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; et al. Plaintiffs, v. THE U.S. DEPARTMENT OF EDUCATION; et al. Defendants.	No. 05 C 0655 Hon. David H. Coar Judge Presiding

NOTICE OF FILING

TO: See Attached Service List

PLEASE TAKE NOTICE that on May 11, 2005, the attached **REPLY IN SUPPORT OF ILLINOIS STATE BOARD OF EDUCATION AND DR. RANDY DUNN'S 12(b)(1) MOTION TO DISMISS**, was filed with the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division, at 219 South Dearborn Street, Chicago, Illinois 60604.

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CERTIFICATE OF SERVICE

The undersigned attorney certifies that a copy of the **REPLY IN SUPPORT OF ILLINOIS STATE BOARD OF EDUCATION AND DR. RANDY DUNN'S 12(b)(1) MOTION TO DISMISS** was served upon the below named counsel of record at the addresses indicated, by mail, postage pre-paid, by depositing same in the U.S. mail located at 100 West Randolph Street, Chicago, IL 60601, on the 11th day of May, 2005.

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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

ILLINOIS STATE BOARD OF EDUCATION AND DR. RANDY DUNN'S
REPLY IN SUPPORT OF 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 submit the following Reply in support of their 12(b)(1) 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"), conflict with the mandates of the Individuals with Disabilities Education Act, 20 U.S.C. §1400 *et seq.*, ("IDEA"). The NCLBA requires that State achievement standards be applied to special education students and the IDEA requires that the education of special education students should be guided by the implementation of individualized education plans ("IEPs"). 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 have moved 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. THE ELEVENTH AMENDMENT BARS THIS SUIT IN FEDERAL COURT.

Plaintiffs argue in their Response that the Eleventh Amendment does not bar this action against the State Defendants because Eleventh Amendment immunity has been abrogated under the Individuals with Disabilities Education Act ("IDEA"). However, as previously discussed in the opening brief, this suit is not brought under the IDEA; rather it is brought under the Declaratory Judgment Act which does not abrogate Eleventh Amendment Immunity.

While Plaintiffs correctly state that §1403(a) of the IDEA, 20 U.S.C. §1403(a), abrogates a State's Eleventh Amendment immunity for its alleged violations of the IDEA, Plaintiffs incorrectly assert that this case arises under the IDEA. Plaintiffs argue that because they have alleged that provisions of the NCLBA conflict with of the mandates of the IDEA, that this suit is therefore brought under the IDEA. However, Plaintiffs clearly state in paragraph 18 of their Complaint for Declaratory Judgment that this case is brought under the Declaratory Judgment Act, 28 U.S.C. §2201 because Plaintiffs are seeking a declaratory judgment that portions of the NCLBA are invalid. Plaintiffs do not allege that this case is brought under the IDEA.

Significantly, Plaintiffs do not allege that ISBE has violated the IDEA nor do they seek any relief available under the IDEA. Rather, the only relief that Plaintiffs seek is declaratory relief under Declaratory Judgment Act, namely a declaration that Sections 6311 and 6316 of the NCLBA be declared invalid. Although Plaintiffs attempt to expand the §1403(a) definition to include cases in which the IDEA is merely "involved," the definition clearly refers only to matters in which a defendant is alleged to have violated the IDEA, which is not the case here.

In short, Plaintiffs Complaint for Declaratory Judgment is brought pursuant to the Declaratory Judgment Act, under which Eleventh Amendment Immunity applies to bar this suit against the ISBE and Dr. Dunn.

II. THE EX PARTE YOUNG EXCEPTION TO ELEVENTH AMENDMENT IMMUNITY DOES NOT APPLY TO DR. DUNN IN HIS OFFICIAL CAPACITY

Plaintiffs also argue that Dr. Dunn in his official capacity is not entitled to Eleventh Amendment Immunity pursuant to the Ex parte Young exception because he allegedly enforces the NCLBA in Illinois. However, as previously discussed in the opening brief, this is not the case. Dr. Dunn does not enforce the federal NCLBA. The only allegation specifically relating to Dr. Dunn, is Plaintiffs' conclusory allegation in paragraph 17 that he is responsible for administering and implementing the NCLBA in Illinois. Plaintiffs argue that "one of the pillars of the NCLBA is to give states unprecedented flexibility in how they design and implement NCLBA provisions." This bald assertion does nothing to bolster Plaintiffs' argument that Dr. Dunn enforces the NCLBA, as flexibility in performing duties under the NCLBA has nothing to do with enforcement authority. At most, Plaintiffs have alleged that the ISBE has abided by federal law by adhering to the mandates of the NCLBA by establishing state AYP assessments and notifying districts and schools of their AYP status along with any remedial activities that may be required. Complaint, ¶ 31, 32, 37. However, there are no specific allegations regarding any involvement by Dr. Dunn in these NCLBA related duties. And, even if these duties could be construed as belonging to Dr. Dunn, these duties alone do not equate to enforcement responsibility under the NCLBA .

Plaintiffs also point to Dr. Dunn's duties under Illinois statute, 105 ILCS 5/2-2 et seq., as evidence that he is somehow responsible for enforcement of the NCLBA. Plaintiffs state that Dr.

Dunn is "responsible for supervision and evaluation of all public schools, for enacting and enforcing rules governing the operation of the public schools and for carrying out the policies of the ISBE." Response, pg. 9. However, there is again no indication that these general duties translate into enforcement responsibility under the NCLBA.

