

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DAVID POWELL, et al. : CIVIL ACTION
 :
 v. :
 :
 THOMAS J. RIDGE, et al. : NO. 98-1223

MEMORANDUM AND FINAL JUDGMENT

HUTTON, J.

November 18, 1998

Presently before this Court is the Defendants' Motion to Dismiss the Plaintiffs' Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure (Docket No. 7), the Plaintiffs' response thereto (Docket No. 12), the Defendants' reply thereto (Docket No. 15), the Defendants' Supplemental Motion to Dismiss (Docket No. 25), the Motion to Dismiss of the Legislative Intervenors (Docket No. 16), the Plaintiffs' response thereto (Docket No. 18), the Brief of Legislative Intervenors for Judgment on the Pleadings (Docket No. 23), the Legislative Intervenors' Reply Brief in Support of their Motion to Dismiss and for Judgment on the Pleadings (Docket No. 24), and the Plaintiffs' Opposition to Intervenors' Supplemental Motion for Judgment on the Pleadings and Defendants' Supplemental Motion to Dismiss Complaint (Docket No. 26). Also before the court is the petition of the United States for leave to participate as amicus curiae in this action (Docket No. 13), which motion is granted and Brief of the United States as Amicus Curiae in Opposition to Defendant Intervenors' Motion to

Dismiss or for Judgment on the Pleadings (Docket No. 20), and United States' Motion to Further Participate as Amicus Curiae and to Intervene of Right (Docket No. 21). For the foregoing reasons, the Plaintiffs' Complaint will be dismissed in part.

I. BACKGROUND

On March 9, 1998, Plaintiffs¹ filed the instant action "against officials of the Commonwealth of Pennsylvania who are responsible for the public education of children in the Commonwealth, including those in Philadelphia." (Pls.' Compl. ¶ 1.) Plaintiffs charge Defendants² with the following: (1) violating Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d-2000d-4a (1994), and certain regulations promulgated by the United States Department of Education's Title VI implementing requirements, 34 C.F.R. §§ 100.3(b)(1) and 100.3(b)(2) (1997) ("Title VI claims") (Count One); and (2) violating the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1994) (Count Two). The Federal Government provides the states with financial assistance to benefit public schools.

1. The Plaintiffs include: "Students who attend public school in Philadelphia, their parents and guardians, and organizations that represent their interests ('Students and Organization Plaintiffs'); the School District of Philadelphia, the Board of Education of the School District of Philadelphia, and officials who lead the School District ('School District Plaintiffs'); and the Mayor of the City of Philadelphia ('City Plaintiffs')." (Pls.' Compl. ¶ 1).

2. The Plaintiffs have named the following parties as Defendants: 1) Thomas J. Ridge, the Governor of the Commonwealth of Pennsylvania; 2) Dr. James Gallagher, Chairperson of the Board of Education for the Commonwealth of Pennsylvania; 3) Dr. Eugene Hickok, the Secretary of Education for the Commonwealth of Pennsylvania; and 4) Barbara Hafer, the Treasurer of the Commonwealth of Pennsylvania.

The Commonwealth distributes these funds to Commonwealth public school districts, including the Philadelphia School District, based on a statutory funding formula. Plaintiffs allege that Defendants' statutory funding formula discriminates against the students of Philadelphia based on race, color and national origin. (Pls.' Compl. ¶ 2.) Consequently, Plaintiffs seek declaratory, injunctive and other appropriate relief to stop further alleged discrimination. (Pls.' Compl. ¶ 3.)

The Plaintiffs allege that the Commonwealth's statutory public school funding formula has a disparate impact on the school children of Philadelphia, the majority of whom are poor and non-white, in violation of Title VI and § 1983. The Plaintiffs allege that over seventy-five percent of the students that the Philadelphia School District is charged with educating are non-white, that in fiscal year 1996 approximately forth-six percent of the children attending schools in the Philadelphia School District could be classified as poor because they were part of families receiving Aid to Families with Dependent Children, and that in fiscal year 1996, eighty percent of the students in the Philadelphia School District were from families eligible for free or subsidized meals. The Plaintiffs further allege that changes in the funding formula in the last several years have favored majority white school districts over majority non-white school districts.

On May 4, 1998, the Defendants filed the instant motion moving this Court for an Order dismissing the Plaintiffs' Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The Defendants' filed their Opposition to Defendants' Motion to Dismiss Complaint on June 17, 1998. On June 29, 1998, the Defendants filed a Reply Memorandum in Support of its Motion to Dismiss Complaint. On July 6, 1998, the Legislative Intervenors³ filed their Motion to Dismiss. The Plaintiffs filed their response thereto on August 20, 1998. On October 7, 1998, Legislative Intervenors filed a Motion for Judgment on the Pleadings. The Legislative Intervenors filed their Reply Brief in Support of their Motion to Dismiss and for Judgment on the Pleadings on October 9, 1998. On October 15, the Defendants filed their Supplemental Motion to Dismiss. On November 6, 1998, the Plaintiffs filed their Motion in Opposition to Legislative Intervenors' Motion for Judgment on the Pleadings and Defendants' Supplemental Motion to Dismiss. It should also be noted that on June 13, 1998, the United States filed their Petition for Leave to Participate as Amicus Curiae in this action. They also filed a Brief as amicus curiae in opposition to Legislative Intervenors' Motion to Dismiss or for Judgment on the Pleadings and Motion to Further Participate as Amicus Curiae and to Intervene of Right on September 21, 1998.

³On June 3, 1998, this Court granted the uncontested motion to intervene by movants Representative Matthew J Ryan, Senator Robert C. Jubelirer, Representative Jess M. Stairs and Senator James J. Rhoades (collectively, the "Legislative Intervenors").

