UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

STATE OF CONNECTICUT and the GENERAL ASSEMBLY OF THE STATE OF CONNECTICUT	)	
Plaintiffs,	)	
v.	)	CIVIL NO. 3:05-CV-01330 (MRK)
MARGARET SPELLINGS, SECRETARY OF THE DEPARTMENT OF EDUCATION	)	
Defendant.	)	

INTERVENORS' MEMORANDUM IN RESPONSE TO PLAINTIFFS' AMENDED COMPLAINT

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INTRODUCTION

Intervenors[1] submit this Memorandum in Response to the State of Connecticut and the General Assembly of the State of Connecticut's ("Connecticut" or "State") Amended Complaint against Margaret Spellings, in her official capacity as the Secretary of Education ("Secretary"). Intervenors maintain that this Court should dismiss Connecticut's action, and incorporate and reiterate the arguments in their Motion to Dismiss and Reply in Further Support of the Motion to Dismiss, filed with this Court on January 30, 2006. In this Memorandum, Intervenors set forth additional arguments as to why Connecticut's action must be dismissed, in light of the deficiencies in the State's Amended Complaint. In particular, this Memorandum focuses on the legal requirements of the No Child Left Behind Act of 2001 ("NCLB" or "the Act") and the clear command of each state's participation in funding those requirements.

ARGUMENT

I. NO CHILD LEFT BEHIND SPECIFICALLY CONTEMPLATES THE USE OF STATE FUNDS, MEANING THIS COURT MUST DISMISS CONNECTICUT'S COMPLAINT

In an effort to divert this Court from the technical deficiencies with the present action – particularly a lack of ripeness and a failure to exhaust administrative remedies – Connecticut focuses its Amended Complaint on the question of state versus federal funding of the Act. However, this cannot save Connecticut's Amended Complaint from dismissal for the fundamental reason that Connecticut is required by the plain terms of the Act to contribute funds to the Act's implementation. In addition, the Act is plainly constitutional and nothing in the statute's own terms prevents the use of state funds.

[1] Movants were granted permission to submit the instant Memorandum pursuant to the Order of this Court dated April 17, 2006.

A. Nothing in the Statute Prohibits the Use of State Funds

In its Amended Complaint, Connecticut's first cause of action rests upon the so-called unfunded mandate provision of the Act, 20 U.S.C. § 7907(a). Connecticut argues that this provision commands that "States and their school districts cannot be required to 'spend any funds or incur any costs not paid for under this chapter.'" Amended Complaint ¶ 175 (quoting 20 U.S.C. § 7907(a)).

To the contrary, the provision acts as a restriction only on the actions of federal employees and officers. As the full relevant text reads,

> Nothing in this Act shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or school's curriculum, program of instruction, or allocation of State or local resources, or mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act.

20 U.S.C. § 7907(a). As the Eastern District of Michigan determined in consideration of this precise issue, the clause focuses on the actions of government officials and employees in implementing the Act, not on those of Congress in enacting the statute. *See Sch. Dist. of Pontiac v. Spellings*, 2005 WL 3149545, at *4 (E.D. Mich. Nov. 23, 2005). Connecticut's obfuscatory phrasing throughout its Complaint aside, Connecticut has sought waivers of assessment requirements clearly imposed by the statute, as enacted by Congress. *See, e.g.*, 20 U.S.C. § 6311(b)(3)(C). If these were not required by the plain terms of the statute, Connecticut would not have needed to seek a waiver in the first place. The only action thus far by a federal employee or officer has been the Secretary's denial of Connecticut's waiver requests. But refusing to waive an existing legal obligation is simply not equal to imposing that obligation in

the first place. *Cf. Hunter v. Baker Motor Vehicle Co.*, 225 F. 1006, 1013 (N.D.N.Y. 1915) (defining waiver as the voluntary yielding of some existing legal right or benefit).[2]

Moreover, Connecticut has not been required, or improperly mandated to take any action. Through the Act, Connecticut has opted to participate in a voluntary federal program in exchange for federal funds. Such programs are common and perfectly legal. *See, e.g., Padavan v. United States*, 82 F.3d 23, 29 (2d Cir. 1996) (ruling state is not "mandated" to participate in voluntary federal funding programs); *see also New York v. United States*, 505 U.S. 144, 167 (1992) (finding no constitutional problem with Congress urging the states to adopt particular programs through use of the spending power).

