UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS - EASTERN DIVISION

BOARD OF EDUCATION OF OTTAWA TOWNSHIP HIGH SCHOOL DISTRICT 140, LASALLE COUNTY, ILLINOIS; et al., Plaintiffs, v. THE U.S. DEPARTMENT OF EDUCATION; et al., Defendants.	Case No. 05 C 0655 Honorable David H. Coar Judge Presiding

MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(B)(1) AND 12(B)(6) OF DEFENDANTS THE U.S. DEPARTMENT OF EDUCATION AND MARGARET SPELLINGS IN HER OFFICIAL CAPACITY

NOW COME the Plaintiffs, the BOARD OF EDUCATION OF OTTAWA TOWNSHIP HIGH SCHOOL DISTRICT 140, LASALLE COUNTY, ILLINOIS; the BOARD OF EDUCATION OF OTTAWA ELEMENTARY SCHOOL DISTRICT 141, LASALLE COUNTY, ILLINOIS; T.H., A MINOR, BY HIS MOTHER AND FATHER AND NEXT FRIEND, C.H. AND S.H.; C.H. AND S.H. INDIVIDUALLY; E.C., A MINOR, BY HIS MOTHER AND NEXT FRIEND D.C.; D.C. INDIVIDUALLY; H.G., A MINOR, BY HER MOTHER AND NEXT FRIEND L.G.; L.G. INDIVIDUALLY; M.H., A MINOR, BY HER MOTHER AND FATHER AND NEXT FRIEND J. H. AND A. H.; AND J. H. AND A. H. INDIVIDUALLY, by and through their attorneys, Raymond A. Hauser, Christina Sepiol, Anthony G. Scariano and Darcee C. Young of Scariano, Himes and Petrarca, Chtd., and in opposition to Defendant U.S. Department of Education's and Margaret Spelling's 12(b)(1) and 12(b)(6) motion to dismiss state as follows.

I. BACKGROUND

On February 3, 2005, Plaintiffs Ottawa Township High School District 140, and Ottawa Elementary School District 141 (collectively referred to as "Plaintiff School Districts"), individual Plaintiffs T.H., E.C., H.G. and M.H., (collectively referred to as "Individual Plaintiffs"), and their

parents, Plaintiffs C.H., S.H., D.C., L.G., J.H. and A.H. filed a complaint against the U.S. Department of Education ("D.O.E."), Margaret Spellings, U.S. Secretary of Education, in her official capacity ("Spellings"), (collectively referred to as the "Federal Defendants"), the Illinois State Board of Education ("ISBE") and Dr. Randy J. Dunn, Interim Superintendent of the ISBE ("Dr. Dunn"), (collectively referred to as "State Defendants") seeking a declaratory judgment that §§ 6311 and 6316 of the No Child Left Behind Act of 2001 ("NCLBA") are invalid. Compl. ¶¶ 1-17.[1]

On March 30, 2005 the State Defendants moved to dismiss Plaintiffs' Complaint pursuant to Fed. R.Civ.P. 12(b)(1) on grounds that the Eleventh Amendment bars the suit against them and that they are not proper parties to the lawsuit. Plaintiffs filed their Response in Opposition to the State Defendants' Motion to Dismiss on April 26, 2005, alleging that: (1) the Eleventh Amendment does not bar this action against the Defendant ISBE because the Individuals with Disabilities Education Act ("IDEA") abrogates Illinois' immunity from suit in federal court; (2) Plaintiffs' claim for injunctive relief against Dr. Dunn in his official capacity is not barred by the Eleventh Amendment; and (3) the Complaint alleges an actual case or controversy and sets forth a proper basis for this Court to exercise jurisdiction over Plaintiffs' claims. On April 15, 2005, the Federal Defendants filed their motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(1) and 12(b)(6) on grounds that Plaintiffs lack Article III standing, and that the NCLBA is not inconsistent with IDEA.