II. DISCUSSION

A. Defendants' Motion to Dismiss the Plaintiffs' Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure

1. Standard Under Rule 12(b)(6)

Federal Rule of Civil Procedure 8(a) requires that a plaintiff's complaint set forth "a short and plain statement of the claim showing that the pleader is entitled to relief" Fed. R. Civ. P. 8(a)(2). Accordingly, the plaintiff does not have to "set out in detail the facts upon which he bases his claim." Conley v. Gibson, 355 U.S. 41, 47 (1957) (emphasis added). In other words, the plaintiff need only "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Id. (emphasis added).

When considering a motion to dismiss a complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6),⁴ this Court must "accept as true the facts alleged in the complaint and all reasonable inferences that can be drawn from them. Dismissal under Rule 12(b)(6) . . . is limited to those instances where it is certain that no relief could be granted under

³. Rule 12(b)(6) provides that:

Every defense, in law or fact, to a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted

Fed. R. Civ. P. 12(b)(6).

any set of facts that could be proved." Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990) (citing Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988)); see H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 249-50 (1989). The court will only dismiss the complaint if "'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" H.J. Inc., 492 U.S. at 249-50 (quoting Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)).

2. Analysis of Plaintiffs' Claims

In the present motion, the moving Defendants have raised four general issues. First, they assert that all of the Plaintiffs' claims are barred by the final judgment of the Commonwealth Court of Pennsylvania in Marrero by Tabales v. Com., 709 A.2d 956 (Pa. Cmwlth. Mar. 2, 1998), under the doctrine of claim preclusion. Second, they argue that the Plaintiffs have failed to state a claim under Title VI because any implied cause of action created by Title VI extends only to suits against institutional recipients of federal funds and not to individuals. Third, the Defendants allege that Count Two fails to state a claim under 42 U.S.C. § 1983 because Title VI's comprehensive enforcement scheme precludes the Plaintiffs' claim. Finally, they contend that the City of Philadelphia, the School District of Philadelphia, the Board of Education of the School District of Philadelphia, Edward G. Rendell, David W. Hornbeck and Floyd W. Alston are not "persons"

protected by Title VI. The Court will address each of the Defendants' arguments in turn.

a. Res Judicata

The doctrine of res judicata, or claim preclusion, gives a prior judgment dispositive effect, and bars subsequent litigation based on any claim that was, or could have been, raised in the prior proceeding. See Board of Trustees of Trucking Employers v. Centra, 983 F.2d 495, 504 (3d Cir. 1992). This is true regardless of whether the prior decision was correctly decided, see, e.g., Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, 398 (1981), as the doctrine exists precisely to draw the line at which the priorities of the legal system shift from accuracy to finality. The doctrine accepts the risk of inaccuracy in the individual case in exchange for what courts have determined to be greater benefits--repose and the reliability of final judgments over time, and across the entire legal system. See generally 18 Charles A. Wright, Arthur R. Miller, et al., Federal Practice and Procedure § 4403 (2d ed. 1996).

To establish the affirmative defense of res judicata, the party asserting it must establish that: (1) the first suit resulted in a final judgment on the merits; (2) the second suit involves the same parties or their privies; and (3) the second suit is based on the same cause of action as the first. See United States v. Athlone Indus., Inc., 746 F.2d 977, 983 (3d Cir. 1984); Harding v. Duquesne Light Co., 1995 WL 916926, *2 (W.D. Pa. Aug. 4, 1995).

The Plaintiffs argue that Marrero was not a decision on the merits, that this matter does not involve the same parties as in Marrero or the same cause of action. (See Pls.' Mot. in Opp'n. at 10.). In sum, the Plaintiffs argue that the Defendants fail to satisfy even one of the three elements necessary to successfully assert claim preclusion. (Id.)

Collateral estoppel is inappropriate because the Defendants fail to satisfy the first requirement set forth in Athlone, thus, this Court need not consider the Defendants' other arguments. Athlone, 746 F.2d at 983. The Commonwealth Court's "Order" in Marrero was not a "final judgment on the merits." See Marrero, 709 A.2d at 966. Indeed, the court dismissed the action for presenting a nonjusticiable political question only after stating that "we are precluded from addressing the merits of the claims underlying the instant action as the resolution of those issues have been solely committed to the discretion of the General Assembly Under Article 3, Section 14 of the Pennsylvania Constitution." Id. Clearly, the court never reached the merits of the Plaintiffs' civil rights claims. The doctrine of res judicata does not apply where, as here, the court did not render a final adjudication on the merits of the prior action. See Wade v. City of Pittsburgh, 765 F.2d 405, 410 (3d Cir. 1985) (finding that a state court decision granting summary judgment to a municipality on the basis of statutory immunity did not preclude a subsequent federal action on the same incident); Superior Oil Co. v. City of

Port Arthur, Tex., 553 F. Supp. 511, 512 (E.D. Tx. 1982) (holding that the lower court's finding that the claim presented a political question was a jurisdictional decision, thus not a judgment on the merits and will not serve as a bar under res judicata principles), rev'd on other grounds, 726 F.2d 203 (5th Cir. 1984); see also Talley v. Southeastern Pennsylvania Transp. Auth., No. CIV. A.93-3060, 1993 WL 496702, at *3 (E.D. Pa. Nov. 30, 1993) (holding that res judicata does not apply to bar second cause of action where prior wrongful termination action was dismissed with prejudice for failure to exhaust administrative remedies) (citing Solar v. Merit Sys. Protection Bd., 600 F. Supp. 535, 536 (S.D. Fla. 1984) (same)).