In addition, Connecticut's claim that the Act prohibits the use of state funds is undermined by the Act's repeated references to the use of state and local funds in its

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[2] Contrary to the Secretary's argument, the denial of waivers is clearly subject to judicial review because the Secretary's discretion under the statute is constrained. Section 20 U.S.C. § 7861 sets forth clear limits on the exercise of the Secretary's discretion in waiving provisions of the Act. First, the Secretary is prohibited by statute from waiving several key components of the Act, including provisions related to parental participation and involvement. *See* 20 U.S.C § 7861(c). In addition, a requirement of the Act can only be waived if a state explains how the waiver will "increase the quality of instruction for students" and "improve the academic achievement of students." *See* 20 U.S.C. § 7861(b)(1). Finally, the Secretary is only permitted to extend a waiver, once granted, if the waiver has in fact "contributed to improved student achievement" and the extension is in the public interest. *See* 20 U.S.C. § 7861(d).

Obviously these standards are highly discretionary and courts should defer to the Secretary's expertise in this area. However, there are clear statutory limits on the Secretary's authority and factors she must consider in ruling on waivers; in other words, there is some law for a court to apply in evaluating her decision. *See, e.g., Christianson v. Hauptman*, 991 F.2d 59, 62-63 (2d Cir. 1993) (finding judicial review restricted only in the "rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply" and allowing review where Congress provided some standards to guide the exercise of administrative authority). For example, if the Secretary waived a provision of the statute guaranteeing the equitable participation of private school students, she would be in violation of the statute, and a court could invalidate her action. *See* 20 U.S.C. § 7861(c). Similarly, if a state submitted a request to waive all mathematics testing with no explanation as to how this would improve student education overall, and the Secretary granted the waiver, a court would have the power to reverse that decision. Though the Secretary's discretion may be great, the key point is that there are boundaries set by Congress that the courts must police. Moreover, the Secretary has certainly not provided clear and convincing evidence of Congressional intent to restrict judicial review. Thus, because the statute does provide guidelines to judge the exercise of the Secretary's discretion, this is not one of the narrow class of cases where judicial review is precluded. *See, e.g., Christianson*, 991 F.2d at 62-63; *see also Pleasant E. Assocs. v. Martinez*, 2004 WL 840290, at *9-10 (S.D.N.Y. Apr. 19, 2004) (finding court can look to legislation's objectives for guidance in reviewing agency action).

implementation, meaning that Connecticut's claim that no state funds are necessary obviously fails as a matter of law. *See, e.g.*, 20 U.S.C. § 6321(b)(1) ("State educational agency or local educational agency shall use Federal funds received under this part only to supplement the funds that would ... be made available from non-Federal sources for the education of pupils participating in programs assisted under this part, and not to supplant such funds"); 20 U.S.C. § 7217(a); *see also* 20 U.S.C. § 6381a(c)(5); 20 U.S.C. § 7255d(b)(3); 20 U.S.C. § 6535(c)(3).

The most significant reference involves the Act's outline of a state's responsibility to develop and implement yearly assessments in the event that federal funding falls below a certain level. That provision reads in pertinent part:

> A state may defer the commencement, or suspend the administration *but not cease* the development of the assessments described in this paragraph that were not required prior to the date of enactment of the No Child Left Behind Act of 2001, for 1 year each year for which the amount appropriated for grants under 6113(a)(2) is less than—
>
> (i) $370,000,000 for fiscal year 2002;
> (ii) $380,000,000 for fiscal year 2003;
> (iii) $390,000,000 for fiscal year 2004; and
> (iv) $400,000,000 for fiscal years 2005 through 2007

20 U.S.C. § 6311(b)(3)(D) (emphasis added). Section 6311(b)(3)(D) makes clear that a state may defer the administration of yearly assessments if federal funding falls below a certain level, but that the state must continue to develop yearly assessments regardless of federal funding levels. Also, as set forth in this section, as long as Congress provides the specified level of funding each fiscal year, states are required to implement the yearly assessments, notwithstanding any additional costs that they may incur. Consequently, Congress clearly intended for states to contribute at least some funds to developing and implementing the Act's requirements. Connecticut has never squarely addressed the obvious implications of this

provision. Thus, Connecticut cannot escape its obligation to contribute state funds to a program it willfully and knowingly adopted.

B. No Child Left Behind is Constitutional

As set forth repeatedly in previous filings, No Child Left Behind represents a valid exercise of the Congressional spending power and is not unconstitutional.