As previously discussed in the opening brief, enforcement of the NCLBA mandates is the responsibility of the Secretary of the U.S. Department of Education. The NCLBA is structured such that the burden to implement its mandates for educational assessments and improvements falls upon both the States and the local schools and educational agencies. As stated in 20 U.S.C. §6301(4), the purpose of NCLBA is to be accomplished in part by "holding schools, local educational agencies, and States accountable for improving the academic achievement of all students...." "If a State fails to meet any of the requirements of this section, other than the requirements described in paragraph (1), then the Secretary may withhold funds for State administration under this part until the Secretary determines that the State has fulfilled those requirements." 20 U.S.C. §6311(g)(2). As such, "[t]he 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, 345-46 (S.D. NY 2003); 20 U.S.C. §6311(g)(2).

Clearly, Dr. Dunn in his official capacity is not directed to enforce the NCLBA. Moreover, "[t]he 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. Absent an express direction to see to the NCLBA's

enforcement, Dr. Dunn does not meet the "some connection" requirement with regard to enforcement of the NCLBA. Weinstein v. Edgar, 826 F.Sup 1165, 1166 (N.D. Ill. 1993).

Plaintiffs also argue that even if Dr. Dunn has only a general duty to enforce the NCLBA, such a general connection would be sufficient to satisfy the "some connection" of Ex parte Young. However, the Seventh Circuit has held that general broad powers to enforce or execute the laws of a state possessed by a state officer, alone, are not sufficient to make the officer a party defendant. Sierakowski v. Ryan, 1999 WL 286290, *2 (N.D. Ill. 1999), citing Sherman v. Community Consolidated School District 21 of Wheeling Township, 980 F.2d 437, 441 (7th Cir. 1992); and Weinstein v. Edgar, 826 F.Supp. 1165, 1166 (N.D. Ill. 1993).

In addition, there is no point in maintaining Dr. Dunn as a defendant when the U.S. Department of Education and Secretary Margaret Spellings have direct enforcement power pursuant to the NCLBA. In the case of Deida v. City of Milwaukee, 192 F.Supp.2d 899, fn3 915 (E.D. Wis. 2002), the Court noted that two of the defendants were directly empowered to enforce the law at issue such that "maintaining a defendant who has only a general connection to the law's enforcement serves no useful purpose." Similarly, there is no need to maintain Dr. Dunn as a defendant when the Secretary of the U.S. Department of Education has direct enforcement authority under the NCLBA.

III. PLAINTIFFS LACK STANDING TO SUE ISBE AND DR. DUNN IN THE ABSENCE OF ANY LIVE CASE OR CONTROVERSY

As stated in the opening brief, 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). Further, the party trying to invoke federal jurisdiction has the burden of establishing standing. Wisconsin Right to Life at 489, citing Perry v. Village of Arlington Heights, 188 F.3d 826, 829 (7th Cir. 1999).

In their Response, Plaintiffs argue that they have satisfied the requirements for standing against ISBE and Dr. Dunn because the ISBE has adhered to its responsibilities under the NCLBA thus causing their alleged injuries. Specifically, Plaintiffs argue in their Response that ISBE and Dr. Dunn have prevented the Plaintiff School Districts from achieving AYP by including special education student population achievement scores in the Districts' AYP calculations. However, doing so is an NCLBA mandate which the States are required to follow as provided for in 20 U.S.C. §6311(b)(2)(C)(v)(II)(aa-dd) and as alleged in paragraph 33 of Plaintiffs' Complaint. The ISBE did not independently decide to designate students with disabilities as one of the four subgroups to which specified achievements levels apply.

Plaintiffs also argue that their injury is traceable to ISBE and Dr. Dunn when no such traceability exists. Plaintiffs argue that the allegations regarding Illinois' AYP indicators and ISBE's notification of AYP status, as contained in paragraphs 31, 37, 38, 39, and 41 of their

Complaint, demonstrate causation in that their alleged injuries are traceable to the actions of the ISBE and Dr. Dunn. Response, page 11. However, Plaintiffs do not allege that the AYP indicators are unreasonable or that ISBE or Dr. Dunn incorrectly identified the subgroups' failure to meet AYP standards. Clearly, ISBE has not caused Plaintiffs to fail to achieve AYP by merely setting the AYP standards and notifying Plaintiffs that they failed to meet those standards; rather Plaintiffs have caused their alleged injuries by their failure to achieve the standards. Further, Plaintiffs have not alleged that ISBE or Dr. Dunn has caused or required them to modify any of the special education IEPS of which Plaintiffs complain. The alleged need to make such modifications is purely the belief of the Plaintiffs without any direction or insistence by ISBE or Dr. Dunn. Accordingly, Plaintiffs' have not shown that they have satisfied the causation requirement for standing as to ISBE and Dr. Dunn.

With regard to the third standing factor, Plaintiffs argue that a favorable decision would redress their alleged injuries. However, there is no indication that ISBE or Dr. Dunn must remain as defendants for Plaintiffs to achieve the relief they are seeking. Only the U.S. Department of Education is in a position to redress the Plaintiffs' alleged claims of harm. In the event that the mandates of the NCLBA are altered, the ISBE will alter its responsibilities accordingly.

The ISBE and Dr. Dunn have neither caused Plaintiffs to miss the specified AYP targets nor have they required the IEP modifications Plaintiffs allege are required. Thus, there is no real and substantial controversy between the parties such that Plaintiffs' claims against the ISBE and Dr. Dunn should be dismissed. Weinstein v. Edgar, 826 F.Supp. at 1168.

CONCLUSION

Plaintiffs have named as defendants ISBE and Dr. Dunn based upon their administration 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.

Wherefore, 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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