b. Title VI of the Civil Rights Act of 1964

Section 601 of Title VI of the Civil Rights Act of 1964 provides that:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. § 2000d. Section 602 of Title VI, 42 U.S.C. § 2000d-1, instructs federal agencies to promulgate regulations interpreting Title VI. Regents of the Univ. of California v. Bakke, 438 U.S. 265, 340 (1978) (Brennan, J., concurring and dissenting). The statute conditions an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a

contract between the Government and the recipient of funds. See Guardians Assn. v. Civil Serv. Comm'n of New York City, 463 U.S. 582, 599 (1983) (opinion of White, J.); id., at 609 (Powell, J., concurring in judgment); cf., Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 17 (1981). The ultimate sanction for non-compliance is the termination of financial assistance. 42 U.S.C. § 2000d-1. The "primary objective" of Title VI is to ensure "that funds of the United States are not used to support racial discrimination" but "are spent in accordance with the Constitution and the moral sense of the Nation." Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 633 (1984) (citing 110 Cong. Rec. 6544 (1964) (remarks of Sen. Humphrey)).

The Defendants assert that Count I fails to state a claim because any implied cause of action created by Title VI extends only to suits against institutional recipients of federal funds and not to individuals. The Defendants argue that the Plaintiffs' Complaint is fatally flawed because it names Defendants Ridge, Gallagher, Hickok and Hafer. This Court must disagree.

In their Complaint, the Plaintiffs allege to sue Defendants Ridge, Gallagher, Hickok and Hafer in their official and individual capacities, but assert that they seek only injunctive and declaratory relief against the Defendants in their individual capacities. (Pls.' Complaint ¶¶ 27, 28, 29, 30 and 31.) The Plaintiffs allege that these Defendants are the key Pennsylvania

officials who accept federal financial assistance for public school education, thereby incurring the obligations of Title VI and its regulations. (Id.) The Plaintiffs contend that these officials choose, set and administer the policies and practices of public education finance in Pennsylvania, which discriminate on the basis of race, color and national origin. (Id.) The Court finds that the Plaintiffs' suit against Defendants Ridge, Gallagher, Hickok and Hafer in their official capacities "is no different from a suit against the State itself." Hafer v. Melo, 502 U.S. 21, 26 (1991); see discussion infra Part II.B.4.b.

c. 42 U.S.C. § 1983

In Count Two of their Complaint, the Plaintiffs assert that the Defendants have violated § 1983 by discriminating on the basis of race, color or national origin in the educational opportunities and funding system they provide. The Defendants make two arguments challenging the validity of the Plaintiffs' claims arising under § 1983. First, the Defendants argue that the Plaintiffs cannot assert a claim under § 1983 based on Title VI because such a claim is precluded by Title VI's comprehensive enforcement scheme. Second, the Defendants assert that the Plaintiffs cannot circumvent the requirements of a Title VI claim by asserting a § 1983 claim based upon a violation of Title VI. This Court finds that the Plaintiffs have failed to satisfy a prima

facie case under § 1983, and therefore are not entitled to protection under that statute.

A § 1983 action has two essential elements: (1) that the conduct complained of was committed by a person acting under color of state law; and (2) that this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States. 42 U.S.C. § 1983.⁵ Neither a state nor its officials acting in their official capacities are "persons" under § 1983. Will v. Michigan Dept. of State Police, 491 U.S. 58, 71 (1989). Moreover, "governmental entities that are considered 'arms of the State'" are not persons under § 1983. Id. at 70.

In Fitchik v. New Jersey Transit Rail Operations, Inc., the United States Court of Appeals for the Third Circuit listed the factors a court must consider when determining whether an entity is an "arm of the State" under Will:

(1) Whether the money that would pay the judgment would come from the state (this includes three . . . factors—whether payment would come from the state's treasury, whether the agency has the money to satisfy the judgment,

4. Section 1983 provides as follows:

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

42 U.S.C. § 1983.

and whether the sovereign has immunized itself from responsibility for the agency's debts);

(2) The status of the agency under state law (this includes four factors-how state law treats the agency generally, whether the entity is separately incorporated, whether the agency can sue or be sued in its own right, and whether it is immune from state taxation); and

(3) What degree of autonomy the agency has.

873 F.2d 655, 659 (3d Cir.), cert. denied, 493 U.S. 850 (1989); see Bolden v. SEPTA, 953 F.2d 807, 814-16 (3d Cir. 1991), cert. denied, 504 U.S. 943 (1992). The Third Circuit has "repeatedly held that the most important factor in determining whether an entity is an 'arm of the State' . . . is 'whether any judgment would be paid from the state treasury.'" Independent Enters., Inc. v. Pittsburgh Water and Sewer Auth., 103 F.3d 1165, 1172 (3d Cir. 1997) (quoting Fitchik, 873 F.2d at 659).

In the instant case, the Plaintiffs have named the following parties as Defendants: 1) Thomas J. Ridge, the Governor of the Commonwealth of Pennsylvania; 2) Dr. James Gallagher, Chairperson of the Board of Education for the Commonwealth of Pennsylvania; 3) Dr. Eugene Hickok, the Secretary of Education for the Commonwealth of Pennsylvania; and 4) Barbara Hafer, the Treasurer of the Commonwealth of Pennsylvania. Suits against state officials in their official capacity should be treated as suits against the State. See Hafer v. Melo, 502 U.S. 21, 26 (1991) (finding that although state officials literally are persons, an official-capacity suit against a state officer "is not a suit against the official but rather is a suit against the official's

office"); Monell, 436 U.S. at 690 n.55 (finding that local government officials sued in their official capacities are "persons" under § 1983 in those cases in which a local government would be suable in its own name); see also Christy v. Pennsylvania Turnpike Comm'n, 54 F.3d 1140, 1143, n.3 (3d Cir. 1995) (finding that a suit against the individual defendants in their official capacities is the same as a suit against the Pennsylvania Turnpike Commission). As officials of the Commonwealth of Pennsylvania who have been sued for actions taken while in their official capacities, Ridge, Hickok and Hafer are not "persons" under § 1983.