A. NO CHILD LEFT BEHIND ACT

The NCLBA, enacted January 8, 2002, amended the Elementary and Secondary Education Act, ("ESEA"), 20 U.S.C. §§ 6301-7938, to among other things, require that all students meet or exceed State standards in reading and math by the 2013-2014 school year. 20 U.S.C. § 6311(b)(2)(F); Compl. ¶ 31. The NCLBA emphasizes objective measures of student achievement, such as standardized testing and holds schools accountable for their progress in meeting goals. Section 6316 of the NCLBA provides in relevant part, that local educational agencies receiving NCLBA funds use State academic assessments to review annually the progress of each school served

[1] Citations to the Plaintiffs' Complaint are designated as "Compl. ¶ ___." Citations to the D.O.E.'s and Spelling's Memorandum of Law in Support of their Motion to Dismiss are designated as "MTD at ___."

to determine whether the school is making adequate yearly progress. 20 U.S.C. § 6316(a)(1)(A).

Adequate yearly progress ("AYP") is defined by the State and represents the annual academic performance targets in reading and math that the State, school districts, and schools must reach to be considered on track for 100% proficiency by the 2013-2014 school year. 20 U.S.C. § 6311(b)(2)(B)-(C); 20 U.S.C. § 6311(b)(2)(F); Compl. ¶ 31. Rather than tracking the progress of the same students over time, under the NCLBA, AYP is measured by comparing successive groups of students against established standards. The indicators to determine AYP in Illinois are: (1) State assessment of student performance in reading and mathematics on a standardized test; (2) student attendance rates at the elementary school level and graduation rates at the high school level; and (3) participation rates on student assessments. 105 ILCS 5/2-3.25(b); Compl. ¶ 32. If a school fails to meet state objective standards in determining AYP based on the aforementioned indicators, the school and/or district is considered to have failed to make AYP. The NCLBA and Illinois accountability system have specific provisions for a school's failure to make AYP. 20 U.S.C. § 6316; 105 ILCS 5/2-3.25(d). The provisions are progressive according to the number of years in which a district or school has failed to meet state standards. 20 U.S.C. § 6316.

Achievement levels apply to the student population as a whole and to each of the four demographic subgroups designated under NCLBA: (1) economically disadvantaged students, (2) students from major racial and ethnic groups, (3) students with disabilities and (4) student with limited English proficiency. 20 U.S.C. § 6311(b)(2)(C)(v)(II)(aa-dd); Compl. ¶ 33. In Illinois, if a subgroup has more than 40 students, the school must separate out the scores of those students, and those students as a group must meet AYP. 20 U.S.C. § 6311(b)(2)(C)(v); Compl. ¶ 34. Assessment data for each of the subgroups, including the subgroup for students with disabilities, must be disaggregated and each subgroup as a whole must make AYP in order for the school, as a whole, to achieve AYP. 20 U.S.C. § 6311(b)(2)(C)(v); Compl. ¶ 33. The NCLBA requires approximately 90% of all students with disabilities be proficient according to grade level standards, by the 2013-2014 school year. 20 U.S.C. § 6311(b)(2)(F); National Conference of State Legislators, Task Force on No Child Left Behind, Final

Report, February 2005 *at* www.ncsl.org/programs/press/2005/pr050223.htm.[2]

Plaintiffs School Districts did not achieve AYP for two consecutive years and are designated for "school improvement." 20 U.S.C. § 6316(b)(1)(A); Compl. ¶¶ 38, 40. Schools identified as being in "school improvement" must develop a school improvement plan, offer technical assistance and offer public school choice. 20 U.S.C. § 6316(b)(1)(E), 20 U.S.C. § 6316(b)(4)(B). The school improvement plan is developed in consultation with experts, parents, school staff, and the school district and is designed to raise student performance on NCLBA-required tests. 20 U.S.C. § 6316(b)(3). Among other things, the plan is required to address the specific academic issues that caused the school to be designated as in need of improvement, adopt scientifically based strategies for resolving those issues, and adopt policies and practices concerning the school's core academic subjects to help ensure that all groups of students meet NCLBA proficiency standards. 20 U.S.C. § 6316(b)(3). The plans must be reviewed and approved by each school district through a peer review process, and must be implemented by schools with technical assistance from their school district. 20 U.S.C. §§ 6316(b)(3)(E) and 6316(b)(4). "Technical assistance" includes assistance in analyzing assessment data, identifying and addressing problems in instruction, identifying and implementing professional development, instructional strategies and assistance in analyzing and revising the school's budget so that school resources can be more effectively allocated. 20 U.S.C. § 6316(b)(4)(B). Additionally, school districts identified as being in school improvement status must offer all students "public school choice." 20 U.S.C. § 6316(b)(1)(E). Public school choice allows parents of a child attending a school that did not make AYP to send their child to another public school that is not in school improvement. Id. Implementation of these systemic remediation activities are not only costly but also require the Plaintiff School Districts to alter or amend the IEPs of students within the special education subgroup in order to specifically address any deficiency in meeting or exceeding State standards. Compl. ¶¶ 21, 26.

