctrine of primary jurisdiction, like the rule requiring exhaustion of administrative remedies, is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties. “Exhaustion” applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course. “Primary jurisdiction,” on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.

Id. at 63-64. The Court explained that the doctrine of primary jurisdiction does: “more than prescribe the mere procedural time table of the lawsuit. It is a doctrine allocating the law-making power over certain aspects of commercial relations. . . . It transfers from court to agency the power to determine’ some of the incidents of such relations.” (Quotations omitted).

Review of the cases on primary jurisdiction establishes two major points that distinguish the general application of primary jurisdiction from the present case: 1) the doctrine applies where there is concurrent jurisdiction between the federal court and the federal administrative agency over a dispute between the parties in a regulated area;⁹ and 2)

⁹ The regulatory issue is commonly unrelated to the federal claim, and anti-trust litigation has often been deferred to the primary jurisdiction of various federal regulatory agencies. *See, e.g. Far East Conference v. United States*, 342 U.S. 570 (1952) *on appeal of agency ruling sub nom. Federal Maritime Board v. Isbrandtsen Co.*, 356 U.S. 481 (1958)(anti-trust action dismissed to allow adjudication by the Federal Maritime Board); *McQuire v. Regents of Univ. of Michigan*, 2000 U.S. Dist. LEXIS 21615 (S. D. Ohio

the administrative authority involves a mechanism for resolution of the dispute or particular issue in a fashion that creates a record for judicial review. Neither characteristic is present here.

Federal law does not provide the Secretary of Education with authority to conduct an adjudicatory hearing over the dispute between these parties or, indeed, even the issues that are raised. Defendants cannot even point to a rulemaking function given to the Secretary that would resolve the conflict.

In contrast, Congress is able to fully articulate when it desires to create a comprehensive and exclusive administrative mechanism that precludes direct judicial enforcement. For example, the Randolph-Sheppard Act, 20 U.S.C. § 107d-1, creates a three tiered administrative / judicial process that is the exclusive remedy available to a recipient under that program. *Fillinger v. Cleveland Society for the Blind*, 587 F.2d 336, 338 (6th Cir. 1978) (“Congress’ decision to provide administrative and arbitration remedies for aggrieved blind vendors clearly evidences a policy judgment that the federal courts should not be the tribunal of first resort for the resolution of such grievances. Rather congressional policy as reflected in the 1974 amendments is that blind vendors must exhaust their administrative and arbitration remedies before seeking review in the district courts.”) No such language can be found in the IDEA.

Moreover, the Supreme Court has consistently held that the authority of an executive funding agency to administer a federal program or even to withhold federal dollars for non-compliance does not preclude a federal cause of action. Thus, in *Rosado v. Wyman*, 397 U.S.

2000)(denying dismissal of trademark action where patent agency’s jurisdiction would not promote uniformity and consistency in regulated area.)(Attached)

397 (1970), the Court stated that “We have considered and rejected the argument that a federal court is without power to review state welfare provisions or prohibit the use of federal funds by the States in view of the fact that Congress has lodged in the Department of HEW the power to cut off federal funds for noncompliance with statutory requirements. We are most reluctant to assume Congress has closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program.”

Id. at 420.

Finally, a number of cases apply the prior yet similar provisions of IDEA to decline deference to OSEP and in support of the courts’ jurisdiction to enforce IDEA claims against the states. The case of *Corey H. by Shirley P. v. Board of Educ.*, 995 F. Supp. 900 (N.D. Ill. E.D. 1998) is instructive, as the Illinois State Board of Education (ISBE) raised a similar defense that the federal court should defer to OSEP. The court ruled that adequate monitoring on the part of the state is imperative to ensure a free appropriate education under IDEA; therefore, “the court must review the state's monitoring policies when a parent or guardian files a complaint regarding these monitoring policies.”¹⁰ *Id.* at 916

Additionally, the *Corey H.* defendants unsuccessfully argued that plaintiffs were "second-guessing" its actions and those of OSEP by requiring the ISBE to ensure compliance through its monitoring efforts. In rejecting the argument the court stated: “Given the fact that the ISBE was incorrect when it proffered this "leave-it-to-OSSEP" argument, as the statute and the case law make abundantly clear, it is not surprising that the ISBE has failed to cite any statutory authority or precedent to support its argument.” *Id.*

¹⁰ Earlier versions of IDEA permitted parents to file complaints with OSEP but that provision was removed by Congress in 1997.

This Court has already recognized that: “The Secretary of Education does have the right to withdraw funds from those States that do not comply with the IDEA. However, in addition, Congress has specifically provided that children with disabilities and their parents may also file suit to protect their right to a FAPE.” (Docket # 89, p.18). Nothing in the 2004 IDEA amendments negates this Court’s prior conclusion that plaintiffs are entitled to proceed against the defendants in this case.

3. Defendants’ Arguments Do Not Support a Lack of Jurisdiction

Defendants wrongly anticipate that plaintiffs’ response to their argument will be based on the fact that the waiver of immunity language remains in the Act.¹¹ This is simply irrelevant. The gravamen of the plaintiff class’ complaint is that the state has failed to provide a funding system which ensures that local districts can meet their obligations to provide FAPE to students with disabilities. Defendants’ memorandum ignores the state’s ultimate responsibility for the provision of FAPE to all Ohio students with disabilities, not just those few who attend programs operated by the state. Plaintiffs have clearly alleged a state failure to exercise its responsibilities under IDEA. (See, e.g., Docket #100, Section II, pp. 47-50). This Court has already determined that a private right of action exists and that exhaustion is not required, especially where due process hearings between individual parents

¹¹ IDEA 2004 provides at § 1403:

(a) In general. A State shall not be immune under the 11th amendment to the Constitution of the United States from suit in Federal court for a violation of this title [20 USC §§ 1400 et seq.].

(b) Remedies. In a suit against a State for a violation of this title [20 USC §§ 1400 et seq.], remedies (including remedies both at law and in equity) are available for such a violation to the same extent as those remedies are available for such a violation in the suit against any public entity other than a State.

(c) Effective date. Subsections (a) and (b) apply with respect to violations that occur in whole or part after the date of enactment of the Education of the Handicapped Act Amendments of 1990 [enacted Oct. 30, 1990].

and school districts can not provide the relief necessary to remediate pervasive, systemic violations of the plaintiffs and plaintiff class' rights caused by the state's actions and inactions. No argument offered by the defendants should derail this Court's jurisdiction to enforce the state's obligations in this case.

Moreover, the fact that Congress has specified OSEP's duties in IDEA 2004 does not lead to the conclusion that Congress intended to strip the courts of jurisdiction over parents' claims against the states. Instead, these provisions respond to the criticisms found in the National Council on Disability's (NCD) 2000 report entitled Back to School on Civil Rights.¹² This report is one of a series of independent analyses by NCD of federal enforcement of civil rights laws. Back to School on Civil Rights looked at more than two decades of federal monitoring and enforcement of compliance with Part B of IDEA. Overall, NCD found that federal efforts to enforce the law over several Administrations have been inconsistent and ineffective and "lacking any real teeth." The report chronicles the widespread and persistent failure to ensure local compliance with Part B requirements. NCD found that "enforcement of the law is too often the burden of parents who must invoke formal complaint procedures and request due process hearings to obtain the services and supports to which their children are entitled under law." The report included recommendations with the intent "to advance a more aggressive, credible, and meaningful

¹² The publication can be found on the web at www.ncd.gov/newsroom/publications/2000/backtoschool_1.htm. The 108th Congress was aware of this report during the IDEA reauthorization process. For example, the Senate cites to the NCD's findings and conclusions that every state was out of compliance with IDEA and that federal monitoring should focus more on student performance than technical, procedural compliance. S. Rept. 185, 108th Cong., 1st Sess., 46.

federal approach to enforcing this critical civil rights law, so that the nation's 25-year-old commitment to effective education for all children will be more fully realized.”