Furthermore, because the Board of Education's ("Board's") funding comes directly from the Commonwealth of Pennsylvania, neither the Board nor Gallagher are "persons" under § 1983. See 61 Pa. Cons. Stat. Ann. § 331.2 (West Supp. 1996); 71 Pa. Cons. Stat. Ann. § 230(b) (West 1990). "[T]he Board enjoys no financial independence from the Commonwealth." Ahmad v. Burke, 436 F. Supp. 1307, 1311 (E.D. Pa. 1977). Accordingly, any judgment against the Board would be "paid from the state treasury." This weighs heavily in favor of the Board's "being considered 'an arm of the State.'" Independent Entrs., 103 F.3d at 1173.

Moreover, the second and third factors also weigh in favor of this conclusion. Pennsylvania courts have found that the Board enjoys sovereign immunity. Reiff v. City of Philadelphia, 365 A.2d 1357, 1358 (Pa. Commw. Ct. 1976). Moreover, "[t]he

Board's powers, in short, are not those of an agency 'sufficiently distinct and independent from the state as not to be considered a part of the state.'" Ahmad, 436 F. Supp. at 1311 (quoting Flesch v. Eastern Pennsylvania Psychiatric Inst., 434 F. Supp. 963, 976 (E.D. Pa. 1977)).

Accordingly, this Court finds that the Board is an "arm of the State," and thus neither the Board nor Gallagher, its Chairperson, are persons under § 1983. As Judge Edmond V. Ludwig recently stated:

plaintiff's claim against the Pennsylvania Board of Probation and Parole must be dismissed. As an agency of the Commonwealth of Pennsylvania, a suit against the Board of Probation and Parole is, in essence, a suit against the Commonwealth. The Supreme Court has held that a state may not be sued under § 1983 for either damages or injunctive relief. Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989); see also Abdul-Akbar v. Watson, 775 F. Supp. 735 (D. Del. 1991).

Carotenuto v. Angelli, No.CIV.A.95-1981, 1995 WL 217619, at * 1 (E.D. Pa. Apr. 12, 1995); See Kubis v. Pennsylvania Bd. of Probation and Parole, No.CIV.A.95-5875, 1996 WL 253324, at * 4 (E.D. Pa. May 14, 1996); McCullough v. Pennsylvania Bd. of Probation and Parole, No.CIV.A.85-1640, 1985 WL 2843, at *1 (E.D. Pa. Oct. 2, 1985) (finding Board "is not a 'person' for purposes of § 1983 action" and "as a state agency . . . is protected by the Eleventh Amendment"). Therefore, the Plaintiffs' claims against the Defendants under § 1983 must be dismissed.

d. Persons Protected Under Title VI

The Defendants do not challenge the standing of the Students and Organization Plaintiffs to sue under Title VI. The Defendants, however, challenge the standing of the City and School District Plaintiffs. The Defendants argue that the City of Philadelphia, the School District of Philadelphia and the Board of Education of the School District of Philadelphia are political subdivisions, and therefore not entitled to protection under Title VI. Furthermore, the Defendants argue that Edward G. Rendell, David W. Hornbeck and Floyd W. Alston have brought their purported claims in their official capacities, not in their individual capacities. The Defendants contend that because these Plaintiffs are suing only in their official capacities, they have no greater ability to proceed against the Defendants than the political subdivisions they represent. This Court must agree.

To this Court's knowledge, the Third Circuit has not yet considered the issue of whether Title VI creates a non-private cause of action. See District of Philadelphia v. Pennsylvania Milk Marketing Bd., 877 F. Supp. 245, 251 n.3 (E.D. Pa. 1995) (stating that the Third Circuit had not yet decided whether a school district would be permitted to sue the state for Constitutional violations). Further, the Third Circuit has not yet decided whether a city has standing under Title VI to sue the state. This Court, therefore, looks to other circuits for guidance.

The Eleventh Circuit has stated that “[n]othing in Title VI or its legislative history suggests that Congress conceived of a state instrumentality as a ‘person’ with rights under this statute.” United States v. Alabama, 791 F.2d 1450, 1454 (11th Cir. 1986) (finding that state university has no standing to sue under Title VI); see DeKalb County School Dist. v. Schrenko, 109 F.3d 680, 689 (11th Cir. 1997) (finding that political subdivision of a state, such as the DeKalb County School District and its Board of Education, may not maintain a suit for a breach of Title VI against the State in federal court). See also Stanley v. Darlington County School Dist., 84 F.3d 707, 717 n.2 (4th Cir. 1995) (holding that Title VI does not authorize a political subdivision of a state to sue the state itself).

Title VI provides for a comprehensive scheme of administrative enforcement, and the Supreme Court has implicitly recognized a private right of action for individuals injured by a Title VI violation. Alabama, 791 F.2d at 1454 (citing Cannon v. Univ. of Chicago, 441 U.S. 677, 696-97 (1978)). “Absent any indication of Congressional intent to grant additional rights under this statute to [political subdivisions] against the state, [this Court] declines to infer such a right of action by judicial fiat.” Id. In the instant matter, the City of Philadelphia, the School District of Philadelphia and the Board of Education of the School District of Philadelphia are political subdivisions. Accordingly,

they are not "persons" under Title VI, and their claims must therefore be dismissed pursuant to Rule 12(b)(6). Furthermore, Rendell, Hornbeck and Alston have brought their purported claims in their official capacities, not in their individual capacities. (See Pls.' Complaint ¶¶ 20, 25.) Because they have sued the Defendants in their official capacities, they have no more standing under Title VI than the political subdivisions that they represent. Breard v. Greene, 118 S. Ct. 1352, 1356 (1998) (finding that the Consul General, acting only in his official capacity, had no greater ability to proceed under § 1983 than did the country he represented). Similarly, the City and School Plaintiffs are not "persons" under Title VI, and their claims must therefore be dismissed pursuant to Rule 12(b)(6).