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[2]In resolving a motion to dismiss, the district court is entitled to take judicial notice of matters in the public record. Palay v. U.S., 349 F.3d 418, 425, n. 5 (7th Cir. 2003)(citations omitted). Documents which have been found to be public records include the letter decisions of government agencies, *see* Phillips v. Bureau of Prisons, 591 F.2d 966, 698 (D.C. Cir. 1979) and published reports of administrative bodies. *See* Mack v. South Bay Beer Distrib., 798 F.2d 1279, 1282 (9th Cir. 1986).

B. IDEA

The Individuals With Disabilities Education Act is the primary federal law governing and protecting the individualized education of students with disabilities. 20 U.S.C. § 1400, et seq. IDEA guarantees all children with disabilities the right to a free appropriate public education in the least restrictive environment. 20 U.S.C. § 1400, et seq.; Compl. ¶ 44. To effectuate this purpose, school districts are responsible for developing an individualized education program ("IEP") for each student with a disability. 20 U.S.C. § 1414(d) et seq.; Compl. ¶ 47. Among other things, the IEP outlines the specialized instruction, services and/or placement that will enable the school district to meet the child's individual needs and reflects the needs of the individual child as they relate to his or her unique disability. 20 U.S.C. § 1414(d); Compl. ¶ 47.

As a result of the performance of Plaintiff School Districts' students in the special education subgroup on state assessments, the Plaintiff School Districts failed to make AYP and were required to complete remediation activities. Compl. ¶¶ 41, 53. Further, the IEPs of each Plaintiff School Districts' special education students, including the IEPs of the Individual Plaintiffs, must be modified in order to employ systemic remediation activities without regard to those students' unique needs. Compl. ¶ 54.

II. STANDARD OF REVIEW

In ruling on a 12(b)(1) motion to dismiss for want of standing and a 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted, the district court must accept as true all material allegations of the complaint, drawing all reasonable inferences therefrom in the plaintiff's favor. Pelfresne v. Village of Lindenhurst, No. 03 C 6905, 2004 WL 1660812, * 5 (N.D. Ill., July 23, 2004)(declining to dismiss claim for lack of standing) citing Lee v. City of Chicago, 330 F.3d 456, 468 (7th Cir. 2003). On a motion to dismiss under Rule 12(b)(1), the parties are permitted to submit evidence outside the four corners of the complaint to address the jurisdictional questions, Ramos v. Ashcroft, No. 02 C 8266, 2003 WL 22282521, *2 (N.D. Ill. Sept. 30, 2003), because when subject matter jurisdiction is challenged, the plaintiff has the obligation to establish jurisdiction by competent proof. Pelfresne v. Village of Lindenhurst, No. 03 C 6905, 2004 WL 1660812, * 5 (N.D. Ill., July 23, 2004).

III. PLAINTIFFS HAVE STANDING TO CHALLENGE THE NCLBA

The Federal Defendants erroneously claim that Plaintiffs do not allege an injury in fact by failing to identify the "systemic remediation activities" which require the Individual Plaintiff's IEPs to be modified. MTD at 8. Plaintiffs have Article III standing in that they have alleged an injury in fact, caused by Defendants, which can only be redressed by this Court.

This Court is empowered only to hear "cases or controversies." U.S. Const. Art. III, § 2. "The doctrine of standing 'is an essential and unchanging part of the case-or-controversy requirement of Article III.'" Doe v. County of Montgomery, Illinois, 41 F.3d 1156, 1159 (7th Cir. 1994)(citations omitted)(reversing District Court decision holding that plaintiffs did not have standing to seek declaratory judgment against county defendant). The irreducible constitutional minimum of standing contains three elements: (1) the plaintiff must have suffered injury in fact, an actual or imminent invasion of a legally protected, concrete and particularized interest; (2) there must be a causal connection between the alleged injury and the defendant's conduct at issue; and (3) it must be "likely," not "speculative," that the court can redress the injury. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 2136-37 (1992). "An identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation." Doe v. County of Montgomery, Illinois, 41 F.3d 1156, 1159 (7th Cir. 1994), (citations omitted).

