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

BOARD OF OTTAWA TOWNSHIP HIGH SCHOOL DISTRICT 140, LASALLE COUNTY, ILLINOIS; BOARD OF EDUCATION OF OTTAWA ELEMENTARY SCHOOL DISTRICT 141, LASALLE COUNTY, ILLINOIS; T.H., A MINOR BY HIS MOTHER AND FATHER AND NEXT FRIEND, S.H. AND C.H.; S.H. AND C.H. INDIVIDUALLY; H.G., A MINOR, BY HER MOTHER AND NEXT FRIEND L.G.; L.G. INDIVIDUALLY; M.H., BY HER MOTHER AND FATHER AND NEXT FRIEND J.H., AND A.H.; AND J.H. AND A.H. INDIVIDUALLY, Plaintiffs, v. THE U.S. DEPARTMENT OF EDUCATION; MARGARET SPELLINGS, U.S. SECRETARY OF EDUCATION, IN HER OFFICIAL CAPACITY; THE ILLINOIS STATE BOARD OF EDUCATION; AND DR. RANDY J. DUNN, INTERIM ILLINOIS STATE SUPERINTENDENT OF EDUCATION, IN HIS OFFICIAL CAPACITY Defendants.	No. 05 C 0655 Hon. David H. Coar Judge Presiding

ILLINOIS STATE BOARD OF EDUCATION AND DR. RANDY DUNN'S
12(b)(1) MOTION TO DISMISS

NOW COME Defendants, THE ILLINOIS STATE BOARD OF EDUCATION and DR. RANDY J. DUNN, INTERIM ILLINOIS STATE SUPERINTENDENT OF EDUCATION, in his official capacity, by their attorney, LISA MADIGAN, Attorney General of Illinois, and move the Court to dismiss the complaint pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure on the grounds that the Court lacks subject matter jurisdiction over this case.

In support of this motion, Defendants state as follows:

1. This suit against the Illinois State Board of Education ("ISBE") and its Interim Superintendent of Education, Dr. Dunn in his official capacity, is barred by the Eleventh Amendment. Dr. Dunn does not enforce the challenged federal statute. Suit against him is not authorized by Ex parte Young, 209 U.S. 123 (1908).

2. The Plaintiffs lacks standing to sue. Defendants ISBE and its Interim Superintendent of Education have not taken any adverse action against Plaintiffs which has caused them any injury in fact, nor are Plaintiffs facing any imminent injury in fact from any actions of these Defendants. Absent any adverse action, there is no case or controversy under Article III of the Constitution.

3. A memorandum of law is submitted in support of this motion.

Respectfully submitted,

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BOARD OF OTTAWA TOWNSHIP HIGH SCHOOL DISTRICT 140, LASALLE COUNTY, ILLINOIS; BOARD OF EDUCATION OF OTTAWA ELEMENTARY SCHOOL DISTRICT 141, LASALLE COUNTY, ILLINOIS; T.H., A MINOR BY HIS MOTHER AND FATHER AND NEXT FRIEND, S.H. AND C.H.; S.H. AND C.H. INDIVIDUALLY; H.G., A MINOR, BY HER MOTHER AND NEXT FRIEND L.G.; L.G. INDIVIDUALLY; M.H., BY HER MOTHER AND FATHER AND NEXT FRIEND J.H., AND A.H.; AND J.H. AND A.H. INDIVIDUALLY, Plaintiffs, v. THE U.S. DEPARTMENT OF EDUCATION; MARGARET SPELLINGS, U.S. SECRETARY OF EDUCATION, IN HER OFFICIAL CAPACITY; THE ILLINOIS STATE BOARD OF EDUCATION; AND DR. RANDY J. DUNN, INTERIM ILLINOIS STATE SUPERINTENDENT OF EDUCATION, IN HIS OFFICIAL CAPACITY Defendants.	No. 05 C 0655 Hon. David H. Coar Judge Presiding

MEMORANDUM OF LAW IN SUPPORT OF
ILLINOIS STATE BOARD OF EDUCATION AND DR. RANDY DUNN'S
12(b)(1) MOTION TO DISMISS

Defendants, THE ILLINOIS STATE BOARD OF EDUCATION and DR. RANDY J. DUNN, INTERIM ILLINOIS STATE SUPERINTENDENT OF EDUCATION, in his official capacity, by and through their attorney, LISA MADIGAN, Illinois Attorney General, submit the following memorandum of law in support of their motion to dismiss.