B. Motion to Dismiss or for Judgment on the Pleadings of Intervenors Jubelirer, Ryan, Rhoades and Stairs

1. Standard of Review Under Rule 12(b)(1)

Pursuant to Federal Rule of Civil Procedure 12(b)(1), a district court can grant a dismissal based on the legal insufficiency of a claim. Dismissal is proper only when the claim clearly appears to be either immaterial and solely for the purpose of obtaining jurisdiction, or is wholly insubstantial and frivolous. Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1408-09 (3d Cir.), cert. denied, 501 U.S. 1222 (1991). When the subject matter jurisdiction of the court is challenged, the party

that invokes the court's jurisdiction bears the burden of persuasion. Kehr Packages, 926 F.2d at 1409 (citing Mortensen v. First Fed. Sav. and Loan Ass'n, 549 F.2d 884, 891 (3d Cir.1977)). Moreover, the district court is not restricted to the face of the pleadings, but may review any evidence to resolve factual disputes concerning the existence of jurisdiction. McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988) (citations omitted), cert. denied, 489 U.S. 1052 (1989).

2. Standard of Review Under Rule 12(b)(6)

See discussion supra Part II.A.1.

3. Standard of Review Under Rule 12(c)

A motion for judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure is treated under the same standard as a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Regalbuto v. City of Philadelphia, 937 F. Supp. 374, 376-77 (E.D. Pa. 1995), aff'd, 91 F.3d 125 (3d Cir.) (table), cert. denied, 117 S. Ct. 435 (1996); Constitution Bank v. DiMarco, 815 F. Supp. 154, 157 (E.D. Pa. 1993). Consequently, judgment under Rule 12(c) will only be granted where the moving party has clearly established that no material issue of fact remains to be resolved and that the movant is entitled to judgment as a matter of law. Regalbuto, 937 F. Supp. at 377 (citing Inst. for Scientific Info., Inc. v. Gordon and Breach, Science

Publishers, Inc., 931 F.2d 1002, 1005 (3d Cir.), cert. denied, 502 U.S. 909 (1991)). Additionally, the district court must view the facts and inferences to be drawn from the pleadings in the light most favorable to the non-moving party. Regalbuto, 937 F. Supp. at 377 (citing Janney Montgomery Scott, Inc. v. Shepard Niles, Inc., 11 F.3d 399, 406 (3d Cir. 1993)).

4. Analysis of Plaintiffs' Claims

In their Brief in support of their Supplemental Motion for Judgment on the Pleadings, the Legislative Intervenors allege that Count One of the Complaint fails to state a claim because § 602 of Title VI does not allow a private cause of action and none should be implied. In their Motion for Judgment on the Pleadings, the Legislative Intervenors assert that the Eleventh Amendment bars the Plaintiffs' claims against the Defendants in their official capacities. The Legislative Intervenors also argue that the Complaint fails to state a claim for disparate impact under existing caselaw. First, the Court will consider whether a private cause of action exists under Title VI. Second, the Court will review whether the Claim brought by the Plaintiffs is barred by the Eleventh Amendment. Finally, the Court will consider whether the Complaint successfully states a claim for disparate impact under Title VI.

a. Private Cause of Action

The Supreme Court has stated that it is a "widely accepted assumption that Title VI creates a private cause of action." Cannon v. Univ. of Chicago, 441 U.S. 677, 703 n.33 (1979). In Cannon, the Court found that Title IX of the Education Amendments of 1972 created a private right of action for victims of discrimination in education. Id. at 703. In making that holding, the Court stated that it had "no doubt that Congress ... understood Title VI as authorizing an implied private cause of action for victims of the prohibited discrimination." Id. The Cannon Court recognized that Title IX of the Civil Rights Act of 1964 "was patterned after Title VI...." Id. at 694. "Thus, the courts have consistently held the language of Cannon to be applicable in discussions of Title VI." Chowdhury v. Reading Hosp. & Med. Center, 677 F.2d 317, 320 (3d Cir. 1982) (citing Pushkin v. Regents of the Univ. of Colorado, 658 F.2d 1372 (10th Cir. 1981); Camenisch v. Univ. of Texas, 616 F.2d 127 (5th Cir. 1980), vacated on other grounds and remanded, 451 U.S. 390 (1981); N.A.A.C.P. v. Med. Ctr., Inc., 599 F.2d 1247 (3d Cir. 1979)).

The Third Circuit recently confirmed that "[a] private right of action exists under section 601, but this right only reaches instances of intentional discrimination as opposed to instances of discriminatory effect or disparate impact." Chester Residents Concerned for Quality Living v. Seif, 132 F.3d 925, 929 (3d Cir. 1997). In this case, Plaintiffs allege discrimination

solely on the basis of disparate impact. (See Pls.' Complaint at ¶ 1.) Therefore, Plaintiffs cannot avail themselves of a private right of action under § 601.