A. PLAINTIFFS HAVE ALLEGED AN INJURY IN FACT

As an initial matter, under federal pleading standards, a pleading need only contain a short and plain statement of the claim showing that the pleader is entitled to relief, Fed.R.Civ.P. 8(a)(2), giving the defendant "fair notice of what the plaintiff's claim is and the grounds upon which it rests." Pelfresne v. Village of Lindenhurst, No. 03 C 6905, 2004 WL 1660812, *6 (N.D. Ill., July 23, 2004). "A party need not plead either facts or law under Rule 8(a)." Id., (citations omitted); see also, Odgon v. Hoyt, No. 04 C 2412, 2005 WL 66039, *3 (N.D. Ill., Jan. 11, 2005). "It is axiomatic that a plaintiff is not required to produce evidence in support of its allegations of harm; notice pleading is the standard." Oak Lawn Pavilion, Inc., v. U.S. Department of Health and Human Services, No. 98

C 614, 1999 WL 1023920, * 5 (N.D. Ill., Nov. 8, 1999)(holding that plaintiff sufficiently alleged an injury in fact with its claims of monetary damages and loss in reputation and goodwill). As such, a plaintiff need only set out a claim for relief at the pleading stage. Id; See also, Stewart v. Office of Rehabilitative, No. 00 C 50166, 2003 WL 164243, *1 (N.D. Ill. Jan. 22, 2003)(holding that the allegations alleged were sufficient to confer Article III standing at the pleading stage), quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 2136-2137 (1992), see also, Pelfresne v. Village of Lindenhurst, No. 03 C 6905, 2004 WL 1660812, * 5 (N.D. Ill., July 23, 2004); Doe v. County of Montgomery, Illinois, 41 F.3d 1156, 1159 (7th Cir. 1994).

The Complaint adequately alleges an injury in fact. Specifically, the Complaint alleges that Plaintiff School Districts did not achieve AYP and are therefore subject to remediation activities. Compl. ¶¶ 38-40. The systemic remediation activities required of the Plaintiff School Districts for not achieving AYP (Compl. ¶ 24), will result in the IEPs of Plaintiff School Districts' special education population having to be changed absent consideration for each student's unique disability. Compl. ¶¶ 60-61. The IEPs would not otherwise have to be altered absent the remediation mandates to improve the District's achievement scores. Further, the Complaint alleges that: (1) Plaintiff Ottawa Township High School is in school improvement status and has to offer school choice (Compl. ¶38); (2) Shepard Middle School, located in Plaintiff Ottawa Elementary School District 141, is in school improvement status (Compl. ¶ 39); and (3) Plaintiff Ottawa Elementary School District 141 is in school improvement status (Compl. ¶ 40). Therefore, based on the liberal federal pleading standards that require only a short and plain statement of the claim showing that the pleader is entitled to relief, (Fed.R.Civ.P. 8(a)(2)), Plaintiffs have adequately alleged they have suffered an injury in fact in that they have alleged that the Plaintiff School Districts are required to employ systemic remediation activities which require the modification of individual students' IEPs without regard to the student's individual disability. Compl. ¶¶ 21, 26, 54, 55, 58. There is no other reason for this activity to occur other than to remediate and improve scores as dictated by the NCLBA. Accordingly, the Federal Defendants' Motion to Dismiss should be denied.

B. THE DEFENDANTS CAUSED PLAINTIFFS' INJURIES

The Federal Defendants also erroneously assert that the Plaintiffs' injuries are a result of the Plaintiff School Districts' decisions to accept federal funds under the NCLBA and IDEA. MTD at 9. However, regardless of whether Plaintiff School Districts accept federal funds, they are required to implement numerous key aspects of the NCLBA.