BACKGROUND

Plaintiffs, Ottawa Township High School District 140 and Elementary School District 141, along with four special education students and their parents, bring this action to challenge the validity of a federal statute. Specifically, Plaintiffs allege that the mandates of the No Child Left Behind Act of 2001, 20 U.S.C. §6301 *et seq.* ("NCLBA"), regarding the application of state achievement standards to special education students, conflict with the mandates of the Individuals with Disabilities Education Act, 20 U.S.C. §1400 *et seq.*, ("IDEA") requiring the education of special education students to be guided by the implementation of individualized education plans. Because of this alleged conflict, Plaintiffs seek a declaratory judgment that Section 6311, "State Plans" and Section 6316, "Academic Assessment and Local Educational Agency and School Improvement," of the NCLBA are invalid. Plaintiffs bring this action under the Declaratory Judgment Act, 28 U.S.C. §2201.

The NCLBA is a "comprehensive education reform statute," whose purpose is "to ensure that all children have a fair, equal and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic standards and State academic assessments." 20 U.S.C. §§ 6301, Complaint, ¶¶ 28, 29. The Act seeks to accomplish this purpose through a variety of means including "holding schools, local educational agencies, and States accountable for improving the academic achievement of all students, and identifying and turning around low-performing schools that have failed to provide a high quality education to their students, while providing alternatives to students in such schools to enable the students to receive a high-quality education." 20 U.S.C. §6301(4), Complaint, ¶30. States and local educational agencies are authorized to receive federal funds to carry out these purposes, provided that they abide by various conditions and requirements under the NCLBA. 20 U.S.C. §§ 6302(i),

6303(g), 6311(a)(1), 6316(a)(1). The States' role in this scenario is to set academic assessments defining "adequate yearly progress" in accordance with the standards set forth in Section 6316(b)(2) of the NCLBA and to submit to the Secretary of Education a plan that demonstrates that the State has adopted challenging academic content standards. 20 U.S.C. §§ 6311(a)(1), (b)(1)(A). These State academic standards are then to be used by local educational agencies receiving federal funds in performing annual reviews of the schools within their service area. 20 U.S.C. §6316(a)(1)(A). In the event of noncompliance by States with NCLBA provisions, the Secretary of Education may withhold funds for State administration until the Secretary determines that the State has fulfilled its requirements. 20 U.S.C. § 6311(g)(2).

Plaintiffs name as defendants the U.S. Department of Education and its Secretary, Margaret Spellings, and the Illinois State Board of Education ("ISBE") and its Interim Superintendent of Education, Dr. Randy Dunn, in his official capacity. With regard to ISBE and Dr. Dunn, Plaintiffs allege that ISBE is "the State agency authorized and required to establish educational policies and guidelines on the NCLBA for school districts in Illinois," and Dr. Dunn is "responsible for supervising public schools in Illinois and administering and implementing the NCLBA." Complaint, par. 16, 17. Plaintiffs further allege that (1) under the NCLBA each State establishes a definition of adequate yearly progress ("AYP") to determine the achievement and progress of students within various subgroups of each school district and school, (2) Illinois has done this, and (3) on an annual basis the ISBE notifies districts and schools of their status regarding AYP and any remedial activities that are required. Complaint, ¶¶ 31, 32, 37, 20 U.S.C. 6311(b)(2)(C).

Defendants move to dismiss the complaint pursuant to Rule 12(b)(1) because the Eleventh Amendment bars this suit against ISBE and Interim Superintendent of Education Dr. Dunn, and ISBE and Dr. Dunn are not proper parties to this lawsuit.

ARGUMENT

I. NEITHER ISBE NOR ITS INTERIM SUPERINTENDENT OF EDUCATION ENFORCES THE NO CHILD LEFT BEHIND ACT. THIS SUIT AGAINST THEM IS BARRED BY THE ELEVENTH AMENDMENT.

Plaintiffs have named as defendants ISBE and Dr. Dunn in relation to their role in the implementation of the NCLBA in Illinois and seek a declaratory judgment against them for invalidation of Sections 6311 and 6316 of the NCLBA. These claims are barred by the Eleventh Amendment.