Moreover, defendants fail to cite any legislative history that would support their argument. To the contrary, defendants have submitted the Affidavit of Michael Armstrong, a defendant in this action (Docket 110, Exhibit A, p. 2, para. 4), which admits that the new provisions of 20 U.S.C. Section 1416(a) merely “codifies the U.S. Secretary’s prior practice of assessing Ohio’s compliance with IDEIA.”

Defendants recite the ways the public can provide input to OSEP. However, the fact that some opportunity for public input to OSEP is provided does not establish that OSEP has primary or exclusive jurisdiction. The availability of the opportunity to comment on Ohio’s application for funds does not preclude this court’s jurisdiction. Moreover, NCD has described the barriers to meaningful parental involvement in the monitoring process in its report. *Id.*

Plaintiffs’ complaint alleges facts that show OSEP’s failure to ensure Ohio’s full compliance with the IDEA. For example, plaintiffs allege in their complaint (Docket 100, Para. 385) that OSEP has granted Ohio only conditional approval for federal IDEA funds since 1999. Additionally, defendants have submitted documents in support of their motion that show that Ohio has not yet corrected areas of IDEA non-compliance cited by OSEP in 2001. See Docket #110, Affidavit of Michael Armstrong, Attachments 2 and 3. These facts demonstrate why federal courts neither have not nor should not defer to OSEP. The plaintiffs and plaintiff class are entitled to effective enforcement of their rights, which this

Court has the authority to ensure.

Accordingly, there is no basis in law or in fact to support the notion that OSEP and the Secretary of Education have preclusive or primary jurisdiction, and the Court should deny this aspect of Defendants' motion.

4. Issues of State Compliance with the IDEA are not solely within the special expertise of the Secretary of Education

The defendants confuse the issue of "de novo" review of an administrative record under IDEA with the issue of jurisdiction to hear a claim. While cases involving individual educational choices are generally heard under the modified "de novo" standard, where some deference is given to the educational expertise of the local school officials, the type of questions presented by plaintiffs' claims in this case are distinct and do not involve educational methodology that might otherwise be outside of the Court's expertise. No cases cited to by defendants address challenges to statewide education special education funding and monitoring systems.

Typical is Defendants' citation to *Renner v. Board of Educ.*, 185 F.3d 635 (6th Cir. 1999). *Renner* was an appeal from an administrative decision of the impartial due process hearing officer. The *Renner* court's decision focused on the appropriate standard of review of the administrative record on appeal from the administrative decision. In contrast, this case has no administrative record regarding the appropriateness of educational services or methodologies provided by a school district to an individual student, nor are these the types of issues to be decided by this Court.

The defendants also cite *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982). As the *Renner* court looked to *Rowley* in reaching its conclusions, the Sixth Circuit's opinion demonstrates the irrelevance of *Renner* and *Rowley* decisions to the case at bar: "We have held, citing *Rowley*, that we are "to defer to the final decision of the **state authorities**" in reviewing the record on appeal. *Thomas*, 918 F.2d at 624 (6th Cir. 1990)." (emphasis in original).

There is no decision from a state hearing officer to review in this case. Nor can there be such a decision because, as this Court has already recognized, administrative hearings can not address or redress plaintiffs' claims. Plaintiffs are not asking the Court to make educational decisions about the appropriateness of services to individual students, or even decisions that go to the expertise of teachers or local school administrators. Instead, plaintiffs argue that local decisions about services are driven by funding, other resource availability and district property wealth, i.e., an over-reliance on property taxes.

Defendants argue in essence that this case is too complex for this Court. However, as this Court knows from experience, class action litigation is typically complex. To be sure, both sides may call experts to present and explain relevant data. OSEP is not in a superior position to the Court in deciding matters of the impact of a state funding scheme on compliance with IDEA. In fact, unlike OSEP's process (which is primarily a self-review conducted by defendant ODE), this Court will have the benefit of experts and other witnesses, including the plaintiffs and their families, who are not employed by the defendants and do not suffer from institutional biases.

5. Defendants' wish for "Uniform Results" does not preclude this Court's jurisdiction over plaintiffs' claims.

Again defendants recycle their prior arguments, e.g.: "The IDEA creates no implied cause of action allowing Plaintiffs to **duplicate** or enforce efforts of the U.S. Department of Education in enforcing Ohio's compliance with the IDEA" Docket #81, p. 39, emphasis added. Defendants previously failed to convince this Court that it should defer to OSEP but they now cite regulatory cases that fall under the primary jurisdiction doctrine. As previously discussed, these cases are inapplicable here. Moreover, as noted by this Court in *McQuire supra*, there are some areas where the actions of an administrative body will not result in uniformity or national outcomes, and this is one such area.

The defendants' wish for "uniform results" suggests that they are less confident of passing this Court's scrutiny than OSEP's oversight. Moreover, there is in fact little chance that the legal conclusions of this Court after trial will conflict with the programmatic requirements of the IDEA, which are designed to enhance educational opportunity for Ohio children with disabilities.

B. Defendant Taft was not sued under the IDEA claim

On page 30 of their brief defendants admit that ODE and OSFC can be sued under IDEA but that Defendant Taft is not a proper defendant. Plaintiffs have not named defendant Taft in their first cause of action; therefore, the Court can ignore this point.

C. Plaintiffs' Claims are not time barred

Defendants raise a statute of limitation defense for claims relating back more than two years. They erroneously state that the claims "pressed in the amended complaint were

first asserted on July 29, 2005.” As explained above, plaintiffs and the plaintiff class were granted leave to intervene in February, 1994. Their original complaint included claims under IDEA, Section 504 of the Rehabilitation Act of 1973, and Section 1983 claims pursuant to the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the U.S. Constitution. These are the same causes of action contained in the amended complaint. Moreover, defendants neglect to recognize that Fed. Rule Civ. Proc. (F.R.C.P.) 15 authorizes the relation back of amended and supplemental pleadings to the original pleading. Therefore, as explained more fully below, defendants’ statute of limitations defense is meritless.

1. Rule 15 Generally

F.R.C.P. 15 facilitates the amendment of pleadings and the presentation of supplemental materials. Amended pleadings generally incorporate events that occurred prior to the filing of the original pleading, while supplemental pleadings include transactions or occurrences that take place after the filing of the original pleading. Moore’s Federal Practice Civil § 15.02. The Rule “allows for liberal amendment in the interests of resolving cases on the merits.” *Id.* Amendments may relate to either parties or claims and may serve such purposes as to add claims or defenses, to properly name or identify parties, and to add, substitute or drop parties or clarify jurisdiction. *Id.*

Plaintiffs and the plaintiff class’ new complaint has aspects of both amendment and supplementation. The new complaint is amended by adding defendant Taft. It is also supplemented with events that have occurred since the original complaint was filed. These

events primarily relate to the termination of the *DeRolph* case and the absence of any other remedy for the rights violations found by the Ohio Supreme Court.

a. Amendments: Addition of Parties and Claims Arising Out of Original Actions

Rule 15 Subsection (c) provides for the relation back of amendments to a pleading. Subsection (2) of the rule provides that an amendment of a pleading relates back to the date of the original pleading when: “the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading.” Subsection (3) provides that the amendment relates back to the original pleading when “the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.”