Plaintiffs do not specify, however, whether the Complaint should be read to imply a cause of action pursuant to § 601 or § 602 of Title VI. Section 602 authorizes and directs federal agencies to promulgate regulations implementing the provisions of § 601. See 42 U.S.C. § 2000d-1. Pursuant to § 602, the Department of Education issued regulations which provide in relevant part:

Specific discriminatory actions prohibited. (1) A recipient under any program to which this part applies may not, directly or through contractual or other arrangements, on ground of race, color, or national origin: (I) Deny an individual any service, financial aid, or other benefit provided under the program; (ii) Provide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program (2) A recipient, in determining the types of services, financial aid, or other benefits, or facilities which will be provided under any such program, or the class of individuals to whom, or the situations in which, such services, financial aid, other benefits, or facilities will be provided under any such program, or the class of individuals to be afforded an opportunity to participate in any such program, may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin.

34 C.F.R. §§ 100.3(b)(1) and 100.3(b)(2).

Although the Plaintiffs' Complaint does not actually cite either § 601 or § 602, as Judge Easterbrook of the Seventh Circuit observed: "Instead of asking whether the complaint points to the appropriate statute, a court should ask whether the relief is possible under any set of facts that could be established consistent with the allegations." Bartholet v. Reishauer A.G. (Zurich), 953 F.2d 1073, 1078 (7th Cir. 1992) (citing, e.g., Conley v. Gibson, 355 U.S. 41 (1957)); see Fed. R. Civ. P. 8. Thus, this Court reads the Complaint to assert a cause of action under § 602.

The Legislative Intervenors contend that, like § 601, § 602 does not afford the Plaintiffs a private right of action. In Alexander, the Supreme Court interpreted Guardians as holding that "actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI." Alexander, 469 U.S. at 293. In Chester Residents, however, the Third Circuit determined that neither Guardians nor Alexander definitively settled the availability of a private right of action under § 602.

Nevertheless, after conducting its own analysis, the Third Circuit concluded that "private plaintiffs may maintain an action under discriminatory effect regulations promulgated by federal administrative agencies pursuant to section 602 of Title VI of the Civil Rights Act of 1964." Chester Residents, 132 F.3d 925, 937. Pursuant to § 602, the Department of Education has issued

regulations providing a private cause of action based on discriminatory impact. See 34 C.F.R. §§ 100.3(b)(2) and 100.3(b)(3). (prohibiting certain actions "which have the effect" of discriminating); see also Elston v. Talledega County Bd. of Educ., 997 F.3d 1394, 1407 n.12 (11th Cir. 1993) (evaluating merits of disparate impact claim under 34 C.F.R. §§ 100.3(b)(2) and 100.3(b)(3)). Consequently, the Plaintiffs' claim of discrimination by disparate impact under § 602 and 34 C.F.R. §§ 100.3(b)(2) and 100.3(b)(3) will not be dismissed under the theory that Title VI does not create a private cause of action.

b. Eleventh Amendment Immunity

The Eleventh Amendment bars suits against the State both when it is the named party and when it is the party in fact. Scheuer v. Rhodes, 416 U.S. 232, 237 (1974), overruled on other grounds, Davis v. Scherer, 468 U.S. 183 (1984). "[A] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. . . . As such, it is no different from a suit against the state itself." Will, 491 U.S. at 71.

In Ex parte Young, the Supreme Court recognized an exception for certain suits seeking declaratory and injunctive relief against state officers in their individual capacities. Ex parte Young, 209 U.S. 123 (1908). The Court has also stated that the exception to the Eleventh Amendment immunity established in Ex

parte Young, also permits suits against state officials in their official capacities for ultra vires acts. See Pennsylvania v. Union Gas Co., 491 U.S. 1, 26 (1989). In a recent case, the Supreme Court emphasized "the continuing validity of the Ex parte Young doctrine" and the "presumption" that "in most cases" when a plaintiff seeks prospective relief in federal court against state officers "ordinarily" the Eleventh Amendment is no bar. Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 117 S. Ct. 2028, 2034, 2038, 2040 (1997).

The Plaintiffs claim that the Eleventh Amendment does not bar their suit as one against the State because their case falls within the Ex parte Young exception to Eleventh Amendment immunity. The Plaintiffs claim that because they sue the Defendants in both their individual and official capacities, and seek to preclude the Defendants from continuing violations of federal law, their suit falls within the exception to Eleventh Amendment immunity established in Ex parte Young. This Court must agree.

Accepting as true the facts alleged in the Complaint and all reasonable inferences that can be drawn from them as proscribed by Rule 12(b)(6), this Court must find that the instant action is solely an official capacity suit. The distinction between official-capacity and personal-capacity suits is, by all accounts, a difficult one. See Kentucky v. Graham, 473 U.S. 159, 165 (1985)

("[T]his distinction apparently continues to confuse lawyers and lower courts.").

[T]he distinction between official-capacity suits and personal-capacity suits is more than "a mere pleading device." . . . State officers sued for damages in their official capacity are not "persons" for purposes of the suit because they assume the identity of the government that employs them By contrast, officers sued in their personal capacity come to court as individuals. A government official in the role of personal-capacity defendant thus fits comfortably within the statutory term "person."

Hafer v. Melo, 502 U.S. 21, 27 (1991).

