UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS - EASTERN DIVISION

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

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MICHAEL W. DOBBINS
CLERK, U.S. DISTRICT COURT

MEMORANDUM OF LAW IN SUPPORT OF THE 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

INTRODUCTION

This case addresses requirements of two major educational reform statutes enacted by Congress in the past three years: the No Child Left Behind Act of 2001 ("NCLB") and the Individuals with Disabilities Education Improvement Act of 2004 ("IDEA"). The former seeks to improve the educational performance of elementary and secondary school students in states and school districts that receive federal funds by measuring student academic progress and holding states, school districts, and schools accountable for improving their students' academic performance. The latter modifies and strengthens prior requirements that states and school districts provide their students with disabilities with a free, appropriate public education that includes the provision of required instruction and services in accordance with individualized education programs. Both statutes provide significant amounts of federal funding to states and local school districts in exchange for satisfying the requirements of the statutes.

The plaintiffs in this case are two school districts as well as four students with disabilities and their parents. The school districts have concededly failed to make "adequate yearly progress" with respect to their population of students with disabilities. However, rather than implement the remedies required by the NCLB for addressing such a situation, plaintiffs have filed suit claiming that the key accountability provisions of the NCLB should be declared "invalid" because they are purportedly inconsistent with the individualized treatment required by the IDEA. Plaintiffs are thus effectively contending that in enacting the IDEA in 2004, Congress impliedly repealed the NCLB's central provisions, as they apply to children with disabilities, within just three years of the NCLB's enactment. This facially implausible claim should be dismissed both because plaintiffs lack standing and because the acts are not inconsistent.

Plaintiffs lack standing because they have failed to explain how they are injured by the statutes, or how this alleged injury is fairly attributable to the requirements of the NCLB. The school districts voluntarily accepted federal funding under *both* statutes and agreed to, and provided assurances that they could satisfy, the requirements of *both* statutes. Any alleged injury resulting from any alleged inconsistency between the statutes would be fairly traceable only to (1) the school districts' decisions to accept the funding and requirements of both statutes, (2) their failure to make adequate yearly progress, and (3) their decision to address the issue in a particular way that is not mandated by NCLB.

Plaintiffs have also failed to state a claim upon which relief can be granted. The NCLB and IDEA are mutually reinforcing and complementary, not inconsistent. Both require states to establish the same goals and use the same assessments to measure and improve the educational performance of students with disabilities. Indeed, one of the primary purposes of the recent amendments to the IDEA was, in Congress' words, to "carefully align[] the IDEA with the accountability system established under NCLB . . . ." Plaintiffs' apparent belief that the standards established by Congress and Illinois have set the bar too high is one that is properly directed, if at all, to the political branches.

STATUTORY BACKGROUND

The No Child Left Behind Act. The NCLB, codified at 20 U.S.C. § 6301 *et seq.*, is a comprehensive education reform package enacted on January 8, 2002, that amends the Elementary and Secondary Education Act of 1965. In general, NCLB is "based on the fundamental notion that an enterprise works best when responsibility is placed closest to the most important activity of the enterprise, when those responsible are given greatest latitude and support, and when those responsible are held accountable for producing results." H.R. Rep. 107-63(I), 1st Sess. (2001) at 265, available at 2001 WL 518421. The NCLB furthers those goals "by granting unprecedented new flexibility to local school districts, demanding results in public education through strict accountability measures, empowering parents, and providing a safety valve for children trapped in failing schools." *Id.*

For present purposes, the most relevant provisions of the NCLB are found in Subchapter 1. Subchapter 1 authorizes the appropriation of billions of dollars in grants to states that satisfy various conditions for purposes of carrying out Part A of the Subchapter. 20 U.S.C. § 6302. A state that desires to receive a Part A grant must submit a plan developed by the state educational agency ("SEA") in consultation with various interested parties, including parents, teachers, local educational agencies ("LEAs"), principals, and other administrators. 20 U.S.C. § 6311(a). The plan must also be coordinated with other educational programs, including the IDEA. *Id.*[1]

[1] This state plan may be submitted as part of a consolidated plan under 20 U.S.C. § 7842. 20 U.S.C. § 6311(a)(2). Illinois has submitted a consolidated state plan.