Rule 15 specifies the circumstances under which amendments that are filed after the statute of limitations are deemed to relate back to the date of the original pleading so that they are not time barred. In order for amendments to relate back, they must arise from the same conduct, transaction, or occurrence set forth in the original pleading. *See* Moore’s Federal Practice Civil § 15.19[2]). Rule 15 allows a party to amend despite the running of an applicable state statute of limitations when parties are sufficiently on notice of the facts and

claims that gave rise to the proposed amendment.

For an amendment that adds or changes parties to relate back: (1) the new party must have such notice of the action that it will not be prejudiced in maintaining a defense; and (2) the new party either must have known or should have known that but for the mistake it would have been named. See Moore's Federal Practice Civil § 15.19[3][b]. In determining whether or not an amendment adding party relates back, courts focus on whether the new party had actual, constructive, or imputed notice. *Wine v. EMSA Ltd. Partnership*, 167 F.R.D. 34, 37-38 (E.D. Pa. 1996). As stated by one federal court: "The conclusion of a growing number of courts and commentators is that sufficient notice may be deemed to have occurred where a party who has some reason to expect his potential involvement as a defendant hears of the commencement of litigation through some informal means". *Kinnally v. Bell of Pa.*, 748 F. Supp. 1136, 1141 (E.D. Pa. 1990).

The purpose of the statute of limitations is to prevent stale claims. The rationale of allowing an amendment to relate back to the original pleading is that once a party is notified of litigation involving a specific factual occurrence, the party has received all the notice and protection that the statute of limitations requires. In some cases notice may be imputed based on shared legal counsel. Moore's Federal Practice Civil §15.19.

Changes in legal theory are also allowed under Rule 15. See *Mayle v. Felix*, 162 L. Ed. 2d 582, 598 n.7 (2005)(relation back is ordinarily allowed "when the new claim is based on the same facts as the original pleading and only changes the legal theory").

Courts should freely grant leave to amend under Rule 15 to effectuate the purpose of

the Rules. *See e.g. Younger v. Chemovetz*, 792 F. Supp. 173, 175 (D. Conn. 1992) (courts freely allow amendments to relate back unless showing of undue delay, bad faith, or dilatory action).

In this case, the original complaint named the State of Ohio but not Governor Taft. The new complaint names both as defendants. The Ohio Attorney General represents both defendants. Defendant Taft was certainly aware of the *DeRolph* litigation. Defendant Taft was on notice of the institution of this action. He will not be prejudiced in maintaining a defense on the merits, and he knew or should have known that the action would have been brought against him. Plaintiffs should not needlessly be remitted to the difficulties of commencing a new action even though events occurring after the commencement of the original action have made clear the right to relief.

b. Supplemental Pleadings: Transactions occurring After the Original Pleading

In addition to permitting amendments, Rule 15(d) provides:

Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statements of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefore.

When events relevant to a claim occur after the pleading is filed Rule 15(d) allows a court, "upon motion of a party" and "upon such terms as are just," to allow a supplemental pleading "setting forth transactions and occurrences or events that have happened since the date of the pleading sought to be supplemented." Supplemental pleadings may be necessary

in a variety of situations. An appropriate application of Rule 15(d) is when certain injuries arising from the event on which the claim is based occur after the plaintiff files the complaint. A supplemental pleading may also be used to add additional facts or events relating to liability or to change the relief requested. A party also may supplement a pleading under Rule 15(d) to add new parties when subsequent events make it necessary to do so.

Supplemental pleadings under Rule 15(d) are limited to subsequent events related to the claim or defense presented in the original pleading. If a claim relates back to those stated in the original complaint, the additional allegations will not be barred by the statute of limitations. *Watkins & Son Pet Supplies v. Iams Co.*, 107 F. Supp. 2d 883 (S.D. Ohio W.D. 1999)[citing *Pessotti v. Eagle Mfg Co.*, 946 F.2d 974 (1st Cir. 1991) *aff'd* 254 F.3d 607 (6th Cir. 2001)]. The district court should analyze the original and amended complaints “to determine whether they share a common core of operative facts sufficient to impart fair notice of the transaction, occurrence, or conduct called into question.” *Id.*, citing *FDIC v. Jackson*, 133 F.3d 694, 702 (9th Cir. 1998) , quoting *Martell v. Trilogy Ltd.*, 872 F.2d 322, 327 (9th Cir. 1989). In particular, the court should consider whether the plaintiff will rely on the same kind of evidence offered in support of the original claim to prove the new claim. *Watkins* at 897. The allegations in the supplemental pleading, however, do not need to arise out of the same transaction or occurrence as the original; they need only bear some relationship to the subject of the original pleading. “The test under Rule 15(c) [for] whether a sufficient factual nexus exists to permit relation back is whether ‘the evidence with respect to the second set of allegations could have been introduced under the original complaint, liberally construed.’”

Watkins, supra, citing Moore's Federal Practice Civil § 15.19[2]. Thus, the same principles that support the liberal amendment of pleadings also apply to supplemental pleadings.

As explained at the outset of this brief, the parties agreed to stay these proceedings until such time as it became apparent that the *DeRolph* case would not satisfy plaintiffs' claims in this case. This Court granted plaintiffs permission to conduct limited additional discovery regarding changes in school funding and to file their supplemental pleading to reflect those changes. Not only were the defendants on notice that plaintiffs would capture recent developments in their supplemental complaint, they participated in conferences with counsel and the Court and consented to the stay and subsequent case management schedule. Prior filings by both parties have raised new facts, such as changes in the way the state funds special education. Under the circumstances, defendants have no credible argument that it would be unfair to them to permit the plaintiffs to proceed with this action. However, it would be patently unjust to the plaintiffs if the Court were to accept defendants' statute of limitations defense. Finally, the law, as explained above, does not support such a result in this case.¹³

2. The Statute of Limitations Also Does Not Bar Plaintiffs' Claims Because They Suffer Continuing Violations of Law

Defendants argue that the statute of limitations bars plaintiffs' claims with respect to failing to provide a free appropriate public education beyond two years from the filing of the complaint. Plaintiffs respond that they have alleged ongoing, continuous violations of law

¹³ It is important to note that, because plaintiffs and the plaintiff class seek a mandatory injunction, their burden will be to show that the system in place at the time of trial violates the law, not the system that was in place in 1994, or even when the amended / supplemental complaint was filed. Thus, there is no question that Defendant Taft or his successor in office will be on notice of the case at that time.

rather than a single event isolated in time. Furthermore, they argue that because the violations have continued into the limitations period, the related violations identified before the two year limitations period are not barred.

In determining when the statute of limitations begins to run, i.e., when the cause of action accrues, this Court must follow federal law. *Sevier v. Turner*, 742 F.2d 262, (6th Cir. 1984). “The statute of limitations commences to run when the plaintiff knows or has reason to know of the injury which is the basis of his action. A plaintiff has reason to know of his injury when he should have discovered it through the exercise of reasonable diligence.” *Id.* at 272. Even if: 1) plaintiffs allege violations occurring more than two years beyond the statute of limitations period and 2) they were or should have been aware of those violations and 3) the complaint allegations do not relate back to the original complaint pursuant to F.R.C.P. 15, all of the incidents are actionable under a “continuing violation” theory.