Defendants nonchalantly state that the Plaintiffs should merely reject Title I funds if they do not wish to adhere to the NCLBA. In fact, each state has the authority to decline NCLBA funds in whole or in part and be excluded from certain program requirements. If the D.O.E. is not vested in whether states accept the money, it's curious why on April 18, 2005, Defendant Spellings sent a letter to Utah Senator Orrin Hatch wherein she warned Utah lawmakers that the state risked losing $76 million in federal funding if it enacted legislation "giving first priority to meeting state goals, objectives, program needs, and accountability systems as they relate to federal programs" rather then giving first priority to the NCLBA which could result in Utah's failure to comply with the mandates of the NCLBA. See April 18, 2005 letter from Margaret Spellings to Hon. U.S. Senator Orrin G. Hatch. School districts may also refuse or decline Title I funds. Although federal sanctions for failing to make AYP will only be imposed on schools in those years the school is receiving Title I services (Illinois State Board of Education, Policy Statement Regarding the Application of NCLB Sanctions by ISBE at School Sites Which Lose or Gain Title I Status During the Span of Years for Which Their AYP is Being Computed *at* www.isbe.net/sos/pdf/policy_statement_nclb.pdf), a school district that refuses or declines Title I funds must still implement several key aspects of NCLBA including: assessing whether students can read and do math at grade level; reviewing whether each school has made adequate yearly progress; and ensuring that teachers of core academic subjects are highly qualified. February 6, 2004 letter, from Eugene Hickok, then Acting Deputy Secretaryof the D.O.E., to Dr. Steven Laing, then Superintendent of Public Instruction for the State of Utah *at* www.nsba.org/site/docs/33100/33051.pdf. Additionally, a school district that refuses or declines Title I funds risks losing funding or eligibility in other areas including funds under the following programs: *Safe and Drug Free Schools and Communities Act*, Reading First, Education Technology Grants; and 21st Century Community Learning Center. Id. Therefore, there is a domino effect to the School District's financial detriment for not accepting Title I funds.

Moreover, a school district that accepts any ESEA funds must comply with the ESEA's military recruitment provisions, (20 U.S.C. § 7908); certify that it has no policies interfering with constitutionally protect prayer, (20 U.S.C. § 908); and implement the unsafe school choice provisions (20 U.S.C. § 7912). Additionally, any school district that receives any funds through the Defendant D.O.E. must provide equal access to Boy Scouts or other similar groups for meetings (20 U.S.C. § 7905). February 6, 2004 letter, from Eugene Hickok, then Acting Deputy Secretary of theD.O.E., to Dr. Steven Laing, then Superintendent of Public Instruction for the State of Utah.

Alternatively, if a state accepts NCLB Funds, its failure to comply with the mandates of the NCLBA can result in fines. On April 22, 2005, Defendant Spellings announced that Texas would be fined $444,282 because it was late last year in notifying schools and districts whether they had reached student achievement benchmarks under the NCLBA. Texas Education Agency, Press Release: Texas Fined For Late Release of School Transfer List, Compromise on Alternative Assessments Possible, April 25, 2005 *at* www.tea.state.tx.us/press/usdefine.html.

Accordingly, based on information provided by the D.O.E. on this topic, because Illinois accepts ESEA funds, even if Plaintiff School Districts reject such funds, they are still required to implement key aspects of the NCLBA. Therefore, Plaintiff's injuries are not "self-inflicted" because Plaintiff School Districts did not voluntarily assume the mandates of the NCLBA by accepting Title I funds because they are required to comply with several aspects of the NCLBA regardless of whether they receive Title I funds.

Further, the Federal Defendants allege that the remedial measures required by the NCLBA for failure to achieve AYP do not require modification of IEPs. MTD at 10. However, the Federal Defendants ignore the requirements of IDEA which are "to assure that all children with disabilities have available to them...a free appropriate public education which emphasizes special education and related services designed to meet their unique needs..." 20 U.S.C. § 1400(c). A free appropriate education requires personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. 20 U.S.C. § 1400 et seq. Changes to the IEP would not be based on the student's need but on the District's need to meet AYP.

A student's IEP is basically a comprehensive statement of the educational needs of the disabled child and the specially designed instruction and related services to be employed to meet

those needs. 20 U.S.C. § 1401(19). As a result of failing to make AYP and being classified as being in school improvement, the Plaintiff School Districts must engage in systemic remedial measures which impact all students and are applied across the board in the same way. The required remedial measures, do not however, take into account an individual student's disability and therefore are not consistent with IDEA which requires personalized instruction. Compl. ¶¶ 21, 26, 54, 55, 61.