Each state plan consists of three primary elements. *First*, each must demonstrate to the Secretary that the state "has adopted challenging academic content standards and challenging student academic achievement standards that will be used by the State, its local educational agencies, and its schools" to carry out the requirements of Part A. 20 U.S.C. § 6311(b)(1)(A). These standards "shall be the same academic standards that the State applies to all schools and children." 20 U.S.C. § 6311(b)(1)(B). While the standards must satisfy certain general criteria, *see* 20 U.S.C. § 6311(b)(1)(D), each state is afforded the flexibility to design its own standards and need not submit the standards to the Secretary for approval. 20 U.S.C. § 6311(b)(1)(A).

Second, each state plan must show that "the State has developed and is implementing a single, statewide accountability system that will be effective in ensuring that all local educational agencies, public elementary schools, and public secondary schools make adequate yearly progress . . . ." 20 U.S.C. § 6311(b)(2)(A). The definition of the term "adequate yearly progress" ("AYP") is also largely subject to state discretion, but must be, *inter alia*, a statistically reliable way of measuring student progress based on academic assessments developed by the state. 20 U.S.C. § 6311(b)(2)(C)(ii), (iv). In addition, the state's definition must include "separate measurable annual objectives for continuous and substantial improvement" for all elementary and secondary school students and four subgroups of students, including students with disabilities. 20 U.S.C. § 6311(b)(2)(C)(v). The annual objectives must include a single minimum percentage of students who are required to meet or exceed the proficient level on the assessments developed by the State that applies separately to each group of students described in subparagraph (C)(v). 20 U.S.C. § 6311(b)(2)(G)(iii). A school or district will be considered to have made AYP if each of the five groups meets the objectives set by the state. 20 U.S.C. § 6311(b)(2)(I).

In the alternative, for any group that does not meet the annual objective, a school or district will be considered to have made AYP if the percentage of students in the group measuring below proficient on the state assessments decreased by at least 10 percent from the preceding school year and the students in that group made progress on one or more other academic indicators set forth in section 6311(b)(2)(C)(vi)-(vii). 20 U.S.C. § 6311(b)(2)(I)(i). Each state is required to "establish a timeline for adequate yearly progress" that ensures that within twelve years of the 2001-02 school year, all students in each group set forth in section

6311(b)(2)(C)(v) will be proficient on the state assessments described in the next paragraph. 20 U.S.C. § 6311(b)(2)(F).

Third, each state plan must show that the state has adopted "a set of high-quality, yearly student academic assessments that include, at a minimum, academic assessments in mathematics, reading or language arts, and [by the 2007-08 school year,] science . . . ." 20 U.S.C. § 6311(b)(3)(A). The state may choose the assessments that it uses to measure proficiency, but the assessments must be aligned with the state's academic standards, must be used to measure all children, and must be "consistent with relevant, nationally recognized professional and technical standards." 20 U.S.C. § 6311(b)(3)(C)(i)-(iii).

An LEA that wishes to receive a subgrant from the state may do so only if it has on file a plan approved by the SEA "that is coordinated with" other federal education programs, including the IDEA. 20 U.S.C. § 6312(a). The plan must explain, *inter alia*, the LEA's plans for meeting various NCLB requirements, 20 U.S.C. § 6312(b)(1)(L)-(P), and how the LEA will "coordinate and integrate services provided under [Part A] with other educational services at the local educational agency or individual school level," including for "children with disabilities." 20 U.S.C. § 6312(b)(1)(E)(ii).

Along with the funding and flexibility afforded by the NCLB, the "centerpiece" of the Act "is academic accountability." H.R. Rep. 107-63(I) at 281. The NCLB "holds States, [LEAs], and schools accountable for ensuring that all students, including disadvantaged students, meet high academic standards." *Id.* In general, under section 6316 schools and LEAs that do not make AYP are eligible to receive still additional assistance, and if they continue to fail to improve, they are subject to required corrective measures designed to raise their academic achievement. *Id.* at 282; 20 U.S.C. § 6316. Section 6316 applies only to LEAs, and schools under the jurisdiction of LEAs, that receive funds under Part A of the NCLB. 20 U.S.C. § 6316(a)(1); *see also* 20 U.S.C. § 6311(b)(2)(A)(ii).