The Supreme Court has stated that official-capacity suits "'generally represent only another way of pleading an action against an entity of which an officer is an agent.'" Kentucky v. Graham, 473 U.S. 159, 165 (1985) (quoting Monell v. New York City Dept. of Soc. Servs., 436 U.S. 658, 690, n.55 (1978)). Suits against state officials in their official capacity therefore should be treated as suits against the State. See Hafer v. Melo, 502 U.S. 21, 26 (1991) (finding that although state officials literally are persons, an official-capacity suit against a state officer "is not a suit against the official but rather is a suit against the official's office"); Monell, 436 U.S. at 690 n.55 (finding that local government officials sued in their official capacities are "persons" under § 1983 in those cases in which a local government would be suable in its own name); see also Christy v. Pennsylvania Turnpike Comm'n, 54 F.3d 1140, 1143, n.3 (3d Cir. 1995) (finding that a suit against the individual defendants in their official

capacities is the same as a suit against the Pennsylvania Turnpike Commission). Indeed, when officials sued in this capacity in federal court die or leave office, their successors automatically assume their roles in the litigation. Graham, 473 U.S. at 165 (citing Fed. R. Civ. P. 25(d)(1); Fed. R. App. P. 43(c)(1)). Thus, the Plaintiffs' suit against Defendants Ridge, Gallagher, Hickok and Hafer in their official capacities "is no different from a suit against the State itself." Hafer, 502 U.S. at 26; see Breard v. Greene, 118 S. Ct. 1352, 1356 (1998) (finding that action brought by Consul General, acting only in his official capacity, could be nothing other than an official capacity suit); Byrd v. Raines, 521 U.S. 811, 2323 (1997) (Souter, J., concurring) (stating that "the Court is certainly right in concluding that appellees sue not in personal capacities, but as holders of seats in the Congress"); Arizonans for Official English v. Arizona, 117 S. Ct. 1055, 1057 (1997) (upholding the district court's ruling that suit brought against the Governor in her individual and official capacities was an official capacity suit).

A plaintiff can, however, bring a claim against a state official in his or her official capacity despite the Eleventh Amendment if the plaintiff is seeking prospective injunctive relief. See Quern v. Jordan, 440 U.S. 332, 337 (1979); Edelman v. Jordan, 415 U.S. 651, 676-77 (1974); Ex Parte Young, 209 U.S. at 155- 56; Helfrich v. Commonwealth of Pennsylvania Dept. of Military

Affairs, 660 F.2d 88, 90 (3d Cir.1981); Eckford-El v. Toombs, 760 F. Supp. 1267, 1270 (W.D. Mi.1991). Such claims are allowed because of the legal fiction that the officer being enjoined has acted in an ultra vires fashion, and is therefore not really acting in an "official capacity." See Papasan v. Allain, 478 U.S. 265, 276 (1986) (stating that Ex Parte Young "was based on a determination that an unconstitutional state enactment is void and that any action by a state official that is purportedly authorized by that enactment cannot be taken in an official capacity since the state authorization for such action is a nullity."); Benning v. Bd. of Regents of Regency Univs., 928 F.2d 775, 778 (7th Cir. 1991) ("In Ex Parte Young, the Supreme Court authorized a federal court injunction against a state official based upon the theory that his violation of federal law stripped him of his official authority."); Laskaris v. Thornburgh, 661 F.2d 23, 26 (3d Cir. 1981); cf. Ex Parte Young, 209 U.S. at 159.

In the instant matter, the Plaintiffs have made claims for injunctive relief. It is not clear at this juncture whether such relief would truly be prospective and therefore not barred by the Eleventh Amendment. See Papasan, 478 U.S. at 278; Hutto v. Finney, 437 U.S. 678, 690 (1978) ("the difference between retroactive and prospective relief 'will not in many instances be that between day and night.'") (quoting Edelman v. Jordan, 415 U.S. 651, 667 (1974); Laskaris, 661 F.2d at 26; cf. Benning, 928 F.2d at

778. Accordingly, at this juncture, this Court cannot find that the Plaintiffs' claims are barred by the Eleventh Amendment.

c. Disparate Impact

The Plaintiffs base their claim on the federal Department of Education's regulations implementing Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d, et seq. In their Complaint, the Plaintiffs allege discrimination solely on the basis of disparate impact. (See Pls.' Complaint at ¶ 1.) The Plaintiffs assert, in substance, that the discriminatory impact arises because the uniformly applied state formula for allocating basic education funds among the 501 school districts does not bring about the same result in Philadelphia as it might in another, more affluent district, because of Philadelphia's special needs. The Plaintiffs' factual allegations, even when assumed to be true for purposes of this motion, do not, as a matter of law, state a disparate-impact claim. The Plaintiffs' Complaint is merely a "we-need-more-money" allegation of a type that has been held non-actionable.

Courts considering claims under analogous Title VI regulations have held that a plaintiff alleging discrimination in program receiving federal financial assistance must make prima facie showing that alleged conduct has a disparate impact. See New York Urban League, Inc. v. State of N.Y., 71 F.3d 1031, (2d Cir. 1995) (citing Civil Rights Act of 1964, § 601, 42 U.S.C.A. §

2000d); Georgia State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403, 1417 (11th Cir. 1985). "A plaintiff alleging a violation of the [Department of Education] regulations must make a prima facie showing that the alleged conduct has a disparate impact." See Georgia State Conference, 775 F.2d at 1417.

"[A] plaintiff may establish a prima facie case of disparate impact by showing that use of the test causes the selection of applicants ... in a racial pattern that significantly differs from that of the pool of applicants." Bridgeport Guardians, Inc. v. City of Bridgeport, 933 F.2d 1140, 1146 (2d Cir.). Such a showing can be established through the use of statistical evidence which discloses a disparity so great that it cannot reasonably be attributed to chance. See Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 307-08 (1977). To establish a prima facie case, the statistical disparity must be sufficiently substantial to raise an inference of causation. See Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994-95 (1988).