IV. THE COMPLAINT STATES A CLAIM FOR DECLARATORY RELIEF THAT THE NCLBA AND IDEA ARE INCONSISTENT

In this case, Plaintiffs seek a declaratory judgment that §§ 6311 and 6316 of the NCLBA are inconsistent with IDEA. Compl. ¶ 65. Based on the text, structure and legislative history of the statutes, Defendants contend that the NCLBA and IDEA are consistent. MTD at 10-11. With the 2004 reauthorization of IDEA, it was admittedly Congress' intent to among other things, align IDEA with NCLBA requirements. However, the NCLBA still conflicts with IDEA. Significantly, the State Defendants have even acknowledged that the NCLBA does not account for the unique needs of special education students. "The most common reason that districts failed to make AYP was the performance of special education students; 201 districts and 142 schools failed solely because of special education students. The State Board of Education believes that the current system for testing special education students does not appropriately measure the progress made by those students and that NCLB does not properly account for the unique needs of special education students." Illinois State Board of Education, Snapshot of Illinois School Report Cards *at* ftp://help.isbe.net/webapps/ReportCard/SnapshotRpCrds.pdf.

As discussed in the Complaint, the NCLBA requires school districts to employ categorical and systemic changes if the district has not met or exceeded state standards as assessed by a standardized test administered to all students within the district. Compl. ¶ 19. Therefore, special education students are not tested according to ability as required by IDEA. Compl. ¶¶ 47, 50. Rather they are tested by grade level. These contradictions between NCLBA and IDEA change how schools teach students with disabilities and how they are held accountable for their achievement. Compl. ¶¶ 54, 55. The results of a Special Task Force of the National Conference of State Legislators, which is a bipartisan group representing 50 state legislatures has acknowledged the inconsistencies between

NCLBA and IDEA and stated that, "there are inherent conflicts between the Individuals with Disabilities Education Act (IDEA) and No Child Left Behind." Task Force on No Child Left Behind, Final Report, February 2005, p. 26 *at* www.ncsl.org/programs/press/2005/pr050223.htm.

Students with disabilities are ill-served by the NCLBA because it bases success or failure on one standardized test. The NCLBA holds all schools, regardless of the number of special education students served to the same benchmark standards. 20 U.S.C. § 6311(b)(1)(B), Compl. ¶¶ 19, 32. Although some children may not have severe cognitive disorders, they may have other disabilities that prevent them from meeting the same grade-level expectations of regular education students. The Defendant ISBE has reported that for the 2003-2004 school year, 1,069 out of 3,783 schools in Illinois failed to make AYP. Illinois State Board of Education, Snapshot of Illinois School Report Cards *at* ftp://help.isbe.net/webapps/ReportCard/SnapshotRpCrds.pdf. The Plaintiff School Districts were among the 1,069 schools that failed to make AYP. Compl. ¶¶ 38, 40. If, for example, the scores of the Plaintiff School Districts' special education student population, were not included in the Plaintiff School Districts' calculations for making AYP, the Plaintiff School Districts would have achieved AYP. Compl. ¶ 42.

"In calculating adequate yearly progress for schools, LEAs [learning education agencies], and the State, the State [m]ust...include the scores of all students with disabilities, even those with the most significant cognitive disabilities..." 34 C.F.R. § 200.13(c)(I). However, the NCLBA allows states to use alternate assessments based on alternate achievement standards for students with the most significant cognitive disabilities. 34 C.F.R. §§ 200.13(c)(ii) and 200.1(d). Therefore, of all the students with severe cognitive disabilities, a school district may include up to 1% of proficient scores from alternate assessments of students with the most significant cognitive disabilities for purposes of making its AYP calculations. Id. As such, the NCLBA allows only 1% of the special education population to be tested according to their ability while the rest of students with disabilities are tested at grade level standards. Id. In Illinois, if a school district has more than 40 students with disabilities, the subgroup of students with disabilities must meet AYP. Compl. ¶ 34.

Plaintiffs challenge the validity of §§ 6311 and 6316 of the NCLBA (Compl. ¶ 65), which, among other things, require that: the same academic standards be applied to all schools and children in the state, regardless of their classification of being disabled (20 U.S.C. § 6311(b)(1)(B) Compl.