Under section 6316, an LEA must "identify for school improvement" any elementary or secondary school that, for two consecutive years, fails to make AYP for any of the groups listed in section 6311(b)(2)(C)(v). 20 U.S.C. § 6316(b)(1)(A). LEAs with schools identified for improvement must provide all students enrolled in the school with the option to transfer to another public school served by the LEA that has not been identified for improvement, and the

LEA must provide for transportation. 20 U.S.C. §§ 6316(b)(1)(E)(1)-(2), (b)(9)-(10). Further, within three months of identification for improvement, the school must "develop or revise a school plan" designed to remedy the school's problems. 20 U.S.C. § 6316(b)(3)(A). As the school develops and implements the plan, the LEA must provide the school with technical assistance, including help in analyzing data from the state assessments to identify, and develop strategies to address, problems in instruction or in implementing requirements of the Act. 20 U.S.C. § 6316(b)(4). If a school fails to make AYP within the year following identification, the LEA must continue to provide students with the option to transfer and continue to provide technical assistance. 20 U.S.C. § 6316(b)(5). Moreover, the LEA must make supplemental educational services available to eligible children "from a provider with a demonstrated record of effectiveness, that is selected by the parents and approved for that purpose by the [SEA] in accordance with reasonable criteria, consistent with [section 6316(e)(5] . . . . " 20 U.S.C. §§ 6316(b)(5)(B), (e)(1).

If a school continues to fail to make AYP after two years in school improvement, the LEA, in addition to continuing to provide technical assistance, supplemental educational services and the opportunity to transfer, must identify the school for "corrective action," which must include one of a number of options in section 6316(b)(7)(C)(iv)(I)-(VI). If a school fails to make AYP after one full school year after the institution of corrective action, the LEA must institute an "alternative governance arrangement," in addition to continuing to provide supplemental educational services and the opportunity to transfer. 20 U.S.C. § 6316(b)(8)(A)-(B).

The NCLB imposes similar requirements on LEAs that fail to achieve AYP. 20 U.S.C. § 6316(c). States must identify for improvement LEAs that fail to make AYP for two consecutive years. 20 U.S.C. § 6316(c)(3). Such an LEA must develop or revise a plan to improve performance, and the state must provide the LEA with technical assistance. 20 U.S.C. § 6316(c)(7)(A), (9). In addition to continuing to provide technical assistance, the state must take corrective action with respect to an LEA that fails to make AYP by the end of the second full year after identification of the LEA for improvement. 20 U.S.C. § 6316(c)(10)(B).

The Individuals with Disabilities Education Improvement Act. The IDEA, 20 U.S.C. § 1400 *et seq.*, previously the Education of the Handicapped Act, was reauthorized and renamed in 1990, and reauthorized and amended in 1997 and in 2004. The IDEA and its predecessor

statute comprehensively altered previous legislative efforts to aid states in educating children with handicaps, which began in 1966. S. Rep. 108-185, 1st Sess. (2003), at 2. Like the NCLB, the IDEA authorizes the payment of grants to states that satisfy certain conditions. *See generally* 20 U.S.C. §§ 1411, 1412.[2] Each state that receives a grant must distribute any funds that are not reserved under section 1411(e) as subgrants to LEAs that establish their eligibility under section 1413. 20 U.S.C. § 1411(f)(1). An LEA is eligible to receive a subgrant if it submits a plan to the state that, *inter alia*, provides assurances that the LEA will comply with the policies established by the state pursuant to section 1412, as described *infra*. 20 U.S.C. § 1413(a)(1), (d)(1).

Under these requirements, states must ensure (1) that a free, appropriate public education is available to all children with disabilities; (2) that an individualized education program ("IEP") satisfying the requirements of 20 U.S.C. § 1414 is "developed, reviewed, and revised for each child with a disability;" and (3) that children with disabilities are educated "[t]o the maximum extent appropriate" with children without disabilities in a regular educational environment. 20 U.S.C. § 1412(a). Prior to providing special education services to a child, an SEA or LEA must conduct an evaluation of the student to determine if (a) the child is a child with a disability and (b) the content of the IEP. 20 U.S.C. § 1414(a)(1), (b)(2)(A). An IEP is a written statement developed for each child with a disability that addresses various factors related to the child's educational needs. 20 U.S.C. § 1414(d)(1)(A). An "IEP team," consisting of various individuals, including parents, teachers, and an LEA representative, develops the IEP and is responsible for reviewing and revising it as appropriate. 20 U.S.C. § 1414(d)(3)-(4).