The Sixth Circuit has stated, “If subsequent identifiable acts of discrimination occurred within the critical time period and were related to the time-barred incident, the bar does not apply.” *Hull v. Cuyahoga Valley Bd. of Educ.*, 926 F.2d 505, 511 (6th Cir.), *cert. denied*, 111 S. Ct. 2917 (1991) [citing *Held v. Gulf Oil Co.*, 684 F.2d 427, 430 (6th Cir. 1982)]. In *Martin v. Voinovich*, 840 F. Supp. 1175 (S.D. Ohio 1993) Judge Smith applied the continuing violation theory to the plaintiffs’ claims that they suffered continuing discrimination by being denied community based placements based on their disabilities:

....the Court finds that the acts of discrimination alleged by plaintiffs are not based solely on isolated incidents. Instead, the alleged discrimination is an ongoing and continuous violation manifested in a number of incidents, and at least one of the alleged discriminatory acts occurred within the two year statute of limitations. Plaintiffs likewise assert continuous violations of other rights under federal law.

Accordingly, because the alleged violations which occurred more than two years ago are part of a continuous pattern of alleged discrimination, they are not barred by the statute of limitations.

Id., at 1189. Just as the plaintiffs in the *Martin* case suffered continuing violations of law, so too have the *Doe* plaintiffs been subjected to continuing failures by defendants to ensure their right to a free appropriate public education. For example, while the inception of a weighted per pupil formula for funding special education students occurred in 1997, the State continues to fail to provide full funding of that formula. (Docket #100, para. 192, 196, 199). Also, plaintiffs have suffered a continuing violation of their rights due to defendants' failure to assure and monitor compliance with the special education laws and to operate an effective complaint system. (Docket #100, para. 395). Therefore, plaintiffs' claims are not barred by the two year statute of limitations because they have suffered violations of law which continued to occur at the time the Amended Complaint was filed.

D. Plaintiffs' Rehabilitation Act Claims

Plaintiffs will not reargue this claim as they have raised it again solely for the purposes of preserving the issue for appeal. *See* Federal Rules of Civil Procedure 11(b)(2)(good faith argument for reversal of existing law).

E. Plaintiffs' Section 1983 Claims

1. Defendant Taft is Not Immune from Plaintiffs' Claims

Immunity from liability is an exception to the general rule, particularly as it relates to state officials and federal law under the doctrine of *Ex Parte Young* that individuals must conform their conduct to the law. Thus, the Court should be reluctant to extend as suggested by the defendants the concept of legislative immunity to an executive official who

is performing executive functions.

The cases cited by defendants in support of their argument that defendant Taft is legislatively immune from suit do not justify such an extension. For example, defendants cite to *Alia v. Michigan Supreme Court*, 906 F.2d 1100 6th Cir. 1990). The *Alia* case was a 42 U.S.C. § 1983 action in federal district court against defendants the Michigan Supreme Court and its seven justices. The *Alia* plaintiffs alleged that defendants "violated the plaintiffs' civil rights and rights to equal protection of the laws" by promulgating a rule of court that required mediation in the plaintiffs' case. Plaintiffs sought money damages, attorney fees, and declaratory and injunctive relief. The court found in favor of the Michigan justices because the promulgation of court rules of practice and procedure were a protected legislative activity entitling the justices to legislative immunity. The facts alleged in the case *sub judice* are distinguishable.

A prerequisite for granting legislative immunity is the presence of legislative rather than administrative, executive, or managerial conduct. To determine whether legislative immunity should apply in a given situation the court must look to the nature of the governmental function being performed. *Butz v. Economou*, 438 U.S. 478, 511-517 (1978). Therefore, some governmental functions will not shield government officials from liability.

Indeed, courts have recognized the supremacy of federal law and the primary public interest in protecting citizens whose Constitutional rights have been overridden by the exercise of state authority. Under the criteria developed by precedents of the U.S. Supreme Court, § 1983 would be drained of meaning were the courts to hold that the acts of a

governor or other high executive officers have “the quality of a supreme and unchangeable edict, overriding all conflicting rights of property and unreviewable through the judicial power of the Federal Government.” *Scheuer v. Rhodes*, 416 U.S. 232, 248, (1974).

The U.S. Supreme Court rejected this notion, stating:

“If this extreme position could be deemed to be well taken, it is manifest that the fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of the land; that the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases, the futility of which the State may at any time disclose by the simple process of transferring powers of legislation to the Governor to be exercised by him, beyond control, upon his assertion of necessity. Under our system of government, such a conclusion is obviously untenable. There is no such avenue of escape from the paramount authority of the Federal Constitution. When there is a substantial showing that the exertion of state power has overridden private rights secured by that Constitution, the subject is necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression.”

Scheuer, supra at 248-249 quoting *Sterling v. Constantin*, 287 U.S. 378, 397-398 (1932).

Plaintiffs in the case at bar have alleged sufficient facts that their private rights secured by the Constitution have been overridden by the exertion of state power. Plaintiffs have alleged that defendant Taft is required to exercise and maintain effective supervision and control over the expenditures of the state. (Docket # 100, para. 158). They have alleged that defendant Taft has failed to carry out his duties when, for example, by executive order, defendant Taft reduced state aid to Ohio schools. In addition, plaintiffs have alleged that Defendant Taft has contributed to the failure to provide a thorough and efficient system of common schools. (para. 157, 160, 162). They claim that they have suffered, at the hands of the state and state officials, a denial of Due Process and Equal Protection of the law. These are executive, not legislative functions, and the plaintiff class is entitled to have its claims

judicially resolved.

2. The *Pennhurst* Doctrine is Inapplicable to Plaintiffs' Claims

Defendants mistakenly characterize plaintiffs' third cause of action as an attempt to enforce state law claims in federal court. Plaintiffs are not asking this Court to compel Governor Taft to comply with state law. If that were the case, plaintiffs agree that the doctrine of sovereign immunity and the *Pennhurst*¹⁴ doctrine would be relevant here. Plaintiffs' third cause of action asserts a state-created liberty and property rights that have been denied in violation of federal due process rights. *See Martin v. Voinovich*, 840 F. Supp. 1175 (S.D. Ohio 1993).

Also, plaintiffs' fourth cause of action alleges that the denial of access to the courts of Ohio to seek redress for violations of plaintiffs' state-created liberty and property interests denies them of their due process rights under the Fourteenth Amendment to the U.S. Constitution. (Docket #100, Para. 412-413). Similarly, plaintiffs' fifth cause of action alleges that the disparities in funding Ohio's school districts, resulting from a district's ability to levy property taxes as well as the native wealth of those citizens and the value of the district's tax base result in a violation of plaintiffs' right to equal protection as guaranteed under the Fourteenth Amendment to the U.S. Constitution. (Docket #100, Para. 415-420).

Because plaintiffs in the instant case assert a violation of federal law, the rule enunciated in *Pennhurst II* does not apply. *Id.* at 1204.

3. Third Cause of Action : Plaintiffs raise significant constitutional issues that transcend the *San Antonio Independent Schools* case

¹⁴ *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984).