¶ 19); students with disabilities in subgroups of 40 or more meet AYP (20 U.S.C. § 6311(b)(2)(C)(v)(II); Compl. ¶¶ 33, 34); and systemic remediation activities be imposed on school districts who fail to make AYP (20 U.S.C. § 6316, Compl. ¶ 54). IDEA requires that students with disabilities be tested based on the individualized needs of students with disabilities as identified in the student's IEP, (20 U.S.C. §§ 1400(c) and 1414(d); Compl. ¶¶ 47, 50), in contrast to the NCLBA's grade level testing standards. 20 U.S.C. § 6311. The NCLBA testing standards also fail to take into account that the disabled student population is not uniformly dispersed across districts, as in the case of Plaintiff School Districts who consequently were unable to reach proficiency goals and therefore failed to make AYP.

In their motion to dismiss, the Federal Defendants refer to an announcement by Defendant Spellings to change federal guidelines allowing states to use modified assessments for 2% of their students with persistent academic disabilities for accountability purposes. MTD at 12; U.S. Department of Education, Raising Achievement Alternative Assessm ents for Students With Disabilities *at* www.ed.gov/policy/elsec/guid/raising/alt-assess.html. This is a separate policy from the current regulation that allows up to 1% of all student with the most significant cognitive disabilities to take an alternate assessment for accountability purposes. U.S. Department of Education, Raising Achievement Alternative Assessments for Students With Disabilities *at* www.ed.gov/policy/elsec/guid/raising/alt-assess-long.html. The change in federal guidelines which provide states more flexibility in determining the percentage of special education students who can be tested according to their ability not their grade level, reflects that students with disabilities may need to take modified assessments based on their unique individual disabilities to make substantial progress toward grade-level achievement. Therefore, the change in federal guidelines is an acknowledgment that the individualized disabilities of students must be taken into account. It can therefore be inferred that testing the remainder of special education students using a standardized test as required by the NCLBA (20 U.S.C. § 6311; Compl. ¶¶ 19, 32), conflicts with IDEA requirements of testing special education students based on their ability. 20 U.S.C. §§ 1400(c) and 1414(d); Compl. ¶¶ 47, 50.

Before finalizing this regulation, the Defendant D.O.E. will seek comments from among others, local school officials. In the meantime, the Defendant D.O.E. anticipates States will be able

to implement an alternate assessment based on modified achievement standards by 2005-2006 or at the latest 2006-2007. Id. Further, the Defendant D.O.E. has discretion in determining which states may implement this interim policy. Id. Therefore, it is unknown when the new guidelines may apply to Plaintiff School Districts, if at all. Moreover, allowing an additional 2% of students with persistent academic disabilities to use alternative assessments in addition to the already allowable 1% of students with the most significant cognitive disabilities, only results in a total allowable amount of 3% of proficient scores from such assessments to be included in the calculation for determining AYP.

As reauthorized in 2004, IDEA continues to mandate that students with disabilities receive individualized instruction and take individualized assessments in compliance with the student's IEP. 20 U.S.C. §§ 1400(c) and 1414(d), Compl. ¶¶ 47, 50. The NCLBA requires all but a very small percentage of student with disabilities to take grade-level assessments. 34 C.F.R. § 200.13 (c)(I). Consequently, the NCLBA conflicts with IDEA. Compl. ¶¶ 25, 65. Pursuant to IDEA, Plaintiff School Districts should be allowed to determine the percentage of special education students tested based on the recommendations contained in each individual student's IEP and not based on standardized assessments as required by NCLBA. Compl. ¶¶ 24, 25. Accordingly, the Federal Defendants' motion to dismiss Plaintiffs' Complaint for failure to state a claim on which relief can be granted should be denied.

V. CONCLUSION

For the reasons discussed herein, this Court should deny the U.S. Department of Education's and U.S. Secretary of Education, Margaret Spelling's, motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) in its entirety and grant any other relief this Court deems proper.

Respectfully Submitted,
SCARIANO, HIMES AND PETRARCA, CHTD.

Dated: 5.11.05 By: Raymond t. Hauser

RAYMOND A. HAUSER
CHRISTINA SEPIOL
ANTHONY G. SCARIANO
DARCEE C. YOUNG
SCARIANO, HIMES AND PETRARCA, CHTD.
1450 Aberdeen
Chicago Heights, IL 60411
(708) 755-1900

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