The IDEA also reinforces the accountability provisions of NCLB by, *inter alia*, requiring the states to establish "goals for the performance of children with disabilities" under 20 U.S.C. § 6311(b)(2)(C) that "are the same as the State's definition of Adequate Yearly Progress, including the State's objectives for progress by children with disabilities." 20 U.S.C. § 1412(a)(15)(A)(ii). *See infra* at 11-13. The section further requires that all "children with disabilities are included in all general State and districtwide assessment programs, including the assessments" required by the NCLB, described above. 20 U.S.C. § 1412(a)(16)(A). Both acts provide that states may use

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[2] The citations here are to the Individuals with Disabilities Education Improvement Act of 2004, Pub. L. 108-446, signed into law by President George W. Bush on December 3, 2004. Most provisions of the Act, with certain exceptions, will take effect on July 1, 2005.

alternate assessments for those children with disabilities who cannot participate in regular assessments so long as the alternate assessments measure the student's performance against "the State's challenging academic content standards and challenging student academic achievement standards," or against alternate standards "permitted under the regulations promulgated to carry out" 20 U.S.C. § 6311(b)(1) of the NCLB. 20 U.S.C. § 6311(b)(16)(C)(ii). *See infra* at 9, 12.

FACTUAL BACKGROUND

The plaintiffs in this case are the Boards of Education for the Ottawa Township High School and Elementary School Districts in Illinois and four special-education students (and their parents) at schools in the districts. Compl. ¶¶ 1-12, 51-52. The plaintiff school districts have been identified for improvement under NCLB because of their failure to achieve AYP for their population of students with disabilities. *Id.* at ¶¶ 41-42. As a result of their failure to achieve AYP, the school districts assert that they must now employ what their complaint refers to as "systemic remediation activities" so that students within the subgroup will meet the state's AYP standards. Compl. at ¶ 53. Plaintiffs assert that these activities will require modification of the IEPs of the individual plaintiffs and other students within the subgroup "without regard to the individual needs of the students within that subgroup and their individual ability to meet the" state's standards under NCLB. *Id.* at ¶¶ 54-55, 62-64.

STANDARD OF REVIEW

In reviewing a motion to dismiss under Rule 12(b)(1), a court "must accept all well-pleaded factual allegations as true and draw all reasonable inferences in favor of the plaintiff." *Macchia v. Loyola Univ. Med. Ctr.*, No. 04 C 5049, 2004 WL 2392201, *2 (N.D. Ill. October 25, 2004). "[T]he plaintiff bears the burden of establishing that the jurisdictional requirements have been met" and "must provide competent proof of jurisdictional facts to support its allegations." *Id.* In reviewing a 12(b)(6) motion, a court must accept as true all well-pleaded allegations, and draw all reasonable inferences in the plaintiffs' favor, but need "'not strain to find inferences favorable to the plaintiffs which are not apparent on the face of th[e] . . . complaint.'" *Id.* at *3 (quoting *Coates v. Illinois State Bd. of Ed.*, 559 F.2d 445, 447 (7th Cir. 1977) (ellipses and brackets in original)). The court also "is not required to accept conclusory legal allegations." *Vakharia v. Little Company of Mary Hospital and Health Care Centers*, 2 F. Supp. 2d 1028, 1030 (N.D. Ill. 1998). A court may also "take judicial notice of matters of public record without

converting a 12(b)(6) motion into a motion for summary judgment." *Henson v. CSC Credit Services*, 29 F.3d 280, 284 (7th Cir. 1994) (citation and internal quotation marks omitted).

ARGUMENT

I. PLAINTIFFS LACK ARTICLE III STANDING BECAUSE THEIR SITUATION IS THE RESULT OF THE PLAINTIFF SCHOOL DISTRICTS' VOLUNTARY AND INDEPENDENT CHOICES, AND BECAUSE PLAINTIFFS HAVE FAILED TO ESTABLISH THAT THEY HAVE BEEN INJURED

To establish Article III standing, a plaintiff must have "suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation marks and citations omitted). In addition, "there must be a causal connection between the injury and the conduct complained of – the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant. . . .'" *Id.* (brackets and first ellipses in original) (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)). Finally, "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan*, 426 U.S. at 560-61 (quoting *Simon*, 426 U.S. at 38, 43).