Defendants' attempt to force the constitutional claims of the plaintiff class into a formulistic and rigid analysis is based on an overly broad reading of *San Antonio* and ignores the nature of the interests and the constitutional framework advanced by plaintiffs. While plaintiffs do attack the rationality of Ohio's education funding system (as allowed or perhaps required by *San Antonio*), they also claim to have been deprived of a significant liberty and property interest without due process of law, and invoke both substantive and procedural due process protections guaranteed by the Fourteenth Amendment. More than mere rationality, plaintiffs' interests demand a higher level of judicial scrutiny of the justifications advanced by the defendants.¹⁵

Moreover, the holding in *San Antonio* concerned, solely, whether classification based on wealth (or a lack of it) constituted a suspect classification for equal protection purposes. Plaintiffs do not advance this theory in this case, but rather point out disparities in educational opportunities that require this Court to scrutinize of whether the state's purported basis for its actions is, in fact, rationally related to the means used. The allegations in plaintiffs' complaint support the argument that the state defendants in this case have acted in an irrational, and therefore unconstitutional, manner with regard to children with disabilities.

¹⁵ It is important to note that *San Antonio* was decided based on only the Equal Protection clause of the Constitution; no due process claims were reviewed by the Supreme Court. *See San Antonio Independent Schools v. Rodriguez*, 411 U.S. 1, 5 (1973).

4. Due Process: Liberty and Property Interests That Are Worthy Of Constitutional Protections

a. Liberty interest in Education

It is now well established that the Constitution protects certain liberty interests that are inherent to the quality of ordered liberty long recognized by this nation. *See City of East Cleveland v. Moore*, 431 U.S. 494 (1977). It is not a question of ‘suspectness,’ as was the case in *San Antonio*, but rather of the fundamental value placed on the interest in question. These interests have been, generally but not exclusively, enumerated by the U.S. Supreme Court as privacy¹⁶ and other

interests protected by substantive due process, which the legislature may not infringe upon unless supported by sufficiently important state interests, include those protected by specific constitutional guarantees, such as the Equal Protection Clause, freedom from government actions that ‘shock the conscience,’... and certain interests that the Supreme Court has found so rooted in the traditions and conscience of our people as to be fundamental ...

Bell v. Ohio State University, 351 F.3d 240, 250-51 (6th Cir. 2003). Courts have struggled to define with particularity the interests that are protected by substantive due process, but a non exclusive list includes the right to reasonable care and safety while in government custody; the right to travel locally through public spaces and roadways; the right to marry; the right to have children; the right to direct the education and upbringing of one's children; the right to marital privacy; the right to use contraception; the right to bodily integrity; and the right to abortion. *Id.* at 250 n.

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¹⁶ Privacy is recognized as “family, marriage, motherhood, procreation, and child rearing,” and is largely concerned with “protected intimate relations.” *Paris Adult Theatres I v. Slaton*, 413 U.S. 49, 66-67 (1973). *See Moore, supra* at 503-504 (plurality).

This checklist approach does not end the inquiry, however. For example, the Supreme Court has determined that the liberty interest of the 14th Amendment creates, as a requirement of substantive due process, a duty on the part of the state to provide training and / or treatment to individuals with disabilities who are institutionalized. *Youngberg v. Romeo*, 457 U.S. 307 (1982). Rather than simply checking the list, it is incumbent on the Court to first analyze the interest advanced by plaintiffs to determine if it has the characteristics that are deserving of heightened scrutiny.

Here, the plaintiff class, made up entirely of children with disabilities, seeks a right to access education as guaranteed to them by federal law and the Constitution. *See Mills v. Board of Ed. of District of Columbia*, 348 F.Supp. 866 (D.D.C.1972) Thus the first characteristic of liberty denominated by the circuit court is easily met in this case.

Secondly, it is apparent that education, and particularly equal access to education for minority students, has long held a valued place in our constitutional system. “The Supreme Court long has recognized that even when discrimination in education does not abridge a fundamental right, the gravity of the harm is vast and far reaching. *See Brown v. Board of Education*, 347 U.S. 483, 493, (1954) (‘education is perhaps the most important function of state and local governments’ because ‘it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education’).” *Association for Disabled Americans, Inc. v. Florida International University*, 405 F.3d 954, 957-958 (11th Cir. 2005)(hereinafter *ADA*). Even *San Antonio* acknowledges that “the grave significance of

education both to the individual and to society cannot be doubted. . .” 411 U.S. at 29-30. *Cf Youngberg supra*, requiring training of people with disabilities who are in state institutions.

The *ADA* opinion demonstrates the difficulty of analyzing these questions in a lock step or rigid analytical approach. That court was faced with the question of Congress’ authority under § 5 of the 14th Amendment to abrogate state immunity under the 11th Amendment. Doing so required the court to determine the scope (or perhaps more accurately “breadth”) of the constitutional protection Congress had sought to protect in passage of the Americans with Disabilities Act, and whether Title II was a “congruent and proportional” remedial statute.

The court in *ADA* reviewed the history of discrimination in education against children with disabilities that Congress had before it in passing the ADA, and concluded that:

Discrimination against disabled students in education affects disabled persons' future ability to exercise and participate in the most basic rights and responsibilities of citizenship, such as voting and participation in public programs and services. The relief available under Title II of the ADA is congruent and proportional to the injury and the means adopted to remedy the injury.

405 F.3d at 959.

By recognizing that education, particularly education that was designed to include individuals who had historically been excluded from the democratic process, constituted a constitutionally significant interest deserving of a heightened level of protection, the Fourth Circuit followed a long history of courts providing constitutional or statutory protections to such students. The Supreme Court in *Plyler v. Doe*, 457 U.S. 202 (1982), explicitly recognized

the significance of a common system of education to the ordered liberty of this nation:

Public education is not a “right” granted to individuals by the Constitution. But neither is it merely some governmental “benefit” indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction. The “American people have always regarded education and [the] acquisition of knowledge as matters of supreme importance.” We have recognized “the public schools as a most vital civic institution for the preservation of a democratic system of government,” and as the primary vehicle for transmitting “the values on which our society rests.” “[As] . . . pointed out early in our history . . . some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence.” And these historic “perceptions of the public schools as inculcating fundamental values necessary to the maintenance of a democratic political system have been confirmed by the observations of social scientists.” In addition, education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. In sum, education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.

Id. at 221 (citations omitted). This allowed the Court to apply heightened scrutiny to a provision that excluded undocumented children from the public schools, concluding that “if the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest.” *Id.* at 230.¹⁷

There can be no doubt that children with disabilities have been excluded from public education over the history of this country. *See ADA, supra; Tennessee v. Lane*, 541 U.S. 509, 525 n. 12 (2004). There similarly can be no doubt that the U.S. Supreme Court has

¹⁷ Ultimately, as predicted by Justice Marshall, 457 U.S. at 230 (Marshall, J. concurring) the courts have struggled with the notion that some interests require one level of scrutiny while others require almost no scrutiny at all. *See, e.g., LeClerc v. Webb*, 419 F.3d 405 (5th Cir. 2005) (acknowledging that *Plyler* calls for “heightened rational basis review”).

recognized education, particularly education that allows individuals to be fully included in society, is a value that is substantially protected by the Constitution. As noted by Justice Breyer, in defining his concept of “active liberty” under the Constitution, “Finally, the people, . . . must have the capacity to exercise their democratic responsibilities. They should possess the tools, such as information and education, necessary to participate and to govern effectively.” Breyer, Active Liberty: Interpreting Our Democratic Constitution, p. 16 (Knopf 2005). This is an accurate paraphrase of the test used by the courts to elevate inclusive education to a higher level of constitutional protection. In this case, the plaintiff class has adequately stated a cause of action under due process, and the defendants’ motion should be denied.

b. Procedural Due Process

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

The U.S. Supreme Court has long held that the hallmark of property “ . . . is an individual entitlement grounded in state law, which cannot be removed except 'for cause. '" *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982); *Light, Gas & Water Div. v. Craft*, 436

U.S. 1, 11-12 (1978); *Goss v. Lopez*, 419 U.S. 565, 573-574 (1975).