The Eleventh Amendment to the U.S. Constitution bars federal courts from exercising jurisdiction over suits brought by a citizen against a state and its departments and agencies, and except for cases falling under Ex parte Young as described below, its officials when sued in their official capacity. Will v. Michigan Dep't of State Police, 491 U.S. 58, 64,109 S.Ct. 2304, 105 L.Ed.2d 45 (1989); Kentucky v. Graham, 473 U.S. 159, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985); Scott v. O'Grady, 975 F.2d 366, 369 (7th Cir. 1992), citing Papasan v. Allain, 478 U.S. 265, 276, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986). All suits against a state or its officials are barred by the Eleventh Amendment unless the state consents to suit in Federal Court or Congress uses its powers under the Fourteenth Amendment to abrogate the State's Eleventh Amendment immunity. Kentucky v. Graham, 473 U.S. at 165-67; Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985). Federal suits against a state are prohibited by the Eleventh Amendment regardless of the nature of the relief sought. Pennhurst State School v. Halderman, 465 U.S. 89, 99-100, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984); Kentucky v. Graham, 473 U.S.at 166; Kroll v. Board of Trustees, 934 F.2d 904, 907-08 (7th Cir.1991); Meadows v. State of Indiana, 854 F.2d 1068, 1069 (7th Cir.1988).

Applying these principles to this case, it is clear that Eleventh Amendment immunity

applies. First, Illinois has not consented to being sued in Federal Court. Second, Plaintiffs bring their claims under the Declaratory Judgment Act, which does not abrogate the Eleventh Amendment immunity provided to the States. Ameritech v. McCann, 297 F.3d 582, 585 (7th Cir. 2002), citing to discussion in Ameritech v. McCann, 176 F.Supp.2d 870, 877-878 (E.D. Wis. 2001); Comfort v. Lynn School Committee, 131 F.Supp.2d 253, 255-256 (D. Mass.2001). In passing the Declaratory Judgment Act, Congress acted pursuant to powers delegated by the judiciary clause of the United States Constitution, Article 3, Section 2, in creating additional procedural remedies for actions over which federal courts already retain jurisdiction rather than enforcing substantive equal protection and due process protections as would derive from Section 5 of the Fourteenth Amendment. Comfort, 131 F.Supp.2d at 256, citing Aetna Life Ins. Co. of Hartford, Conn. v. Haworth, 300 U.S. 227, 240, 57 S.Ct. 461, 81 L.Ed. 617 (1937). Thus, Congress has not abrogated the states' Eleventh Amendment Immunity in an actions brought under the Declaratory Judgment Act, 28 U.S.C. §2201, and the ISBE should be dismissed from this lawsuit.

With regard to Dr. Dunn, who is sued in his official capacity, Eleventh Amendment immunity also applies, despite the Ex parte Young exception. Under Ex parte Young, 209 U.S. 123 (1908), a state official may be sued in his official capacity for injunctive relief if that state official is responsible for enforcing an unconstitutional statute. But to fall within the Ex parte Young exception, the official sued must have some direct enforcement link to the challenged statute. State officials who have no such role, or too remote a role (such as a Governor, who in a general sense is responsible for "enforcement" of all state law) are not proper defendants. See Weinstein v. Edgar, 826 F.Supp. 1165 (N.D. III. 1993); David B. v. McDonald, 156 F.3d 780, 783 (7th Cir. 1998) ("to take advantage of Young the plaintiffs must sue the particular public official whose acts violate federal law."). If the official is outside the orbit of Ex parte Young,

suit against him is tantamount to suing the State of Illinois, which is forbidden under the Eleventh Amendment. Bruggeman v. Blagojevich, 324 F.3d 906, 912 (7th Cir. 2003); Sonnleitner v. York, 304 F.3d 704, 717 (7th Cir. 2002); Licari v. City of Chicago, 262 F. .3d 646, 648 (7th Cir. 2001). As the Court put it in Weinstein:

> Implicit in the right to sue state officials for prospective injunctive relief, however, is the requirement that the state official bear "some connection" with the enforcement of the challenged statute: In making an officer of the state a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional, it is plain that such officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the state, and thereby attempting to make the state a party.

826 F.Supp. at 1166. Because Dr. Dunn is not the party responsible for enforcement of the NCLBA and Plaintiffs have not alleged that Dr. Dunn is violating or threatening to violate federal law, naming him in his official capacity fails to satisfy the requirements of the Ex parte Young exception.