As discussed in the next section, the assertion that the requirements of NCLB and IDEA are inconsistent is meritless as a matter of law. Plaintiffs, however, lack standing even to make this assertion, first, because they have failed to allege an injury in fact. Plaintiffs claim that the NCLB requires the plaintiff school districts to modify the IEPs of students within the special education subgroup "in order to employ systemic remediation activities so that students within the subgroup meet or exceed State students (sic) within the timeframe dictated by the NCLBA." Compl. ¶ 54. Plaintiffs do not identify those "systemic remediation activities," or how, why, or the extent to which those activities will require the modification of the individual plaintiffs' IEPs. Nor do they explain (1) how modifications designed to increase the proficiency of students with disabilities would be injurious; (2) why the school district would want to make modifications that would not help to increase proficiency given that such modifications would not help the school district to achieve AYP; and (3) why individualized treatment of students with disabilities cannot be accomplished when an LEA is in improvement. The inadequacy of plaintiffs' allegations becomes even more pronounced when one considers the additional technical assistance received

by LEAs and schools that fail to make AYP, 20 U.S.C. § 6316(b)(4), (c)(9)(A), and the "supplemental educational services" received by students and parents in such school districts under section 6316(b)(5)(B). Under these circumstances, plaintiffs' allegations of harm are purely conclusory and conjectural. *See Lujan*, 504 U.S. at 560; *Allen v. Wright*, 468 U.S. 737, 751 (1984) (injury alleged must be "distinct and palpable," rather than "abstract or conjectural").

In addition, states will now be permitted to use alternate achievement standards to evaluate students with persistent academic disabilities, and to count the results of assessments based on those standards towards calculating AYP for 2 percent of all students. *See infra* at 12. Even if plaintiffs' complaint adequately alleged an injury in fact in the absence of this policy, there is not even a conclusory allegation in the complaint that plaintiffs face any potential threat of harm subsequent to its announcement.

Even if plaintiffs had stated a cognizable claim of injury, however, their asserted injury is not "fairly traceable" to the requirements of NCLB. Instead, it is the direct result, first, of Ottawa Township's independent decision to accept funds from the federal government under both IDEA and NCLB. A plaintiff lacks standing when the injury upon which it premises its assertion of jurisdiction is "self-inflicted," regardless of whether the challenged action could also be deemed a "but for" cause of the harm.[3] In this case, any alleged intent to implement "systemic remediation activities" is the result of Ottawa Township's voluntary pursuit and acceptance of funds under two statutes, each with its own funding and conditions – conditions that it now alleges it cannot fulfill. *See supra* at 4, 6. Ottawa Township could thus have avoided the alleged injury to itself and the individual plaintiffs by declining funds under either statute if it did not believe that it could or should comply with both sets of requirements.

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[3] In *Pennsylvania v. New Jersey*, 426 U.S. 660 (1976) (*per curiam*), for example, the plaintiff states challenged the constitutionality of New Jersey and New Hampshire taxes on the income derived from those states by the plaintiff states' residents. The plaintiffs' purported injury was the loss to state treasuries resulting from the out-of-state taxes and tax credits they afforded to their citizens for income taxes paid to other states. *Id.* at 664. The court held that the plaintiff states lacked standing because the "injuries to the plaintiffs' fiscs were self-inflicted, resulting from decisions by their respective state legislatures" to grant the credits. *Id.* at 664. *See also Petro-Chem Processing, Inc. v. Environmental Protection Agency*, 866 F.2d 433, 438 (D.C. Cir. 1989) (Hazardous Waste Treatment Council could not establish standing based on potential liability "voluntarily incurred" notwithstanding the allegation that it was "forced" to incur the liability by competitive pressures allegedly caused by the challenged EPA action).

The State of Illinois also voluntarily accepted the funds and requirements of the statutes. *See* 20 U.S.C. § 6311(a)(1); 20 U.S.C. § 1412(a). This decision – which the plaintiffs do not challenge – is an additional break in the causal chain that precludes standing. *See, e.g., City of Detroit v. Franklin*, 4 F.3d 1367, 1373 (6th Cir. 1993) (city lacked standing to challenge the conduct of the census based upon the use of it to establish congressional districts because the use of the data for that purpose resulted from the independent decision of the Michigan legislature).