Property interests are not created by the Constitution. Rather, “they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law” *Daniels v. Woodside*, 396 F.3d 730, 736 (6th Cir. 2005) citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985) [quoting *Board of Regents v. Roth*, 408 U.S. 564 (1972)]. State statutes or rules create protected property interests by entitling a citizen to certain benefits. *Goss v. Lopez*, 419 U.S. 565, 573 (1975) (“Here, on the basis of state law, appellees plainly had legitimate claims of entitlement to a public education.”).

c. State created property interest

The United States Constitution provides in relevant part as follows:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person . . . of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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

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

As this Court is well aware, the Supreme Court of Ohio has now ruled conclusively on four separate occasions that school children in Ohio, including the children with disabilities who make up the plaintiff class in this case, have an interest, defined in the state constitution, in a properly funded educational system.¹⁸ Stated differently, the Supreme

¹⁸ The history of the *DeRolph* litigation is set out in the Ohio Supreme Court’s opinion in *DeRolph IV*, 97 Ohio St. 3d 434, 780 N.E. 2d 529 (2002).

Court of Ohio has ruled that the State had failed in its state constitutional duty to provide a thorough and efficient system of public education. The final ruling of the Ohio Supreme Court on December 11, 2002, found that “the current school-funding system is unconstitutional.” *DeRolph IV* at 435, and re-iterated its rationale as set forth in the first two opinions.

The Ohio Supreme Court’s order directed “the General Assembly to enact a school-funding scheme that is thorough and efficient, as explained in *DeRolph I*, *DeRolph II*, and the accompanying concurrences.” *Id.* The Supreme Court of Ohio neither stayed the effective date of its *DeRolph IV* decision nor retained ongoing jurisdiction over the case. On the same day as the decision, the court issued its judgment entry that Ohio’s public school funding system was unconstitutional and issued a mandate to the trial court to carry the judgment into execution.

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

On May 16, 2003, the Supreme Court of Ohio rendered its decision and entered a judgment granting the State’s request for a writ of prohibition against the trial court. *State ex Rel State v. Lewis*, 99 Ohio St.3d 97; 789 N.E.2d 195 (2003). The Court stated that “we now

grant a peremptory writ and end any further *DeRolph* litigation in *DeRolph v. State*” *Id.* The Court, in a triumph of the former dissenters and two newly elected justices, focused on the legislative nature of the remedy, insisting that any further remedial actions must be left to the Ohio General Assembly. The plaintiffs in *DeRolph*, and every other schoolchild in Ohio including those in the plaintiff class, were left without a meaningful judicial remedy for violation of an interest created by the Ohio Constitution in a thorough and efficient funding system for the state’s schools.

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

There can be no questioning of the educational entitlement of the class members pursuant to the Ohio Constitution. This is a matter of state law and has already been decided by the Supreme Court of Ohio in *DeRolph*¹⁹ As a result, it is now settled law that the education clauses of the Ohio Constitution are not merely aspirational; rather, they create entitlements on the part of Ohio’s students and corresponding enforceable obligations on the part of the State.

¹⁹ *See also, Goss v. Lopez, supra at 573*, ”Here, on the basis of state law, appellees plainly had legitimate claims of entitlement to a public education. Ohio Rev. Code Ann. §§ 3313.48 and 3313.64 (1972 and Supp. 1973) direct local authorities to provide a free education to all residents between five and 21 years of age, and a compulsory-attendance law requires attendance for a school year of not less than 32 weeks. Ohio Rev. Code Ann. § 3321.04 (1972).”

Indeed, this Court has already held that plaintiffs have a property right in a free, appropriate public education, secured by the IDEA and state statutes implementing that federal law. (Docket #89, pp.36-37, citing *Fetto v. Sergi*, 181 F. Supp. 2d 53, 80 (D. Conn. 2001) (student had “a protected property right to an appropriate IEP under the IDEA”); *Quackenbush v. Johnson City Sch. Dist.*, 716 F.2d 141, 148 (2d Cir. 1983)(denial of FAPE constitutes denial of right secured by federal law); *B.D. v. DeBuono*, 130 F. Supp. 2d 401, 431 (S.D.N.Y. 2000)(students had a “protected property right to an individualized treatment plan that would meet their needs”). Plaintiffs’ Complaint clearly alleges that they have been denied a free appropriate public education. The Court should therefore conclude again that plaintiffs have sufficiently alleged the deprivation of a protected liberty or property interest.

In due process cases, once the plaintiff establishes a deprivation of life, liberty or property, “the question remains what process is due.” *Morrissey v. Brewer*, 408 U.S. 471 (1972). “In procedural due process claims, the deprivation by state action of a constitutionally protected interest in ‘life, liberty, or property’ is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest **without due process of law.**” *Zinerman v. Burch*, 494 U.S. 113, 125 (1990) (emphasis in original). The Court in *Zinerman* stated:

The constitutional violation actionable under § 1983 is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process. Therefore, to determine whether a constitutional violation has occurred, it is necessary to ask what process the State provided, and whether it was constitutionally adequate. This inquiry would examine the procedural safeguards built into the statutory or administrative procedure of effecting the deprivation, and any remedies for erroneous deprivations provided by state or tort law.

Id. at 126. A court must weigh several factors to determine what process is due: First, the private interest that will be affected by defendants' official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Mathews v. Eldridge*, 424 U.S. 319, 335, (1976).

The procedures available under IDEA have not prevented the illegal deprivations suffered by the plaintiffs. This Court has already concluded that the impartial due process hearing procedures provided for in Chapter 3323 of the Ohio Revised Code can not address the plaintiffs' alleged violations of their rights. (Docket #89). Further, plaintiffs have alleged that the State complaint and monitoring systems are inadequate. (E.g., Docket #100, para. 395). Finally, as discussed above, OSEP has failed to ensure Ohio's compliance with the IDEA.

There is also little doubt that the Ohio courts have abandoned the plaintiffs and the plaintiff class of schoolchildren with disabilities. As noted by one commentator:

The Ohio Supreme Court's failure to impose prophylactic remedies in the school funding case, *DeRolph IV*, demonstrates the defendants' ability to evade compliance when they fail to accept the legitimacy of the adjudicated right or the ordered remedy. In *DeRolph I* in 1997, the Supreme Court declared the state's funding system for public education unconstitutional under the Ohio Constitution's guarantee of a thorough and efficient education and ordered a total "overhaul" of the system. 677 N.E.2d 733 (Ohio 1997). Yet the state took no action to change the funding system. It repeatedly appealed to the Court on philosophical and practical reasons (lack of funds), and each time the Court reaffirmed its holding. *DeRolph v. State* (*DeRolph II*), 678 N.E.2d 886 (1997); *DeRolph v. State* (*DeRolph III*), 754

N.E.2d 1184 (2001); *DeRolph IV*, 780 N.E.2d 529. However, the Court never imposed specific prophylactic measures nor imposed contempt penalties to counter the defendants' resistance. Instead, a worn-down, and differently constituted Supreme Court finally issued a writ of prohibition freezing all relief in the case. See *State v. Lewis*, 789 N.E. 2d 195 (Ohio 2003).