Dr. Dunn's only alleged connection to the NCLBA is his responsibility to administer and implement the NCLBA in Illinois. This general responsibility does not bring him within the Ex parte Young exception. The NCLBA is drafted to focus on the regulation of states and local educational entities and violation of the NCLBA results in a withholding of state funding by the Department of Education. "The statute contemplates that any enforcement actions for violations of the statute by states be taken by the Secretary of Education and vests such authority solely in the Secretary." Association of Community Organizations for Reform Now v. New York City Dept. of Education, 269 F.Supp.2d 338, 345 (S.D. NY 2003); 20 U.S.C. §6311(g)(2). "The fact that the Secretary of Education is provided with the sole enforcement authority for violations of the Act suggests that Congress intended that the interpretation of NCLBA be centralized with the

Secretary of Education." Association of Community Organizations, 269 F.Supp.2d at 346. Not only does the NCLBA make no reference to enforcement by ISBE, but Plaintiffs make no allegations that ISBE is responsible for such enforcement or has sought to take any enforcement action against Plaintiffs. "Finally, the enforcement scheme of the statute indicates a Congressional intent to centralize enforcement and thereby to avoid the possibility of individual lawsuits and multiple interpretations of provisions of the Act." Id. at 347. Thus, Plaintiffs must address their claims regarding the validity of the federal NCLBA with the party responsible for its enforcement and interpretation, which party is the U.S. Department of Education. Any claims against Dr. Dunn in his official capacity are, therefore, barred by the Eleventh Amendment and Plaintiffs are barred from bringing suit against either the ISBE or Dr. Dunn.

II. ISBE AND DR. DUNN ARE NOT PROPER PARTIES TO THIS LAWSUIT AS PLAINTIFFS LACK STANDING TO SUE THEM IN THE ABSENCE OF ANY LIVE CASE OR CONTROVERSY

Because Plaintiffs have not alleged that either ISBE or Dr. Dunn have or will take steps to enforce the NCLBA against them, Plaintiffs' Complaint also fails to fulfill the "case or controversy" requirement of Article III.

Under Article III of the Constitution, the judicial power of the United States extends only to cases and controversies. Wisconsin Right to Life Incorporated v. Schober, 366 F.3d 485,488 (7th Cir. 2004), citing Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 102, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). The required elements of Article III standing are: "(i) injury in fact, which is an invasion of a legally protected interest that is concrete and particularized and, thus, actual or imminent, not conjectural or hypothetical; (ii) a causal relation between the injury and the challenged conduct, such that the injury can be fairly traced to the challenged action of

the defendant; and (iii) a likelihood that the injury will be redressed by a favorable decision." Wisconsin Right to Life, 366 F.3d at 489, citing Reid L. v. Ill. State Bd. of Educ., 358 F.3d 511, 515 (7th Cir. 2004) (quoting Lee v. City of Chicago, 330 F.3d 456, 468 (7th Cir. 2003); see also Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). Without a real and substantial controversy between the parties, Plaintiffs' claims against the ISBE and Dr. Dunn require dismissal. Weinstein v. Edgar, 826 F.Supp. at 1168; See also Long v. Van de Camp, 961 F.2d 151, 152 (9th Cir. 1992); N.A.A.C.P. v. State of California, 511 F.Supp 1244,1259-62 (E.D. Cal. 1981), aff'd, 711 F.2d 121 (9th Cir. 1983).

Plaintiffs have not alleged that Defendants ISBE and Dr. Dunn have taken, or will in the future take, any adverse action against them pursuant to the NCLBA, nor have Plaintiffs alleged that ISBE or Dr. Dunn have failed to comply with their responsibilities under the NCLBA. Nor have Plaintiffs alleged that the achievement standards set by ISBE are unreasonable or actionable in any way. Rather, Plaintiffs simply allege that ISBE has followed the mandates of the NCLBA in setting statewide achievement assessment standards and that Plaintiff school districts have failed to meet those standards with regard to their special education subgroups. Further, Plaintiffs do not seek any specific relief from ISBE or Dr. Dunn; rather they are merely seeking a declaration that the relevant sections of the NCLBA are invalid. As such, there is no case against or controversy against either ISBE or Dr. Dunn and they should be dismissed from this lawsuit.

CONCLUSION

Plaintiffs have named as defendants ISBE and Dr. Dunn based upon their implementation of the NCLBA in Illinois. However, this action against them is barred by Eleventh Amendment Immunity. Additionally, Plaintiffs have failed to allege a justiciable controversy against them such that Plaintiffs have failed to satisfy the Article III standing requirements. Neither the ISBE not its Interim Superintendent of Schools is responsible for enforcing and interpreting the NCLBA; the U.S. Department of Education is the party with responsibility for both of those functions.

For the foregoing reasons, Defendants Illinois State Board of Education and its Interim Superintendent of Schools Dr. Randy Dunn, request that their motion to dismiss be granted.

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Respectfully Submitted,

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