To be clear, defendants are not arguing in this case that the mere acceptance of federal funds deprives a recipient of the ability to challenge any conditions on the funds. There is no claim in this case that the conditions attached to NCLB or IDEA funding are unconstitutional. Instead, Ottawa Township's sole claim is that it faces inconsistent obligations that it voluntarily assumed and provided assurances that it could satisfy. Ottawa Township is also advancing this claim only after receiving hundreds of thousands dollars from the federal government under both programs, and only after it now must engage in remedial measures for failure to achieve AYP.

Moreover, Ottawa Township's alleged intent to modify IEPs in a (as yet unidentified) "systemic" fashion is also not fairly traceable to the NCLB. The remedial measures required by the NCLB for persistent failure to achieve AYP – *e.g.*, replacing staff, appointing an outside expert, or decreasing managerial authority – do not require the modification of IEPs. 20 U.S.C. § 6316(b)(7)(C)(iv)(I)-(VI). Systemic modification of AYPs is, if anything, Ottawa Township's independent choice of how to avoid those remedial measures. Moreover, any need to "employ systemic remediation activities" would also be the "result of the [plaintiff school districts'] failure to make AYP," Compl. ¶¶ 53-54, 60, and the various independent decisions that contributed to that situation. Plaintiffs' putative choice of response to the failure to make AYP, and the failure to make AYP itself, are thus additional independent causes of plaintiffs' current situation that do not result from purported inconsistency between the NCLB and IDEA.

II. PLAINTIFFS' COMPLAINT FAILS TO STATE A CLAIM BECAUSE THE NCLB IS NOT INCONSISTENT WITH THE IDEA.

Plaintiffs seek a declaration that 20 U.S.C. §§ 6311 and 6316 are inconsistent with the IDEA and "are therefore invalid insofar as they require the establishment of a special education subgroup, subject to assessment by standardized test, and required to meet an artificially imposed AYP." *Id.* at ¶ 65. In essence, plaintiffs are arguing that the IDEA, as amended, impliedly

repealed the aspects of NCLB that required school districts accepting federal funds to ensure that children with disabilities make adequate yearly progress under the same standards that are applied to children without disabilities.[4] The text, structure, and legislative history of the two acts, however, demonstrate that such a claim is untenable.

It is well established that "'when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.'" *J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 143-44 (2001) (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)).[5] Resort to this canon is not even necessary in this case, however, because there is no basis for asserting that the IDEA is inconsistent with the NCLB. The IDEA expressly incorporates the NCLB's standards for measuring the educational progress of children with disabilities – *i.e.*, the very requirements that plaintiffs are now claiming are inconsistent with the IDEA. Section 1412(a)(15) of the IDEA requires that states "establish[] goals for the performance of children with disabilities in the State that," *inter alia*, "promote the purposes of" the IDEA, found at 20 U.S.C. § 1401, and that are "*the same as the State's definition of adequate yearly progress, including the State's objectives for progress by children with disabilities*, under" 20 U.S.C. § 6311(b)(2)(C). Moreover, section 1412(a)(15)(B) requires states to establish "performance indicators" to use towards measuring the progress towards achieving those goals, "*including measurable annual objectives for progress by children with disabilities under*" 20 U.S.C. § 6311(b)(2)(C)(v)(II)(cc) – *i.e.*, the state AYP standards that, if not met, trigger the NCLB remedial measures in section 6316.

Section 1412(a)(16) also requires states to ensure that "all children with disabilities are included in all general State and districtwide assessment programs, including assessments described under" section 6311. Further, all IEPs must contain "a statement of any individual

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[4] Plaintiffs could not be arguing that the NCLB is inconsistent with the earlier version of the IDEA – a claim that would also be untenable – because even if they were correct, the requirements of the NCLB, as the later-passed statute, would trump the earlier requirements. *See Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976) (where two statutes "are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one") (internal quotation marks omitted).