Thomas, *The Prophylactic Remedy: Normative Principles and Definitional Parameters of Broad Injunctive Relief*, 52 Buffalo L. Rev. 301, 381 n. 381 (2004).

The language of the Ohio Supreme Court's decisions supports this conclusion. While the early *DeRolph* decisions always showed significant (and arguably proper) deference to the legislature,²⁰ it was equally clear that the Court would impose a judicial remedy if necessary:

Conversely, it is the role of the courts, pursuant to the Ohio Constitution, to determine the constitutional validity of the system of funding and maintaining the public schools in Ohio. It is now up to the General Assembly to devise a system of funding which will be in compliance with our Constitution.

Our decision to remand this matter is a recognition of the unique role of trial courts as triers of fact and gatherers of evidence. Our remand to the trial court is to provide a proper venue for the parties, if necessary and requested by any party, to present all evidence concerning the final enacted remedy, including measures taken since the record in this case closed and further enactments made in response to our decision.

It would then be the trial judge's responsibility to rule on the constitutionality of the enacted legislation and to render an opinion. Any party could then appeal that decision directly to this court for final determination.

²⁰ “[W]e recognize that the proper scope of our review is limited to determining whether the current system meets constitutional muster. We refuse to encroach upon the clearly legislative function of deciding what the new legislation will be.” *DeRolph I*, 78 Ohio St.3d at 213, 677 N.E.2d 733, fn. 9; “Given the separate powers entrusted to the three coordinate branches of government, both this court and the trial court recognize that it is not the function of the judiciary to supervise or participate in the legislative and executive process. We accord respect to the coordinate branches of government, and we have full faith and trust that they will act to remedy the disparate effects of the current statutory method for raising and distributing funding for education. The creating of a constitutional system for financing elementary and secondary public education in Ohio is not only a proper function of the General Assembly, it is also expressly mandated by the Ohio Constitution. *DeRolph II*, 78 Ohio St. 3d, 419, 419-420, 678 N.E. 2d 886 (1997)

78 Ohio St. 3d, 419, 419-420, 678 N.E. 2d 886 (1997)(*per curiam*).

In *Lewis*, however, the Court indicated with finality that its intent is to leave the solution to the legislature. In the most strongly worded passage, it becomes apparent that the “differently constituted [Ohio] Supreme Court,” Thomas, *supra*, will not entertain further judicial forays into what the Court determines is exclusively the province of the legislative branch:

The *DeRolph* plaintiffs' request is nothing more than an ill-disguised attempt to require judicial approval for proposed remedies *even before those remedies are enacted*, i.e., requesting advisory rulings on the constitutionality of legislation that has not yet been passed. This, however, would constitute an unquestioned violation of the *DeRolph I, II, and IV* mandates. See, e.g., *DeRolph I*, 78 Ohio St.3d at 213, 677 N.E.2d 733, fn. 9 (“we recognize that the proper scope of our review is limited to determining whether the current system meets constitutional muster. We refuse to encroach upon the clearly legislative function of deciding what the new legislation will be”); *DeRolph II*, 89 Ohio St.3d at 12, 728 N.E.2d 993 (“it is for the General Assembly to legislate a remedy”). It also constitutes an inappropriate request for an advisory opinion. Cf. *Egan Natl. Distillers & Chem. Corp.* (1986), 25 Ohio St.3d 176, 25 OBR 243, 495 N.E.2d 904, syllabus (“it is well-settled that this court will not indulge in advisory opinions”). In addition, as previously discussed, because the trial court's 1999 remedial orders were not affirmed by this court in *DeRolph II*, these orders are no longer valid.

* * *

Therefore, our *DeRolph IV* mandate forbids Judge Lewis and the common pleas court to exercise further jurisdiction in this matter. We never held in *DeRolph II* or *IV* that Judge Lewis's 1999 remedial order or, for that matter, the *DeRolph* plaintiffs' mandatory-injunction claim would be revived when we relinquished our jurisdiction. The duty now lies with the General Assembly to remedy an educational system that has been found by the majority in *DeRolph IV* to still be unconstitutional.

Lewis, 99 Ohio St. 3d at 103-104, 789 N.E. at 202 (emphasis supplied).

Plaintiffs allege that the Ohio Supreme Court has ended its jurisdiction to enforce the

plaintiff class' right to a thorough and efficient system of common schools. The futility of further litigation in state court is obvious. Finally, plaintiffs have alleged that the legislative process has failed to ensure an educational system that meets Ohio Constitutional standards as well as federal special education standards.

The only process available to the plaintiff class to seek redress for violations of their property right to an adequate and appropriate public education is in this Court. Concerns regarding the costs of ensuring a free appropriate public education to all Ohio students with disabilities are clearly a barrier to the enforcement of that right in the Ohio Courts and legislature.

There is a long and well-regarded tradition, however, of the use of federal equity courts to remedy violations of federal rights, and in particular civil rights. In this case, as in those before it, the prophylactic effect of a mandatory injunction is the only remedy that can effectively protect the rights of this class under federal law. In the context of education, the Sixth Circuit has repeatedly held that cost considerations are only relevant when choosing between appropriate educational options. *See e.g., Clevenger v. Oak Ridge School Bd.*, 744 F.2d 514, 517 (6th Cir. 1984); *Roncker ex rel. Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983). It is also clear that "ordinary considerations of cost and convenience alone cannot justify a State's failure to provide individuals with a meaningful right of access to the courts." *Tennessee v. Lane*, 541 U.S. 509, 533 (2004). It is, ultimately, up to the federal courts to enforce these important, indeed fundamental, federal constitutional interests.

d. Fourth Cause -- Access to Courts

The U.S. Supreme Court held in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), that a cause of action is a type of property protected by the Fourteenth Amendment's Due Process Clause.²¹ In *Wolff v. McDonnell*, 418 U.S. 539 (1974), the Supreme Court defined the right of access in a civil rights action under section 1983 in the following terms: "The right of access to the courts, upon which *Avery* [*Johnson v. Avery*, 393 U.S. 483 (1969)] was premised, is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights." *Id.* at 579. A mere formal right of access to the courts does not pass constitutional muster. Courts have required that the access be "adequate, effective, and meaningful." *Bounds v. Smith*, 430 U.S. 817, 822-825 (1977).

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

²¹ The federal constitutional right of access to public tribunals has been found under the privileges and immunities' clause of the Fourteenth Amendment, the First Amendment Right to petition for redress of grievances, and the due process clause of the Fourteenth Amendment. *Ryland v. Shapiro*, 708 F.2d 967 (5th Cir. 1983).

Courts typically exercise continuing jurisdiction to achieve structural reform. To this end, a court cannot terminate its jurisdiction until it has eliminated the constitutional violation "root and branch." *Battle v. Anderson*, 708 F.2d 1523, 1538 (10th Cir. 1983) citing *Green v. County School Board*, 391 U.S. 430, 438 (1968). The court must exercise supervisory power over the matter until it can say with assurance that the unconstitutional practices have been discontinued and that there is no reasonable expectation that unconstitutional practices will recur. In *Green*, a classic example of structural reform of segregated schools, the Court stated that "the court should retain jurisdiction until it is clear that state-imposed segregation has been completely removed." *Id.*, at 439; accord, *Raney v. Board of Educ.*, 391 U.S. 443, 449(1968); *see also Brown v. Board of Educ.*, 349 U.S. 294, 301 (1954) (district court to retain jurisdiction during "period of transition" to desegregated schools).