Article I, § 8 of the United States Constitution empowers Congress to "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States." Pursuant to this clause, the Supreme Court has recognized Congressional power to "attach conditions on the receipt of federal funds, and ... to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (internal quotations omitted); *see also Henrietta D. v. Bloomberg*, 331 F.3d 261, 290 (2d Cir. 2003). Provided these conditions are in pursuit of the general welfare and unambiguous, there is no constitutional violation. *Dole*, 483 U.S. at 207-10.

Again, as set forth in the previous briefs, the Act is clearly in furtherance of the general welfare and the conditions for the receipt of federal funds are unambiguous. Contrary to Connecticut's pleadings, § 7907(a) does not make the Act ambiguous in light of that provision's plain language and the multiple other provisions of the Act that call for state spending. In addition, Connecticut evinced its own understanding of the Act's requirements by formulating and submitting a plan for the Act's implementation. In order to be unambiguous, a state must appreciate its primary, core obligations in agreeing to a program; the federal government need not set forth every exact, conceivable requirement. *See, e.g.*, *Benning v. Georgia*, 391 F.3d 1299, 1306 (11th Cir. 2004). Given that it submitted a plan to develop testing requirements in

compliance with NCLB, Connecticut cannot possibly argue that it did not understand its primary obligations in agreeing to accept federal funds.

Finally, even if this Court considers the dubious coercion doctrine, the Act is not coercive under the terms set forth by the Fourth Circuit, virtually the only circuit that has adopted this standard. *See West Virginia v. U.S. Dep't of Health and Human Servs.*, 289 F.3d 281, 291 (4th Cir. 2002) (ruling analogous statute with similarly high levels of federal funding not coercive on its face).

II. CONNECTICUT SHOULD NOT BE PERMITTED TO EVADE THE ESSENTIAL REQUIREMENTS OF NO CHILD LEFT BEHIND

This Court must appreciate the importance and central nature of the testing provisions that Connecticut seeks to evade as part of this suit. The State references three requirements of the Act that it has sought to waive, including (1) assessments of disabled students at grade level (2) assessments of English-language learners, or ELL students and (3) annual testing. These testing requirements are central to the Act's core mission of better educational results and increased accountability.

First, the State seeks to assess students with disabilities at essentially whatever level the school chooses to place the student. *See* Amended Complaint ¶¶ 50, 104, 116. Thus, according to the State, if a 12-year-old Connecticut student is placed in the second grade of a public school, he or she should be assessed at a second-grade level. This contention is directly contrary to the central requirements of the Act. The law requires that schools assume the responsibility of all students, including disabled students to proficiency. *See, e.g.*, 20 U.S.C. § 6311(b). Indeed, a focus of the Act is ensuring that disabled students are not left behind their peers, and schools that fail to make adequate yearly progress with respect to students with disabilities face corrective actions similar to those faced by schools that fail to make progress in other areas. *Id.*

Connecticut relies upon the Act's requirement of "reasonable accommodations" to explain its desire for lowered testing standards. *See* Amended Complaint ¶ 49. It is true that the law calls for reasonable accommodations to be given to students with disabilities and that the law recognizes that a limited number of students may be so cognitively impaired that they require alternative assessments. However, as the Secretary notes in her response to the Amended Complaint, the Secretary has acted administratively to implement this provision by permitting alternate assessments for up to 3 percent of students with disabilities. *See* Secretary's Response to Amended Complaint at 10-11. For other students, accommodations include extra time to complete exams or other such assistance. Connecticut attempts to go far beyond these carefully drawn provisions by asking the power to keep up to 100 percent of children with disabilities at the lowest grade levels and assessing their skills only at these levels. This would be an abdication of the State's statutory responsibility to help these students achieve proficiency and a violation of NCLB. In sum, the narrow "reasonable accommodations" provision does and should not enable Connecticut to escape its obligations to prepare and assess disabled students at the same level as their peers.

Next, the State asks to exempt ELL students from assessment during their first three years in a United States school. *See* Amended Complaint ¶¶ 51, 52, 104. Again, this runs contrary to the fundamental purposes of the Act of increased quality assessments for all student populations.