[5] *See also id.*, 534 U.S. at 142 ("'The rarity with which [the Court has] discovered implied repeals is due to the relatively stringent standard for such findings, namely that there be an irreconcilable conflict between the two federal statutes at issue.'") (quoting *Matsushita Elec. Industrial Co. v. Epstein*, 516 U.S. 367, 381 (1996)) (brackets in original).

appropriate accommodations that are necessary to measure the academic achievement and functional performance of" students under the assessments required by the NCLB and IDEA. 20 U.S.C. § 1414(d)(1)(A)(i)(VI)(aa). Section 1413(d)(1) requires states to withhold or reduce funds from LEAs that fail to comply with state policies, including these IDEA and NCLB requirements. There is no basis for claiming that the IDEA and NCLB are inconsistent when both require states to establish the same goals and use the same assessments.

The IDEA also incorporates the NCLB's standards in identifying the situations where the use of alternative achievement standards for students with disabilities may be used. The IDEA allows LEAs to "measure the achievement of children with disabilities" against "alternate academic achievement standards permitted under the regulations promulgated to carry out" section 6311(b)(1) of the NCLB. 20 U.S.C. § 1412(a)(16)(C)(ii)(II). Under the current regulations, schools and LEAs may evaluate students with the most serious cognitive disabilities against alternate achievement standards, and may count their proficient scores in determining AYP subject to a cap of 1.0 percent of all students assessed. 34 C.F.R. § 200.13(c)(ii). The SEA may also request an exception permitting it to exceed the 1 percent cap and may permit an LEA to exceed the cap under certain conditions specified at 34 C.F.R. § 200.13(c)(2). 34 C.F.R. § 200.13(c)(3). The Secretary also recently announced that states will be permitted to use alternate achievement standards to evaluate students with persistent academic disabilities, and to count their proficient scores towards calculating AYP for an additional 2 percent of all students. *See* http://www.ed.gov/policy/elsec/guid/raising/alt-assess.html. Otherwise, Congress requires states to measure progress using the state's grade-level academic achievement standards that apply to all children.

It is also consistent, more generally, to have basic educational proficiency goals for all students, including students with disabilities, while requiring individualized plans for students with disabilities that help them reach those goals. IEPs are not synonymous with lower expectations and lack of accountability, nor are they inconsistent with having basic proficiency requirements. IEPs are individualized plans designed, *inter alia*, to help students with disabilities "become involved in and make progress in the general education curriculum." 20 U.S.C. § 1414(d)(1)(A)(i). To be sure, certain students may require individual accommodations to enable them to participate in the assessments required by the NCLB and IDEA, which is why,

as noted *supra*, all IEPs must contain "a statement of any individual appropriate accommodations" necessary to measure the assessment performance of children with disabilities. Indeed, the Senate Committee Report states that "individualization in practice occurs through the accommodation and modification provisions in the IEP." S. Rep. No. 108-185, at 29. *See* 20 U.S.C. § 6311(b)(3)(C)(ix)(II) (mandating that assessments required under the NCLB provide for "the reasonable adaptations and accommodations for students with disabilities" that are "necessary to measure" their achievement under state academic standards). Congress thus did not provide that IEP teams would have complete discretion to design the standards against which the performance of students with disabilities would be measured. Instead, it intended states to develop guidelines for providing appropriate accommodations to enable students who need such accommodations to be evaluated under statewide standards. *See* 20 U.S.C. § 1412(a)(16)(B).

Further, as explained above at 10, the NCLB remedial measures for schools and LEAs that fail to make AYP are consistent with the IDEA. 20 U.S.C. § 6316(b)(7)(C)(iv)(I)-(VI). While Ottawa Township may wish to avoid them, none of them requires schools or LEAs to violate the IDEA's IEP requirements. Nor could plaintiffs be suggesting that the technical assistance received by schools and LEAs that fail to make AYP, or the supplemental educational services received by parents and students, is somehow inconsistent with the IDEA. 20 U.S.C. § 6316(b)(3)(A); 20 U.S.C. § 6316(b)(4)(A)-(B). *See supra* at 4-5.

While one need not move beyond the plain language of the statutes to see that they are consistent, the Senate Committee Report for the IDEA explains that the IDEA:

> makes a series of significant modifications *to reflect the important changes to accountability that were enacted under the No Child Left Behind Act.* NCLB established a rigorous accountability system for States and local educational agencies *to ensure that all children, including children with disabilities, are held to high academic achievement standards and that States and local educational agencies are held accountable for the adequate yearly progress of all students.* Most importantly, NCLB requires schools and local educational agencies to disaggregate their data to examine the results of children with disabilities and to ensure that such subgroup is making adequate yearly progress towards reaching proficiency. The bill *carefully aligns the IDEA with the accountability system established under NCLB* to ensure that there is one unified system of accountability for States, local educational agencies and schools.