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

In this case, members of the plaintiff class were beneficiaries of the Ohio courts pronouncements in *DeRolph*. Yet the Ohio Supreme Court terminated jurisdiction without creating a remedy to eliminate the unconstitutional violation. Thus, plaintiffs claim that they have been deprived of property without due process and equal protection of the law. They have been singled out from other litigants having been denied to right to enforce established

rights in state court. *See Goss v. Lopez*, 419 U.S. 565 (1975); *Board of Regents v. Roth*, 408 U.S. 564 (1972).

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

e. Legislative Process is not sufficient Due Process

It is also absolutely settled that the State has neglected its obligation and that the laws that presently compose the State's school funding system are unconstitutional. The Ohio Supreme Court, having repeatedly declared both of the foregoing, failed to provide a judicial remedy to this class of Ohio schoolchildren with disabilities.

Defendants argue here as they did in *DeRolph* that plaintiffs could file a new state lawsuit aimed at vindicating their state created educational rights. First, as detailed above, it is not state rights that the plaintiff class is seeking to vindicate, but important federal rights. Additionally, such a suit could not redress the ongoing deprivation of the remedy to which the school children are presently entitled, under *DeRolph IV* and *Lewis*. Moreover, unless the Ohio Supreme Court would reverse its holding in *Lewis*, a new suit could not yield anything more than Ohio's school children already have obtained – a comprehensive declaration of rights, all of which are completely unenforceable in state court.

Defendants wrongly argue that the legislative process is all the process that is due to plaintiffs. It is beyond question that courts possess the power to declare legislation

unconstitutional. Furthermore, courts have the power to act when the legislating body fails to remedy the unconstitutional act. *Brown, supra*.

5. Equal Protection Claim

The Equal Protection Clause of the Fourteenth Amendment prohibits a state from denying to any person within its jurisdiction the equal protection of the laws. In essence, a State must “treat similarly situated individuals in a similar manner.” *Buchanan v. City of Bolivar*, 99 F.3d 1352, 1360 (6th Cir. 1996) (quoting *Gutzwiller v. Fenik*, 860 F.2d 1317, 1328 (6th Cir.1988)). There is no Equal Protection violation “if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose. (Docket #89, p. 33). “To survive a motion to dismiss for failure to state a claim, a plaintiff must allege facts sufficient to overcome the presumption of rationality that applies to government classifications.” See *Bower v. Village of Mt. Sterling* 44 Fed. Appx. 670, 2002 U.S. App. LEXIS 15383 (6th Cir. July 26, 2002)(quoting *Wroblewski v. City of Washburn*, 965 F.2d 452, 459-60 (7th Cir. 1992).

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

The parties agree that because children with disabilities are not a suspect class, classifications based on disability are subject only to a rational basis review. See *Board of*

Trustees of the Univ. of Alabama v. Garrett, 531 U.S. 356, 366-67 (2001). This means that there is no Equal Protection violation “if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.” *Id.* at 367 [citing *Heller v. Doe*, 509 U.S. 312, 320 (1993)]. However, as noted above, denial of education to a discrete minority is given a heightened level of scrutiny because of the important interest that is involved. *Plyler v. Doe, supra.*

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

If a state elects to furnish free compulsory public education to any of its citizens (as does Ohio), it must do so in a manner, respecting all of its residents, which comports with basic Fourteenth Amendment equal protection and due process requirements. See *Brown*, 347 U.S. at 493 (“Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.”); *Goss*, 419 U.S. at 572-75 (explaining that, when state law has guaranteed access to a free public education, a beneficiary of that statutory entitlement may be denied that right only if the state effected that deprivation in

conformity with due process requisites).

Defendants argue that the disparities of funds and opportunities foster local control and therefore are rationally based. To the contrary, plaintiffs have alleged facts sufficient to overcome the presumption of rationality that applies to government classifications. The factual allegations contained in the plaintiffs' Complaint sufficiently demonstrate that school districts and their residents have little local control, and as a result, the list of Ohio's financially troubled school districts is growing. (Para. 295).

Specifically, plaintiffs have alleged disparity based on arbitrary classifications related to a district's ability to levy property taxes on its citizens, as well as the native wealth of those citizens and the value of the tax base in that district. (Docket #100, para. 416). As a result of these resource disparities, students receive differing, and often inadequate levels of educational opportunity from district-to-district as reflected by school and building report cards and disparities in graduation rates and proficiency test passage rates. (Docket #100, para. 417). Plaintiffs' Complaint further alleges that this disparity has harmed plaintiffs and the plaintiff class in that, particularly in less well funded school districts, children with disabilities with identified needs for special education services are denied such services. (Docket #100, para. 418).

For example, plaintiffs allege at para. 200 that because of defendants' failure to fully fund the school-age special education formula: "Poor districts are less able to raise revenue to fund the 10% formula shortfall." With respect to special education preschool, plaintiffs have alleged at para. 270 that the scheme by which Ohio distributes the state funds appropriated each biennium results in under-funding and inequitable funding for special

education. (Docket #100, para. 271). The inequities arise from the method of calculation for state approved preschool special education unit funding which is not equalized based on the wealth of the district. (Para. 272). Thus unit funding adversely impacts children with disabilities in smaller and poorer school districts to a greater degree than students in larger and wealthier school districts.

Moreover, children with disabilities in less well funded districts are less likely to be identified as being in need of special education services. (Docket #100, para. 419). By denying special education services to eligible students, plaintiffs have sufficiently alleged that Ohio's funding system is not rational and therefore violates the right to equal protection guaranteed to plaintiffs and the plaintiff class by the 14th Amendment to the United States Constitution.

Moreover, instead of exercising reasoned judgment about how the needs of students with disabilities can be adequately funded, Ohio's system continues to be based on what the Ohio Generally Assembly is willing to spend.²²

Some examples of arbitrary limits placed on funding for special education services include:

the state limits reimbursement for home instruction costs for only three disability categories (para. 209), reimbursement is limited to 50% of the cost of home instruction for a maximum of one hour per day (para. 211) and there is a budgetary cap on the amount of funds available to reimburse school districts for the costs of home instruction (para. 212);

there is no allocation of state funds to assist districts with the amount above the

²²Plaintiffs allege as follows: "The Ohio State Board of Education continues to make budget recommendations based on political viability and not based on the actual costs of providing students, including students with disabilities, an adequate education." (Para. 327). "The Ohio General Assembly continues to enact education budgets that do not fully fund the costs of providing a thorough and efficient system of common schools." (Para. 328).

amount provided by the special education weighted formula but before the catastrophic aid threshold amount is reached (para. 219) and there is a budgetary cap on catastrophic aid (para. 217);

for FY 2006-2007, Ohio lawmakers have again failed to fully fund the special education weighted formula, with funding provided at 90% for FY 2006 and FY 2007 and with no plan to fund the weights at 100% (para. 199).

In conclusion, plaintiffs have alleged sufficient facts entitling them to proceed with their argument that there is no rational basis for Ohio's system that creates funding disparities and results in denying students with disabilities their federally mandated right to receive a free appropriate public education.

III. CONCLUSION

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

Respectfully submitted,

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Certificate of Service

I hereby certify that on April 7, 2006, the Plaintiffs' Memorandum *Contra* was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/Susan G. Tobin