In Alexander v. Choate, 469 U.S. 287 (1985), the Supreme Court applied section 504 of the Rehabilitation Act to a factual situation somewhat similar to that presented here. In that case, Tennessee had reduced from 20 to 14 the number of inpatient hospital days per year that it would reimburse hospitals on behalf of a Medicaid recipient. Statistical evidence showed that disabled persons were more likely than non-disabled persons to require more

that 14 days of hospitalization per year, and accordingly challenged the reduction as violative of section 504. The Supreme Court first assumed that a disparate impact would be sufficient to state a claim under section 504. See id. at 299. It held, however, that section 504 requires that "an otherwise qualified handicapped individual must be provided with meaningful access to the benefit that the grantee offers." Id. at 301 (emphasis added). The Court noted that the benefit itself "cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled; to assure meaningful access, reasonable accommodations in the grantee's program or benefit may have to be made." Id.

Applying these standards, the Court determined that the relevant benefit was the 14-day period of covered hospitalization. The Court upheld the benefit limitation, reasoning that it "does not exclude the handicapped from or deny them the benefits of the 14 days of care the State has chosen to provide." Alexander, 469 U.S. at 302. "The reduction in inpatient coverage will leave both handicapped and non-handicapped Medicaid users with identical and effective hospital services fully available for their use, with both classes of users subject to the same durational limitation." Id.

In the instant case, the Plaintiffs do not assert that the Executive Branch Officers calculate funding for the School

District any differently than they calculate it for other districts or that the School District receives any less Commonwealth funding than other school districts. Rather, the Plaintiffs want the School District to get more than the statutory formula provides under the theory that factors external to the state subsidy program make education more expensive or funding shortfalls greater in Philadelphia. Under Alexander, this scenario does not state a cause of action for disparate impact. See Alexander, 469 U.S. at 287; see also Cercpac v. Health and Hospitals Corp., 147 F.3d 165, 167 (2d Cir. 1998) (stating that "the disabled do not have a right to more public services than the non-disabled, even if the disabled need them") (quoting Lincoln Cercpac v. Health and Hospital Corp., 977 F. Supp. 274, 280 (S.D. N.Y. 1997)). Likewise, "the [School District] do[es] not have a right to more public services than [other school districts], even if the [School District] need[s] them." Id. Accordingly, the Plaintiffs' claims arising under Title VI and its implementing regulations are dismissed for failure to state a claim.

C. Petition of the United States for Leave to Participate

The United States has filed a petition for leave to participate in this action as amicus curiae. The United States alleges that it has an interest in ensuring that both Title VI and its implementing regulations may be enforced in federal court by

private parties. In the interest of justice this Court shall grant the petition.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DAVID POWELL, et al. : CIVIL ACTION
 :
 v. :
 :
 THOMAS J. RIDGE, et al. : NO. 98-1223

FINAL JUDGMENT

AND NOW, this 18th day of November, 1998, upon consideration of the Defendants' Motion to Dismiss the Plaintiffs' Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure (Docket No. 7), the Plaintiffs' response thereto (Docket No. 12), the Defendants' reply thereto (Docket No. 15), the Defendants' Supplemental Motion to Dismiss (Docket No. 25), the Motion to Dismiss of the Legislative Intervenors (Docket No. 16), the Plaintiffs' response thereto (Docket No. 18), the Brief of Legislative Intervenors for Judgment on the Pleadings (Docket No. 23), the Legislative Intervenors' Reply Brief in Support of their Motion to Dismiss and for Judgment on the Pleadings (Docket No. 24), and the Plaintiffs' Opposition to Intervenors' Supplemental Motion for Judgment on the Pleadings and Defendants' Supplemental Motion to Dismiss Complaint (Docket No. 26); also before the court is the petition of the United States for leave to participate as amicus curiae in this action (Docket No. 13), Brief of the United States as Amicus Curiae in Opposition to Defendant Intervenors' Motion to Dismiss or for Judgment on the Pleadings (Docket No. 20), and United States' Motion to Further Participate as Amicus Curiae

and to Intervene of Right (Docket No. 21), IT IS HEREBY ORDERED that:

(1) all claims arising under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d-2000d-4a (1994), and certain regulations promulgated by the United States Department of Education's Title VI implementing requirements, 34 C.F.R. §§ 100.3(b)(1) and 100.3(b)(2) (1997) ("Count One") brought by the Plaintiffs⁶ against Defendants: 1) Thomas J. Ridge, the Governor of the Commonwealth of Pennsylvania; 2) Dr. James Gallagher, Chairperson of the Board of Education for the Commonwealth of Pennsylvania; 3) Dr. Eugene Hickok, the Secretary of Education for the Commonwealth of Pennsylvania; and 4) Barbara Hafer, the Treasurer of the Commonwealth of Pennsylvania are **DISMISSED** with prejudice;

(2) all claims brought by the Plaintiffs arising under the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1994) ("Count Two") against Defendants: 1) Thomas J. Ridge, the Governor of the Commonwealth of Pennsylvania; 2) Dr. James Gallagher, Chairperson of the Board of Education for the Commonwealth of Pennsylvania; 3) Dr. Eugene Hickok, the Secretary of Education for the Commonwealth

⁶The Plaintiffs include: "Students who attend public school in Philadelphia, their parents and guardians, and organizations that represent their interests ('Students and Organization Plaintiffs'); the School District of Philadelphia, the Board of Education of the School District of Philadelphia, and officials who lead the School District ('School District Plaintiffs'); and the Mayor of the City of Philadelphia ('City Plaintiffs')". (Pls.' Compl. ¶ 1).

of Pennsylvania; and 4) Barbara Hafer, the Treasurer of the Commonwealth of Pennsylvania are **DISMISSED** with prejudice; and

(3) the motion of the United States for leave to participate as amicus curiae in this action is GRANTED.

BY THE COURT:

HERBERT J. HUTTON, J.