S. Rep. 108-185 at 17-18 (emphasis added). The Report further confirms that the IDEA was intended to maintain and strengthen, rather than to repeal impliedly, the NCLB's accountability and AYP requirements.

Plaintiffs' complaint also is fatally undermined by a marked lack of specificity. The complaint fails even to identify the specific language in the statutes that allegedly is inconsistent. Instead, plaintiffs couch their claim of inconsistency in general terms such as "the NCLB requirement of categorical and systemic change" and "treating each special education student as an individual through his/her IEP." Compl. ¶ 23.[6] Plaintiffs never move beyond the general assertion that now that they have failed to achieve AYP for their subgroup of children with disabilities, they must employ "systemic remediation activities" and modify the IEPs of the student plaintiffs and others in unidentified ways so that they will meet or exceed state standards.

Plaintiffs also do not move beyond general descriptions of the IDEA's IEP provisions, and so do not identify the specific aspect of those provisions that said modifications will violate. IEPs must contain, for example, "a statement of measurable annual goals" designed to "enable the child to become involved in and make progress in the general education curriculum" and "meet each of the child's other educational needs that result from the child's disability," and "a statement of" special education aids and services that will be provided to help the student advance towards those goals. 20 U.S.C. § 1414(d)(1)(A)(i). Plaintiffs do not explain how such requirements are in "irreconcilable conflict with," *see supra* note 5, the NCLB's requirement that schools and LEAs reduce the percentage of children scoring non-proficient on state assessments by 10 percent per year. But even if plaintiffs could advance a specific coherent explanation, the foregoing demonstrates that Congress believed the two acts to be entirely consistent and that the IDEA thus did not repeal *sub silentio* the NCLB accountability requirements.

In sum, Congress expected school districts that accept money under both the IDEA and NCLB to abide by the standards of both acts and viewed the acts to be mutually reinforcing. Even if there were any ambiguity on this point, the canon discussed *supra* would require it to be

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[6] *See Panaras v. Liquid Carbonic Industries Corp.*, 74 F.3d 786, 792 (7th Cir. 1996) ("While federal notice-pleading allows for a generous reading of a complaint, in order to resist a motion to dismiss, the complaint must at least set out facts sufficient to outline or adumbrate the basis of his claim. The pleader will not be allowed to evade this requirement by attaching a bare legal conclusion to the facts that he narrates . . .") (citation and internal quotation marks omitted) (ellipses in original).

resolved in favor of upholding the provisions of both statutes. Ottawa Township may well believe that it is not "realistic," *see* Compl. ¶¶ 26, 61, to hold students with disabilities to standards purportedly "developed for regular education students," *id.* at ¶ 62, or to expect it to reduce the percentage of children with disabilities deemed non-proficient under those standards by at least 10 percent per year. It may also believe that it should not be subject to remediation activities under the NCLB, because it would have made AYP "except for [the school districts'] subgroup of special education students." *Id.* at ¶ 42. If so, plaintiffs' remedy is to lobby Congress for a change in the requirements because the current statutes reflect the contrary view. Congress believed that state proficiency standards are not just "developed for regular education students," and that schools are not accomplishing their purpose if they make AYP for all but their "subgroup of special education students." Ottawa Township committed to abide by the requirements and goals of these acts, and agreed to accept the remedial measures and assistance that follow the failure to meet them. The remedies prescribed by Congress for schools and school districts that fail to make AYP do not include the abandonment of the individualized treatment of students with disabilities required by the IDEA. And they do not include a declaration that the "centerpiece" of the No Child Left Behind Act is "invalid."

CONCLUSION

For the foregoing reasons, plaintiffs' complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1) or 12(b)(6).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 14th day of April, 2005, I caused to be served upon the following by overnight mail the foregoing 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 AND MEMORANDUM IN SUPPORT THEREOF on:

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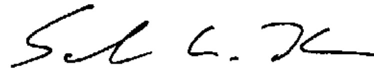

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