Nonetheless, the Secretary is most likely mistaken in her statement on the law as to this issue. NCLB requires that assessments be conducted "to the extent practicable, in the language and form most likely to yield accurate data on what such students know and can do in academic content areas until such students have achieved English language proficiency...." 20 U.S.C. § 6311(b)(3)(C). Educational experts have concluded that testing students in English before they

have gained English proficiency is not a valid assessment of the students' true substantive proficiency. A broad consensus of experts in several states have concluded that testing in Spanish is practicable and will yield valid comparisons with tests given in English. *See* U.S. Department of Education, Biennial Report to Congress on the Implementation of the State Formula Grant Program, Washington, DC 20005 (the states are Colorado, Delaware, Kansas, Massachusetts, Minnesota, Nebraska, New York, Ohio, Oregon, Pennsylvania, Rhode Island and Texas); *see also* Bob Hass, *How Equitable is U.S. Education for English Language Learners*, Stanford Educator, Fall 2002.

Where Connecticut errs is in assuming that if it must conduct assessments in Spanish, it must also conduct those assessments in Russian, German, or any other language spoken by a student. The requirement of the statute is "to the extent practicable" and non-English, non-Spanish speaking students represent much smaller populations in the relevant state communities. The point is that the language testing determination is a highly fact-specific inquiry and the law yields different requirements for different groups.

Finally, Connecticut asks excusal from the core requirement of the Act—annual assessments. This is truly the "bright line" of No Child Left Behind and a focal point of the law, which repeatedly references each state's annual obligations. *See* 20 U.S.C. § 6311. There is no question that the Act intended annual assessments to allow parents and other observers to monitor the progress of students and their schools.

III. THIS COURT SHOULD NOT DILUTE NO CHILD LEFT BEHIND'S TESTING REQUIREMENTS

Although it is important that this Court understand the fundamental nature of the testing requirements at issue in this case, it is equally important that the Court appreciate what issues are properly before it, and what issues are not. In her response to the Amended Complaint, the

Secretary encourages this Court to wade into the nebulous factual questions of precisely what manner of testing Connecticut must implement (multiple-choice versus formative, Connecticut's existing tests versus a new modified assessment) and exactly how much the testing will cost. The specific manner of testing required by the Act, especially where special student groups are included, raising the question of what is "practicable," should not be resolved by the Court.

Taking Connecticut's allegations as true, as this Court must at this stage in the proceeding, implementation of No Child Left Behind in Connecticut will require the use of state funds. *See* Amended Complaint ¶¶ 6, 8, 9, 14, 19, 159, 163, 167. The Secretary cannot have this actions dismissed simply by disagreeing with Connecticut's additional, superfluous factual allegations. The Secretary is essentially asking this Court to make a factual determination that there is a less expensive means of implementing the Act than that Connecticut has chosen (with the Secretary's own approval). *See* Secretary's Response to Amended Complaint at 4-5. Even if, as the Secretary contends, Connecticut's plan exceeds the requirements of the Act, such an issue is not appropriate for a motion to dismiss as factual questions remain concerning the feasibility and cost of implementing an entirely different testing regime that would comply with the Act, in a timely fashion. Finally, as the GAO study relied upon by both current parties notes, the costs associated with testing are likely to increase, and there is no guarantee that federal funds will continue to cover the full cost of implementation of any manner of testing into the future. *See* GAO Study at 20-21. In any case, the key point is that the cost of test implementation under various testing regimes presents fact-intensive questions, not suited for resolution on a motion to dismiss.

Furthermore, in suggesting that certain forms of assessments need not be undertaken and that Connecticut can implement the lowest level of testing possible (and therefore need not

expend state funds to comply with the Act), the Secretary essentially asks this Court to eviscerate the Act to save it. But the Court need not put its imprimatur on this position, setting a precedent that would foster a lowest-common denominator system and damage the educational prospects of the children of Connecticut and their peers throughout the United States.

Nonetheless, this Court can and should dismiss this action based on either of the two legal points properly, squarely before it, namely: (1) that Connecticut's claim is not yet ripe for review, as set forth in the Intervenors' and the Secretary's earlier motions and (2) because the No Child Left Behind Act clearly contemplates the use of state funds in its implementation.

CONCLUSION

For the reasons set forth above, as well as those set forth in Intervenors' and the Secretary's previous motions to dismiss, this Court should dismiss Connecticut's Amended Complaint with prejudice.

Dated: New York, New York
April 26, 2006

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CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2006, a true and accurate copy of the foregoing Memorandum was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated in the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System. Courtesy copies were also provided to chambers and the parties via overnight mail.

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